THE HERITAGE LECTURES

424

On Natural Rights: Speaking Prose All Our Lives

By Hadley Arkes

The Heritage Foundation

The Heritage Foundation was established in 1973 as a non partisan, tax-exempt policy research institute dedicated to the principles of free competitive enterprise, limited government, individual liberty, and strong national defense. The Foundation's research and study programs are designed to make the voices of responsible conservatism heard in Washington, D.C., throughout the United States, and in the capitals of the world.

Heritage publishes its research in a variety of formats for the benefit of policy makers; the communications media; the academic, business, and financial communities; and the public at large. Over the past five years alone The Heritage Foundation has published some 1,500 books, monographs, and studies, ranging in size from the 927-page government blueprint, *Mandate for Leadership III: Policy Strategies for the 1990's*, to the more frequent "Critical Issues" monographs and the topical "Backgrounders," "Issue Bulletins," and "Talking Points" papers. Heritage's other regular publications include the *SDI Report, Business/Education Insider, Mexico Watch,* and *Policy Review*, a quarterly journal of analysis and opinion.

In addition to the printed word, Heritage regularly brings together national and international opinion leaders and policy makers to discuss issues and ideas in a continuing series of seminars, lectures, debated, briefings, and conferences.

Heritage is classified as a Section 501(c)(3) organization under the Internal Revenue Code of 1954, and is recognized as a publicly supported organization described in Section 509(a)(1) and 170(b)(1)(A)(vi) of the Code. Individuals, corporations, companies, associations, and foundations are eligible to support the work of The Heritage Foundation through tax-deductible gifts.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
U.S.A.
202/546-4400

On Natural Rights: Speaking Prose All Our Lives

By Hadley Arkes

Bertrand Russell once had a joke about Mrs. Christine Franklyn-Ladd, who was a solipsist: she professed not to know that there was anyone in the world apart from herself. But she was so disappointed that she couldn't find others to come to meetings. And Immanuel Kant once remarked upon those philosophers who marshalled reasons in the most strenuous and demanding way to prove that we are incapable of reason. Now, in a similar style, we have seen people in Washington recently, who have spent their lives appealing to the logic and language of natural rights, but who find themselves denouncing Clarence Thomas for taking natural rights seriously. We find these people, members of the political class, on the left as well as the right, who seem to be affecting the style of Claude Rains in the movie "Casablanca": they affect to be "shocked—shocked" that anyone should truly find the anchor of his understanding in the natural rights teachings of Abraham Lincoln and the American founders; that anyone should take seriously the moral premises on which the American regime and the Constitution were founded.

Lincoln-Douglas Debates. For most people trained in the modern law school, there is something novel, or even exotic, about the notion of natural rights. If we bring back the classic debate between Abraham Lincoln and Stephen Douglas, most lawyers would align themselves with Douglas, whether they are conservatives or liberals. Most of the teaching in the law schools has been in the spirit of Douglas. Most lawyers don't recall what was in dispute between Lincoln and Douglas; they have heard something about natural rights, but they have the impression that the case for natural rights was refuted long ago, for reasons that have slipped from memory. We ought to recall, then, the way in which the question of natural rights was posed again during the "crisis of our house divided," in the debate between Lincoln and Douglas.

The issue was cast in this way: When the Founders declared in the Declaration of Independence that "all men are created equal," did they in fact mean *all* men, blacks as well as whites? Or did they really mean—as Douglas contended—all white men, or all people of British stock? In that case—as Harry Jaffa offered the translation—when the Founders were proclaiming the right of all men everywhere to be governed by their own consent, they were really proclaiming the right of all men, everywhere, to be British! As Jaffa pointed out, that notion would have made a fine aria in a Gilbert & Sullivan operetta, but it hardly made sense of what the Founders were saying.

Lincoln argued, on the other side, that when the founders said "all men," they meant, as an abstract, universal proposition, all men. It was not that all men were equally intelligent, equally virtuous, equally deserving of rewards and punishment. But they deserved to be measured and judged by the same, equal standard; and whether they were slow of wit, or swift, they deserved to be governed only with their own consent. As Lincoln and the Founders understood, that claim arose from nature, from the things that enduringly separated human beings from animals; and hence the universal sweep of those rights: those rights would be the same in all places, where human nature remained the same, and human beings were still distinguishable from animals. That sense of "human nature" identified what was human by marking off the differences that separated human things from the things that were either superhuman or subhuman. And so the

---

Dr. Hadley Arkes is Edward Ney Professor of Jurisprudence and American Institutions at Amherst College and an Adjunct Scholar at The Heritage Foundation.

He delivered this address at The Heritage Foundation on December 11, 1991.

ISSN 0272-1155.

reasoning ran in this way: that no man was by nature the ruler of other men in the way that God was, by nature, the ruler of men, and men were, by nature, the ruler of dogs, horses, or monkeys.

Animal Rights. Even in this age of animal rights, no one has thought it especially apt to obtain the consent of dogs and horses before we rule them, or to secure the informed consent of our pets before we authorize surgery for them. But on the other hand we persist in the judgment that beings who can give and understand reasons deserve to be ruled with the rendering of reasons, in a regime of free elections. Whether we are in Europe, then, or Africa, or Asia, the case in principle for a government of consent remains the same: beings who can give and understand reasons do not deserve to be ruled in the way that we are warranted in ruling horses and monkeys.

Hence the irony we find now in the universities: the people on the Left, flirting with deconstruction, Derrida, and Heidegger, insist that there are no moral truths that hold across cultures, and that there is no "nature." The differences between humans and other species, or even the differences between men and women are not fixed in nature, but "socially constructed," a matter of convention and imagination. And yet, these people support the interests in "human liberation," and rights of feminism in all places. Apparently, there are human rights—rights that arise for human beings in all places—but there are no "humans," and no truths that would make these rights truly rightful.

Independent Standards vs. Majority Rule. But in the debate with Lincoln, Stephen Douglas denied that there were any rights that arose in this way from nature. Douglas came closer to the cultural relativists, on the left and right, of our own day, in holding that all rights are "relative" to the understandings of right and wrong that are held in any place, or in the local culture. These rights do not derive from nature; they exist only because they are "posited," set down, in formal statutes by particular men in particular places. They were rights, as we say, of "positive law." But then the question of course arose: What if the local culture were divided in its opinions about right and wrong, as this country was divided in the middle of the nineteenth century on the question of slavery? Which strand of opinion was more authoritative, more genuinely reflective, of the local culture? And the answer was clear: the strand of opinion that was dominant. That is, with the premises of positivism or cultural relativism, what we mean by right and wrong is "that which is approved (or disapproved) by the majority."

But as Lincoln understood, that doctrine would cut the ground out from under the very notion of constitutional rights: For if the will of the majority is the decisive test of right and wrong, there could be no independent standard to which we could appeal in challenging the judgments reached by a majority, and vindicating the rights of a minority. And so what we must understand here is that we are appealing to the logic of natural rights whenever we invoke some independent standard of right and wrong, apart from the will of the majority, and apart from anything that has been posited or set down in a statute or in the text of the Constitution.

This is precisely the understanding to which people like Joseph Biden and Laurence Tribe were appealing four years ago, when they sought to draw a dramatic contrast between themselves and Robert Bork by pointing up Bork's attachment to legal positivism. When Biden opened the hearings over Bork, he staked out for himself a natural rights position: He insisted that he had rights that were "not derived from the Constitution... [or] from any government... [or] from any majority. My rights are [he said,] because I exist." That is, certain rights flowed to him, as Biden said, simply on account of his standing as a human being, from the moment he exists. That sentiment seemed sufficiently sweeping that it would encompass the unborn child, as soon as she comes to "exist." But we assumed that Biden would not allow his newly discovered natural rights position to undercut his support for abortion. We may have rights as soon as we exist, but presumably other people will be left to decide whether we exist, and have rights that others are obliged to respect.

Chairman Biden's adviser, Professor Tribe, appealed to the logic of unwritten rights in opposing Judge Bork, but he has always been uneasy over the claim of "natural rights" to speak of moral truths. The Founders held that "all men are created equal" was a self-evident, or necessary truth. Tribe would support the same principle, but he doesn't wish to claim it is true. But what sense would it make to claim rights that are false, or which are not truly "right"? In any event, Tribe has professed to reject natural rights because certain judges in the past have made extravagant mistakes in reasoning from natural rights. Judges have made even more extravagant mistakes, of course, in rejecting natural rights, and defending slavery. But from the fact that mistakes have been made in construing natural rights, would Tribe and his friends wish to conclude that there are no such things as "human rights"—rights drawn from the very nature of human beings?

Attacks on Natural Law. The critics of natural law, on the right and the left, have spent their energies in attacking an understanding of natural law that no proponent of natural law would take seriously. They have often assumed that natural law arrives at an understanding of human nature by drawing generalizations from the record of human behavior. In this vein, Richard Posner has treated Social Darwinism as one theory of natural law: that theory would offer "the survival of the fittest" as a "law" or a doctrine about the behavior that is natural to men. But the proponents of natural law recognized long ago that we could not draw out natural law in this way, as a generalization from experience. If we did, we would find that genocide, infanticide, slavery, have been enduring, intractable parts of the human record. Would we conclude then that infanticide and slavery are natural to human beings? And yet, natural law has ever rejected the notion of slavery and the destruction of the innocent; and so it should be plain that natural law has never depended merely on generalizations about the behavior of humans.

All notions of natural law have depended on an understanding of what was higher or lower in human nature; about the attributes that were distinctively human, as opposed to the attributes that we shared with other animals. Lincoln could refer to "the better angels in our nature"; and Aristotle and Kant could recognize, as quite distinct to human beings, the capacity to reason about the things that are right or wrong, justified or unjustified. The giving and demanding of justifications is as much a part of our natures as the understanding of space and time; it is as much a part of our natural world as trees and rocks. Even people who reject the existence of morality and moral reasoning, end up insisting to us passionately that it would be "wrong" and "unjustified" for others to impose moral judgments on them. That is, they find themselves appealing to the logic and language of morality for the sake of staging their resistance to morality. And if we are asked, Can we conduct politics and law, can we argue over matters of right and wrong, without the language and logic of moral reasoning, we might as well ask: Can we order coffee without using syntax?

This language, this logic, simply cannot be purged from our experience. Even the most confirmed positivists cannot purge from their language the logic of moral reasoning, and they don't seem to be aware that they are simply taking for granted one of the most important meanings of natural law: namely, the discourse on right and wrong that is accessible, commonly, to all human beings as human beings, regardless of their religion or their citizenship.

Justifying Slavery. In this understanding, we see natural rights at work whenever we find people engaged in principled reasoning about the things that are right and wrong; and there is no more dramatic example of principled reasoning than that fragment written by Lincoln, in which he imagined himself engaged in an argument with an owner of slaves. He puts the question of how the man could be justified in making slaves of other human beings: Is it intelligence, he asks? Then beware: "By this rule, you are to be slave to the first man you meet, with an intellect superior to your own." Is it color—that people of lighter skin have a right to enslave people of

darker skin. Then take care again: "by this rule, you are to be slave to the first man you meet, with a fairer skin than your own."

As the argument is drawn forth, as a compelling form of principled reasoning, the pitch is this: There is nothing one could cite, in justifying the enslavement of black people, that would not justify the enslavement of whites as well. Now it is critical for my point here to notice that nowhere in this chain of reasoning does Lincoln appeal to faith or revelation. There is no religious claim here. This argument can be understood—it can be measured, grasped, judged for its validity—by any person of reason, regardless of his religious persuasion. I have suggested in print that the same style of reasoning may be applied to the question of abortion: Why is a fetus, or an unborn child, thought to be less than a human being, with a claim to the protections of the law? Because she doesn't speak yet? Neither do deaf mutes. Because she lacks arms or legs? Many people were born with missing limbs, or they may come to lose an arm or a leg, and yet we don't say that they have suffered a change in species, that they have become something less than human beings. It is one of the common cliches now of our politics to insist that abortion is a religious question, and therefore it may not be addressed in our politics. But we can simply proceed in this style of reasoning, the style of a principled argument, in testing the arguments brought forward on abortion, and we can do that in the style of Lincoln, without the need to appeal to revelation or to any claims of religious faith.

Moral Reasoning. But if we say that it is possible to engage in that kind of conversation, we are saying that it is possible to have a discourse, among fellow citizens, about the things that are right or wrong, even when those citizens are drawn from different nationalities and different communities of faith. And that is precisely what was meant in that "proposition," as Lincoln called it, on which this republic was founded, the proposition that "all men are created equal." This nation would not require, as the ground of citizenship, a common ethnic identity. This nation was founded on a proposition, and the ground of our citizenship came in our capacity to understand that proposition: to understand the implications for our duties and our rights that arise from our natural equality.

I think we would find, in the end, that even the positivists on the left and right would not wish to argue that constitutional government, or government by consent, is good merely because it is the form of government that most people prefer, and that it would cease to be good if most people should cease to prefer it. I think we will find a disposition to think that there is something in principle good about this form of government, that it is the kind of government *most fitting for the nature of human beings*. I think we will find, even among the most adamant positivists, a marked inclination to believe there are standards of right and wrong that do not depend on the votes of a majority; that there are rights that do not depend on our citizenship; that there are things we may aptly call "human rights"; and there are laws of reason that allow us to make some plausible distinctions between the claims of rights that are reasonable or unreasonable, justified or unjustified. What we will discover then, I think, is that even the people who profess to be most skeptical of natural rights cannot get through the day without the use of moral reasoning. In spite of themselves, they write and speak with the language of reason, and they have spoken natural justice all their lives.

♦♦♦