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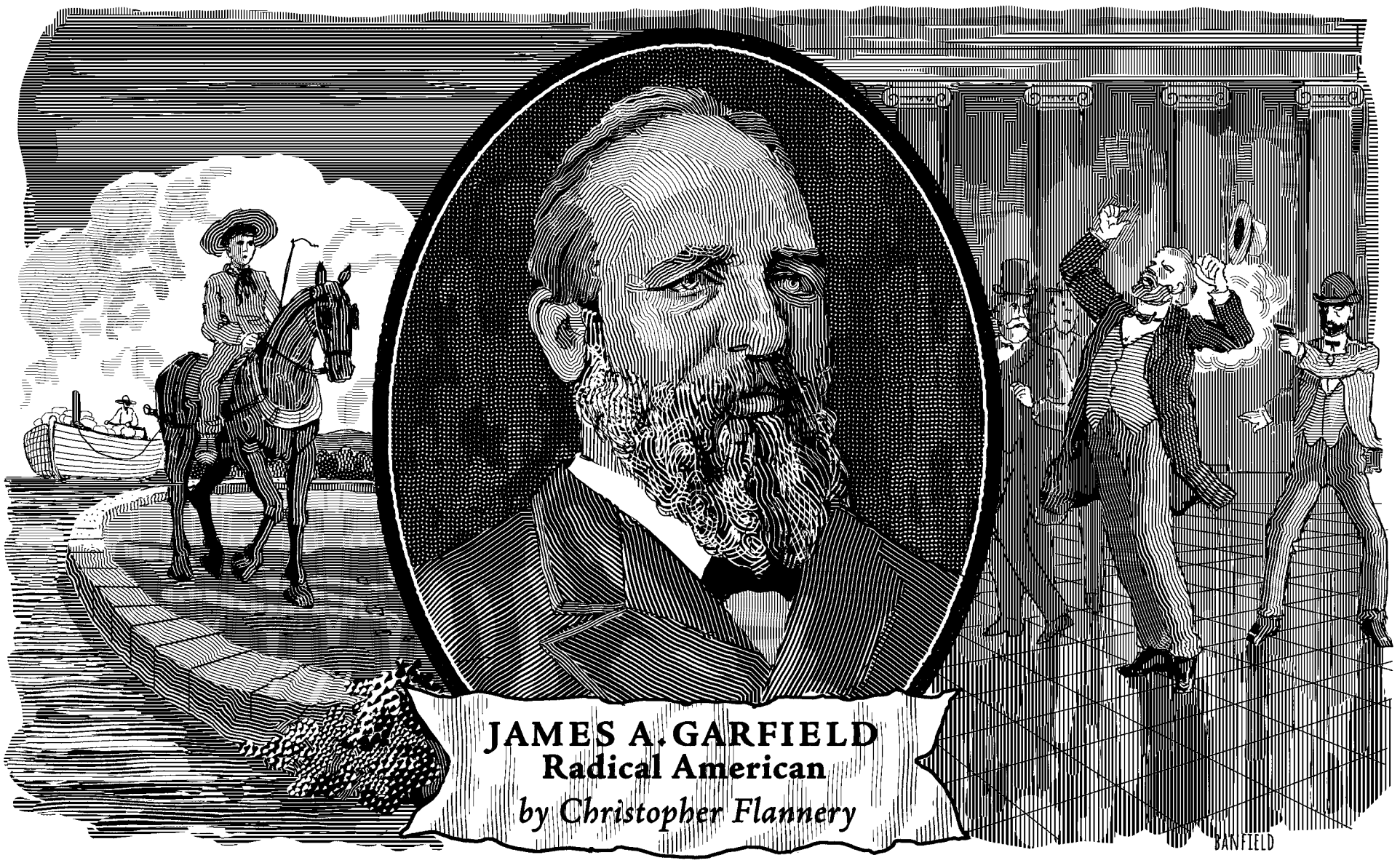

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Book Review by Justin Dyer

The Ground of Judgment

Mere Natural Law: Originalism and the Anchoring Truths of the Constitution, by Hadley Arkes.
Regnery Gateway, 352 pages, $32.99

Acknowledging the reality of natural law, C.S. Lewis claimed in one of his wartime broadcasts, is "the foundation of all clear thinking about ourselves and the universe we live in." Lewis's aim in these talks, later published as *Mere Christianity* (1952), was to offer an ecumenical restatement of Christian belief to a world saturated in nihilism, relativism, and historicism. He chose to go about his task in a "roundabout way" by starting with the experiential reality of what he variously called the "Law of Nature," "Moral Law," and the "Rule of Decent Behaviour," a standard known by reason prior to revelation.

Hadley Arkes, the Edward N. Ney Professor in American Institutions, Emeritus, at Amherst College and founding director of the James Wilson Institute on Natural Rights and the American Founding, nods to Lewis's project in the title of his most recent book, *Mere Natural Law: Originalism and the Anchoring Truths of the Constitution*. It is Arkes's eighth major book and the capstone to a remarkable career that is now in its sixth decade. Arkes's aim, like Lewis's, is to draw our attention to truths woven into the fabric of human reason and thus of human experience. For Arkes—in contrast to many of his originalist friends—clear thinking about constitutional jurisprudence begins with acknowledging the reality of the natural moral law.

Psychologist Daniel N. Robinson used to joke that he wanted his tombstone to read: "He died without a theory." Arkes, one suspects, would be happy with a similar epitaph memorializing his illustrious body of work. Arkes claims in *Mere Natural Law* that he is not "dealing with 'theories' of Natural Law" but is "moving rather to those primary truths that any ordinary man needs to grasp before he starts dealing with that array of theories, sure to come at him, as he tries to get on with the business of life."

If Arkes is a man without a theory, he is not a man without a teaching. He has devoted his life to expounding the first principles of our political regime, and in doing so he has drawn on the insights of theorists, jurists, and statesmen. His sources are eclectic and sometimes arrayed in surprising combinations. Thomas Aquinas, Immanuel Kant, Thomas Reid, John Marshall, and Abraham Lincoln are frequent sources of inspiration. Above all, however, Arkes turns to "that commonsense understanding of ordinary people, in which the Natural Law finds its ground." This commonsense understanding points to the axioms of reason that we must recognize before dealing with theories. These axioms comprise a form of truth that is *per se notum*, known in itself rather than derived from other premises. They cannot be denied without falling into incoherence.

Think here of the very existence of truth and the reality of personal identity. To deny either is to engage in a self-refuting endeavor. There is no truth—*but is that statement true?* I do not exist—*but who is it who doesn't exist?* There are other such axioms. The first principle of practical reason, says Aquinas, is that good is to be done and evil avoided; it presupposes the reality of good and evil as catego-

ries and a rational standard by which to judge conduct as rightful or wrongful. That there is such a standard implies that power is not the source of its own justification—that we may make moral judgments about the uses of power. When we make such judgments, we take it as an axiom that we must not hold someone blameworthy for an act he was powerless to effect, a principle that presupposes the reality of man's freedom and reason.

Man's freedom and reason are ultimately what distinguish the rightful rule of man over man from the rightful rule of man over beast. There is a reason, Arkes reminds us, why even in our enlightened age we do not sign labor contracts with animals or seek their informed consent before taking them to the veterinarian. By contrast, human beings, capable of giving and understanding reasons, ought to be ruled in a regime of law. Indeed, at the heart of Arkes's teaching about natural law are two observations. First, the *polis*, marked by law, is fit only for rational beings. There is thus an inherent connection between law and the rational aspect of human nature. Second, the axioms of reason precede theory and provide the rational ground of our judgments.

We find a model for how to do this in the first generation of American jurists, especially Marshall, who traced his judgments "back to those anchoring truths or axioms on which a judgment ultimately rests," and in the statesmanship of Abraham Lincoln, who offered models of principled reasoning about the wrong of slavery. These necessary truths remain especially relevant for the work of judging. Judges, writes Arkes, must "take as their craft and their vocation the discipline of finding an anchoring ground of principle for their judgments in one of those axioms or necessary truths."

All of this carries with it an implicit criticism of legal positivism's separation of law and morality. To the extent that various theories of constitutional originalism build on the legal positivism of early progressive jurists such as Oliver Wendell Holmes, Jr., Arkes's teaching also carries with it a criticism of originalism, to which the book's subtitle alludes. He shows how a jurisprudence of natural law—which, he suggests, *is* the original jurisprudence of the first generation of American jurists—would part ways with the Supreme Court majority's originalist approach to constitutional interpretation on a range of issues including criminal procedure, equal protection, speech, religion, and abortion.

It is important, Arkes insists, that we distinguish between absolute and contingent rights. There are some rights, traceable to a moral axiom, that admit of no exceptions. Because the first principle of moral judgment holds that no one is blameworthy for an act he was powerless to effect, it follows that everyone, everywhere, has a moral right to be punished only for acts for which he was responsible. There is no circumstance in which punishing the innocent is justified. Yet there are other rights that are contingent on circumstances. Not everyone, everywhere, has a right to publish, speak, travel, wear hats, or get married. These rights may be restricted when such a restriction is *justified*. Here Arkes identifies the logic of contingent rights: we have a "right to be treated justly, with reasons that can establish the ground of *justification* for the restriction of our freedom in any of its dimensions, whether in the crafting of sculpture, the shining of shoes, or the braiding of hair."

The supreme court's doctrines acknowledge this in a way. Benign discrimination is okay, but invidious discrimination is not. There must be a rational basis for disparate treatment. Religious freedom may be restricted when there is a compelling governmental interest. Restrictive policies should be narrowly tailored. Speech is subject to time, place, and manner restrictions. The list goes on. Yet the Court's originalists, when invoking and applying these doctrinal categories, are careful to maintain the illusion that they are not engaged in moral reasoning, not relying on moral principles or axioms. This posture has distorted the craft of judging and has wedded our constitutional jurisprudence to a practical moral relativism.

Rather than addressing directly the substantive moral issues at stake in the most pressing issues of the day, originalism screens them from view. Our speech jurisprudence does not inquire into the rightful or wrongful ends for which speech can be used. Our religion jurisprudence makes no judgment about what religion is and does not distinguish the rightful or wrongful ends to which religion might be put. Our abortion jurisprudence, even in a post-*Dobbs* world, prescinds from the question of when human life begins—as though the question were irrelevant or unknowable. Examples could be multiplied across other areas of the law. In each, a morally principled approach to jurisprudence cannot be premised on either legal positivism or moral relativism.

Judges must draw out the implications of the first principles of moral judgment when addressing the concrete cases that arise in law, eschewing moral relativism and anchoring each judgment in a moral axiom. "Once we sign on to the premises of even a mild moral relativism," Arkes warns, "we can no longer explain or defend the rightness or goodness of the regime we are seeking to preserve." Without a moral justification for legal judgments, or the legal regime as a whole, we are left only with power. If, as Lincoln urged in his 1860 Cooper Union address, we are to live out our "faith that right makes might," then we must offer justifications grounded in necessary truths—those truths we cannot deny without falling into incoherence. When we do so, Hadley Arkes notes in his superb new book, "we have chosen…the moral reasoning of the Natural Law."

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