**Natural Law, the Social Contract and the Right to Privacy**

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Law is a social pact between the government and the governed, reinforced by some combination of coercion and consent, through which society and the state negotiate, within the proper channels, to settle disputes and instill order on the general populous. In an ideal democracy rule of law is dictated primarily by a social contract between society and the state in which the state is able to use coercion as a means to control society, but society is ensured fundamental rights that limit the state’s roles in their lives and consent to the state’s legitimate use of said coercion (Rousseau, 1762). Alexander Hamilton’s vision in Federalist No. 78 was for the courts of the United States to be an “intermediate body” between the people and the state charged with protecting the rule of law and assuring the state stay within its proper “limits” (Hamilton, 1788). The purpose of the courts then, at least for Hamilton, is to be the mediators of the social contract. This model certainly does not work perfectly. The law clearly carries racial bias (Alexander, 2013) and is, at times, used to prey on the weakest members of society (Kairys, 1966). Nonetheless, the state’s ability to infringe on the rights of its weakest citizens is limited. As Richard Dworkin asserted throughout his career, rights trump the state’s desire to take unreasonable coercive action. Though the jurisprudence regarding the state’s specific limits regarding individual rights is relatively new, The United States Supreme Court has established a sphere of private life in which individual liberty is protected from state interference. Using the due process clause of the Fourteenth Amendment, the court has enshrined the Bill of Rights as a document that is legally meaningful and can be used to limit the state’s coercive nature. Freedom of speech, press, religion and assembly, the right of the people to be protected from unwarranted and unreasonable search and seizure and the right of the people to be protected against self incrimination, for example, have all been developed through the court system to ensure that the liberty of the people is protected, at least to some extent, from the damaging incentives of the state to infringe on that liberty. These protections all have some textual basis, but that does not settle the debate of how the state and the rights of the people are limited. The constitution expresses moral principles that are intentionally vague, making debates about these principles an inherent part of the law (Dworkin, 1996) .

There is, however, a longstanding debate as to what the source of law is. The Hart-Fuller debate famously displayed two very different schools of thought that, at times, seem diametrically opposed to one another. HLA Hart argues that law is a creation of mankind. Man makes law to govern itself. It is a tool of society to set communal standards, and is entirely separate from morality (Hart, 1958). This approach is known as positivism. Fuller, contrarily, argues that law comes not from man, but from nature. The text of law, written by man, is merely a means of codifying a natural law that is more fundamental to human existence and exists whether we recognize it or not. The law is tied to the morality of duty, and the state has natural limits which it should not violate (Fuller, 1964). “What is” can and should be influenced by “what ought to be” (Fuller, 1958). There is an objective right and wrong, and the best that mankind can hope for is to create rules that reflect that objective moral truth. While it is difficult to argue that moral relativism is entirely bunk, it is exceedingly difficult to argue that morality is entirely subjective. Moral truth, in some sense, certainly exists. In an idealized democracy, society will not accept coercive state action that violates this objective moral truth.

In 1965, the US Supreme Court made a decision that solidified natural law’s place in the American legal system. In *Griswold v. Connecticut,* the court established the right to privacy, not by strictly relying on the text of the constitution, but rather, by using its powers of judicial interpretation to codify a right that had not previously existed, in any meaningful way, in the American legal system. The right establishes legitimate limits on the state (Rubenfeld, 1999 P. 737). Rule of law, thus, is not about the supremacy of the state, but rather, as John Marshall put it in *Marbury v. Madison,* the superiority of “law and not of men” (Marshall, P. 163). The court has since expanded the right to privacy in decisions protecting women’s right to an abortion (*Roe v. Wade)* and homosexual’s right to engage in consensual sex (*Lawrence v. Texas).* Though privacy jurisprudence did not spontaneously appear in *Griswold,* the decision established the court's commitment to protect rights that are not necessarily codified. The right to privacy will likely expand in the coming century with the development of technology and increased capability for the government to take coercive action. The limits of this new right will certainly continue to be negotiated and established through judicial proceedings. This paper will discuss the right’s relationship to natural law and the social contract and how the court has used it to enforce a powerful rights based conception of the rule of law. This paper will not only explain natural law’s place in the american legal system, but will also contextualize why the right to privacy is an essential turning point that will likely carry the judiciary's commitment to recognizing natural law into the twenty first century.

**Refining the Definition of Natural Law**

The notion of natural law has a long history in philosophy and legal scholarship that warrants discussion. Plato wrote that the law should be “established in accordance with nature,” in The Republic. Aristotle is often thought to be the father of natural law writing that “[Universal law](https://en.wikipedia.org/wiki/Universal_law) is the law of Nature,” positing that an ill-defined, but concrete universal moral code was inherent in nature. “For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other" (Aristotle, Rhetoric, 4th Century BC)

Throughout history, religions have preached that the law of god is supreme, rooting morality not in the subjective judgement of individuals, but in the nature created by their god(s). In Christianity and Judaism, the Ten Commandments serve as a prominent example of specific moral codes being attributed to the laws of god. In Islam, the five pillars serve the same ends. Buddhism, likewise, presents the eightfold path as a concrete, even if vague, moral code appealing to natural justice. Those who see natural law as religious law have deeply rooted, stringent convictions based on what they believe to be the word of god. Some states, such as Iran, base their entire judicial system on the superiority of the laws of god to that of men.

Natural law is also prominent among enlightenment thinkers. Thomas Hobbes, in the Leviathan, laid out nineteen conditions that were necessary for the law of man to be in accordance with the laws of nature (Hobbes, 1651). John Locke famously argued that there were three natural rights to which man was endowed, those of “life, liberty and property.” Some have speculated that Locke’s potential Christian background informed his formation of natural rights. Whatever the case may be, Hobbes and Locke both attempted to codify natural principles that they saw as inherent and fundamental to the rule of law, simply because of the nature of the human condition.

The conception of Natural Law that seems most realistic is that of Plato, Aristotle and early Greek thinkers- that there is some unwritten set of principles that are sourced in nature. Mankind is inborn with a primitive innate sense of morality that informs our perception of the world. While the application of these principles will vary widely across times and cultures, there is a fundamental core conception of natural justice, which is, though difficult to articulate, meaningfully present within the law and underlies all codes that can be written by man. This is not to say that other conceptions of natural law cannot inform what is at the core of this innate and primitive sense, merely that these are, perhaps, interpretations of natural law that require context, and that the natural law conceived of in this paper, is somewhat devoid of context. It can be seen in the involuntary ‘gut’ reactions of individuals, as well as those who attempt to practice justice.

Natural law is thus about a sense of justice that underlies individuals and groups of individuals decisions about morality and law. Because it is a sense, an instinct, it is impossible to articulate with precision. This is how my definition is most directly contrary to religious definitions that seek to invoke strict moral codes. “Thou shalt not kill,” though the articulation of a moral principle that is almost universal, does not leave a lot of grey area. Killing in self defense simply does not hold the same type of moral culpability that killing out of greed or hatred does. Religious laws’ nature of codification is contrary to the notion that justice is instinctual. Enlightenment thinkers sought to articulate broader moral principles, and in that encapsulated ideas that are central to mankind’s conception of justice. They however fail, as anyone would, to articulate the exact nuances of natural justice, as well as its broad scope. This is not to say that religious interpretations or enlightenment thinkers were misguided, merely that are inherently incomplete. No conception of natural justice can be complete, in part because it is rooted in instinct.

**Natural Law, Trolley Problems and Monkey Justice**

While I cannot fully claim credit for this compelling argument, the evidence that humans carry with them an innate, primitive sense of justice is quite powerful. This argument was first presented to me by Carlton Henson, a lawyer who twice argued before the Supreme Court and briefly taught at the University of Wisconsin, during my first year as an undergraduate student and fundamentally changed the way I saw the law. Trolley problems taken with the fact that other primates seem to understand principles of equality and reciprocity heavily implies that natural justice exists and is instilled in all of us in a primitive sense.

Trolley problems demonstrate not only that individuals have deep seeded values that interact with each other, but also that there is a great deal of nuance to these internal moral systems and that many people share the same fundamental set of values on certain questions. When people are presented with the following trolley problem:

*If a trolley were headed toward five innocent bystanders who were assured of death, unless you were to pull a lever that would set the trolley on a different track, but that action would certainly kill a worker who was working on the other side of the track, would you pull the lever?*

About 90 percent of people would pull the lever (Cloud, 2011). If people are then presented with a different question, with the same tradeoff, but different moral circumstances:

*If you were a doctor with five dying patients who each require the transplant of a different organ, when a healthy patient walks in, would it be ethical to kill him to save the five patients?*

Almost no one would kill the healthy patient (Thomson, 1985. P. 1396). This demonstrates that moral reasoning is more complex than the five to one trade off and that individuals often see these moral dilemmas in similar ways.

There is also evidence that other primates have an innate sense of justice and fairness (de Waal, 2011). In the 1930s experiments were run in which Chimpanzees had to complete tasks together in order to get fed. When neither of the chimpanzees had been fed, they both worked together, diligently, to obtain the food and split it evenly. When one of the chimpanzees had been fed, the chimpanzee who had not, had to gesture and haggle to get the other to cooperate. The fed chimpanzee ultimately did cooperate, but allowed the hungry chimp to take most of the spoils. This indicates that chimpanzees have both a sense of fairness and empathy (Ibid). It also may indicate that the fed chimp may expect reciprocity at another time when it requires a favor. In another experiment, monkeys were trained to perform a task for a food reward. One monkey was given cucumbers, and another was given a better prize, grapes. When the first monkey completed and received cucumbers, he was perfectly satisfied, until he saw his counterpart receiving grapes for the same task. At that point the monkey became visually dissatisfied, throwing the cucumber back at his trainer and pounding on the walls of his cage. This again shows that monkeys have an innate sense of fairness, and expect equal treatment (Ibid). In the most powerful experiment on the topic, two monkeys were separated by a glass screen with a small opening, one was given a sealed container of food, and the other was given a tool to open the sealed container. The monkey who was given the tool cooperated by giving it to the monkey with food. Once the monkey was given the tool, he opened the container and gave exactly half of the nuts to the monkey who had given him the tool, so that both could eat (BBC, 2010). This indicates, not only that monkeys reward each other for cooperation, but that their sense of fairness, empathy and equality are powerful enough to realize that equal participation and necessity should yield an equal share of the spoils.

Postmodern pragmatist scholars, such as Stanley Fish have posited that principles of justice are merely social constructions, separate from any objective reality. Justice, for them, is entirely subjective and man-made. Moral objectivity does not exist because there is no truth. It would be very interesting to see what these postmodern scholars have to say about studies regarding moral behavior in animals. It seems very difficult to believe that justice is a man-made social construction when we can observe monkeys engaging in acts that demonstrate a complicated moral understanding of the world akin to that of humans. For these postmodern positivists, the rejection of moral objectivism is a bit of a straw-man argument. Fish concedes that Courts should use the language of justice because that language is powerful, while he rejects the idea that justice is objective. For Fish, what gives the language of justice its power is its social constructing. In other words, according to Fish, even though justice does not exist, society has a common understanding of it and that understanding can be used to legitimate court decisions. So even as the pragmatists deny the existence of justice, they describe something that seems to be very much like the principles of justice that they are rejecting. Postmodern Positivists’ critiques are valid in that no two individuals are likely to have the same exact conception of what is and is not just, and society’s conception of justice changes over time, meaning that some elements of justice, or at least society’s understanding of it, must be socially constructed. To deny that there is any underlying elements of objective moral truth is to deny a great deal of evidence that indicates that justice is real.

In sum, the evidence indicates that justice is not a human invention, that it is a primitive sense, and likely something that has been part of the evolutionary process for quite some time (de Waal, 2011). Monkeys display behavior that demonstrates that they have an innate sense of fairness and empathy. Trolley problems can be engineered to receive the same response nearly universally. This almost certainly indicates that justice is not entirely subjective, but rather something that is innate and primitive in humans. Justice carries a great deal of nuance; just as some trolley problems will spark great controversy. No one would ever suggest that natural law means that there can be no disputes about what is right and wrong, however, it does mean that some moral objectivity exist and is sourced in nature. My conception of natural law is more complex than it being an indisputable moral truth. Rather it is that there are an innate set of underlying moral principles that are universal, and inform debates not only about morality, but also legality. There are certain principles that are deeply embedded in mankind's universal moral compass, and those principles certainly interact with the law, at times. When they do, justices should side on the side of what is right rather than what is codified. Privacy is a perfect example of this. It has been proposed, since the time of Justice Louis Brandeis’ essay on the topic that “the nature of the constitution requires recognition of a thick and powerful right to be left alone” and that this right is so inherent to the rule of law that it cannot be taken out (Murphy, 1990, P. 213-214). This implies that there are certain principles that are so foundational to our moral understanding of the law that they must be recognized whether or not they are found in the text.

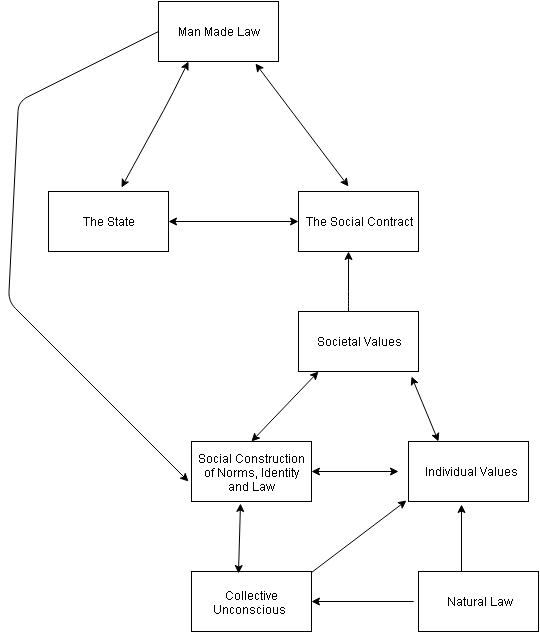
Perhaps the strongest argument against natural law is that the concept seems so subjective. For example, opponents of same sex marriage often used the argument that same sex relations were sinful or unnatural, most often citing religious doctrine. Proponents of same sex marriage, on the other hand, argued that blatantly oppressing a group because of their sexual orientation went against their basic moral conception of the world, and that the state simply had no right to interfere. It is important to note that my conception of the natural law is not based on church doctrine, but rather on broad principles of morality that seem to be virtually universal and present in the evolutionary process. So in this specific example, natural law would seem to be more on the side of proponents of gay marriage who believe in equality. Nonetheless, the point that natural law arguments can be made to support many things and that contradictory arguments can be rooted in natural justice is a strong critique. Sometimes natural law is unclear. There are times, even when innate moral principles come into conflict with each other. This is not to say that natural justice does not exist. There are certain things that are so radically in opposition with these natural justice principles that they could never become part of any just law. It would be improper for the law to condemn someone to a life of destitution or deprive people of certain liberties or their lives on the basis of their sexual orientation, religion, or their race. While there are countries around the world where such laws exist, and they even hold a prominent place in US history, such laws are objectively immoral and reprehensible and should not be recognized as valid by the societies they function in. It is not our laws that make these things wrong, but rather an inherent sense of respect for human dignity. While codifying natural law would be exceedingly difficult, and individuals’ conception of it conflict with one another, that does not mean that it does not exist. The truth is not an abstraction merely because it is unknowable. As Fuller suggested in the *Morality of Law,* law is a balancing act of mankind's objectives, which can be exceedingly difficult. Moral absolutes cannot capture the complexities of the real world. (Fuller, 1964)

Many scholars, often of the tradition of legal realism, believe that judges are policymakers who often invoke their values to create policies that better fit their values. Some scholars have endorsed “value voting” and see judges as political players (Peretti, 1999), as others have noted that justices tend to vote based primarily on their partisan leanings (Segal and Spaeth, 2002) and found instances of judges voting strategically rather than strictly on principle in order to achieve better policy outcomes (Epstein and Knight, 2000). The underlying assumption for some scholars is that judges’ preferences are all they vote on and are independent from any other influence. My response to this critique is that natural law influences judges’ values and moral preferences. When judges make decisions based on their moral, or even sometimes political, values, they are employing their best moral judgment and relying on their innate, primitive sense of right and wrong. While that sense does not always translate into a substantive outcome, it influences certain decisions and is most notable when the court bases its decisions on an appeal to morality, without textual basis, as they have done in countless due process decisions and in establishing the right to privacy in *Griswold.* Some realists argue that “legal indeterminacy" exists in the law "in conflicting moral and political principles that purportedly exist beneath the surface of the law, at some suitable level of abstraction" (Leiter, 1997 P. 274 ). It is then the role of the court to settle these political and moral debates. It would simply be naive to assert that judges have no discretion to read their own morality into statutes to settle these disputes. However, it would be just as naive to assert that judges are not bound by something more fundamental than that. The court's power is based on its legitimacy, thus, surely their decisions must comply with communal moral standards, if judges wish to be successful in their role. Communal standards are influenced by the innate, inborn, universal sense of morality that is part of the human condition. The law, if it seeks to be legitimate, is thus bound by natural justice. This binding, however, is not simple.

**How Social Contract Theory and Natural Law Interact**

If we believe that law is a part of a social contract theory in an ideal democracy, we must reconcile a gap between the laws of nature and the will of the people. It is theoretically possible that the people will desire something that is directly opposed to the law of nature. Racial discrimination, for example, could be seen as something that carries or has carried widespread public support whilst being objectively immoral. The thought of Jim Crow and slavery, today, shocks the conscious and causes distress to most. The disproportionate police discrimination and systematic oppression of African Americans today is the source of a great deal of political controversy and is seen by some to be among the greatest moral failing of American Democracy. However, as Dr. Martin Luther King argued, “the arch of history is long, but it bends towards justice.” Things have slowly but surely gotten better for the black community throughout American history. This is due to a multitude of factors, not the least of which is a moral awakening of the nation, or the development of what one might call “Rights Consciousness” (McCann, 1994 P. 224). During the abolitionist and the Civil Rights movement, people saw the coercive actions of the state as a moral failing and something that needed to be reformed. Social construction of the law changed in such a way that the overt discrimination of slavery and Jim Crow was no longer palatable to a majority of Americans (albeit a century apart). Protests and violence, in each case, eventually compelled the state to modify the social contract to one that was more inclusive to the black community. These changes were met with resistance, but were ultimately, eventually, widely accepted because they were morally in the right, and the social construction of blackness was no longer such that the group was seen as subhuman. Once that conception had changed, it was irreconcilable with society's conscience to continue their degrading behavior. While full equality certainly has not been realized, social movements that have improved the condition of the African American community have relied on the people's innate sense of justice and equality to motivate them to act to induce social change. In order for social change to be successful in the American legal system it must be backed by a pervasive and persevering sense of justice in Carl Jung’s idea of the “collective unconscious” of the people. Some principles of justice, such as notions that one should not murder, steal, or cheat, can be observed in virtually any society in the world. Even if one does not believe in Jung’s idea of the collective unconscious, it is difficult to argue that there are some principles of communal justice that seem to be universal and adaptable on the greatest spectrum of cultural diversity, and that there must be something about humanity and the development of culture that contributes to the universality of these values. Because societies have been shaped by these underlying principles of morality, these principles have become a quintessential part of the human experience. What society believes to be just must be molded to fit the deeply rooted conceptions of morality of either the collective unconscious, or something that resembles it; a common cross-cultural moral code that is influenced by a wide variety of factors, but shares a great deal of commonality seems to be a persistent pervasive force across cultures[[1]](#footnote-0).

Before moving on to my discussion of the right to privacy it is necessary to discuss the complexities of my model in which natural law interacts with the social contract and man-made law.



Needless to say, the model is very complicated and draws on a great deal of legal, political and even psychological scholarship. My contention is that, in a democracy, man made law is the product of a dialogue between the state and society. Through the social contract, society negotiates with the state as to what the rules should be. The rules (man made law), the state and the social contract all exert an influence on each other. An ideal social contract is a reflection of society's values. Societal values themselves are part of a complex negotiation between individual’s aggregate values and the social construction of society itself, meaning the social construction of things like norms, identity and law (man made law, itself, certainly exerts an influence on this component). Societal values, individual values, and the social construction of norms, identity and law all exert an influence on each other. Two things that play an important role in both the social construction of norms, identity and law and individual values are the collective unconscious and natural law. The collective unconscious is in dialogue with the social construction of society; meaning that they exert direct influence on each other. The collective unconsciousness, however, only directly exerts influence on individual values and is not necessarily influenced by them (unless those individual values become part of society’s construction of itself). Natural law influences the collective unconscious and individual values, but is not influenced by either. For purposes of this model, natural law is not influenced by anything, rather, it is simply an innate primitive, largely objective, sense of what is right and wrong that embeds itself in human emotion. It is largely objective moral truth and thus cannot be influenced by anything in this system. In sum, natural law is only a small part of the much bigger picture that is the lawmaking process. Nonetheless it exerts an influence on man-made law through the social contract via other complex parts of this complicated system.

**The Right to Privacy and Natural Law**

Natural law has always had some place in the American legal system. Ronald Dworkin has made the case that “political morality” is at the “heart of constitutional law,” and that the constitution was left vague so that future generations could read their morality into the broad principles the founders’ words (Dworkin, 1996). The founders recognized the importance of rights not listed in the Bill of Rights by including the Ninth Amendment ensuring that the constitution could not be misconstrued to deny rights not listed. While the Ninth Amendment has almost never been used to justify decisions, it demonstrates that the founders were thinking about these issues and aired on the side of natural law. Justices have been making appeals to natural law since *Calder v. Bull* in 1798 when Justice Chase wrote that “There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power” (Chase, P.3), though this initial natural law movement was short-lived. In some sense, in the American legal system, individual rights were created by the Fourteenth Amendment in 1868. Prior to its passage the Bill of Rights only applied to the federal government and had no legal meaning in state court. Though the court effectively rendered the privileges and immunities clause meaningless in *The Slaughterhouse Cases,* they eventually found a way of manifesting natural law through the Due Process clause, under which individuals cannot be deprived of life, liberty or property without the “due process of the law.” This eventually became a vehicle for natural law to work its way into American jurisprudence. The court eventually interpreted this to mean, not only that the process of the law had to give people their fair day in court, but also that the substance of the law had to be conducive to liberty. In *Palko v. Connecticut,* the court rules that the Due Process clause protected not only those liberties protected in the Bill of Rights, but also those that are essential to “the very essence of a scheme of ordered liberty” (Cardozo, P. 325). The court thus recognized that natural law is an inherent part of American law. Throughout the Twentieth Century many decisions were made recognizing fundamental rights that were not explicitly mentioned in the Constitution, including *Brown v. Board,* recognizing the right to education, *Loving v. Virginia,* recognizing the right to marriage, and *Skinner v. Oklahoma,* recognizing the right to reproduce. None of them were as fundamentally important to American jurisprudence as the establishment of the right to privacy in *Griswold v. Connecticut.*

The right to privacy is a cornerstone of American constitutional law for its mass scope and ambiguity, its formal recognition of a sphere of private life that cannot be subject to government intervention, and, perhaps most notably, its lack of presence in the constitution. In *Griswold*, the court constructed the right to privacy, not from the explicit text of the constitution, but rather from the “penumbras” (P. 484) and “emanations” (P. 484, 493, 509) of the Bill of Rights. Though the right to privacy is not explicitly mentioned in the constitution, the first, third, fourth, fifth and ninth amendments imply that privacy was central to the founders’ conception of liberty. The Supreme Court read into the principles of natural law that underlie the constitution, and based their decision on those principles rather than the text of the law itself. The court thus recognized that the foundational principles of the law are more important than the law itself. The Court could have made a decision based on the text of the constitution that overturned the state of Connecticut’s ban on contraceptives. In the original draft of the decision, Justice Douglas based the law’s unconstitutionality on the right to association, rather than the right to privacy. He was urged by Justice Brennan to make a more expansive decision that stressed privacy (Schwartz, 1985. P. 227-239). It is also conceivable that the Court could have also struck down the Connecticut law on the establishment clause, given that the state of Connecticut has historically had a large Catholic plurality, and a ban on contraceptives could have been seen as an attempt to reinforce an established church doctrine as law (Blumberg, 2014). The Court felt it necessary to create the right to privacy because they felt the need to base their decision more on basic principles of right and wrong than on the law. If the court believed strictly in a Rule Book (Dworkin, 1985) or Legal Formalist (Tamanaha, 2004 P. 119-122) conception of the rule of law, they could have crafted a reason to come to the same conclusion as they did. The decision thus signaled a commitment to a rights based conception (Dworkin, 1985) and one rooted in natural law.

HLA Hart made the argument that “the recognition of an obligation to obey the law must, as a minimum imply that there is some area of conduct regulated by the law, in which we are not free to judge the moral merits of particular laws and to make our obedience conditional on this judgment” (Hart, 1958). However, in striking down Connecticut’s Comstock law, the court did just that. It alleviated the moral obligation to obey the unjust law by striking it down. The Court acts on behalf of the people as political representatives (Peretti, 1999), and has the authority to act on our behalf. By striking down the ban, the people as a whole chose not to obey this particular law because of its moral absurdity. Society, through the legal system, has the authority to do away with unjust laws that conflict with natural law, and often do.

Justice Black even recognized the use of natural law in the decision in his dissent: “If these formulas based on ‘natural justice,’ or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary” (Black, P. 511-512). Though his critique is fair, there is greater danger in legal formalism dictating that judges make decisions that are morally abhorrent when the law is silent. It would have been reprehensible for justices to allow the state to have a role in people’s bedrooms, not because the law says it has no place there, but because such a decision would have violated the social contract and expanded the role of the state beyond what it reasonably, ethically should be.

The right to privacy merely codifies a principle that is inherent in both natural law and the social contract: that there is a sphere of private life that the government has no place in. While this principle was not new in American constitutional law, as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* recognized parents the right to oversee their children’s education, free of state influence, dating back to the 1920s, the right to privacy makes that sphere explicit and solidifies and entrenches it in constitutional law in a way it had not been before. An all-powerful government that can dictate people’s sex lives is a draconian nightmare. Even Justice Stewart, who dissented to the Court's creation of the right to privacy, recognized that Connecticut’s statute banning contraception was "an uncommonly silly law" (P. 527). It is simply immoral for the government to have a place in the bedrooms of married couples. What gave *Griswold* and the right to privacy its power, however, was its strong basis in the social contract. The founders could simply not have conceived of a government powerful enough to enforce a law like Connecticut’s. By the 1960’s, with the advent of the birth control pill and the sexual revolution, society’s values were changing. A society that was becoming more open about sex would not have recognized the government’s role in their intimate and private affairs as legitimate. As the social construction of sex changed from something that was extremely taboo to a topic that could be discussed openly in public, society’s values, and individual’s values, changed and forced the state to recognize the importance of sexual rights. Ironically, as private life began to become more public, the state was forced to recognize the importance of privacy.

The real power of the Right to Privacy is in its grandness in scope and its vagueness. If we conceive of the law as necessarily incomplete (Pistor and Xu, 2005), the reason the right to privacy is so important is that it is so poorly defined. In the past, substantive due process rights were very specific. As mentioned earlier, the court had established a right to reproduce, a right to marry, a right to an education and a right for parents to oversee their children’s education. These were all drafted as specific remedies to specific problems, and only set legal precedent to defend people against very distinct state infringement on their rights. The Right to Privacy is not specific, rather it protects an entire domain of people’s lives. As the state has defined the Right to Privacy, through *Griswold, Roe v. Wade* and *Lawrence v. Texas,* it has created a right that is of the same constitutional scope as freedom of speech or religion, that was not explicitly mentioned in the constitution. The implications of the Right to Privacy are already extraordinarily far reaching, and there is still a great deal of refinement and definition that needs to be done to properly understand its limits.

Thus far the Right to Privacy has been used to establish sexual rights (Rubinfeld, 1999), or perhaps a right to bodily autonomy. In *Roe v. Wade,* the court expanded the right to privacy to protect women's right to an abortion. The "right of privacy,” Justice Blackmun wrote in his majority opinion, “whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman’s decision of whether or not to terminate a pregnancy” (Blackmun, P. 153). Here, Blackmun recognizes that the textual basis for the right to privacy is vague, at best, but that private decisions made by women regarding their bodies, their families and their pregnancies are certainly protected by it. In *Lawrence v. Texas,* the Court overturned its ruling in *Bowers v. Hardwick,* and recognized that anti-sodomy laws, targeted at the LGBT community violated the right to privacy. This is another example of natural law making its way into the social contract due to changing societal values. As being gay or lesbian became more acceptable, discrimination against the gay community became unacceptable. Again, it may have been possible for the court to strike down Texas’ anti-sodomy law on other grounds. *Yick Wo v. Hopkins* (which said that laws could violate equal protection, even if they were neutral on their face, if they targeted a specific group implicitly) and other Equal Protection jurisprudence could have made it possible for the court to declare sexual orientation a suspect or quasi-suspect class and strike down the law as discriminatory. They instead chose to expand the definition of the right to privacy as a protection of people’s sex lives from government intrusion. Justice Kennedy wrote in the majority opinion “the petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime” (Kennedy, P. 18). Privacy jurisprudence has thus created a clear protection for sexual rights: the right for consenting adults to be free from government intrusion in their bedrooms. Scholars have speculated that there may be a “tacit agreement that sexuality is an area of life into which the state has no business intruding” (Rubinfeld, 1999 P 738). Following *Bowers,* prior to its nullification in *Lawrence,* scholars had grown wary of this interpretation of privacy rights (Ibid, P. 739), but following the *Lawrence* decision it is hard to conceive of the right to privacy, as it exists today, without putting sexual rights front and center.

Many questions about the scope of privacy jurisprudence remain. While it is clear that sexual rights are protected, whether or not it grants a right to bodily autonomy or a right for people to make certain decisions regarding the wellbeing of themselves and/or their family, is far from clear. It would be easy to read the constitutional protections on privacy as granting a right of bodily autonomy. The court has ruled, however, unanimously in *Vacco v. Quill,* that the right to physician assisted suicide, even when a patient is terminally ill and in great pain, is not protected by the constitution. While the decision did not directly address the right to privacy, it has implications for it, if we consider it a right to bodily autonomy. The Court said that the state has a legitimate interest in preventing suicide. The Court did address the privacy question indirectly in a similar case regarding physician assisted suicide, *Washington v. Glucksberg,* when it ruled that physician assisted suicide was not a protected right under due process, but discussed it only in passing. Privacy advocates who believe that the right to privacy grants a right to bodily autonomy may see the issue very differently. It could be argued, rightly or wrongly, that natural law dictates that when someone is terminally ill, they should have the right to chose the manner of their death. The state’s role is not to enslave the dying to a life of pain. There are perfectly valid moral arguments on the other side. There is a concern that mentally ill patients, who are not capable of making such a grave decision, will be mistreated. There is also the concern that doctors should not be in the business of killing people. However, as more states adopt laws permitting assisted suicide, it seems like the issue is far from settled.

Under the Bodily autonomy conception of the Right to Privacy, it is imaginable that the right to privacy could even protect drug use. If society believes drug usage to be a crime whose only victim is the one using drugs, it could be argued that the state has no place in regulating individuals decisions about their own body and health. There are also valid arguments against this protection. It could be argued that the state should not actively endorse drug use and that the legalization, even through the courts, could be a detriment to society. It could also be argued that drug usage is not a victimless crime. Nonetheless, as society begins to favor the legalization of marijuana and support for the war on drugs dwindles, this could be a legal fight on the horizon. While it is hard to imagine the court handing down a decision that all drug use is protected by the right to privacy, the court may rule that certain, less harmful, drugs are protected because the state has no right to make bodily, health decisions for individuals.

Privacy also has implications in other spheres of life, and, with the growth of technology, could become a vitally important part of constitutional law. European courts have established a ‘right to be forgotten’ that prohibits search engines from keeping embracing information on private citizens. Information that could be found on the Internet could harm individual's reputation or prevent them from becoming employed. It would be easily conceivable for the Court to expand their protection of privacy to include this right to be forgotten. It is just as possible that the court will refuse to recognize it, perhaps on freedom of press grounds. Ultimately the Court's decision on such a topic would rely on pre-existing jurisprudence and society’s values and construction of privacy and digital life. If the Court cannot be seen as legitimate if it refuses to recognize the right to be forgotten, they will likely expand their definition of privacy to include it. If not, they might avoid setting such a precedent.

The Right to Privacy, however, is certainly not boundless, as the court has already placed some limited restrictions on its protections. Even in *Roe,* the right only protected women’s access to abortion in the first two trimesters, as the state’s interest was tied to protecting potential life, and that interest got stronger as the pregnancy went on. In *Casey v. Planned Parenthood,* the court’s limitations on abortion rights became slightly more pronounced as they overturned the trimester framework and tied the state’s ability to restrict abortion to fetal viability, meaning the state could restrict abortion as soon as 22 or 23 weeks (O'Connor, P. 860). In *Washington v. Glucksberg,* justice Rehnquist implies that the due process clause protects only rights that are “deeply rooted in this Nation’s history and traditions” (Rehnquist, P. 727). While it is unclear if this necessarily binds the right to privacy to only those that are embedded into the fabric of American tradition, particularly given the outcome of *Lawrence,* this is a possible limitation. This is not to say that the right to privacy does not protect natural law, as those rights that are important to American culture and tradition are likely those that are most central to the public that the court intends to protect. If the court fails to define “the Nation’s history and tradition,” in such a way that it protects the central liberties of the people which are not codified, this is a failing of the rule of law, because the court is both failing to do what is right and failing to interpret the social contract in a manner that is conducive to liberty for all. As long as the court interprets “the Nation’s history and tradition” to be an inclusive and tolerant one, there is no reason that such a test is inherently a failure of the rule of law. As for limitations on the right to privacy, at large, every right has limitations. The right to free speech does not protect muggers ability to say ‘give me your wallet or I will shoot you.’ The nature of rights is that they generally trump state interest, but are also limited by the state’s need to instill order and ensure the welfare of its citizens. Privacy is no different. It is not a moral absolute, as that distinction would make it incompatible with the rule of law (Fuller, 1964).

The exact boundaries of the right to privacy are still a long way from being established by the courts and will undoubtedly change as societal values change. Nonetheless, the right to privacy establishes a precedent that is inherent in natural law- that the government should not be able to encroach on a certain sphere of private life. This principle is only textually supported by the constitution insofar as the constitution gives discretion to judges to read natural law into it. What is and is not protected by this natural right needs to play out in society and the legal system. There is no way telling where this new right will find its way into jurisprudence, just as there is no way of telling how societal values will change. The right to privacy is a new legal tool that will be used to help settle debates within the judiciary for generations to come. Wherever the social contract demands that individuals must be entitled to privacy, there the right will be invoked.

**Conclusion**

Natural law plays an important role in the American legal system, just as it should, and as the framers intended. We know that the founders thought about natural law when forming the US government. Thomas Jefferson wrote in the declaration of independence that the people were “endowed by their creator with certain unalienable rights.” The founders were heavily influenced by John Locke who believed strongly that natural rights were superior to any man made law. They included the Ninth Amendment to reserve certain rights, not listed in the constitution, to the people, thus purposefully filling in the gaps, if their positive law failed to protect the importance of natural law. There is strong evidence to suggest that primates other than humans have an innate sense of justice, and when taken with the fact that moral dilemmas can be designed to be answered the same way, almost universally, it seems almost certain that humans also have this innate primitive sense. While judges were at first hostile to the concept of Natural Law playing a role in the legal system, substantive due process cemented its role by placing constitutional protections on rights not explicitly mentioned in the text of the constitution (though most judges would deny that they are practicing natural law). Though natural law is filtered through the social contract, societal values and the social construction of society itself, it is difficult to deny that it plays a prominent role in the American Judicial system.

Natural law’s prominence is inherent to the rule of law. If we rely strictly on the text of the law, or legal formalism, we lose the ability to distinguish right from wrong. Though law can be about social control (Shapiro, 1986), it is also about setting communal moral standards. If judges become too focused on the text and precedent, they impose not the rule of law, but rather the unchecked power of the state. Judges must focus on the moral righteousness of their decisions, or they fail the society they are trying to serve.

The right to privacy is a beautiful judicial construction in order to help impose natural law. It is just as important as the rights to free speech, freedom of religion and the right to be protected from unwarranted search and seizure, because it protects people from government intrusion in the most intimate settings. Privacy Jurisprudence has already made it clear that the scope of the right is on par with other constitutional protections explicitly mentioned by the founders. Because the right is so poorly defined (to the Court's credit), it could, in the future, become the most powerful and important constitutional protection that the people have, despite the fact that it is not mentioned in the constitution. Privacy protects an entire sphere of societal life.

Attempting to predict where Privacy Jurisprudence will go is exceedingly difficult. Though the Court has thus far used privacy mainly to protect sexual rights, the scope of the right will continue to be the subject of judicial debate for generations to come. The next major privacy decision could be on virtually anything. The future of Privacy Jurisprudence is largely dependent on how lawyers, judges and society decide to use the right. There are many issues it could be applied to, but its legitimate usage in the legal system is something to be negotiated between the legal system and society at large.

*Griswold* is among the most important decisions the court has ever made. The Court's establishment of the Right to Privacy assured that natural law would remain a major part of American Jurisprudence well into the 21st century and codified that the state cannot go where society does not invite it. In their construction of the right to privacy, the court knowingly set a powerful precedent that would lead to a great deal of scholarly debate and judicial soul searching. They assured the people that morality would remain an integral part of law. Though debates over the scope of privacy protections will continue, the Court's commitment to privacy has reinforced the rule of law by protecting the people from government intrusion that violates common sense. By recognizing that justice is not subjective, the Court has done a great service to the people they serve.

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