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A Jurisprudence of Natural Rights: How an Earlier Generation of Judges Did It

By Hadley Arkes

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By Hadley Arkes

I was recalling, not too long ago, the experience of having dinners with a seventeen-year-old, who was absorbed in his thoughts; and occasionally he would lift his head out of his plate, and address a question as if to no one in particular. He might say, "Who is she, so fair, whose unear'd womb disdains the tillage of my husbandry?"—or words to that effect. The actual words, as you may suspect, were notably less lyrical. What is far more common to us is the reverse of that experience, the conversion that we recognize more readily as "reduction." And so, for example, someone may recall these lines from John Stuart Mill:

> Still more salutary is the moral part of the instruction afforded by the participation of the private citizen... in public functions. He is called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good... [*Considerations on Representative Government*]

We read those lines, and then someone offers us a translation of the passage by saying: Mill *likes* politics. But something *is* lost in the condensation; a reduction has taken place. Not only is there a flattening in the style of expression, but there has been a loss of the precise reasons that politics may become a school of moral instruction. This kind of reduction becomes all the more serious in the domain of law, or in discussions of justice, because the reduction then is a moral reduction—it is a reduction that removes the moral substance of what is being said, and it conveys a false account.

Most affable relativists today are really the descendants of David Hume, and for Hume, moral judgments were, at bottom, merely expressions of the things that give us pleasure or displeasure. To say that something is right or wrong would be translated then to mean, "It pleases me/It displeases me," or even more elementary yet, "I like it/I don't like it." Now I would ask you to consider for a moment just what this state of mind produces when it is turned to questions of law or jurisprudence. Justice Hugo Black was convinced that natural law was simply a collection of airy sentiments, supported by nothing more than the subjective feelings of the judge. When a judge struck down a statute on the basis of natural law, he might be filled with pretensions, but he was really saying nothing more than "I don't like it." This perspective on the law accorded with the views held by logical positivists on morality itself, and this view of morality and law hung on well past the time that logical positivism was discredited in the schools of philosophy. And so we found many writers and judges viewing the law through this prism, and offering this account: that many conservative judges in the 1930's struck down the legislation of the New Deal, and many of them appealed to the logic of natural law; but all that the judges were doing was acting out their own prejudices, or, to use a favored expression, their "predilections." In short, the judges didn't "like" legislation that restricted business and sought to help people.

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When this kind of reductionism is practiced by Woody Allen, it becomes comedy; when it is done by the likes of Arthur Schlesinger, Jr., it becomes "history." And in this kind of history, there was no need any longer to consider the reasoning offered by the judges or the arguments they had sought so carefully to frame.

It is remarkable that this perspective took hold even among some conservatives, and among some of the most sober of judges. And so, Chief Justice Taft moved off in dissent when his colleagues struck down the minimum wage law for women in the District of Columbia in 1923, in the case of *Adkins v. Children's Hospital.* Taft was regarded as thoughtful and scholarly, and yet he thought fit to characterize in this way the opinion written for the Court by his friend, George Sutherland: "It is not the function of this Court," he announced, in portentous tones, "to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound."[1]

With a translation of that kind, one could never reconstruct the reasons in the opinion composed by Sutherland, any more than one could approximate their urbanity and persuasiveness by reporting that Sutherland and his colleagues did not "like" the law in the District of Columbia. One might have imagined, from Taft's dissent, that Sutherland had offered some rival theories of economics, on employment or wage rates. And yet, Sutherland offered no theories of economics; nor did he engage in any reasoning that might be labelled as "economic." He did not even presume to predict whether the minimum wage would work to raise incomes or produce widespread misery. The case already contained evidence that the policy would destroy jobs. But Sutherland's reasoning in the case was drawn from considerations and principles that were *jural* in nature. His ground of objection to the statute was founded in principle, and it was really quite indifferent to any speculations about the results that would be produced by policies like the minimum wage.

In fact, I would put the matter in this way: If we can see what was so inapt in Taft's characterization; if we can see just how Sutherland managed to avoid any temptation to quibble with the economics of the legislation, or challenge the economic theory behind the policy; we would be able to see the simple way in which judges, in an earlier generation, were able to "do" a jurisprudence of natural rights, without a hint of affectation, or without the sense that they were doing anything especially audacious or remarkable.

But as a first step into the problem, it may be illuminating to consider just how Sutherland could be caricatured in this case simply for applying the rudiments of principled reasoning. Mr. Samuel Gompers, of the American Federation of Labor, saw the decision, in the minimum wage case, as a judgment that could be struck off only from the most reactionary state of mind, and he offered this translation: He reported that, in the eyes of Justice Sutherland, the labor of a woman, sold in the marketplace, was on the same plane as the meat being sold by a butcher.[2] As you may suspect, that was not exactly what Sutherland had said. But it does reveal the perils of drawing analogies in the course offering principled arguments to the public. Sutherland had been seeking to point up what was problematic in supposing that every job, in every establishment, could support the kind of wage that was necessary to sustain a person or a family. And so he offered this analogy: Let us suppose that we go to the butcher or grocer to buy food, and let us say that we pay the price for a pound of meat. Would we be morally entitled to more than that pound of meat? Would the butcher or the grocer be morally obliged to supply, for the price of that meat, all of the food necessary to sustain our families? Sutherland thought it was quite plain that, if the

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1 *Adkins v. Children's Hospital*, 261 U.S. 525, at 562.

2 See the *Washington Star*, April 9, 1923, p. 2.

customer receives the worth of what he pays, "he is not justified in demanding more simply because he needs more." What if the government sought to "determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum [price]"? There was no doubt that a statute of that kind would fail a constitutional test. And yet, Sutherland and his colleagues thought there was no difference in principle: The law seemed to suggest that it was better not to offer a position as a delivery boy unless the employer could pay the kind of wage that would sustain a person or a family. But on what ground did we claim to know that every position could generate that kind of return, and that every employer could afford to pay that wage for every position? We could not draw that inference simply from knowing that a man stood in the class of an employer — any more than we could say that anyone who was a butcher or grocer could afford to give, to each of his customers, as much food as he required for a fixed price stipulated in the law.

To recognize what was implausible in this scheme, it was not necessary to know anything about the market in meat and groceries; and it was not even necessary to know very much about economics. It was necessary simply to grasp a central truth about moral judgment that is accessible to people of ordinary wit, as well as to judges and lawyers. It is expressed in different forms, but one way or another, judges manage to make their way to this understanding, which is an understanding about morality and "determinism": namely, that we cannot draw any conclusions of moral consequence from facts, or attributes, that are utterly wanting in moral significance. From a person's height, or weight, or the color of his hair, we cannot infer that he will be a good man, or a bad employee, that he deserves to be rewarded or punished. Simply by knowing the race of the people moving in next door, we cannot say that their presence will improve or degrade the character of the neighborhood, and therefore we cannot say that we are justified in resisting their entrance. In all of these cases, what we are saying, in effect, is that moral conduct is not "determined" or controlled by height or color, in the way that the Marxists were convinced that morality was "determined" by the class structure, or Nazis were persuaded that character was determined or controlled by race.

One of the central truths for any judge, or moralist, to grasp is that there is something autonomous about moral conduct, that people retain a certain freedom to choose their own course, and on the basis of that essential freedom we may be justified in holding people responsible for their acts. I've often thought that we could reduce the principles of judgment available to the judges to this one cardinal point, and train them to recognize the rich variety of ways in which the same principle may be violated. For example, the State of California bars the entrance of indigents into the State during the Depression, and Justice Byrnes, striking down this law, explains that "poverty and immorality are not synomous"[3]: Knowing that a resident is indigent is not to know that his presence will be unwholesome. The State of Idaho wants to assign the authority to act as the executor of an estate, and it assumes that women will have less experience in business and law than men will have. And my friend, Robert Bork, aptly remarks, that if the measure is experience in business or law, then the law should gauge experience in business and law; it should not take sex as a predictor of experience, as though sex *determines* that a person will, or will not, have experience in business.

Now, if we return for the moment to the Adkins case in Washington, we find that the case simply provided a collection of fallacies all drawn from this same, central point. The law in the District of Columbia cast its protections solely around women, and it stipulated the level of wages, in any job, that was more likely to preserve the "health and morals" of the occupants.

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3 *Edwards v. California*, 3141 U.S. 160, at 176-77 (1941).

Sutherland was skeptical about the grounds on which the legislators claimed to know, with such precision, that women working in a department store required wages of $16.50 per week to preserve their moral character, while women working in laundries could apprarently sustain themselves and their morals on wages of only $9 per week. "The relation between earnings and morals," he wrote "is not capable of standardization. It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages... " And if the end was to protect the moral condition of women, why only the women who worked for others—but then why a concern only for the moral condition of women, and not men?

But this "determinism" by sex and wage was not the only determinism at work here. There seemed to be a *class* determinism: It seemed to be assumed that anyone who fell into a class called "employer" had the capacity to pay the wage that was stipulated by the board. The law assumed that, if we merely knew the sex of the worker, we would know what that worker needed to support herself. And if we merely knew that a person was an employer, we knew what he was capable of paying, whether the establishment was a large corporation or a marginal, small business, with one or two workers. As Sutherland argued, the law took no account of the vast differences among the needs of employees and the capacities of employers. It created the same obligations for employers "whose bargaining power [he observed] may be as weak as that of the employee."[4]

Of course, the writers who would defend these laws, even today, will readily concede that sex and class do not *determine* moral conditions, or the capacity to pay, but that they may hold true most of the time. To know that a person is female is not to know, of necessity, that she cannot have experience in business and law, but sex may be a good guide to the probabilities: namely, that men are more likely than women to have experience in business and law. But it was the nature of the problem before Sutherland and his colleagues that they could not settle for this probabilistic reasoning. The law was arranged in categories—it conferred protections and disabilities, in a categorical way, on women, and it cast liabilities, in a categorical way, on employers, without finer calibrations. Therefore, the judges were compelled, by the very logic and arrangement of the law, to face an old question in jurisprudence, the difference between judgments that are *categorical* or *contingent*, necessary or probabilistic.

Philosophers will readily recognize the differences here and they may be able to elaborate on the properties: On the one hand, we have propositions that are logically necessary; their validity will not be contingent on matters of circumstance or degree. ["No one ought to be held blameworthy or responsibile for acts he was powerless to affect."] Whether it is wrong or injurious to take an alcoholic drink will always be dependent on matters of degree, of moderation, of circumstance. And yet, we do not hear anyone say that genocide, if taken in moderation, may be harmless or inoffensive. In the difference between the two, we have been able to understand—as the judges once understood—the difference between wrongs that were merely contingent, and wrongs that were virtually indifferent to matters of circumstance and degree.

The law imposed its restrictions or disabilities, it restrained the freedom of people, or imposed burdens on them, in a sweeping, categorical way. And so it was only fitting to raise the question of justification at the root here: Does the law have as its foundation an understanding of a good that is truly categorical and necessary? And that problem yielded to the rather simple question, cast in the familiar form, "Is it necessarily true that... ?": Is it necessarily true that any person

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4 *Adkins v. Children's Hospital*, 261 U.S. 525, at 557.

who is a woman will need a job paying $71 a week, or that it would be better for her not to have the job than to have that job at less than $71 per week? On the face of things, that question virtually answered itself. As Sutherland remarked, the law took no account of whether a woman was living by herself or with a family, whether she needed money to support a family, or whether she needed merely a certain amount as a supplement to the income of the family. In the very case before the Court, Ms. Willie Lyons had been employed by the Congress Hall Hotel as an operator of an elevator, at a wage of $35 per week, plus meals. Ms. Lyons thought the pay and the setting were quite satisfactory altogether, and better than any alternative she was able to find. But she was not permitted to stay in that job at less than the wage of $71.50 per week stipulated by the commission on minimum wages. The law meant to concentrate this kind of protection on women, not men; and so men were still free to accept this job at the market rate, which was around $35 per week. At that wage, the Hotel had no trouble finding takers for the offer. But under the terms of the law, the Hotel was not permitted to employ a woman at that wage, and Ms. Lyons, even as a mature woman, was not given the freedom to make her own judgment about the terms of employment that were acceptable to her. The law was passed out of a certain tenderness toward women, but it created the result of replacing women, in jobs, with men.

It was not plausible to claim, then, that a wage of $71.50 was categorically good, that it *necessarily* rendered justice or served the good of the employee. And yet, without any proposition that described a categorical good, the law imposed a categorical policy, it restricted people in their freedom, and deprived them of their jobs. Reduced to its moral essentials, the law could not provide a justification for itself; it could not establish the ground of justice that made right or defensible the harms that it would impose. I've traced the argument in this manner for the sake of making this point: Once Sutherland framed the argument in this way, he managed to show what was in principle wrong, wrong at the root, with policies like the minimum wage or wage-price controls; and that wrongness in principle was quite indifferent to the question of whether these controls might offer benefits, or generate some benign effects. Even if they "worked," in some way, they could not coherently be justified. To take another example, we could show that it is incoherent to hold someone blameworthy for an act he was powerless to affect. And yet, we might have the effect of reducing public anxieties and improving the climate of business and investment if we simply punish someone now, perhaps even Jones, who had not been born when the crime had been committed. The punishment of Jones could indeed have benign effects for the community, but nothing in those good results would efface the wrongness of punishing Jones for a crime he didn't commit. In the same way, even if the policy on minimum wages raised incomes and prosperity in the city, none of those good effects would establish the justification for depriving Willie Lyons of a legitimate job she was anxious to keep.

Again, the vice in the project could be seen in this way: The legislation swept categorically in its restrictions, and yet it could not be supported by any proposition that had a categorical or necessary force. The supporting propositions claimed to be, at best, only probabilistic: that if wages are pegged at a certain level, there will be more benefits than costs, and the community will benefit in the long run from propping up incomes. The heart of the problem was that Sutherland and his colleagues recognized that logical disparity. Now, in striking contrast, there were other cases in which Sutherland showed that we could indeed ground our judgments in propositions that *were* logically necessary. The judgments we would reach then, about the things that were right or wrong, would not be true only most of the time; but true and just of necessity.

We may take, as a notable case in point, *Patton v. United States*,[5] decided by the Court in 1930. The defendants had been accused of bribing a prohibition agent, but during their trial, one juror, in a panel of 12, had become ill. A mistrial might have been declared, but the defendants waived their interest in a jury of 12 and accepted a verdict by a jury of 11. But the defendants guessed wrong, and the judgment of that jury ran against them. They suffered no embarrassment,

though, in launching an appeal and claiming that they had been improvident in making their own waiver. For Sutherland, the judgment in this case could be settled through a string of propositions that began with the right of a defendant to enter a plea on his own guilt or innocence. If we were asked to offer an account of that right, we could trace it back to the logic of justice itself: By the logic of morals, we are justified in inflicting punishment only on the guilty, and the purpose of any trial is to use the canons of reason in the most strenuous way to test evidence and make accurate distinctions between the innocent and the guilty. Anyone would be obliged to offer evidence that could save an innocent man from being punished unjustly; and that obligation would have to hold quite as well for the defendant who is accused of a crime. If there is a right on the part of the defendant to enter a plea, that right must involve the right to plead guilty as well as innocent.

And from that proposition, grounded in the logic of morals itself, Sutherland was able to extract the propositions that finally settled this case: The right to enter a plea must entail the right to plead guilty, as well as innocent. The right to plead guilty must entail then the right to waive a trial (by making the trial unnecessary). But if there is a right to waive a trial, that right must entail, or cover, the right to waive a trial by jury. (To foreclose a trial is to foreclose the possibility of a trial by jury.) And if there is a right to waive all twelve members of a jury, then that must entail the right to waive but one juror on a panel of twelve. There must be a right then to waive a jury of 12 in favor of a jury of 11.

Sutherland understood that this chain of propositions was unbreakable, because it could claim a force of logical necessity. The defendants might have gambled and lost in *Patton* when they accepted a jury of 11, but there was nothing in the least bit unjust in the freedom they exercised to make that judgment. The axioms that established the rightness of that freedom were not affected by anything contingent or probabilistic.

I am offering the modest, but telling point that Sutherland and his colleagues were alert to these differences in the properties of the propositions that made up the problems before them; and in that respect, they were in a line that ran back to John Marshall and our first generation of jurists. At the end of his opinion in *Gibbons v. Ogden*, John Marshall apologized to his readers for taking so much space "to demonstrate propositions which may have been thought axioms."[6] Marshall was evidently quite clear on the difference between *demonstrations* and those axioms, or necessary truths, that had to be in place before a demonstration could be carried through. That understanding was expressed in another way by Alexander Hamilton in his memorable introduction to the Federalist #31, when he observed that, "In disquisitions of every kind there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, command the assent of the mind."

The Founders showed a remarkable capacity to trace their judgments back to these first principles, and anyone who knows the jural writings of this period knows that these works are woven through with the axioms, or first principles, of the law, as the strands that the judges needed in composing their judgments. And yet, there seems little awareness among the commentators that when the judges were applying these axioms, or these principles of law, that they were doing natural law. During the late hearings over Clarence Thomas, we were offered many instructions on natural law, from the left and the right, and yet the doctors of instruction had an infirm hold on their subject. One of the most widely travelled misconceptions, on the right as well as the left,

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5 281 U.S. 276.

6 22 U.S. 1, at 221 (1824).

was that natural law was drawn as a generalization from experience. And so one conservative jurist actually offered Social Darwinism as a species of natural law, because it purports to describe a law of behavior that finds its source in the "nature" of human beings. By this reasoning, infanticide and genocide would be in accord with natural law, because they seem to be such a persisting, intractable part of the human record. And yet, natural law has ever set itself against the slavery of human beings and the destruction of the innocent.

The classic teachers of natural law did not make their way to natural justice by drawing generalizations in this way from the checkered history of our kind. They began, rather, with an understanding of what was higher and lower in human nature. Lincoln spoke of the "better angels in our nature," and he reflected there an understanding that ran back to Aristotle: What was most distinct to human beings was the capacity to give and understand reasons over matters of right and wrong. Human beings were the only beings who could offer justifications for their acts, and law itself was the distinct creation of moral agents. From this angle, the discourse of law was itself distinct to our natures, and there was no higher expression of our natures than the strenuous effort to establish reasons for our actions and a principled ground for our motivations. And when we sought to establish the principled ground for our judgments, we were compelled to appeal to the "laws of reason" that were accessible to human beings as human beings.

This kind of discourse was the preeminent example of our human natures, but it seems to have passed the notice of so many observers that we are engaged, preeminently, in the discipline of natural law, and natural rights, when we seek to expound those "laws of reason" and draw out their implications. And so we may have failed to notice, in the same way, those principles of justice that our best jurists managed to extract for us over the years and offer up as the maxims of the law. These pronouncements may seem to us so obvious—we might say "self-evident"—that we may not realize that we are in the presence of axioms of the law. When they are read today, they may be seen simply as grand sentiments. But if we had the space here we could show that they were logically necessary, and their practical bearing, on the cases of our law, has never been trivial. "The presence of a 'wrong,' implies a remedy. If a wrong has been done, we would be justified in taking the measures that would vindicate the wrong." Was Marbury wrongfully denied his commission as a justice of the peace? Then he would have a "right" to his commission. Marshall was moved to quote Blackstone, "that every right, when withheld, must have a remedy, and every injury its proper redress."[7] Justice Story was compelled often to point out that what may not be done directly, may not be done indirectly.[8] If it is wrong to commit a murder, it is wrong also to hire, or incite, another party to perform the same killing. If the federal government cannot reach a subject directly, it may not use the taxing power as a surrogate, and legislate through the guise of taxing.

"A power to create," wrote Chief Justice Marshall, "implies a power to preserve." [McCulloch v. Maryland[9]]: If the national government has the authority to create a post office, it must have the authority to "punish those who steal letters from the post office, or rob the mail." If the government may create a bank, as an instrument of its policy, in pursuing its legitimate ends, then the government must have the power to preserve that bank against the attempts of a local government to destroy that bank, in effect, through taxation.

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7 Marbury v. Madison, 1 Cranch 137 (1803), at 163; see also 162 and 166.

8 See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837): "Can the legislature have power to do that indirectly, which it cannot do directly?"

9 4 Wheaton 316 (1819), at 426.

"We [the judges] have no more right to decline the exercise of jursidiction which is given, than to usurp that which is not given." [Marshall, in *Cohens v. Virginia*[10]]

Or again, in the same case: "[T]he judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."[11]

Corollary: Any question or subject that may come, properly, within the authority of the courts, must come properly within the jurisdiction of the legislature. And, by extension, any subject of legislation must come within the reach of the executive, who bears the responsibility to enforce the laws.

It is curiously assumed today that, if the question of abortion were returned to the arena of legislation—if legislatures were free once again to legislate on this matter, in establishing the conditions and restrictions on abortion—the subject would fall properly within the domain of the States. Neither liberals nor conservatives assume that Congress would have any authority to legislate directly on this matter. And yet, the subject of abortion has been ruled dramatically, preeminently, by the federal courts. How could the subject of abortion come properly within the reach of only one branch of the federal government? If the federal courts bear, persistently, an authority to address the question of abortion in all of its dimensions, that same authority could hardly stand, in any more diminished version, in the hands of the Congress or the President.

These implications are scarcely trivial; and yet they flow quite clearly from propositions that have a "necessary" force of axioms in the law. With these axioms, the judges cultivated the principles of judgment, and those principles could be used in gauging the restrictions on freedom that were justified or unjustifed, in any domain of the law. Willie Lyons suffered an injury, and a restriction of personal freedom, and that violation of personal rights was not diminished by the fact that the legislation was put forward simply as a regulation of the economy. When the judges struck down regulations of this kind, they did not apply principles of "economics," nor did they see themselves as vindicating rights that were confined to "the economy."

The point is worth making these days because we find some conservative writers, who have recoiled from liberal activists on the bench, and they think it is necessary then to oppose, on the same principle, those judges who actively protected personal freedom against schemes of economic planning and price-fixing, from the last days of the nineteenth century down through the New Deal. And so we find a curious willingness on the part of some conservative writers and lawyers to uphold local policies of price fixing and regulation, as part of a tradition running back in this country to a time before the Constitution. But the judges they assail did not see such a clear distinction between the personal freedoms restricted in regulations of the economy, and in other kinds of restrictions. And in fact, those distinctions are not always so clear even if we look at the record of the so-called conservative judges. In the histories written of the Court, the supposedly reactionary record of the judges has been marked off in cases like *Truax v. Raich* (1915). In that case, the Supreme Court struck down a statute in Arizona that compelled private employers to fill 80 per cent of their jobs with people who were American citizens. The case was brought by Mike Raich, an immigrant from Austria, a resident alien who was barred from working in a restaurant. It would offer a false account, I think, to suggest that the Court was faced, in this case, with a legislature seeking to experiment with controls on the economy. What we had here was simply another one of those cases in which nativism seeks different levers for imposing

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10 6 Wheaton 264, at 404 (1821).

11 *Ibid.*, at 384.

restrictions or penalties on aliens. We should recall that the Court that struck down this statute was quite willing to uphold other kinds of restrictions on aliens when those restrictions could be regarded as more tenable and justified (e.g., in confining to citizens the uses of public hunting grounds, or the right to vote). If this law in Arizona could be described simply as a "regulation of the economy," then so too could the kinds of laws passed in Germany in the 1930's, to remove Jews from the professions, and to restrict, progressively, the freedom of Jews to make their livings at ordinary callings.

The question may be posed then to conservatives in our jurisprudence: Would they truly be reluctant to have the Court appeal to natural rights or "substantive due process" and strike down the kinds of laws that were produced in Germany in the 1930's, or the kind of law involved in *Truax v. Raich*? We suspect that even conservative judges today would find the resources for recognizing what was arbitrary and unwarranted in this kind of legislation; and in doing that, they would probably make their way back to the ground of judgement that was understood by conservative judges in an earlier day. Is it really imaginable today that the conservative judges would hold back the hand of judgment if a State suddenly declared that black people, or Asians, were no longer "persons" in the eyes of the law, and therefore that the law could not protect them from assaults or lynchings? Even conservative judges would not declare that they were wanting in principles of judgement here. We suspect that the judges would focus on the kinds of "arbitrary" differences that would separate black people from the "persons" who are offered the protections of the law. There may be a notable difference between black persons and others, but nothing in that difference could possibly bear on the moral question of whether anyone deserves to live or die.

But in that event, might we not take another, comparable step?: Could the argument not be heard in a federal court that a State recedes from its obligation in the same way when it declares that unborn children are not children or "persons," with the same claim to be protected from the unjustified taking of their lives? Many conservatives would be willing to strike down *Roe v. Wade*, the decision that articulated a right to abortion, but they would see the matter returned then to the authority of the separate States. This is a matter, they are convinced, that belongs in the hands of legislators in the States, who are responsive to their publics in elections. But if I have been correct so far in the line of argument I have set forth here, then judges may be obliged to go beyond the limit that conservatives have declared for themselves. If they will concede nothing more than the competence shown by those earlier judges—a competence in recognizing certain "arbitrary" restrictions on freedom, or unwarranted takings of life—then they certainly have the wit to consider whether they are not faced in this kind of case with the most flagrant example of "arbitrary" legislation: Simply by declaring unborn children as less than human, or less than persons, the legislators and judges may remove these children from the protections of the Constitution. And in that event, would judges not have even more of a responsibility to test the justifications that are brought forward for distinguishing this class of vulnerable beings from the beings who are covered right now with the protections of the law?

An earlier generation of conservative judges did not recede from these kinds of questions, precisely because they did not regard them as inscrutable questions. The judges knew that they weren't economists or soothsayers, but judges, and as judges, the one thing they could claim to know were principles of judgment and the principles of lawfulness. They inherited a tradition of jural reasoning, which gave them a science for testing the properties of a justification; and with those canons of reasoning, they could sustain a jurisprudence of natural rights. They were able to connect the enduring principles of right and wrong to the prosaic cases, drawn from the materials of their own age. They could be persuasive in settling the cases cast up by their own society, even as they saw themselves applying the principles of the American Founders, and doing the work of the Founders anew.

In my favorite show, "Guys and Dolls," Miss Adelaide tells her boyfriend, Nathan Detroit, that "the doctor thinks... my cold might possibly be caused by Psychology." To which Nathan responds, in disbelief, "How does he know you've got 'psychology'?!" The line could draw a ready laugh from audiences, in the theater and in movies, because people seemed able to grasp at once the point of the joke, which Adelaide makes in her comeback: namely, that everyone has "psychology." Now, why should it be any harder to grasp the comparable recognition that everyone out there has "reasoning" and moral judgment; and when we engage in arguments about the justifications for the laws, we appeal to the most common and distinct part of our natures. Hence, our curious situation: We find lawyers and writers, on the left and the right, who claim to reject natural rights, but they persistently depend on the logic of natural rights. We find writers on the liberal side who reject the notion of moral truths that hold across cultures, wherever human nature is the same. And yet, these writers also commit their passions, rightly, to the defense of "human rights" in places like South Africa and China, in countries and cultures quite different from their own.

On the conservative side, we find a comparable skepticism about natural rights, and we are constantly warned about the dangers of moving outside the text of the Constitution for the sake of appealing to the principles of natural right. We are told that none of the principles of natural law would have any place in our law unless they are formally incorporated through the "positive" law. This understanding is put forward as a rule of construction—but more than that, as a premise that anchors the jurisprudence of the Constitution. And yet, that premise is nowhere to be found in the text of the Constitution. On what basis, then, would it claim our credence as a rule to be followed in our law? Evidently, the writers who appeal to this rule are persuaded that they are appealing to a sense of the fitness of things, or perhaps even a sense of the "logic of law." But that means that they are appealing to axioms of the law that do not depend, for their standing, on the question of whether they are mentioned in the Constitution. In other words, we are back to the axioms of the law: we have discovered, yet again, the principles of natural law.

These discrepancies have now become familiar, but they are hardly more momentous than those shown by the typical citizen, who indicates that he is aware of the law of gravity, even while he cannot recite Newton's equation. To ask whether we can have a discourse on law, or on matters of right and wrong, without using the "laws of reason," is rather like asking, "Is it possible to order coffee without using syntax?" The landscape of our law and politics is filled, then, with lawyers who profess puzzlement and dubiety about natural law, but every day they depend on natural law and appeal to its maxims. They may think themselves skeptics, they may have powerful reasons for wishing to stand, in our politics, as the doubters of established truths, but on the matter of natural rights, as an old line used to have it, they have been speaking prose all their lives.

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