CRITIQUING HADLEY ARKES'S NOT-SO-MERE NATURAL LAW THEORY

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Law can't be separated from morality, because law is a kind of human conduct. So is compliance with the law. Morality constrains all of human conduct. So the idea of natural law, a set of moral constraints binding on any possible legal system, has perennial appeal.

Hadley Arkes is a leading contemporary proponent of a revived natural law. His prominence is deserved. His work is smart and learned and entertaining. He writes with admirable moral passion. He is urgently concerned that persons be treated with dignity and respect, passionate about protecting the weak and vulnerable, especially children, with an especial scorn for racism. But he is unpersuasive with respect to some of the most important legal issues he takes up: the scope of the modern administrative state, antidiscrimination law, and abortion. He often ignores counterarguments. More than that, he neglects important aspects of the natural law tradition.

His most recent book is *Mere Natural Law*. The title echoes, and the book models itself upon, C.S. Lewis's *Mere Christianity*. Lewis aimed to "explain and defend the belief that has been common to nearly all Christians at all times," centrally "that there is one God and that Jesus Christ is His only Son."[1] Arkes aims to do the same for natural law.

Arkes's understanding of natural law is however idiosyncratic. This separates his project from that of Lewis, who consciously sought to avoid saying anything at all about matters on which Christians were divided: besides having doubts about his own competence to adjudicate theological disputes, Lewis wisely thought that "the discussion of these disputed points has no tendency at all to bring an outsider into the Christian fold."[2] Arkes however reasons his way to libertarian, minimal-state conclusions that not all natural lawyers share. As Lewis feared, this makes natural law appear less attractive than it is, by tying it to inessential, disputed points.

Arkes's foundational claim is that "the good should be promoted and the bad discouraged, forbidden, and at times punished."[3] Every claim of liberty should be evaluated in light of "whether our freedom was being directed to ends that were good or bad, rightful or wrongful."[4] Freedom "may be plausibly restricted at many points for good reasons," and the question of whether rights are thereby infringed "will always hinge then on whether those

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[1] C.S. LEWIS, MERE CHRISTIANITY 6 (1952).

[2] *Id.* at 6.

[3] HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 63 (2023) [hereinafter MERE NATURAL LAW].

[4] *Id.* at 9.

reasons for restricting freedom are *justified or unjustified*."[5] Judicial review of any statute, he says in an earlier work, "must encompass the question of whether the restrictions or the penalties imposed by the legislation can be substantively justified."[6] The question of justification must be addressed by standards not to be found in the Constitution's text, by "appealing to those standards of moral judgment that could not be summarized, or set forth with any adequacy, in a Constitution."[7]

Thus there is a strict limit on the legitimate scope of the law. Some matters, such as how to fund education and for whom, are appropriate judgments for "politicians who have a closer connection to the conditions and sentiments of their own community,"[8] but the judiciary can still appropriately limit legislative power by "the narrow task of drawing out the logical implications that follow from the very idea of law."[9] That idea holds that "we are justified in legislating only when the law is governed by an understanding of right and wrong that can tenably claim to be valid, in principle, for everyone." Propositions could not legitimately underlie law "if their truths varied with alterations in local culture or with the vagaries of what majorities, in one place or another, are pleased to regard as right and wrong."[10] If this understanding were applied, "one result would be far fewer laws on the books than we have today."[11]

Arkes thus calls into question many restrictions on liberty that are familiar parts of the modern administrative state. For example, it is not legitimate for the state to require employers to provide benefits to their employees, such as health insurance: "if a service is mandated by the federal government, the federal government should be required to fund that service, not transfer a *public service to private persons to bear at private expense*."[12] Arkes admires Franklin Roosevelt's nemesis, Justice George Sutherland.[13] He rejects the New Deal Court's deference to economic regulations, because "the regulation of business touches liberties that many people regard as fundamental."[14] Minimum wage laws are invalid because they "seriously abridge personal freedom."[15]

Natural law does not necessarily entail these conclusions. What is constant among natural law theorists – the real core of mere natural law - is the idea that human nature is constant across cultures, that this nature is teleological and implies certain human purposes that are worthy of pursuit, and that the function of law is to coordinate human activity in order to realize those purposes and forbid actions that thwart them. Aquinas described law as "an ordination of reason

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[5] *Id.* at 91.

[6] HADLEY ARKES, BEYOND THE CONSTITUTION 97 (1990).

[7] *Id.* at 56.

[8] MERE NATURAL LAW, at 59.

[9] *Id.* at 58–59.

[10] HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 27 (1986). *See also* MERE NATURAL LAW at 228.

[11] FIRST THINGS, *supra* note 10, at 28.

[12] MERE NATURAL LAW, at 195.

[13] *See generally* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1997).

[14] *Id.* at 88.

[15] MERE NATURAL LAW, at 52–53.

for the common good promulgated by the one who is in charge of the community."[16] It has a purpose and should be judged in light of that purpose.

Aquinas inherited from Aristotle the idea that human beings should aim at that which perfects their nature. Aristotle wrote, "Anyone who intends to investigate the best constitution in the proper way must first determine which life is most choiceworthy, since if this remains unclear, what the best constitution is must also remain unclear."[17] In Aristotle, this perfection consisted in "activity and actions of the soul that involve reason"[18] (or, perhaps, philosophical contemplation).[19] The purpose of a polity is "to make the citizens good and just."[20]

The realization of this purpose may empower a state to forbid conduct that is not in itself wrongful. Arkes does not appear to leave room for what Aquinas called *determinatio*, or what lawyers call *malum prohibitum*.[21] Aquinas thought that "there are two ways in which something is derived from natural law - first, as a conclusion from its principles, and second, as a specific application of what is expressed in general terms."[22] The latter necessarily is somewhat arbitrary. We all need to drive our cars on the same side of the street, but one can't deductively establish which side that should be. It is not inherently wrongful to park in the business district between 2 and 6 a.m., but a statute prohibiting that conduct is nonetheless legitimate. The need for coordination entails that there must be lawmaking authority. "Though the lawmakers' *determinatio* is in a sense free," John Finnis explains, "it must also be made with due consideration for the circumstances which bear on the appropriateness of alternative laws."[23]

The decline of natural law reasoning in court is in large part the consequence of the increasing detail of *determinatio*. The proliferation of written constitutions and statutes, and the publication of most judicial decisions, meant that judges could rely on positive law, and did not need to reason from first principles. This obviously also made the law more predictable, which is one of the principal benefits of *determinatio*. The concern about predictability became more salient as it became clear, in the nineteenth century, that natural law could be invoked on both sides of many of the most salient controversies.[24] Some modern Thomists think that existing positive law is legitimately promulgated, is therefore worthy of obedience, and suffices to answer most legal questions.[25]

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[16] THOMAS AQUINAS, *Summa Theologiae, I II*, q. 90, art. 3, *in* ST. THOMAS AQUINAS ON ETHICS AND POLITICS 46 (Paul E. Sigmund ed. & tr. 1988).

[17] ARISTOTLE, POLITICS, 1323a, at 191 (C.D.C. Reeve tr. 1998).

[18] ARISTOTLE, NICOMACHEAN ETHICS 1098a, at 10 (Terence Irwin tr., 3d ed. 2019).

[19] Aristotle is inconsistent on this point. *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 373–77 (1986).

[20] Politics, 1280b, *supra* note 17, at, 80.

[21] Gerard Bradley offers a similar criticism, without specifically invoking *determinatio*, in Constitutional Theory beyond Left and Right (review of Beyond the Constitution, *supra* note 6), 54 Rev. f Pol., Vol. 54, No. 1 (Winter, 1992), pp. 144-150.

[22] Summa Theologiae, I II, q. 95, art. 2, *supra* note 16, at 53.

[23] JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 268 (1998).

[24] *See generally* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021).

[25] *See generally, e.g.*, Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403 (2022). A.P. D'Entreves distinguishes "technological" understandings of natural law, as solutions to perennial problems of governance and adjudication, from "ontological" understandings, which

In a complex modern economy, the promotion of human flourishing can entail an immense regulatory apparatus. The evils to be avoided may require considerable expertise even to detect and diagnose: pollution, financial market fraud, dangerous or ineffective pharmaceuticals, hazardous consumer products, workplace hazards. In a minimal state, people would be vulnerable to all these harms.[26] Thus one of the most prominent contemporary neoThomists, Adrian Vermeule, argues that the modern regulatory state promotes the common good.[27]

Arkes thinks that government wrongs an individual if it uses its regulatory powers to commandeer his property for public purposes, as it does for example with the minimum wage, or the Affordable Care Act's mandate that large employers provide health insurance to their workers. But he doesn't seem to notice that property rights are subject to many different legal specifications, and that those specifications are a species of *determinatio*.

In our system of property rights, some subset of the social output is allocated for collective rather than individual determination of the use to which it will be put. There is no uniquely justified specification of that subset's size or use. Private property has no meaning outside that total system. Political life did not begin after I was already sitting in the state of nature with my brokerage account. The actual structure of property rights comes with a proviso that resembles the "rake" in a casino poker game: players know when they start the game that the house will take a percentage of each pot. Whether health care is to be directly funded by government, or by employer mandates, or (as is the case in the United States) some combination of the two, is a prudential judgment appropriately guided by the moral imperative to minimize morbidity and mortality.

Arkes ranges over a broad range of other specific applications, more than I can take up here. I'll focus on gay rights and abortion.

Arkes writes that the Supreme Court should have rejected same-sex marriage by offering "a *substantive defense of marriage*" as "the union of one man and one woman."[28] The state can prohibit discrimination on the basis of race, but not sexual orientation, because the former is wrong and the latter is not. He discusses a Supreme Court case, *Masterpiece Cakeshop v. Colorado*,[29] in which a baker asked for exemption from an antidiscrimination statute that required him to bake a case for a same-sex wedding.[30] He is unpersuaded that either religion or free speech can

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rest on an account of humanity's nature and purpose. *See* A.P. D'ENTREYES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 145–158 (2d ed. 1970). When early courts cited natural law, they were usually invoking the former, and some accounts of natural law simply build on those perennial governance problems. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 86–89 (2d ed. 1994). The distinction helps explain why "neither Continental nor English lawyers made much use of" Aquinas, whose view of the human telos was pervasively religious. R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 5 (2015).

[26] *See generally* ANDREW KOPPELMAN, BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED (2022). On the importance of *determinatio* in justifying the modern administrative state, see ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 46, 136, 152-53 (2022).

[27] *See generally* Vermeule, *supra* note 26; CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020). Arkes praises Vermeule but does not appear to notice this enormous difference in their views. Hadley Arkes, *Vermeule, his Critics, and the Crisis of Originalism*, THE AMERICAN MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/vermeule-his-critics-and-the-crisis-of-originalism/.

[28] MERE NATURAL LAW, at 11.

[29] 584 U.S. 617 (2018).

[30] MERE NATURAL LAW, at 76.

be a basis for such an exemption. There is no legally salient difference between the baker and any other defendant. Yet he thinks that the baker should prevail. The implication appears to be, not exemption, but that the statute is constitutionally invalid in all its applications, and that legislature has no power to prohibit discrimination on the basis of sexual orientation. On the contrary, with the Supreme Court's interpretation of the Civil Rights Act to protect transgender people from discrimination, "the trend of nihilism may have reached its terminus."[31] He thinks that, in that case, the Court should have looked "beyond the text of the statute" to "the differences that must ever separate males from females."[32]

The substantive defense of opposite-sex marriage, and exclusion of same-sex marriage, that Arkes endorses is that elaborated by Girgis, Anderson, and George. Arkes complains that proponents of same-sex marriage have not offered reasoned responses to those arguments,[33] but I have done so in some detail (as it happens, with the generous help and advice of Prof. George). My counterarguments are not nihilistic. They are just counterarguments, which claim that the conclusions about same-sex marriage do not follow from the natural law premises.[34] Nor is it explained why "the differences that must ever separate males from females" imply that the state cannot prohibit discrimination against those who construe those differences in ways with which Arkes disagrees. Racial discrimination, he writes, is wrong because "it denies to black people their very standing as moral agents to bear responsibility for their own acts and receive the praise or blame that is theirs alone."[35] This is a wrong "even when it is not clear that the victims have suffered any material injuries."[36] But of course discrimination against gay and transgender people also has historically involved devaluation of their personhood, treating them as irredeemably defective beings. Why isn't a legislature authorized to respond to that?[37]

In a long discussion of abortion, Arkes nowhere acknowledges that there is a serious philosophical debate about whether a fetus is a person, an entity with rights. He merely speculates that defenders of abortion rights "are incapable of simply reading what the textbooks on embryology or obstetric gynecology have to say."[38] He assumes that the physical human

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[31] *Id.* at 9.

[32] *Id.* at 15.

[33] *See generally* Hadley Arkes, *When a Man Loves A Woman*, CLAREMONT REV. OF BOOKS, Winter 2015/2016. He also worries that if same-sex marriage is not resisted in principle, "marriage would lose its integrity as a concept and its durability then as an institution." Hadley Arkes, *The Family and the Laws*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 116, 127 (Robert P. George and Jean Bethke Elshtain eds. 2006). But this prediction is parasitic on his view about what marriage essentially is.

[34] *See generally* Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage,* 2 U. ST. THOMAS L. J. 5 (2005); Andrew Koppelman, *Is Marriage Inherently Heterosexual?,* 42 AM. J. JURIS. 51 (1997); Andrew Koppelman, *More Intuition than Argument,* 140 COMMONWEAL 23 (Mar. 25, 2013) (review of SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012)), . Our disagreement turns on whether the legal institution of marriage must correspond to a good with essential properties. *See* Sherif Girgis, Ryan T. Anderson and Robert P. George, *Does Marriage, or Anything, Have Essential Properties?*, PUBLIC DISCOURSE (Jan. 12, 2011) https://www.thepublicdiscourse.com/2011/01/2350/ (engaging, and linking to, my arguments on this issue). Arkes is distinctive from them to the extent that, because he has so little room for *determinatio*, he wants legal categories to correspond to essences more than they do.

[35] MERE NATURAL LAW, at 102.

[36] *Id.* at 102.

[37] There are also other purposes of antidiscrimination law, which Arkes does not pause to consider. *See* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 43–65 (2020).

[38] MERE NATURAL LAW, at 138.

organism is identical with the person, so that "from the blastocyst stage the fetus qualifies for respect."[39] The most sophisticated defenses of abortion challenge that assumption, and they do so by engaging in detail with embryology. Scholars who agree with Arkes respond to that literature.[40] He ignores it.

The claim that abortion is morally permissible need not deny that a fetus is an organism or that is a member of the human species. Lynne Rudder Baker, for example, offers a pro-choice argument that is entirely consistent with natural law premises.[41] She proposes that personhood is an essence that emerges at a certain point in fetal development. Her view is essentialist and teleological. The human-making property of an entity, she argues, is the capacity to have a first-person perspective. Persons are necessarily embodied, but it is possible to have a body without being a person: corpses are not persons. "The relation between you and your body – constitution – is the same relation as the relation between Michelangelo's *David* and the piece of marble that constitutes it."[42] The *David* and the piece of marble are spatially coincident, but they are not identical. The piece was marble before and after Michelangelo got his hands on it, but it was not then, and is now, the *David*. I was once a fetus, but that does not necessarily mean that the fetus was me.

A fetus has the capacity to develop the capacity for a first-person perspective – to become, in Aristotle's terms, a rational animal. But such a remote capacity, Baker argues, cannot make anything the kind of entity that it is.[43] In the early stages of pregnancy, the person does not yet exist. "It makes no sense to suppose that a nonexisting person has a right to be brought into existence."[44] Baker observes that her view is consistent with that of Aquinas, who thought that the fetus was not a human individual until it possessed a rational soul, a point that he placed about twelve weeks into gestation.[45]

David Boonin similarly argues that, at the early stage of development, there is no consciousness and so no person. A rational soul must be at least sometimes conscious. If it is never conscious, then one may wonder in what sense it can be deemed rational. No consciousness is possible until neural connections begin to form in the fetus's brain, which happens at about 25 weeks. Roughly 99% of abortions take place before this point.[46] Until that stage, fetuses have not even begun to be (to use Arkes's words) "beings who can give and understand reasons."[47]

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[39] *Id.* at 219.

[40] *See generally, e.g.*, FRANCIS J. BECKWITH, DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE (2007).

[41] *See generally* LYNNE RUDDER BAKER, PERSONS AND BODIES: A CONSTITUTION VIEW (2000).

[42] *Id.* at 9. I became aware of Baker's argument when I encountered the attempted refutation in ROBERT P. GEORGE AND CHRISTOPHER TOLLEFSON, EMBRYO: A DEFENSE OF HUMAN LIFE (2d ed. 2011). In my judgment, their attack on mind-body dualism is effective against Descartes but is not responsive to Baker.

[43] Lynne Rudder Baker, *When Does a Person Begin?*, 22 SOC. PHIL. POL'Y 25, 35 (2005).

[44] *Id.* at 45.

[45] *Id.* at 41 n.50. Aristotle's views, on the other hand, are so distant from ours that no reliable conclusions can be drawn regarding his views on abortion in light of modern knowledge. *See generally* Mathew Lu, *Aristotle on Abortion and Infanticide*, 53 INT'L PHIL. Q. 47 (2013).

[46] *See* DAVID BOONIN, A DEFENSE OF ABORTION 115–29 (2003).

[47] MERE NATURAL LAW, at 27.

Arkes proposes that the principles of natural law are "readily – and instantly – understood," "accessible to all functional persons," "understood by virtually everyone."[48] If there is any need to articulate them, this is because they "involve those matters so foundational that we absorb them often without the least awareness that we know them."[49] He accurately observes that disagreement with these principles does not prove that they do not exist: with respect to some matters, it is often the case that one side is simply wrong.

On the other hand, the truths that anchor Arkes's arguments are not ones that "cannot be denied without falling into contradiction."[50] Writers who share his premises reject his conclusions. He is certainly right that the exercise of political power must be justified, but his arguments depend on too cursory an inventory of possible justifications. This leads him to zoom quickly past considerations that he should address and answer. He heaps scorn on stupid counterarguments as though they were the only ones he needs to address. One sometimes suspects that he perceives only two alternatives: the nihilist view that morality and law are merely matters of personal preference or agreeing with him about everything.

Law necessarily has a moral foundation. Exploring that foundation can help us understand what law can and should be. The project of finding anchoring truths is well worth undertaking, and the natural law tradition has something to contribute to that.[51] That is why Arkes's work is important. But the increasing importance of *determinatio* explains why natural law is not much relied upon today. Another is that virtue takes more forms than the natural law tradition recognized: Robert George acknowledges its "fail[ure] to understand the diversity of basic forms of good and the range of valid pluralism."[52] The basic commitment to the accountability of political power is important, and Arkes has performed a service by emphasizing it. But his arguments would be stronger if he engaged in detail with the strongest objections to his position.

[48] *Id.* at 19.

[49] *Id.* at 19.

[50] *Id.* at 23.

[51] Its relation to liberalism is complicated. The most careful assessment I know, from within the natural law tradition, is ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 189–229 (1993). On the other hand, Patrick Deneen and Adrian Vermeule, whose work has become quite prominent, radically misunderstand the liberalism they criticize. *See* Andrew Koppelman, *"It is Tash Whom He Serves": Deneen and Vermeule on Liberalism*, 98 NOTRE DAME L. REV. 1525 (2023).

[52] GEORGE, *supra* note 51, at 38.