On the Status of Rights, Legal and Philosophical

Liam Butchart*

ABSTRACT

In cases where the law conflicts with bioethics, the status of rights must be determined to resolve some of the tensions. This paper considers the origins of both legal and philosophical rights, arguing that rights *per se* do not exist naturally. Even natural rights that are constitutional or statutory came from relationships rather than existing in nature. Once agreed upon, rights develop moral influence.

Keywords: Rights, Contractualism, Law, Bioethics, Philosophy, Interpretation

INTRODUCTION

I. The Question of Rights

The language of rights is omnipresent in current discourse in law, bioethics, and many other disciplines. Rights dialogue is frequently contentious – some thinkers take issue with various uses of rights in the modern dialogue. For example, some criticize "rights talk," which heightens social conflict when used as a "trump" against disfavored arguments.[1] Others are displeased by what is termed "rights inflation," where too many novel rights are developed, such that the rights these scholars view as "more important" become devalued.[2] Some solutions have been proposed: one recommendation is that rights should be restricted to extremely important or essential ones. Some Supreme Court justices make arguments for applying original meanings in legal cases.[3] Conflict over the quantity and status of rights has long been a subject of debate in law and philosophy. Even Jefferson had to balance his own strict reading of the Constitution with tendencies to exceed the plain text of the document.[4] This thread of discourse has grown in political prominence over the years, with more Supreme Court cases that suggest newly developed (or, perhaps, newly recognized) rights.

The theoretical conflict between textualists and those looking to intent or context could lead to repealing rights to abortion, sterilization, or marital privacy and deeply impacts our daily lives. Bioethics is ubiquitous, and rights discourse is fundamental. This paper analyzes the assumptions that underlie the existence of rights. The law is steeped in philosophy, though philosophical theories have an often-unacknowledged role. This is especially true in cases that navigate difficult bioethical issues. As a result of this interleaving, the ontological status of rights is necessary to resolve some of the theoretical tensions.

* Liam Butchart, Candidate, MD, MA Renaissance School of Medicine at Stony Brook University

Many philosophers have either argued for or implicitly included human rights in their theories of morality and legality. However, there is no universally accepted definition of rights; various philosophers have their own approaches. For example: Louden comments, "Rights are permissions rather than requirements. Rights tell us what the bearer is at liberty to do"; Martin thinks that a right is "an established way of acting"; Hohfeld concludes that all rights are claims.[5] Similarly, there is dissent about the qualities of rights: The Declaration of Independence characterizes rights as unalienable, but not all thinkers agree. Nickel comments, "Inalienability does not mean that rights are absolute or can never be overridden by other considerations. . . . Perhaps it is sufficient to say that [human] rights are very hard to lose."[6] This discord necessitates additional analysis. "Many people tend to take the validity of. . . rights for granted. . . However, moral philosophers do not enjoy such license for epistemological complacency."[7] Because of the fundamental impact that political and moral philosophy enacted as the law have, this paper considers the origins of both legal and philosophical rights, arguing that rights *per se* do not exist naturally. Even natural rights that are constitutional or statutory came from relationships rather than existing in nature. Once agreed upon, rights take on moral force.

II. Legal Rights: From Case to Constitution

Bioethics and law sometimes address rights differently. Three Supreme Court cases marked the development of privacy rights in the United States: *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973) and *Cruzan v. Director, Missouri Department of Health* (1990). These cases shape the normative dialogue and consider complex moral quandaries.

Griswold v. Connecticut concerned providing contraception to married couples in contravention of state law. Justice Douglas writes for the majority that, based in "a right of privacy older than the Bill of Rights," legally protected zones of privacy extend from the text of the Constitution. "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[8] Writing in dissent, Justice Black argues that there is not a broad right to privacy included in the provisions of the Constitution, and expresses concern over "dilut[ion] or expans[ion]" of enumerated rights by terms such as privacy, which he characterizes as abstract and ambiguous – and subject to liberal reinterpretation.[9] He concludes that the government does have the right to invade privacy "unless prohibited by some specific constitutional provision."[10] Also dissenting, Justice Stewart finetunes the argument: rather than look to community values beyond the Constitution, the Court ought to rely solely on text of the document, in which he "can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever decided by this court."[11] Thus, *Griswold v. Connecticut* is an example of the tensions within the Supreme Court over strict textualism or broader interpretations of the Constitution that look to intent and purpose.

Roe v. Wade held that there is a right to privacy found through the Due Process Clause of the Fourteenth Amendment that includes the right to make medical decisions including abortion. While the conclusion – that there is a Constitutionally protected right to abortion, with certain limits seems to expand the *Griswold* doctrine of privacy rights, dissent to the ruling stems from much the same concern as before. Justice Rehnquist writes:

> A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.[12]

However, he then departs from the stricter approach of Justices Black and Stewart:

> I agree… that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.[13]

This is a tempering of the stricter constructionism found earlier, where more latitude is allowed for the interpretation of the text of the Constitution, even though there are clearly limits on how far the words may be stretched, with the genesis of a new right. Later, in *Planned Parenthood of Southwestern Pennsylvania v. Casey*, the Court further refined *Roe v. Wade* implementing an "undue burden" test.[14]

In *Cruzan v. Director, Missouri Department of Health,* the Court held that there is a general liberty interest in the refusal of medical treatment. The case continues the tradition of *Griswold* and *Roe v. Wade* ensuring a liberty that is beyond the text, but also allows states to impose a strict evidentiary burden to shape how the right is exercised. The Court affirmed the lower court's decision that "because there was no clear and convincing evidence of Nancy [Cruzan's] desire to have life-sustaining treatment withdrawn. . . her parents lacked authority to effectuate such a request."[15] The Supreme Court found that the clear and convincing evidentiary burden applied by the Missouri Supreme Court was consistent with the Due Process clause. Justice Scalia notes that even though he agrees with the Court's decision, he finds this judgment unnecessary or, perhaps counterproductive, because the philosophical underpinnings of the case "are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory" and should be left to the states to legislate as they see fit.[16] He goes on to further argue that the Due Process clause "does not protect individuals against deprivations of liberty *simpliciter"*; rather, it protects them from infringements of liberty that are not accompanied by due process.[17] Justice Scalia's textualist position likely influenced his remarks.[18]

Comparing these cases, I argue there is a distinct effort to make the Constitution amenable to contemporary mores and able to address present issues that is moderated by justices who adhere to the text. The legal evolution of rights that are beyond the text of the Constitution may reflect social norms as well as the framers' intent. Rights are protected by the Constitution, but the Constitution is mutable, through both case law and legislation. Prior to the adoption of the Constitution, the Declaration of Independence declared:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[19]

The Declaration of Independence gives insight into rights prior to the Constitution by referring to *a priori* rights extended by a creator, sheltered and supported by the state.[20]

For earlier evidence of rights, Supreme Court cases often reference English common law doctrines. The common law was informed by preexisting principles and drew on a historical body of thought: philosophy. Exploring philosophy can give insight about the evolution of law.

III. Philosophical Rights: Issues of Ontology

A moral right, the precursor to many legal rights, in some ways is a claim that bears moral weight. One relevant distinction is between positive and negative rights: a positive right is a claim on another to do

something for the right holder; a negative right is a claim on others to leave the rights holder alone. Some rights are *per se* (that is, rights that have a *de novo* ontological origin) and some are constructed (rights that are secondary to some other theoretical apparatus).

We must appeal to the state of nature to understand the origin of rights. If rights exist in the state of nature, they are *de novo*; if not, they are constructed. The state of nature is the theoretical realm where there are no social conventions or no normative rules. The theoretical state of nature is stateless. Hobbes writes about the state of nature. He constructs the person within as incorporating two normative qualities: the law of nature, "whereby individuals are forbidden to do anything destructive of their lives or to omit the means of self-preservation," and the right of nature, where the person has the "right to all things" – those things required for self-preservation.[21] Similarly, more contemporary philosophers have also inferred that the right to freedom is a natural right.[22] I argue that nature allows every person the freedom to all things, or a natural right against limitation on freedom. Every person has the capacity to do whatever they want, in accordance with their reason; liberty, rather than being a normative claim, is a component of the essence of beings. Yet both nature and other people pose some limitations.

Early modern contractarians' status theories maintain that human attributes engender rights.[23] A specific formulation of human status ethics can be found in Kantian deontology. From the autonomous and rational will, Kant evolves his Categorical Imperative: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."[24] Without (or before) law, philosophers suggested behaviors should reflect moral rights.

Like Rawls, I maintain that the state of nature includes both a scarcity of resources and individuals with whom we may develop conflicts of interest.[25] Individually, we are vulnerable to others, and because of that natural vulnerability, we have an inclination toward self-interest.[26] Therefore, we eventually find the state of nature unsatisfactory and move to create a civil society. Then the subsequent pathway to creating "rights" is well known. People agree on them and act accordingly. Then, they are enshrined in the law.[27] I attribute the impetus to move from the state of nature toward government to interpersonal interaction that creates a form of the social contract. Rawls qualitatively describes this when he notes the "identity of interests" that powers interpersonal cooperation.[28]

To me, the development of positive social relations has three components. The first is the human capacity for empathy. Empathy is commonly accepted by psychologists as universal.[29] Kittay deepens the concept of human empathy, arguing that there is a "register of inevitable human dependency" – a natural sense of care found in the human experience of suffering and decay and death to which we all eventually succumb, necessitating a recognition of interdependence and cooperation.[30]

The second is the importance of identity in generating social cooperation.[31] There is a sense of familial resemblance that resonates when we see others in our lives, forming the base of the identification that allows us to create bonds of mutual assent. A microsociety develops when people are exposed to each other and acts as a miniaturized state, governed by what is at first an implicit social contract. An internal order is generated and can be codified.

The third component of social relations is the extension of the otherness-yet-sameness beyond human adults. Mirroring connects the fully abled adult man and the woman, as well as the child, the physically and mentally disabled, and could extend to animals as well.[32]

Therefore, to me, it seems that rights do not exist *per se* in the state of nature, but because of our human capacities, relationships yield a social contract. This contract governs interpersonal relations with normative power: rights are constructed. Once constructed based on people in micro-society and then larger groups, rights were codified. Negative rights like those found in the U.S. Constitution allow people in liberal society to codify nearly universal ground rules in certain arenas while respecting minority views and differing priorities. However, the social contract is not absolute: it may be broken by any party with the power to enforce their will upon the other and it will evolve to reflect changing standards. So, there is a subtle distinction to be made: in unequal contractual social relations, there are not constructed rights but rather privileges. In a social relationship that aims at equal status among members, these privileges are normative claims – rights that are not inherent or *a priori* but mandated to be equally applied by society's governing body. In this way, I differ from Rawls. To me, justice is a fundamental moral principle only for societies that aim at cooperation, where advancing the interests of all is valued.[33]

CONCLUSION

From Liberty to Law

Social contractualism purports to provide moral rules for its followers even when other ethical systems flounder in the state of nature. Relationships consider the needs and wants of others. Rights exist, with the stipulation that they are constructed under social contracts that aim for equality of application. I also suggest that contractualist approaches may even expand the parties who may be allowed rights, something that has significant bearing on the law and practical bioethics.

The strict/loose constructionism debate that has played out in the Supreme Court's decisions focuses on whether rights are enumerated or implied. Theoretical or implicit contracts may be change quickly, based on the power dynamics in a social relationship. Theoretical bounds of the social contract (possibly including animals, nonhumans, etc.) may be constricted by an official contract, so these concerns would need to be adjudicated in the context of the Constitution. In certain cases, strict interpretation reflects the rights determined by the social compact and limits new positive rights; in others, a broad interpretation keeps government out of certain decisions, expanding negative rights to reflect changing social norms. The negative rights afforded in the Constitution provide a framework meant to allow expansive individual choices and freedom. The underlying social compact has more to do with the norms behind societal structure than forcing a set of agreed upon social norms at the level of individual behavior. The Constitution's text can be unclear, arbitrary, or open to multiple meanings. The literary theorist may be willing to accept contradiction or multiple meanings, but the legal scholar may not. The issue of whether the social compact is set or evolving affects constitutional interpretation.

The law is itself may be stuck in a state of indeterminacy: the law, in the eyes of the framers, was centered on a discourse steeped in natural, human rights, attributed to a creator. Today, there is an impulse toward inherent human dignity to support rights. The strict/loose constructionism debate concerns interpretation.[34] In conclusion, rights have no ontological status *per se*, but are derived from a complex framework that springs from our relationships and dictates the appropriateness of our actions. While the Constitution establishes the negative rights reflecting a social compact, interpretations recognize the limitations on rights that are also rooted in societal relationships.

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[1] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 14.

[2] James Griffin, *On Human Rights* (Oxford: Oxford University, 2008).

[3] Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1973).

[4] Barry Balleck, "When The Ends Justify the Means: Thomas Jefferson and the Louisiana Purchase," *Presidential Studies Quarterly* 22, no. 4 (1992): 679-680.

[5] Robert Louden, "Rights Infatuation and the Impoverishment of Moral Theory," *Journal of Value Inquiry* 17 (1983): 95; Rex Martin, *A System of Rights* (Oxford: Oxford University, 1993), 1; Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University, 1919), 36.

[6] James Nickel, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), ed. Edward N. Zalta, accessed 27 April 2021, https://plato.stanford.edu/archives/sum2019/entries/rights-human/.

[7] Andrew Fagan, "Human Rights," *Internet Encyclopedia of Philosophy,* ed. James Fieser and Bradley Dowden, accessed 27 April 2021, https://iep.utm.edu/hum-rts/.

[8] *Griswold v. Connecticut* 381 U.S. 479 (1965), para. 18, https://www.law.cornell.edu/supremecourt/text/381/479.

[9] *Griswold v. Connecticut* 381 U.S. 479 (1965), para. 69 https://www.law.cornell.edu/supremecourt/text/381/479.

[10] *Griswold v. Connecticut* 381 U.S. 479 (1965), para. 69 https://www.law.cornell.edu/supremecourt/text/381/479.

[11] *Griswold v. Connecticut* 381 U.S. 479 (1965), para. 92 https://www.law.cornell.edu/supremecourt/text/381/479.

[12] *Roe v. Wade* 410 U.S. 113 (1973), 172, https://www.law.cornell.edu/supremecourt/text/410/113%26amp.

[13] *Roe v. Wade* 410 U.S. 113 (1973), 172-173, https://www.law.cornell.edu/supremecourt/text/410/113%26amp.

[14] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), https://supreme.justia.com/cases/federal/us/505/833/#:~:text=Casey%2C%20505%20U.S.%20833%20(1992)&text=A%20person%20retains%20the%20right,the%20mother%20is%20at%20risk.

[15] *Cruzan v. Director, Missouri Department of Health* 497 U.S. 261 (1990), https://www.law.cornell.edu/supct/html/88-1503.ZO.html.

[16] *Cruzan v. Director, Missouri Department of Health* 497 U.S. 261 (1990), https://www.law.cornell.edu/supct/html/88-1503.ZO.html.

[17] *Cruzan v. Director, Missouri Department of Health* 497 U.S. 261 (1990), https://www.law.cornell.edu/supct/html/88-1503.ZO.html.

[18] It is worth noting that some of the Supreme Court's conservatives – like Scalia, Thomas, Roberts – have expressed explicit disdain for the right to privacy introduced in *Griswold*. Jamal Greene, "The So-Called Right to Privacy," *UC Davis Law Review* 43 (2010): 715-747, https://scholarship.law.columbia.edu/faculty_scholarship/622.

[19] National Archives. "Declaration of Independence: A Transcription." July 4, 1776; reviewed July 24, 2020, https://www.archives.gov/founding-docs/declaration-transcript.

[20] However, the reference to a creator has come to mean a natural right and a priori best describes it rather than a religious underpinning. To borrow from Husserl, this approach will be bracketed out.

[21] DJC Carmichael, "Hobbes on Natural Right in Society: The 'Leviathan' Account," *Canadian Journal of Political Science* 23, no. 1 (1990): 4-5.

[22] HLA Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64, no. 2 (1955): 175.

[23] Warren Quinn, *Morality and Action* (Cambridge: Cambridge UP, 1993), 170.

[24] Immanuel Kant, *Groundwork of the Metaphysic of Morals*, trans. James Ellington, 3rd ed. (Indianapolis: Hackett, 1993), 30.

[25] John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Belknap, 1999), 109.

[26] JS Mill, *Remarks on Bentham's Philosophy*, in *Collected Works of John Stuart Mill, Vol. X*, ed. JM Robson (Toronto: U of Toronto Press, 1985), 13-14.

[27] Rex Martin, *A System of Rights* (Oxford: Oxford University, 1993), 1; Kenneth Baynes, "Kant on Property Rights and the Social Contract," *The Monist* 72, no. 3 (1989): 433-453.

[28] John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Belknap, 1999), 109.

[29] Frederik von Harbou, "A Remedy Called Empathy: The Neglected Element of Human Rights Theory," *Archives for Philosophy of Law and Social Philosophy* 99, no. 2 (2013): 141.

[30] Eva Feder Kittay. *Learning from My Daughter: The Value and Care of Disabled Minds* (Oxford: Oxford UP, 2019), 145-146.

[31] Jane Gallop, "Lacan's 'Mirror Stage': Where to Begin," *SubStance* 11, no. 4 (1983): 121; Lacan, Jacques. *The Seminar of Jacques Lacan: Book X: Anxiety: 1962-1963,* trans. Cormac Gallagher, 26-27, https://www.valas.fr/IMG/pdf/THE-SEMINAR-OF-JACQUES-LACAN-X_l_angoisse.pdf. (In Lacanian psychoanalytic theory, human development necessitates both recognition of the Self and the separation of the Self from the Other.)

[32] Lacan, Jacques. *The Seminar of Jacques Lacan: Book X: Anxiety: 1962-1963,* trans. Cormac Gallagher, 27-28, https://www.valas.fr/IMG/pdf/THE-SEMINAR-OF-JACQUES-LACAN-X_l_angoisse.pdf.

[33] There is an interesting discussion to be had about whether social contract theory allows for this gradation in quality of contracts, or whether the two are fundamentally different phenomena. I cannot answer this question here; John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Belknap, 1999), 102-103.

[34] Ruthellen Josselson, "The Hermeneutics of Faith and the Hermeneutics of Suspicion," *Narrative Inquiry* 14, no. 1 (2004): 2-4.