Transcript dated 5/9/2023. All errors are my own. – Maxwell Steinberg

Maxwell Steinberg:

"Welcome to this book discussion with Professor Hadley Arkes. A professor emeritus at Amherst College, Professor Arkes is a prominent legal and political scholar who has made significant contributions to the fields of constitutional law, natural law, and jurisprudence. He is the founder and director of the James Wilson Institute on Natural Rights and the American Founding, and has written several books on these topics. He's been so kind as to agree to join me to discuss his latest book *Mere Natural Law*."

MS: "Just to begin with my first question, what is your book's central argument?"

Professor Hadley Arkes:

"It is about *Mere Natural Law.* Natural law involves real truths: anchoring truths. I want to resist the notion that natural law involves some very high minded sentiments lofted in the sky instead of the anchoring grounds of practical judgements. I want to take it back to the point before theories. My late dear colleague and friend Dan Robinson wrote 18 academic books, but he died without a theory. He did say that he was going upon the great Scot philosopher Thomas Reid, with his teaching on commonsense. Reid was read closely by James Wilson and John Adams, among the founders. He was appealing to those precepts of common sense that an ordinary man not only has to know, but has to take for granted in getting on with life. Things he has to know before he can begin trafficking in theories. So, before the average man would start bantering and state a view about the meaning of causation, he knew his active powers to cause his own acts to happen."

"What I was trying to point out here is the anchoring truths as the first rule of all moral and legal judgment understood by Kant as well as Thomas Reid. It makes no sense of placing moral praise or blame on people when they are utterly incapable of affecting the act in question. There's an anchoring truth. The one thing that will never be contingent and variable is the principle itself: If Jones was really incapable of affecting the outcome, he cannot be held responsible for the result. I'm trying to point out that these anchoring truths were there before the Constitution. The Founders understood. One of the interesting attributes of that first generation of lawyers – Alexander Hamilton, James Wilson, John Marshall – is that they typically made their way back to those anchoring axioms as they are trying to explain their judgment in the cases coming before them. The Founders drew upon those principles as they were framing the Constitution."

"The Constitution was not the source of their understanding of the principles of law or the principles of right and wrong. They understood that those principles would be there even if there were no Constitution, much as John Quincy Adams said that the right to petition the government would be there even if it wasn't mentioned in the First Amendment – even if there were no First Amendment, even if there were no Constitution. So, what I'm trying to show in this book is that

there is something strange about the question being raised when judges invoke the natural law. The point is that the natural law is there: It's woven into everything we do. The natural law is what tells us why we have a law in the first place – how we have a law. In the law that's enacted, there's an underlying natural law that tells you why it's worth it having a law – why it would be justified to restrain the freedom of people to drive at speeds that put innocent life at hazard. And then you have to make a transition from the general principle to a regulation that applies the principle to the circumstance. If we have a little more time with this and you want to try it out, we could point out that the natural law is the logic that tells you why you have law in the first place."

MS: "Going back to [what] you said that the right to petition the government would still exist regardless of whether it was written out in the Constitution, if that's the case, what's the point of having a written Constitution?"

HA: "The written Constitution provides a structure. The purpose of the Constitution was to establish the structure of governance, the underlying principles, that form the character of this political community. That character was provided by, as Lincoln said, that proposition in 1776: All men are created equal. The only rightful governance over human beings relies on the consent of the governed. We created one Constitution that gave rise to all kinds of principles. We had to do a second Constitution to be more consistent. The point is that it has to be consistent with the underlying principle that establishes the character regime. And establishes, by the way, the power to make positive law for us. I was at a meeting a few years ago where Professor Amy Coney Barrett was asked, 'if you really respect positive law, why do you respect the positive law? What makes positive law in America different from the positive law in Stalin's Russia?'"

[brief technical difficulties]

"It can't be simply that they're both put in force. It had something to do with the fact that the positive law in America was enacted according to principles that established for us what is the right form of governance: a government of elections. With all that, as I said, Maxwell, the Constitution that failed in the first attempt was [trying] to convey the deep principles of this regime of ours, our political order, into a structure that could give us a pattern of practice consistent with that principle. And people ask, 'Well, why do you need a Constitution?' Well, it's the structure. It really is important for me to know whether a state may make its territory available to a foreign power as a naval or military base, and it's really important for me to know who the military will obey if the president dies in office. These are all matters of the structure of the Constitution, the structure of governance, and the reason we are not noticing them is that we are not litigating about them. You know, in the arguments over Obamacare, back ten years ago, Obamacare had a bump in the road because the Constitution, for the like the 56th time, in peace or war, served up a midterm election. People may not be noticing that this is what the

Constitution is doing: it's the structure. And Justice Scalia used to say that it was the structure of governance – more than the Bill of Rights – that protected the freedom of speech and those kinds of freedoms because people have the possibility of retaliating at the ballot box to get rid of those who pass those sorts of laws."

[brief technical difficulties]

"That it was the structure of politics: the fact that people whose freedom of speech could be threatened by a local government had means to remove that government through the process of election. The Alien and Sedition Acts of 1798 were overturned by an election, by the Jeffersonians coming in in 1800. To Scalia's point, it was the structure of politics, the fact that people whose liberties were threatened could retaliate at the polls. That is what preserved these rights of speech in the states, even before the Supreme Court began extending the First Amendment against the states in the 1920s."

"I don't know if you caught this, but Lincoln, drawing out proverbs, [said] an apple of gold in a frame of silver – the frame is made for the apple, not the apple for the frame. The Constitution was made for the Union, not the Union for the Constitution. The Union is older than the Constitution. The Constitution was made for a more perfect union. Before we have the structure of the Constitution or the framing of the Constitution, we have those principles that determine the character of the American regime. It's interesting, I mention in the book, that Barack Obama, on the night he was elected, said we built this country…for 221 years: He was counting back from 2008 and reaching 1787, the drafting of the Constitution. Lincoln said the country was born four score and seven years ago at Gettysburg in 1863. For Lincoln, the country did not begin with the Constitution. It began with that first principle that established the character of the American regime: all men are created equal – no man is by nature the ruler of other men the way that other men must be by nature the ruler of dogs and horses."

MS: "That's really fascinating. Another theme you address in the book is moral relativism, so can you talk about whether the fight over the courts today is just a product of wider cultural moral relativism that has just grown in recent decades? Maybe you can define what cultural moral relativism is."

HA: "Cultural relativism is the argument that there are no moral truths, that the truth is always relative – what's dominant in the culture. Lincoln faced this thing. We say that their point is that there are no moral truths holding across the epochs – that we know what is right and wrong is established in the country at any time by dominant opinion. So, by the Civil War, we have one strand of opinion that favors slavery, and one strand of opinion that favors the opposition. Well, which one reflected the culture? The answer was the one that was strongest. Now the premise of cultural relativism is that the moral truth is in the hands of the mightier, the stronger. If that's the

case, you can knock the ground out of any claims about respecting the rights of a minority because once a majority has won, they can establish their right to rule. It's a curious thing that we hear the historicism of this: 'They can know moral truths only in the epoch of which they are held.' Except for the truth of historicism. That principle holds true across the epochs. It's self-defeating. If you want to fend off moral judgements, cast the pale down, so they want to argue that there are no moral truths. The philosophy student stands up in class and says, 'There are no truths,' and the professor responds, 'What about that proposition that there are no truths? Is that itself true?' It's simply contradictory, but that's been critical to unfolding the whole liberal program over the years: That we simply declare that the child of a woman in the womb is not a human being, [that] we don't have principle reasons or judgements to bring."

"It's like Lincon having a conversation with the owner of slaves. Imagining this conversation, 'Why is the black man fit for slavery? Because he is darker than you? The next white man may enslave you.' In other words, he's testing the argument in a principled way. In the same way regarding abortion, 'Why is the offspring in the womb anything less than human?' 'Well, he doesn't have arms or legs.' 'Other people lose arms and legs without losing their standing to receive the protections of law.' What we have here is simply assertions: It's in the woman's interest to have the abortion. But you're putting aside the question of whether an innocent being is being destroyed. It's the assertion of rights without an explanation."

"In the Founding generation, every time you mentioned liberty, liberty was associated with license. What is license? That is when a liberty was used for a wrongful end. It had a moral framework. Talk about my right to do something – it's a liberty directed toward a rightful end, not a wrongful end. In our own time, one of the most critical jumps here comes with the first question of abortion – which asserts the right of a woman to kill this being even against the evidence that she's destroying a very small human being. As Paul Ramsey pointed out in riveting detail years ago, there's nothing human I have now that we don't have when we're no larger than a zygote – no larger than a period at the end of a sentence. Lawyers from Texas in *Roe v. Wade* brought in an exquisite brief with updated findings that pointed out the offspring in the womb has never been anything other than human. It's never been merely part of the mother. To make the case for abortion, you simply have to rule out that there's another being there without being subject to examination."

"In the case of same-sex marriage, Justice Kennedy [argued] that a person has a claim to autonomy as to how he wants to live. Autonomy is always the mark of a moral agent – a person who has the freedom to reflect on things that are right or wrong. Status as a moral agent who can make decisions and be held responsible. The question of autonomy always comes with the question of whether you are using your autonomy for ends rightful or wrongful. Justice Kennedy, from the liberal perspective, just asserted autonomy as something good in itself, and detached it from the whole framework of moral judgment. Women have relied on the right to abortion –

reliance interests. Are you saying that someone is relying on the freedom to destroy an innocent child? Is that what you take to be a legitimate reliance interest."

"In other words, Maxwell, what I'm saying is that the liberal argument works by removing any of these questions from a moral argument, and part of my argument here is that the moral framework is understood by ordinary people as a matter of natural powers. I think I told a story in the book about being put outside on the grounds of my apartment building with my neighbors in Washington when the fireman was fighting a fire. We were out there for two to three hours. People were vexed. They didn't like being out of their apartments. The ability to move into their homes was being barred. Their liberty was being restricted. And, yet, no one would have thought this was unconstitutional or that their rights were being violated. Why? Because they were being restricted for a patently clear justification: the sake of protecting your life and the lives of others. Of course, the natural way people set this up is [asking] what's their justification. I remember seeing a youngster on Connecticut Avenue on a bike. I said, 'Can you do that?' He said, 'Yes, but not during rush hour.' He understood that it would be unreasonable to take that bike and have it take up the space of two or three other people in the rush hour. In other words, he understands that his liberty is being restricted for a justified purpose. My point in all of this, Maxwell, is these are decisions that ordinary people make everyday without much awareness that they're doing it. The point is that there is nothing inscrutable about it. Part of the argument of the book is that there's nothing foggy or cloudy about those principles of natural law. The work with the axioms with which people are making decisions everyday. An ordinary man knows his own power to cause his own acts to happen. He knows he does not hold somebody responsible or blameworthy who doesn't hold the capacity to affect the outcome. These are things so woven into our natural understanding and our common sense."

MS: "[You have a line that states,] 'To ask whether judges can actually get through their day without touching those axioms of reason, the very ground of the Natural Law, is rather like asking: Can I order the coffee without using syntax?' Can you speak about the role of writing with some degree of humor?"

HA: "Writing with humor? You're crediting me with humor! I said in the book that comedians and philosophers are in the same business. The comedians make their work by drawing on the principles of logic…The point is that there are many critical moments in which the deep principle of the matter comes out more clearly with a joke that illustrates it. So, for example, you can get a really good sense of what the American people understood about Natural Law by listening to the old radio comedies I grew up with. One Jack Benny, which was very famous, established that Jack Benny with a bow and arrow was a gleeful proposition. His band later [said] I bet you a dime you can't hit an apple off the head of Don Wilson, the bouncer. Don Wilson says, 'I want none of this.' And Jack Bennett says, 'What is your problem? It's our money,' and gets a laugh from the audience. What's the point? That you don't put human life at

risk for something [like] a dime. That show had to assume that ordinary people would understand that it would bring a laugh."

"Sometimes in my own courses, I'll say on the matter of marriage: 'It's subjective attraction, nothing deeper about it.' I say let's try it this way: "I married her because of her exquisite blondeness. She went perfectly with the drapes in my apartment. But now I'm doing the holiday's art decor. She just doesn't go.' That elicits a laugh. What people recognize is that it's trivializing. It brings us away from the recognition that marrying somebody – taking a vow of a long term relation – that there's something admirable there that will remain long after looks wither with age. Say that there's something morally significant about this person that draws my affection and respect. In other words, comedy is often a way that people may [take recognition]."

MS: "There was that one example – I think it was that someone beat someone up and the question is do you assume that there was some just cause of beating them up, or some example along those lines."

HA: "The youngster is beaten up. Do we think that he thinks, 'I was wrong!' Or does he think, 'Wow, they must have been right. They succeeded!' The second response is utterly implausible. Nobody would think that way. In that case, we've pointed out, the seven-year-old understands that the mere capacity of some people to seize and hold power over others is not a justification for the exercise of that power. So, the seven-year-old understands something that eluded the famous Justice Holmes. The question was put to Justice Holmes: 'On what ground does the majority rule the minority?' He said, 'He had the power to overpower the minority.' In other words, 'might make right.' So you could say the seven-year-old, with his natural reactions – because he's not thrown with the type of theory that a Justice Holmes had acquired over the years – understands the situation."

MS: "A lot of detractors may argue that your approach to natural law would lead to some form of freewheeling judicial power. You note that judges operating under natural law reasoning would not presume to tell communities about things dependent on society's wealth and generosity, like residency requirements for a publicly funded higher education. That's one example you point to. You write in that same passage, 'The standards for those judgments are not contained anywhere in the kit available to judges.' What would you define as the 'kit available to judges?'"

HA: "It's good that you picked up that passage. You're being attentive to the critical points. The judges are working with propositions that are true of necessity: anchoring principles that we don't hold people blameworthy for actions they were powerless to affect. If we separate kids on the basis of race and the reading scores go up, does segregation cease to be wrong? It's wrong in principle. You trace it back. It is utterly indifferent to whether people are better off or worse off

as a result of it. My point is that the natural law that judges are anchoring truths of a categorical nature to necessity. There's no principle that tells what the proper price is for a pair of pants or a gallon of milk. They're dubious about things like that. Wage and price controls, and things like that. They just cannot tell you what is the rightful residence requirement for a person new to a state before a person can establish a right to a publicly funded higher education. It depends on whether the people of a state really want to offer a publicly funded higher education, and how long they think someone ought to be there as a real resident to claim that. That's a judgment that should be made only by local people who are responsive to the means available to the population – what the population is willing to support, what they're going to provide by law. There's nothing in the toolkit of judges to do this."

[brief technical difficulties]

"We've had a number of cases in which the government…could not prosecute somebody because it could not expose itself to the conditions of discovery and it could not bring out into open court the names of its witnesses. In other words, the government holds back from prosecuting. What holds them back? They have to respect that principle that [everybody] accused of a crime should have access to the witnesses and the evidence against him. That confirms the categorical truth of this thing. Even if it…weren't in the Constitution, somebody could bring it up with the Due Process Clause, but that's just free-roaming now. The point is that if we understand the principles of natural law, they provide the ground for a reasonable conversation. Any time you have an argument that doesn't make sense unless you are presupposing the standards of justice that we can have this conversation to deceive what is more right or wrong. If you are concerned about judges making serious mistakes, then the corrective is to bring out those mistakes and show where they're wrong. This is the way we ordinarily live and it shouldn't be altered when we are dealing with judges. Also, I'm closer to a more Lincolnian perspective on these things where the political branches have some more authority to hold back. Lincoln could not have raised his hand on March 4, 1861 if he thought the Constitution contained the holding in *Dred Scott*…He lit a national movement to overturn that decision."

Interested readers can buy *Mere Natural Law* here: Mere Natural Law: Originalism and the Anchoring Truths of the Constitution