Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law by Hadley Arkes

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The latest book from Hadley Arkes, Edward Ney Professor of American Institutions and Jurisprudence, Amherst College, is a master class in legal philosophy. Arkes's forensic approach to legal reasoning and his encyclopaedic knowledge of case history lead the reader confidently through complex arguments about the nature of law, and ask urgent questions about the place and authority of the Constitution and Bill of Rights in contemporary American legal discourse.

Though primarily a book about law, Arkes welcomes rather than excludes the non-expert. The book, thoroughly researched and dense with ideas, is so well written and compellingly argued that it is easy to follow and hard to put down. Indeed, the breadth and ambition of Arkes's area of research opens up as many sociological and philosophical debates as it does legal ones.

Arkes identifies a contemporary mistrust for 'Natural law' (sometimes moral law, or law of reason, that derives from the natural order and predates formal legal systems) amongst Judges and legal scholars in America and the purpose of the book is to reground legal debate in 'first principles', those principles which originally rooted the Constitution in the 'principles of the mind', or 'the laws of reason and nature.' (p.5) Arkes suggests that:

> [i]t is quite common in our own time to hearpeople speak of "those rights" we have *through* the First Amendment (p.7)

Arkes argues that law in America did not begin with the rights laid out in the American Constitution and the Bill of Rights, but rather suggests that those who wrote the Constitution drew upon deeper principles of Natural law from which current legal discourse in America has become divorced.

Arkes suggests that this process of separation began with the drafting of the Constitution and the Bill of Rights and identifies the anxiety present in the initial debates, suggesting that the Founders were aware that:

> [t]he impression would soon take hold that the rights set down in the Constitution, or the Bill of Rights, were more important than the rights we had neglected to mention in the text. (p.26)

The problem here for Arkes is that the fact of a written Constitution that sets down individual rights cannot hope to cover all rights. As an example of this Arkes cites an instance during the drafting of the Bill of Rights in the first Congress when Theodore Sedgwick of Connecticut 'expressed dubiety and asked, "Why don't you specify my right to get up in the morning, my right to walk down the street, my right to wear a hat?"'(p.26) Furthermore, Arkes suggests that the fact that the Constitution is written has gradually given it primacy over those first, unwritten principles. The resulting mistrust of these first principles is, he argues, a situation that is particular to contemporary legal discourse and Arkes uses this book to unpack why this is the case and why it must change.

The primacy of the written Constitution, Arkes reasons, problematizes the contemporary Judges' relationship with the fundaments of law which gave rise to the Constitution, and that a reconnection with these fundamental elements, or at least the acknowledgement of their place as the touchstone of America's modern legal system, is essential. More than suggesting that the separation between 'positive law' (law which is posited or written down) and 'natural law' is solely an issue of academic interest, Arkes argues that we cannot hope to understand the true nature of law in America without grounding ourselves in first principles:

> [A]s we try to apply the cases that come before us, we find the need to move beyond the text of the Constitution to those premises, or principles, that were antecedent to the text. They were the first principles of "lawfulness," so fundamental that few people thought it necessary even to state them. (p.51)

Arkes takes a historical approach to his analysis, citing a variety of cases from the 17th century to the present day. Through analysing subjects as varied as the racial discrimination in a bequest to provide education for 'poor white orphan boys' (p.32), which was challenged in the Supreme Court in 1954, and an 1868 case in which a Sheriff in pursuit of a suspected murderer was charged with 'obstructing and retarding the passage of mail' (p.3), Arkes systematically separates natural law from positive law Arkes then uses these examples of natural law to examine the fissure between constitutionalism and the Constitution, asking whether the Constitution can be fluid and reflexive, a 'living Constitution' (p.14), or whether its potential malleability undermines its authority. The question of whether the

written Constitution can be regarded as the foundation of American law is key to unlocking Arkes's central question:

> [W]e might say that the legislature is the source of the positive law, the law that is posited or enacted, but then what is the source of the legislature, or the authority to legislate? (p.24)

Though the book is necessarily focused on the American legal system and its relationship with the Constitution and Bill of Rights, which will, of course, be of most interest to students of American law, there is much here that will reward readers of more general interests. Arkes skilfully guides the reader through complex arguments which unpack the universal tension between positive law and natural law. As a result, for the non-American reader, the relationship between the American Constitution and the American legal system becomes a case study through which Arkes explores the relationship between the individual and the state, the nature of individual rights, and the place of natural law within positivist legal systems. The result is a highly readable and highly recommended book that uses law to analyse the much larger issue of the way in which liberal societies are constructed and how, in order to maintain and honour that construction, we must not ignore the reality of the 'first principles' of natural law in favour of the illusory certainty of positivist constitutionalism.

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