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Gay Rights As A Particular Instantiation of Human Rights

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GAY-RIGHTS AS A PARTICULAR INSTANTIATION OF HUMAN RIGHTS

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This article argues that lesbian, gay, bisexual, and transgendered (LGBT) rights are a particular instantiation of human rights. But in order to make this argument, several things must be done first. Preliminarily, it should be noted that some transgendered issues fall under the rubric of “gay-rights,” even though, strictly speaking, they center most prominently on matters of gender and not sexual orientation. ¹ Still, their gender aspects are often ignored because of concerns related to sexual orientation, such as whether a transgendered female can use a woman’s washroom. ² Arguably, the reverse may also be true of gays, lesbians, and bisexuals insofar as many of society’s concerns regarding this group involve their not following gender roles, even though the discrimination against them is not usually seen as sex discrimination. ³ Bearing that in mind, among the various responsibilities of this article is to define—in the broad sense—what gay and lesbian rights are. ⁴ This is followed by a similar set of expressions defining what human rights are and an

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¹ In Littleton v. Franchise, 9 S.W.3d 223 (Tex. App. 1999), cert. denied, 121 S. Ct. 174 (2000), the Texas Court of Appeals, while denying Christie Littleton’s right to sue for the wrongful death of her spouse because it held she was a male for purposes of the state’s marriage laws, nevertheless did distinguish between homosexuality, which is a sexual orientation, and transgenderism, which concerns sexual identity. Id. at 230, 231.

² See Doe v. McCow, 459 F. Supp. 75, 81 (S.D. Tex. 1980) (holding a local ordinance prohibiting a pre-operative transsexual from using a washroom to be unconstitutional); see also City of Chicago v. Wilson, 889 N.E.2d 622, 622, 525 (III. 1978) (holding that a section of the Chicago Municipal Code, which prohibits a person from wearing clothing of the opposite sex with the intent to conceal his or her sex, is unconstitutional).

³ In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998), the Supreme Court recognized for the first time that Title VII would encompass, at least, claims based on same-sex sexual harassment in the workplace. At the state court level, in Tanner v. Oregon Health Sciences University, 980 F.2d 186, 188, 189 (Or. Ct. App. 1999), an Oregon Court of Appeals found, inter alia, that denial of insurance benefits to the spouses of domestic partners constituted sex discrimination within the meaning of Oregon’s anti-discrimination law.

⁴ See infra notes 7–18 and accompanying text.
argument for how such rights get justified. Once that is done, the connection between gay and lesbian rights and human rights is pursued within the context of a theory of political morality that establishes the centrality of human rights to all moral concerns.

One small caveat should be noted. This article is about the ideals that constitute gay and lesbian rights generally, although it will from time to time look at specific aspects of American law. These ideals are not always clear from specific legal doctrines because the doctrines that make up this area are far from settled. Where, at least in American law, one might expect the doctrines to lead to a certain set of results given the way prior cases not involving gays or lesbians were decided, there is often that funny exception pinned somehow to the fact that one of the claimants is gay. The article is also not about the political mechanics of how to actually bring gay rights into legal existence, though to some extent mechanics are mentioned to show how institutions operate to promote, or not promote, human rights. Political pragmatism is essential to the latter task, but political pragmatism will not be sustained unless the ideals upon which it is built are firmly understood and supported. Spending time on a theory of ideals is thus a worthwhile effort even for activists and lawyers who work to achieve legal protections for LGBT people in society. Ideals are what this article will address.

I. WHAT ARE GAY AND LESBIAN RIGHTS?

At the outset, the reader might note that while talk about gay and lesbian rights, and human rights in general, is relatively new to the political stage (natural rights talk only dates back to the early modern period\(^6\)), the idea of a right itself is not new. Surely, the ancient Greeks and Romans had a sense of this concept, even though they did not have a word for it, for they understood that the law could be used, for example, to force the payment of a debt.\(^7\) That being the case, what is new about the modern rhetoric of rights is that there is now a systematic language in which to pull

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\(^5\) See infra notes 99-113 and accompanying text.
\(^6\) See infra notes 114-239 and accompanying text.
\(^8\) See J. Roland Pennock, Rights, Natural Rights, and Human Rights—A General View, in HUMAN RIGHTS 2 (J. Roland Pennock & John W. Chapman eds., 1981) (suggesting that, even though there existed no word to express the concept of a legal right, the idea of a “right” was implicit in Ancient Greek society).
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... together talk about who holds the right, what the right is about, and who (if anybody) has a correlative duty associated with the right.

One result of that change in dialog is to make clear a distinction between two uses of the word “right,” since they are often confused in the political debate, if not in academic discourse. This is especially true when people think of the word “right” in the context of what it is “right to do.” In those situations, people who may, for example, be sympathetic to gay-rights will not always agree with every use of those rights. The distinction is between the word “right” when used as a noun and its use as an adjective. This distinction is important because the two uses are easily confused when both get applied in a single context. For example, it may seem contradictory (although it is not) to say that Nazis have a legal, and possibly a moral, right to march in Skokie, Illinois (which is home to many holocaust survivors), even though it is not morally right for them to do so.

In this example, the former, or nominative, use of the word “right” refers to particular rights of freedom of speech and assembly that are due every individual or group based upon some political, legal or moral ideal. The latter, or adjectival, use is evaluative of the particular action of Nazis marching in Skokie, which is presumably not what the ideal is ultimately aiming to achieve. The point is that one can say that there exists an important right (in the nominative sense) to freedom of speech and assembly that is available to all people, while, at the same time, saying that one

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9 See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 48 (Walter Wheeler Cook ed., 1946) (citing an example where the word “right” is meant to convey “freedom” or “liberty” in a general sense and not “right” in the sense of a legal entitlement to do something).

10 See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 696 (Robert Audi ed., 2d ed. 1995) (distinguishing between having a “right” and whether is morally “right” to exercise that “right”).


12 See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1322 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed., 1987) (defining normative as “1. of or pertaining to a norm... 2. tending or attempting to establish such a norm... 3. reflecting the assumption of such a norm or favoring its establishment”); see also THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 10, at 185 (recognizing that non-normative terms reference the non-moral).

13 See Palmer, supra note 11, at 210-11 (implying that, in Collin, the lower court’s decision focused on the nominal right, not the adjectival use of the term “right”).
ought not to exercise that right for certain heinous purposes. This is separate from the situation where the exercise of the normative right itself may create a clear, present, and imminent risk of harm to life or property. In that case, we might want to say that the right to march is overridden by another right (such as the right not to be harmed) because it is considered the more important right. Here too, one has to be careful that the valuation of importance is not based on some altogether independent moral standard. Rather, it should be based on finding a common denominator that justifies both rights to see exactly why the latter trumps the former. Otherwise, rights rhetoric devolves into a kind of rule utilitarianism.14

We can also say of all nominative rights that they fit a common language pattern, which Alan Gewirth describes with the following paradigm: A has a right to X against B by virtue of Y.15 Here A is the subject of the right, the right holder; X is the object of the right, the thing the right is to; B is the respondent of the right, the person, group or institution (if any) that has a duty to satisfy the right; and Y is the reason or justification for the right. Separate from this paradigm, Gewirth describes the institutional setting in which the right is held (law, morality, and etiquette), as well as its nature (whether it is a claim-right, a liberty, a power, or an immunity).16 Regarding this last point, Gewirth follows Wesley Hohfeld, who distinguished rights claims into those four distinct varieties.17

Claim-rights, like the rights that arise from contracts and agreements, involve correlative duties by others.18 Liberties, like the liberty to pick up ten dollars lying in the gutter (where no limiting statute applies), involve no specific duty on the part of any

14 In fact, sometimes rule utilitarianism is thought to be a kind of rights approach, but it is not the approach usually associated with the development of natural rights. See Pennock, supra note 8, at 8 (explaining that a “rights approach” has little to do with maximizing human happiness, which is the essential ideological underpinning of utilitarianism).
15 ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATION 2 (1982) [hereinafter HUMAN RIGHTS].
16 See id.; see also HOHFE LD, supra note 9, at 35-64 (delineating categories for the nature of rights).
17 See HOHFE LD, supra note 9, at 35-64 (explaining his four juridical correlates as: “rights and duties,” “privileges and ‘no-rights,’” “powers and liabilities,” and “immunities and disabilities”).
18 See id. at 38 (quoting Lake Shore & M.S. Railroad Co. v. Kurtz, 37 N.E. 303, 304 (Ind. App. 1894), for the proposition that “[d]uty’ and ‘right’ are correlative terms” because “[w]hen a right is invaded, a duty is violated”).
poses. This risk of harm at the right not to be right. Hence is not. Rather, it justifies the former.

: a common rule following. Here A is of the right, the person, a right; and from this which the its nature immunities.16 Hohfeld, who lies.17 Tracts and serties, like (where no part of any

other person.19 Powers, like the power of the Congress to pass legislation, involve correlative liabilities on the part of citizens to obey the law.20 Immunities, like the Fifth Amendment immunity against self-incrimination, involve correlative disabilities on the part of the state to take action, such as forcing a confession in a police investigation.21

Another way to describe rights language would be to incorporate directly into the Gewirthian paradigm these explanations about the institutional setting and the nature of the right.22 The incorporation seems preferable to the separation approach because incorporation makes clear the paradigm’s applicability to the language of rights in general rather than limiting applicability to specific types of rights, like legal rights or moral rights. Consequently, one might write Gewirth’s paradigm as: A has a U-V right to X against B by virtue of Y.23 Here U is the institutional setting for the right and V is the specific nature of the right.24 Regardless of which construction is adopted, not much is affected in the final analysis of the way rights are described.

One final point to be noted here is that the rights being described fit better a will theory than an interest theory of rights. The difference is that in the case of the will theory, a right empowers its holder “to make a choice about the fulfillment of someone else’s duty,” whereas an interest theory sees rights as “legally or morally shielded against interference or non-assistance.”25

Given what has been described as the way the paradigm identifies rights, the question can be asked: Do gay and lesbian rights fit the

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16 See id. at 42-43 (equating the term “liberty” with “privilege” as terms that by nature imply independent existence, thereby recognizing that the mere existence of such liberty does not automatically include rights against third parties for “interference”).
17 See id. at 50-60 (providing examples of how legal liabilities arise in the realms of property and contract).
18 See id. at 60 (Hohfeld analogized the difference between power and immunity to the difference between right and privilege:
   "A right is one’s affirmative claim against another and a privilege is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative “control” over a given legal relation as against another; whereas an immunity is one’s freedom from the legal power or “control” of another as regards some legal relation.

Id. 22 See VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 14-17 (1991) (demonstrating the importance of understanding the “institutional setting,” (i.e. legal framework) of a right in order to better understand the nature of the right).
23 Id. at 17.
24 See id. at 14-15 (expressing that the issue being considered affects the “specification of the privacy right”).
paradigm? In general, the aphorism "gay and lesbian rights" really references a set, or cluster, of separate claims concerning privacy, nondiscrimination, freedom of speech, marriage, parenting, and so forth, put forth by gay and lesbian people against the state and other individuals. The set of claims is a set of rights because the claims are meant to afford advantages to the holders of the rights as opposed to disadvantages that accompany various theories of duty. However, gay rights also involve duties because the rights gay people are asserting are not just claims to a set of liberties or privileges, but also claims against others—that others not interfere and, in some cases, supply a benefit to the "right-holders."

When the claims are negative, in the sense of demanding non-interference in the performance of certain actions, they are active rights claims. In other cases, when the claims involve positive benefits others can provide, they are passive rights claims. These passive rights claims may also be referred to as entitlements. For example, consider the difference between the right to nondiscrimination and the right to marry or adopt children. In the first case, the right to nondiscrimination is a negative right imposing a duty on employers, landlords, mortgage brokers and the owners of public accommodations, such as hotels and restaurants, not to discriminate on the basis of sexual orientation when deciding to whom they will rent or grant a loan, or who they will hire, promote, or serve. In the latter case, the right to marry or adopt children is a positive right demanding that the state grant gays and lesbians equal consideration with heterosexual couples in the granting of marriage licenses and the placement of children for adoption. In short, gay rights claims fit the paradigm of rights language, or, more specifically claim-rights language.

Gay rights also involve claims of universalizability. In other words, they are, in the first instance, in rem, and not in personam.

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10 See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 10, at 695-96.
11 See id. at 695 (explaining that negative rights, such as the right not to be battered or the right to defend oneself, are active rights because their "content is best stated in the active voice").
12 See id. (distinguishing passive rights from active rights on the ground that passive rights, such as a creditor's right to be repaid, can be "properly formulated in the passive voice").
13 See id. at 822-23 (explaining the term as "the moral criterion implicit in Kant's First Formulation of the categorical imperative," requiring one to act only upon principles which one would accept as universal law). A principle which satisfies this test is "univerisalisable," and thus "morally acceptable." See id.
14 See id. at 822-23. "[A] right in rem is a right that holds against all second parties; a right in personam is a right that holds against one or a few others." Id. Accordingly, since gay rights are in rem rights, they involve rights that must be held binding against the world.
This is true even though they will often get raised in particular contexts, such as when a nonbiological parent sues her partner for visitation rights to a child they mutually raised prior to their breakup. Here, the universal side of the issue is whether these rights should be recognized at all, not whether they are applicable in the particular context.

Yet, it would be overly simplistic to believe the phrase “gay and lesbian rights” applies only when the discussion is about claim-rights. The language of gay rights also applies where individuals claim liberties (such as the liberty to immigrate without regard to sexual orientation), as well as where they invoke the power of the state to protect certain interests or grant certain immunities. In this way, gay and lesbian rights can be seen as a cluster of rights involving all four of Hohfeld’s categories. For example, if one wants to come out of the closet in the military, one may seek the privilege of doing so on the ground that no one else’s rights are being interfered with.

If one does not want to be discriminated against in housing, employment or public accommodations, then one may need the power of the state to ensure that those who do discriminate will be punished. Similarly, for marriage and adoption rights, the powers conveyed to institutions—namely the law-making institutions of the various states in the United States—determine directly whether those rights will be available to gays and lesbians. This suggests that the powers conveyed to the societal institutions may play an important role in guaranteeing claim-rights the person or group believes they possess, at least morally. In the case of marriage and adoption, it is not a matter of state interference with one’s claim-rights, but rather a matter of the state making available the objects about which the rights are claimed. With respect to immunities, if one is granted the complete set of marital rights, then the state will recognize its own disability from having one of the spouses testify.

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82 See CARL WELLMAN, A NEW CONCEPTION OF HUMAN RIGHTS (1978), reprinted in PHILOSOPHY OF LAW, 325, 328-31 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) (defining ethical equivalents to Hohfeld’s legal concepts and stating “[a] human right is a cluster of ethical liberties, claims, powers and immunities that together constitute a system of ethical autonomy possessed by an individual as a human being vis-a-vis the state”).
against the other. Similarly, the state will recognize it is disabled from making determinations restricting marital privacy in the same way it guarantees these protections to heterosexual married couples.

One important point implicit throughout what has been said is that gay and lesbian rights are equal rights available to all other people. In fact, what gives gay-rights its name is that many of the rights claimed by gay people already exist for heterosexuals. The problem is that gay-rights issues have been construed in such a way as to give the appearance that either gays currently have these rights and have chosen not to exercise them, as in marrying someone of the opposite sex, or that no one has these rights, such as a claimed right to engage in same-sex sodomy in the home.

But these constructions are facades, creating confusion rather than illuminating reality. They hide the fact that under established institutional arrangements, heterosexual interests of the related kind are already provided for. Once one penetrates these facades, it becomes evident that many of the claims gays and lesbians are making are to equal rights that have not been afforded them. These claimed rights are not, in this sense, special rights. This will be made clear with the answer to the question of how gay-rights are justified. As that answer will depend on showing that gay and lesbian rights are properly a species of justified human rights generally, it is first necessary to say something about what human rights are and how they might be justified.

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33 See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2332–2335 (John T. McNaughton Rev. 1961) (discussing the history, policy, and general applicability of the marital privilege); Gloria M. Sodaro & Paul A.J. Wilson, Spousal Privileges, in 2 TESTIMONIAL PRIVILEGES § 5.01 (Scott N. Stone & Robert K. Taylor eds., 2d ed. 1995) (noting there is a trend in the law away from allowing criminal defendants an unqualified right to prevent spousal testimony).

34 See, e.g., Buehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993), reh'g granted in part, 875 P.2d 225 (Hawaii 1993) (noting that heterosexual married couples are entitled to a "multiplicity of rights and benefits" not accorded same-sex couples).


36 See Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding there is no fundamental constitutional right to engage in same-sex sodomy, even within one's home).

37 See DIANE SILVER, THE NEW CIVIL WAR 35-36 (1997) (noting the rights to which heterosexual individuals are entitled but to which homosexuals are denied, and further noting that no state or municipality in the United States grants equal rights to homosexuals and heterosexuals).

38 See infra Part V.
II. WHAT ARE HUMAN RIGHTS?

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights.\textsuperscript{39} In that document, two distinct classes of rights are promoted: political rights and economic and social rights.\textsuperscript{40} The latter differ from the former only in the recognition by the United Nations that they may not be immediately achievable in every nation due to economic circumstances and, therefore, member states should promote those rights to the extent that each state’s resources allow.\textsuperscript{41}

Under the political category are rights, such as the rights to life, liberty, and security; to not be held in slavery or subjected to torture or inhumane treatment; to be treated as an equal before the law; to not be subjected to arbitrary arrest, detention, or exile; to a fair and public trial; to a presumption of innocence; to have privacy respected; to travel and asylum; to change nationality; to own property; to freedom of thought, conscience, and religion; to hold and express opinions; to peacefully assemble; and to be able to take part in government.\textsuperscript{42} Of these, many of the rights listed are negative rights (demanding noninterference with actions), though a significant number are positive rights (demanding entitlements or assistance in various forms), including the right to a fair and public trial, to a presumption of innocence, to be treated as an equal before

\textsuperscript{39} The President’s Commission for the Observance of Human Rights Year 1968, Human Rights: Unfolding the American Tradition 96 (1968).

\textsuperscript{40} The U.N. Declaration itself does not distinguish classes of rights on its face. Rather, it determines that certain types of rights, like social security (article 22), shall be made available “in accordance with the organization and resources of each State.” Id. at 103.

\textsuperscript{41} See United Nations, United Nations Action in the Field of Human Rights 10-11 (1963). This concept is embodied in the U.N. Declaration’s language stating that “[e]veryone . . . in accordance with the organization and resources of each state [is entitled to] the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” The President’s Commission for the Observance of Human Rights Year 1968, supra note 39, at 103. This distinction is further illustrated by the United Nations’ adoption of two covenants which are based on the U.N. Declaration: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See David M. Trubek, Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs, in Human Rights in International Law: Legal and Policy Issues 235, 210-11 (Theodor Meron ed., 1984). The United Nations adopted two covenants rather than one because it saw an important distinction: political rights, such as the right to a fair trial, could be protected immediately through the passing of legislation while social rights, such as the right to health, required the establishment of programs and action taken over time. See id. at 211.

\textsuperscript{42} The President’s Commission for the Observance of Human Rights Year 1968, supra note 39, at 100-103.
the law, to own property, to change nationality, to asylum, and to take part in government.  

Under the social and economic category are almost all positive rights including rights to social security, to work, to rest and leisure, to an adequate standard of living, to education including compulsory primary education, to participate in the cultural life of the community, and to a social and international order in which these rights are realized. Though here too, there is at least one negative right, namely the right to join unions without interference.

At first glance, the political rights may appear to be associated with rights traditionally thought of as natural rights. Recall that for Hobbes and Locke the use of natural rights language was meant to bring about joint action in the pursuit of common goods. Hobbes saw natural rights as the inherent freedom to take what one wanted when no greater force was present. Locke saw natural rights as property claims that, in the first instance, were to one's own body and the labor of one's hands. Both followed a bottom-up approach to rights starting with the individual and moving from there to the society. This is in contrast to the still older natural law approach that begins with broad concerns about law, justice, duty, and the public interest, and from there moves to the individual. By following the bottom-up approach, natural rights rhetoric replaced the rhetoric of the old natural law theory, which was generally teleological or top-down. The latter had also been the focus of the classical understanding of "natural right."

In natural law rhetoric, one starts with a conception of the last end, or good to be achieved, and moves from there to a view about the way society should be organized. In contrast, the modern

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43 See id.
44 See id. at 108-109.
45 See id. at 104.
46 See Penneck, supra note 8, at 3.
49 See infra notes 52-53 and accompanying text.
50 See LOCKE, supra note 48, at §§ 1-2 (distinquishing political power from power of a father in a family and power of a captain of a galley).
51 See Penneck, supra note 8, at 1-2 (providing an historical sketch of the rise of the terms "human rights" and "rights of man").
52 See ST. THOMAS AQUINAS, 2 THE BASIC WRITINGS OF SAINT THOMAS AQUINAS, 744-45 (Anton C. Pegis ed., 1946) (stating that the end of law "is not always the common good," and law is then directed to some particular good).
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The rhetoric of natural rights makes claims on behalf of the self, although these claims were usually oriented to joint actions in the pursuit of common goods. Historically, this modern sense of natural rights rhetoric came about because rulers would not always follow principles of equality and non-arbitrariness and individuals had to find justifications for self-help if their basic interests were to be protected. Those justifications sought to ground rights either as given by God, by the fact human beings were rational creatures, or by the fact that most human needs and abilities do not differ between individuals. Nonetheless, what natural rights rhetoric shared in common with natural law rhetoric was the ever-present sense that the rights being claimed were absolute and unalterable. The same cannot be said of today's human rights rhetoric, although some similarities with natural rights rhetoric endure.

Comparing natural rights to human rights, one finds, on the side of their similarities, that the rights proclaimed are universal, in the sense that they are held by all people regardless of one's rank or status. The U.N. Declaration says that the rights it declares hold for all people regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and, arguably, sexual orientation. Although sexual orientation is not specifically mentioned in the U.N. Declaration, an argument for it could be subsumed under the phrase “other status,” if sexual orientation is thought of as a status regardless of any behavior that identifies or accompanies it. Human rights are also similar to natural rights in that they are also imprescriptible; one cannot alienate these rights, although one can forfeit them as in the

53 See Pennock, supra note 8, at 8 (noting religious persecutions led to this outcome).
54 See id. (concluding that failure to “respect natural law” led to the development of the rhetoric of natural rights).
55 See LOCKE, supra note 48, § 25 (supposing that God gave the World to men in common).
56 See HUMAN RIGHTS, supra note 15, at 120-21 (stating that any agent who claims a right must admit that the right also belongs to other prospective agents). For Immanuel Kant, all actions, to be morally justified, have to comport with the categorical imperative. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (Lewis White Beck trans., 1976) [hereinafter FOUNDATIONS].
57 See HOBBES, supra note 47, ch. 23 (stating that every person has two capacities, one natural and another political).
58 See Pennock, supra note 8, at 6 (noting that human rights share in common with natural rights the qualities of applicability to all persons, inalienability, and validity independent of government).
59 See id. at 15 (distinguishing between feudal rights, where rank mattered, and modern general rights, which apply to all).
case of self-defense. Moreover, every person has the same measure of these rights.

On the side of their differences, human rights are not exclusive, as seen by the fact that compulsory education and social security are juxtaposed in the *U.N. Declaration* against the right to liberty. Nor are these rights necessarily absolute. Where the economic circumstances will not allow their fulfillment, the economic and social rights are not obligatory. This also be a reflection of the Kantian doctrine ought implies can. If, based on available resources, a nation cannot provide certain benefits to its citizens, such as, for example, social security, it shouldn't have to. In this regard, certain human rights may be overridden under circumstances in which more basic human rights would otherwise not be made available.

The rights mentioned in the *U.N. Declaration* allow for changes related to advances in technology and medicine, improved economic conditions, and increased awareness and sensitivity to human need. Even in the case of political rights, the right to life would arguably not apply to a comatose patient in a persistent vegetative state, nor might it apply to unborn fetuses, especially if there was a threat to the mother's life or health or a legitimate dispute over what constitutes a person. Moreover, while the origin of natural rights is historically grounded in metaphysics or theological doctrines, no similar grounding for human rights would likely pass muster today among scholars who question underlying assumptions. Still, one cannot afford to by-pass laying a

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61 The idea is that when one intentionally seeks to harm another, the other can resist such harm even if that means harming the perpetrator in return. See Pennock, *supra* note 8, at c.

62 See id. at 5, 15-16.

63 See id. at 7 (noting that exclusiveness is not specified by natural rights philosophies, but generally implied or assumed).

64 See id.

65 IMMANUEL KANT, CRITIQUE OF JUDGMENT 345 n.48 (Werner S. Puhar trans., 1987) [hereinafter CRITIQUE].

66 See Pennock, *supra* note 8, at 7 (stating that rights can vary in degree and importance).

67 See id. at 7 (noting that new human rights may come into being as a result of changed circumstances).


69 See Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47, 48-62 (1971) (attacking the argument that a fetus, even if considered a person, has a right to life).


71 See Pennock, *supra* note 8, at 3 (noting that the doctrine of natural rights was criticized because of its association with metaphysical or theological doctrines).

72 See id. (noting that the doctrine of natural rights has come upon "hard times").
foundation for human rights, for that would provide no basis for saying when these rights apply and when they do not.

This suggests that, while human rights may not be direct descendants of natural rights, they do bear a family resemblance to natural rights, at least as collaterals. It also suggests, in the tradition of natural rights, that to secure human rights one must be able to provide them with a firm foundation. The latter inevitably means going beyond institutional rights, which might be little more than ad hoc guarantees of what some human beings are willing to give. For this reason, it is important to spend some time considering what basis there might be for recognizing human rights.

III. A JUSTIFICATION OF HUMAN RIGHTS BASED ON NECESSARY GOODS

Here we might begin by asking: are human rights merely a product of interests, or are they, as Ronald Dworkin would say of rights, “a claim that it would be wrong for the government to deny an individual even though it would be in the general interest to do so”? Given the metaphysical problems with attempts to justify human rights, one might be inclined to ask: are human rights the product of some intuition, a result of some social contract, or simply a necessary condition for happiness? These questions all address how we justify human rights. Separate is the question of whether rights come out of duties or the reverse. In many instances, one prefers to say: I may have a duty (such as to help the poor) where no corresponding right exists (on the part of any poor person to my help). Where claim rights are involved, “there is a mutual entailment between the agent’s right-claim and this ‘ought’-judgment.” This is because the right-holder regards the ought-judgment as setting forth duties owed to him. Moreover, the ought-judgments are strict in the sense that the right-holder

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74 See HUMAN RIGHTS, supra note 15, at 2 (explaining that human rights often include a framework of institutional rights).
75 See Pennock, supra note 5, at 5 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 269 (1977)).
76 Two metaphysical problems arising from human rights grounded in religious doctrine include: proving the existence of God and the proper interpretation of her ordinances.
77 ALAN GEWIRTH, REASON AND MORALITY 61, 66 (1978) [hereinafter REASON AND MORALITY].
78 Id.
regards them as obligatory on the respondent and not mere notions of generosity and fittingness.  

As to various modern schemes to justify human rights, intuitions are not feasible justifications because people have conflicting intuitions. Nor does contractarianism work if the social contract is either surreal or involves assumptions that seem counterintuitive or counter-rational, as in John Rawls' hypothetical original position. Conventionalism is problematic in basing rights on the possibility of unjust conventions, like slavery or apartheid. Basng human rights on the intrinsic worth of human beings (as many religious moral theories do) begs the question. Even human happiness will not justify rights because not everyone will agree as to what constitutes human happiness.

What is lacking in each of these various justifications is a truly independent ground upon which every rational agent could agree that a right with a certain determinative set of contents exists. Still, such an independent ground might emerge from what all moral theories share in common, tied to strict rules of deductive and inductive logic. For example, because all moral theories are prescriptive, they presuppose that the individuals they address are voluntary purposive agents. According to Alan Gewirth, this normative property of all human action alone provides the independent ground to justify fundamental human rights.

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79 Id. at 67.
80 See HUMAN RIGHTS, supra note 15, at 43-44 (utilizing the Declaration of Independence as an expressive example of the intuitionist idea that "possession of certain inalienable rights is self-evident"). See generally JOHN RAWLS, A THEORY OF JUSTICE 19-21 (1971) [hereinafter RAWLS] (discussing justification of convictions and principles in that our principles don’t always match our convictions of justice since we continually adjust our principles).
81 See REASON AND MORALITY, supra note 77, at 108-109 (explaining that the drastic Rawlsian assumption that places persons behind a veil of ignorance is neither factual nor rational).
82 In John Rawls' A Theory of Justice, a group of representative agents approximately equal in physical and intellectual abilities, who share general knowledge of human motivations, but no knowledge of their own circumstances, are asked to decide on principles of justice that will govern their own and everyone else's behavior in society. RAWLS, supra note 80, at 11-13.
83 See HUMAN RIGHTS, supra note 15, at 44 (explaining that the institution which ground rights may itself be morally wrong).
84 See JACQUES MARTIN, THE RIGHTS OF MAN AND NATURAL LAW (1943); see also HUMAN RIGHTS, supra note 15, at 44.
85 See CRITIQUE, supra note 68, at 33 (noting that human happiness is an ascertainties hypothetical imperative).
86 See REASON AND MORALITY, supra note 77, at 26-28, 45-46.
87 See HUMAN RIGHTS, supra note 15, at 6-6 (noting that human action provides a rigorous basis for human rights).
The voluntary part of this ground arises from an application of Kant's dictum "ought" implies 'can', because it would make no sense to say one ought to do what one cannot do. The purposive part "ground surfaces" from the recognition that it would make no sense for a moral theory to address people who had no goals since they would have no reasons for acting. By having goals, one is motivated to set a direction for one's own life.

Now, starting from these two commonalities to all moral theories, the question arises: Can a determinative set of rights be derived every rational person would have to agree to that are based on necessary features of all human action? Gewirth believes that he has found a method capable of making this connection.

Starting from what Gewirth calls the internal "conative standpoint" of an agent—the view the agent takes of his or her own actions one might ask: What must an agent logically admit, on pain of contradiction, if she is to do any act for any purpose she regards as good? The idea here is to create an internal dialectic in which the agent must affirm a set of statements to be logically consistent with her doing any action for any purpose she regards as good. The connection between the doing of any action and the agent's choice to act is just the connection between the normative properties of the action—its voluntariness and purposiveness—which every moral theory must presuppose. The method, which Gewirth calls "dialectically necessary," works as discussed below. The quotation marks signify that the statements are made from within the internal conative standpoint of the agent.

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88 Id. at 54; see CRITIQUE, supra note 65, at 345 n.48.
89 See REASON AND MORALITY, supra note 77, at 38.
90 See HUMAN RIGHTS, supra note 15, at 20 (summarizing the method as a necessity, simple in its face, yet intertwined with a sequence of acceptances that lead to a logical conclusion).
91 See id. at 20-21 (explaining the dialectically necessary method as proceeding in the first-person).
92 Id. at 20. The relevance of the word 'necessary' here can be made clear if we draw a connection to what Plato does in the first book of the Republic. Recall that in his debate with Thrasymachus over the proper understanding of justice, Plato shows that Thrasymachus's view, which basis justice only on the interests of the stronger, may ultimately lead to results Thrasymachus himself would not want to accept. PLATO, The Republic, Book 1, in REPUBLIC I 3, 89-90" (G.F. Goold ed., 1930). This is because Thrasymachus's argument is contingent on serving only a certain set of interests that all people may not share, including himself once the argument is worked out. By contrast, Gewirth's dialectically necessary method seeks a basis for rights that any agent would logically have to accept on pain of contradiction. In other words, the argument is not confined to specific interests that may vary from one person to another, but results from a set of interests that agents qua agents must share, hence the word 'necessary'.
The agent begins by saying (1) “I do X for purpose E.” This is a statement in which the agent admits her own voluntariness and purposiveness in choosing to do some action for some purpose. It is what all moral theories presuppose about agents, and it is what is implicit in the normative structure of action. From (1), the agent concludes (2) “E is good,” whereby “good” the agent need not necessarily mean morally good. It can be any sense of good that indicates a pro-attitude or a reason or motive for action. Obviously, if doing X were not good at all, from the agent’s own point of view, the agent would not do it. Thus, the sense of good here is part of the agent’s conative attitude toward what she is doing. Perhaps the agent is being forced to do some action to avoid a threat to her own life. But even then there would be a limited sense of “good” in which the agent found it “good” to protect her own life.

From (2), the agent concludes (3) “My freedom and well-being are necessary goods.” Freedom comes in here with the notion of voluntariness. Well-being comes in with the notion of purposiveness. The idea is that if the agent wants to affirm doing any action, she must also affirm those generic features of the action that makes her doing it possible, namely her freedom to perform the action and her well-being to carry it out. From (3), the agent concludes (4) “I have rights to freedom and well-being.” Here some philosophers might object that a normative concept is being introduced with the term ‘right,’ which is without justification. But Gewirth responds to that objection by saying that the idea of a right is implicit in what the agent has already admitted.

To show this, he would have us return to (3), “My freedom and well-being are necessary goods.” Another way of writing (3) is as (3a) “I must have freedom and well-being,” if I am to do any X for purpose E. But suppose one now denies (4) because one wants to challenge its derivation. Let her write the denial as (4’) “I deny I

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95 See HUMAN RIGHTS, supra note 15, at 22 (noting that the agent controls his behavior with respect to achieving his own goal).
96 See id. (noting that the agent says something is good not because it actually is good but because the agent believes it to be good).
97 See REASON AND Morality, supra note 17, at 52-61 (explaining the logical move the agent makes from seeing her goal as good to viewing her freedom and well-being as necessary goods).
98 Id. at 52-53.
99 HUMAN RIGHTS, supra note 15, at 23.
100 See id. (following a rational chain of thought, since the agent has already determined freedom and well-being as necessary to her agency, she cannot believe she “must have freedom and well-being” and accept that there is a possibility of others interfering with them—it would be contradictory).
This is a ness and pose. It is what is the agent need not good that obviously, t of view, art of the haps the her own "good" in being are notion of rm doing he action cform the he agent e ere some is being ion. But of a right dom and (3) is as any X for wants to "I deny I

have rights to freedom and well-being." From this the agent would have to also deny (5) "All other persons ought at least to refrain from removing or interfering with my freedom and well-being."

This is because she is assuming that the rights at stake are claim rights having correlative duties associated with them. This assumption is reasonable because what one is talking about are the necessary goods required to perform any action at all. This means that the agent would have to also affirm (6) "I may not (i.e., It is permissible that I not) have freedom and well-being." Now, (6) contradicts (3a). Because (6) was derived from the controversy over (4), whereas (3a) was derived from the non-controversial (3), this means, via the negative proof, that (4) as originally written was correct.

At this point, one takes stock of exactly what Gewirth believes he has established thus far. He believes that he has established only a prudential rights claim, what an agent logically must admit from her own standpoint to be consistent with doing X for purpose E. He fully admits that, as yet, he has not established a moral rights claim. To go from a prudential rights claim to a moral rights claim, one would have to further show that all other persons also have these same rights to freedom and well-being. To do that, Gewirth points out (5) (without the prime) that the sole basis upon which the agent claimed (4) was that she was a prospective purposive agent—that is, that she wanted to do X for purpose E. No other basis, such as age, race, sex, sexual orientation, or mental agility was relied upon. This is an example of the Principle of Sufficient Reason.

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99 See id. at 68 (explaining the denial of rights correlates with a denial of "oughts").
100 Id.
101 Id. at 68-69 (identifying a prudential right as a "justified claim or entitlement ... that is based on a person's furthering his own self-interest").
102 See id. at 68 (explaining that the claims or rights are not yet moral because they exist only for the agent pursuing his or her own purposes).
103 See id. (emphasizing the concept of universal applicability as necessary to the transition, whereby one "is concerned to uphold not only his own interests but those of other persons as well").
104 See id. at 47. Gewirth points out that this concept derives from "what is logically involved in the structure of action," given the fact that agents usually act "for purposes they regard as worth pursuing," thus seeking to achieve such purposes.
105 See id. at 51 (explaining that the only sufficient justification for entitlement to such rights, which all agents must accept, is being a "prospective agent who has purposes she wants to fulfill"). Agents may hold certain rights, regardless of whether they have a specific reason for carrying out such rights, for to hold otherwise would be contradictory. Id.
who wants to do X for purpose E could make the same claim.\textsuperscript{106} This is an illustration of the Principle of Universalizability.\textsuperscript{107} From these two further points, Gewirth concludes that every agent must affirm (7) "Act in accord with the generic rights [that is, the rights to freedom and well-being] of your recipients as well as of yourself."\textsuperscript{108} This Gewirth calls the Principle of Generic Consistency, or PGC for short.\textsuperscript{109} It is, for Gewirth, the supreme principle of morality since it emanates out of what all moral theories presuppose—namely voluntary purposive action—and it concerns the most fundamental of human interests.\textsuperscript{110} Moreover, because anyone who would go through this dialectically necessary process would arrive at this same conclusion, Gewirth points out that we can drop the quotation marks on (7) and assert the principle assertorically (as a factual truth), not just dialectically (as a truth within a certain argumentative point of view).\textsuperscript{111}

In effect, what Gewirth has done here is to set forth a foundation for human rights based on features that any moral theory must presuppose. That these features are also natural for human beings is evident from the empirical fact that human beings claim to be voluntary and purposive when performing actions.\textsuperscript{112} That all rational agents must acknowledge the rights that follow out of these features is made plain by the logic that ties their statements to the normative structure of action. A different point is that the rights derived, along with their correlative ought judgments, have prescriptive force for humans because they are an outcrop of their own conative nature in treating their own purposes as good and in making claims to the necessary conditions of their fulfillment. As Gewirth points out, because the rights being claimed follow out of an agent’s desire to act voluntarily for her own purposes, she must

\textsuperscript{106} See id. at 51-52 (rationalizing that the general proposition of sufficient justification inevitably leads to universal application since rights are inherently present by virtue of being a prospective purpose agent; therefore all who hold such status will be afforded such rights).

\textsuperscript{107} See id. (noting that to avoid self-contradiction every agent must “accept the generalization that all prospective agents have the generic rights”).

\textsuperscript{108} Id. at 52.

\textsuperscript{109} Id. at 52-53. Gewirth explains his conception of the PGC as encompassing both “the formal consideration of consistency with the material consideration of the generic features and rights of agency.” Id. at 58.

\textsuperscript{110} See id. at 53.

\textsuperscript{111} See id. at 21; see also REASON AND MORALITY, supra note 77, at 150-61 (providing a more detailed discussion on the assertoric and dialectically necessary methods).

\textsuperscript{112} Here I would just note Kant’s transcendental argument, in section three of the Foundations of the Metaphysics of Morals, for the point that to have morals at all necessarily presupposes that human beings regard themselves as autonomous, at least from the point of view of the subject self. See KANT, supra note 65, at 89.
take account of the conditions necessary both for her agency to exist and to be brought to fruition. Finally, the rights are human rights in the sense that we have been using that term because they derive out of necessary features of all human agency.

Now, one can expect from this derivation that the PGUC would justify particular rights that protect human agency as an end in itself. Consequently, if the set of more particular human rights specified, for example, in the U.N. Declaration—along with the rights gays, lesbians, bisexuals and transgendered people claim— also protect human agency, then the PGUC would certainly support them as well.

IV. THE DERIVATION OF SPECIFIC HUMAN RIGHTS

Thus far the attempt to find a justification for human rights has focused only on “the most fundamental moral principle [of human rights]—the principle that provides the criterion for determining right and wrong for a [human rights] theory.” As C. E. Harris has noted,
a moral standard [including this one] is different from both a moral judgment and a moral rule. A moral standard furnishes a criterion for determining what makes an action right or wrong. Rather than referring to an individual action, or even a class of actions, it designates a characteristic that all right actions must have.

This means that the evaluations defining the moral standard may be too unwieldy, and too general to decide particular instances, since every specific case that comes along is unique. For this reason, the moral standard may be best used to identify whole classes of action, which would be evaluated as to whether or not they conformed to the moral standard.

Such classes would themselves be governed by a particular moral principle whose justification would be furnished by the moral standard. That principle, in turn, could then be used to resolve individual case determinations. Put another way, one would not need to appeal to the moral standard each and every time a moral issue was raised, unless the principle defining the class of cases to which it applies was itself in doubt. Bearing this in mind, it might be worthwhile to see some of the intermediate principles—

113 See HUMAN RIGHTS, supra note 15, at 51-52.
115 Id.
governing whole classes of cases—that the PGC would justify. These intermediate principles would then constitute the basis for determining specific human rights claims.

Starting from the PGC as the moral standard, what kinds of principles would the PGC support? Here it is important to make a distinction between principles related to personal ethics and principles related to social ethics. Since human rights (and, in particular, gay-rights) fall within the realm of social ethics, it will be helpful to confine the discussion to principles affecting just this area alone. Suffice it to say that there is also much value in discussing inner-personal morality in respect to all rights concerned, but that is a topic for another day. Treating social ethics, then, as the focus, one might begin by asking what sort of social arrangements the PGC would support, understanding that by doing this, one will eventually have to develop principles for law, politics, and economic and social interactions.

Here, one might begin by noting that freedom and well-being are not empty concepts, but encompass various types of goods. Included under freedom are the essential civil liberties that allow one to be a self-ruling individual, such as freedom of speech, freedom of the press, right of assembly, right to worship and right to privacy. These goods follow out of the freedom component of the PGC because they are essential to the doing of any action for any purpose an agent regards as good. That is, they are essential to agency itself. Under well-being are included three different categories of goods in order of their importance to prospective purposive agency: basic, nonsubtractive and additive. The basic goods include life,
physical integrity, and mental equilibrium. These are the most primary goods because without them prospective purposive agency is not even possible. Next follow the nonsubtractive goods, such as the right not to be lied to, cheated, or otherwise to have one's purpose fulfillment decreased. These are the second category in importance of goods because they maintain one's level of purpose fulfillment without diminishment. Lastly are the additive goods. These goods include such economic and social rights as might be required to increase one's level of purpose fulfillment. They include rights to education, health care, a decent standard of living, welfare, etc. These are the third group in Gewirth's hierarchy of importance because they add to one's overall purpose fulfillment and capacity to protect one's basic rights in the long run. If the PGC derives out of the necessary conditions for human purposive agency, then the PGC must provide an end that such purposive agency supports.

Now these different goods illustrate that the PGC is more than just a formal principle involving universalizability and consistency. It also has certain definite contents in the form of the rights the above referenced goods are about. Those contents are themselves necessary, as shown by the fact that they follow out of the conditions that make purposive agency possible. Thus, one cannot legitimately deny these contents to others based on some more restrictive criterion (such as being white, male, or straight) even if

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122 See HUMAN RIGHTS, supra note 15, at 55-56 (stating that each of these basic goods are necessary preconditions of action).
123 See REASON AND MORALITY, supra note 77, at 54 (explaining that an agent ceases to exist when "his purpose is to put an end to all his purposive actions").
124 See HUMAN RIGHTS, supra note 15, at 56 (noting that an agent's nonsubtractive rights are violated "when he is adversely affected in his abilities to plan for the future").
125 See REASON AND MORALITY, supra note 77, at 56, 69 (asserting that a loss of a nonsubtractive good lowers one's level of purpose-fulfillment). In Gewirth's hierarchy, nonsubtractive goods rank higher than additive goods because "to be able to retain the goods one has is . . . a necessary condition of being able to increase one's stock of goods." Id. at 63.
126 See HUMAN RIGHTS, supra note 15, at 56 (noting that additive goods, also increase an agent's capabilities for particular actions); see also REASON AND MORALITY, supra note 77, at 56 (distinguishing different meanings of the phrase "additive good"). In one meaning, "an additive good is any positive object of any purpose . . . ." Id. In the second meaning, "an additive good is only such a positive object of a purpose as is not comprised within basic and nonsubtractive goods." Id.
127 See HUMAN RIGHTS, supra note 15, at 56 (stating that an agent's additive rights are violated when the agent's ability to act effectively in pursuit of their purpose is hindered).
128 See REASON AND MORALITY, supra note 77, at 54-55, 63 (asserting that a gain of an additive good increases an agent's level of purpose fulfillment).
129 See HUMAN RIGHTS, supra note 15, at 51 (concluding that every agent "must hold or accept that he has rights to the necessary condition of action," and, without such acceptances, no agency exists).
one were willing to forego the same rights for themselves. Since these contents are required for all human agency, any attempt to deny them would itself invoke their existence. Moreover, because one cannot deny these contents even to oneself, fairness in consistency mandates that one not deny them to relevantly similar others. Again, the sole criterion of relevant similarity here is that the other is an agent. This suggests that implicit in the PGC is a principle of justice that goes beyond treating like cases alike, but has specific material contents that must be considered in granting to each that which is his or her due. Those contents were described above as the various goods at stake. For now, it suffices to say that Gewirth believes that these contents along with the requirement of consistency, provide distinct solutions to deal with conflicts of duty.

Where the conflict of duties involves rights at the same level, such as a gunman using his right to freedom to subdue his victim’s freedom, as with the statement “your money or your life,” the conflict is strictly one of consistency. In that case the gunman is violating the PGC’s requirement that he give equal accord to the generic rights of his recipients, thus creating a transactional inconsistency between himself and his victim. To avoid the inconsistency, the victim must be morally free to respond to the gunman with various self-defense measures even if they lead to the gunman’s death. A different situation occurs where the rights that are in conflict are at different levels of importance with respect to furthering prospective purposive agency. In a case, for example, where the Gestapo asks “Where is the Jewish family?” it is permissible for the respondent to lie, even though lying is a violation of the Gestapo officer’s nonsubtractive rights. Lying is permitted as the Gestapo officer is going to use his right to freedom to deny basic goods to the Jewish family, in violation of the PGC’s

130 See id. at 51-52 (noting that every agent must accept that all prospective purposive agents have rights).
131 See id. at 52-53 (demonstrating that if an agent were to deny or refuse to accept rights to other prospective purposive agents, he would contradict himself).
132 See id. (explaining the Principle of Generic Consistency (PGC) which requires that every agent accord his recipients the same rights to freedom and well-being that he claims for himself).
133 Plato recognizes in The Republic an early definition of justice to be “render[ing] to each his due.” Plato, supra note 92, at 21.
134 See REASON AND MORALITY, supra note 77, at 842, 854 (noting the importance of the consistency between the agent’s claim to necessary conditions of action and his corresponding action).
135 See id. at 213-14 (stating that the recipient’s actions in self-defense is “an attempt, in part, to ‘restore an equilibrium’ disrupted by [the gunman’s threat]”).
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requirement to give equal accord to the rights of others, and since basic rights are more essential to purposive fulfillment than nonsubtractive rights. Moreover, if one can do it with impunity, lying is also obligatory. These situations are admittedly extreme and obvious examples. What one should do or how one should approach it may also not be so obvious, as everyday situations are not so clear. For this reason, the PGC allows the empowerment of third party institutions (that include, for example, judges, prosecutors, and police) to render more carefully worked out judgments and to enforce specific penalties to deter these situations.\footnote{See HUMAN RIGHTS, supra note 15, at 276 (stating that rules are necessary to resolve conflicts and that officials must "make, interpret, and execute the rules").}

In effect, these institutions are justified by the PGC because they promote the equal freedom and well-being of all persons. Self-help remedies do not always promote equal freedom and well-being, especially in the long run; as a result more comprehensive institutions may be necessary. The PGC thus supports such comprehensive institutions when they are able to advance individual purposive fulfillment better than supporting direct action by individuals, and when they are the product of a free choice by the individuals concerned. Such support by the PGC, also, might be thought of as indirect compared to the more direct approaches mentioned above, because it does not, in the first instance, attach itself to specific individual behaviors. Even so, it may provide morally stronger grounds for the regulation of individual behavior than the more direct application because of its ability to also promote truth finding and fairness for all people.

In respect to political, social, and economic institutions, at least two basic concerns are at stake. One goes to individual freedom; the other to well-being.\footnote{See REASON AND MORALITY, supra note 77, at 135 (stating that the two components of the PGC involve "rights of freedom and well-being").} The freedom component usually manifests itself in terms of how one gets tied to an institution,\footnote{See id. at 261 (stating that "human: associations are extensions of freedom, in that persons unforcedly choose or agree to participate in them and to obey their rules").} and what decisions an institution can make on one's behalf.\footnote{See id. at 282-83 (noting that an institution's rules "are prima facie morally right" if a proper form of consent is given by its members).} In effect, it deals primarily with the issue of consent.\footnote{See HUMAN RIGHTS, supra note 15, at 61 (explaining that the application of the freedom component to institutions involves optional or necessary consent; the consent is optional for voluntary organizations where one does not have to be a member, necessary for the decision procedures of government voting where one in born into membership).} Consequently, Gewirth
calls this manifestation of the freedom component on institutions “procedural.” In contrast, the well-being component usually gets manifested in terms of how well the institutions provide conditions under which human voluntary purposive agency can be brought to fulfillment. Here the issue is how to support the well-being of all persons. Since the conditions under which such agency is promoted are the means and human agency is the end, Gewirth calls this application of the well-being component “instrumental.” Together the two components reflect the two strains of foci that define the PGC.

Focusing within these two different manifestations, one can further distinguish, on the procedural side, optional and necessary consent. Optional consent applies to safeguarding freedom against being forced into institutions that one would not belong to except by coercion. Necessary consent applies to governmental institutions, where persons are born under the aegis of some government they initially did not choose. Necessary consent is satisfied when the government the person is born under provides reasonable conditions (e.g., through voting) for consenting to its own decision procedures.

Under the instrumental component, government must first protect against violations of rights and, second, provide for the enhancement of human agency in the long run. The first, or static, application of the instrumental component is reflected in the

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141 See id. (extending “From the PGC’s freedom component... that social rules and institutions are morally right insofar as the persons subject to them have consented to accept them”).
142 See id. at 56, 61 (stating that institutions should protect a person’s well-being, including its nonsubtractive element of “maintaining undiminished one’s level of purpose-fulfillment and one’s capabilities for particular actions”).
143 Id. at 61 (extending “From the PGC’s well-being component... that social rules and institutions are morally right insofar as they operate to protect and support the well-being of all persons”).
144 See id. (noting that the procedural component derives from the PGC’s freedom element and that the instrumental component derives from the PGC’s well-being element).
145 See id. (acknowledging that, in addition to procedural applications, the instrumental applications are, in one of two ways, also static and dynamic).
146 See REASON AND MORALITY, supra note 77, at 283-85 (stating that individuals are given freedom or voluntary consent to determine which institutions to belong to and be bound by their rules).
147 See id. at 283 (noting that an individual cannot voluntary consent to the state in which he must live and the laws to which he must obey).
148 See HUMAN RIGHTS, supra note 15, at 61 (arguing that the consent of necessary procedural applications “operates as a general decision procedure using the civil liberties to provide the authoritative basis, through elections and other consensual methods, of specific laws or governmental officials”).
149 See id.
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criminal and civil laws, provided the goals there are to prevent loss of occurrent purposive fulfillment through deliberative action.\textsuperscript{150} This aspect of the instrumental component also requires a grant of due process so that only those responsible for some misfeasance (or who are guilty of some crime) will be subjected to the penalties or punishments of the state.\textsuperscript{151} The second, or dynamic, application of the instrumental component is to provide individuals with the social, cultural, educational, and economic conditions necessary for not only maintaining their level of purposive fulfillment, but for bringing it to fruition.\textsuperscript{152} This is done by requiring government, wherever possible, to provide reasonable systems of education, health care and social services, and to support cultural and other social events that aid one to develop a positive self-image and identity.\textsuperscript{153}

From the application of these two components of the PGC to institutions, one begins to see how a set of principles not far removed from those found in the \textit{U.N. Declaration} gets justified. Under the freedom component, one finds a justification for rights to liberty; to not be held in slavery; to have privacy respected; to travel and asylum; to change nationality; to own property; to freedom of thought, conscience and religion; to hold and express opinions; to peacefully assemble; and to be able to take part in government.\textsuperscript{154} Under the well-being component, one finds a justification for rights to life; to not be subject to torture or inhumane treatment; to be treated as an equal before the law; to not be subjected to arbitrary arrest, detention or exile; to a fair and public trial; to a presumption

\textsuperscript{150} \textit{See id.}
\textsuperscript{151} \textit{See REASON AND MORALITY, supra note 77, at 292} (distinguishing between static and dynamic justifications of the PGC, and noting that the criminal law fosters protection and restoration of personal equality); \textit{see also HUMAN RIGHTS, supra note 15, at 61-62} (explaining that "only persons who have violated [basic and important] rights of others are to be punished").
\textsuperscript{152} \textit{See REASON AND MORALITY, supra note 77, at 292} (describing the "dynamic phase" as one that attempts to "move toward a new situation in which a previously nonexistent dispositional equality is attained or more closely approximated"); \textit{see also HUMAN RIGHTS, supra note 15, at 62} (stating that dynamic-instrumental justification "recognizes that persons are dispositionally unequal in their actual ability to attain and protect their generic rights, especially their rights to basic well-being, and it provides for social rules that serve to remove this inequality").
\textsuperscript{153} \textit{See HUMAN RIGHTS, supra note 15, at 62} (listing "supportive rules," including education, safe housing, and working conditions, and other "public goods" that allow for the "rectification [of] inequalities of additive well-being").
of innocence; and to an adequate standard of living, decent health care and a good education. In effect, then, applying the PGC to the realm of human affairs, as typified in much of social ethics, produces a set of midrange principles not dissimilar to those found in the U.N. Declaration.

V. GAY-RIGHTS AS PARTICULAR INSTANCES OF THESE MIDRANGE PRINCIPLES

It is now time to come back to the point from which this article began. That is, to show that the claims of gays and lesbians to rights to privacy, nondiscrimination, marriage, parenting, and so forth, are indeed particular instantiations of the human rights found in the U.N. Declaration of Human Rights. To do this, however, it will be necessary to identify three important human rights components of such claims, which are also related to the two components—freedom and well-being—identified above. This is important to show that the claims lesbians and gays are making have the same foundation as the rights found in the U.N. Declaration. Those three components are privacy, freedom of speech, and equal protection of the laws. Privacy and freedom of speech are components here because, as will be shown below, they directly relate to freedom and indirectly support well-being. Equal protection of the laws is important because it directly relates to well-being and indirectly supports freedom. So, in making the transition from human rights, in general, to gay-rights, in particular, one continues to protect voluntary purposive agency, as an end of moral reasoning.

Even if one were not to accept the Gewirthian argument for basic human rights, provided one affirmed fairly general rights to privacy, liberty, equality, and justice, the arguments made here for gay rights would still succeed. In that instance, the test would not be whether specific gay rights can be derived from some universal rights principle of voluntary purposive action. Rather, the test would be whether the analyses offered to justify gay rights would also ground those other human rights already accepted. Put another way, the analyses would succeed by providing a way to see

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155 Id.
156 See infra notes 159-215 and accompanying text.
157 See infra notes 216-37 and accompanying text.
158 See REASON AND MORALITY, supra note 75, at 135, 256 (defining the two components of the PGC as freedom and well-being, and noting that the right to freedom includes "a sphere of personal autonomy and privacy" that includes "sexual conduct").
gay rights as mere particular instantiations of these other, already accepted, more general human rights.

A. Privacy

With respect to privacy, voluntary purposive action is promoted when individual privacy is protected. But it is privacy interpreted in the right sense that needs to be protected. In other words, the sense of privacy that some feminist theorists have expressed concern about—namely, the sense that protects male domination of women in the bedroom and in the marital relationship—is not the sense of privacy that is at stake here. For that sense of privacy would not support the equal voluntary purposive action of women compared to men. To the contrary, the sense of privacy that is at stake here is the sense that affirms certain actions as private just because they do not affect others, at least not in the first instance. And related to this notion of a private act is the sense that certain states of affairs are private because they provide places of safe haven or information that contribute support to the performance of private acts.

In American law, privacy developed in three distinct areas: Fourth Amendment, tort, and constitutional law. Here one moves in the opposite direction from the first part of this article. That is, one moves from specific laws to fundamental human rights rather than from a seemingly noncontroversial premise to a moral standard that then justifies those specific rights. Fourth Amendment privacy protects persons against searches and seizures where there is a reasonable expectation of privacy. A person

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159 See id. (equating voluntariness with freedom, and exploring the role of consent in the recipient’s participation in transactions).
160 See Linda C. McClain, Inviolability and Privacy: The Castle, the Sanctuary, and the Body, 7 Yale J.L. & Human. 125, 222-23 (1995) (explaining Andrea Dworkin’s theory that "women have a lesser privacy due to the physical design of their bodies and the existence of intercourse," and noting that women’s privacy is limited by the fact that "[t]here is never a real privacy of the body that can co-exist with intercourse").
161 See SAMAR, supra note 22, at 19, 21, 23 (summarizing the development of these three areas).
162 This move from merely following a principle of law that is unclear or unjust to adopting a higher-ordered principle that contains the earlier one I elsewhere call "epistemic pragmatism." Its justification is the justification of law itself as creating a moral duty that one ought to obey. See VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 60, 70-71 (1995) (detailing the five steps a judge would consider in deciding to engage in epistemic pragmatism).
163 U.S. CONST. amend. IV; see also SAMAR, supra note 22, at 28 (discussing Katz v. United States, 389 U.S. 347 (1967), a decision that extends the zone of privacy "as far as a court would consider a reasonable person to expect").
using a cell-phone in an automobile would have a reasonable expectation of not being heard, but no such expectation of not being seen. The expectation, of course, could be overridden by a compelling interest of the state that might exist, for example, if the police obtained a warrant to install a wiretap because they had probable cause that a crime was in the making. Tort privacy revolves around protecting one's seclusion and solitude, not being placed in a false light, not having embarrassing facts said of oneself, and not having one's name or likeness used for commercial purposes without permission. Due to the fundamental right of freedom of the press, violations of this area of privacy may not be protected for public officials and public figures if actual malice is not present. Consequently, in those instances, the right of the public to information and the ability of the subject to respond to false or misleading information combine to outweigh the protection of privacy.

Constitutional privacy concerns the freedom of the individual to make intimate decisions. Under the Constitution of the United States, this area of privacy has been extended by the courts to protect certain forms of individual freedom. For example, the constitutional right to privacy has been held to justify the rights of married and unmarried couples to use contraceptives, the right of a woman to have an abortion, and the right of a person to watch

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164 Although, the phrase “compelling state interest” is not usually used in connection with Fourth Amendment protections, the idea, nevertheless, governs under a slightly different language form. See SAMAR, supra note 22, at 80 (arguing that the legal exigencies that are recognized by the Supreme Court—which may at any moment be in flux—represent a determination by the Court that either the protection of the right is outweighed by a greater policy interest of the state or that no policy purpose of the Amendment is served by extending its protection to the situation in question).

165 See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 814 (4th ed. 1971) (discussing the distinct nature of the four forms of invasion of privacy); see also SAMAR, supra note 22, at 28-29; William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960) (hereinafter Privacy) (describing the four torts under the law of privacy).

166 As Justice Douglas remarked in Time, Inc. v. Hill, 385 U.S. 374, 401 (1967), “[i]n such privacy as a person normally has ceases when his life has ceased to be private.”

167 See Privacy, supra note 165, at 412, 415-16 (noting that the positions of public officials and the recognition of the public figure grant them the ability to create and/or garner news coverage to clear their name).


adult pornography in his home. It has not, however, been recognized to justify the rights of adults to have same-sex consensual sexual relations in their home.

Three separate questions follow out of this cursory inspection of the different areas of privacy law. First, what is the exact nature of the right to privacy? That is, how can the coverage of this right be understood to encompass the seemingly distinct natures of selective disclosure of information (as typify much of the tort and Fourth Amendment law) and the liberty interest (as fits the constitutional area)? Second, what is the justification behind the right to privacy? Finally, how does that justification help resolve conflicts between privacy and other active rights and important governmental interests?

With regard to the first question, cases from the above areas suggest two common strands to understanding privacy law. First, all the cases involve claims of negative freedom in the sense of the right-to-be-let-alone and, second, all involve self-regardingness in the sense that no other relevant interests are involved. From these two common threads we can derive a definition for what a private act is, which I take to be central to the law of privacy. That definition is: "An action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors." The definition derives from the two common strands of privacy law insofar as it provides a theoretical definition of what self-regardingness means and a rationale for understanding why one would claim to be left alone.

One important concern that must be attended to in the definition of a private act is the meaning of "in the first instance." This is important because there is a sense in which any act (by the mere fact of its being known) can affect another person. A fundamentalist Christian, for example, may feel disgust living in a state that allows abortion or same-sex sexual relationships. Thus, to avoid the problem of having no act ever be private, I understand the phrase in the first instance to mean that a mere description of

170 Stanley v. Georgia, 394 U.S. 557, 564, 568 (1969) (protecting an individual's right to receive information and ideas, regardless of their perceived social value).
172 See supra note 22, at 64 (describing privacy as a "negative freedom").
173 Id. at 68.
the act without the inclusion of any additional facts or causal theories suggests a conflict with another's interest. That is not to say that if a conflict could be established by additional facts or causal theories with another's interest, then it may not be enough to override privacy. However, it does say that privacy would still be at stake, which means that, if it were to be overridden, it would have to be because the other right or interest was more important to securing why we protect privacy to start with. Exactly how this might happen will become clear shortly.\textsuperscript{174}

Another issue concerning the definition of a private act is the difference between the basic interest of the actor and the interest of the specified class of actors. The point is not to undo, by an overly broad sense of the word "interest," what the specification of "in the first instance" achieves. To prevent this from happening, one must understand a basic interest as an interest that does not presuppose any institutional or factual conception. Any other interest is a derivative interest, as it would include such institutional or factual conceptions. So, for example, the category "freedom" subsumes such basic interests as expression, privacy, thought, and worship. The category of well-being subsumes such basic interests as health, physical integrity, and mental equilibrium. By contrast, the right to marry is derivative of the basic interest in freedom combined with the institutional arrangement of marriage, and the right to a primary education is derivative of the basic interest in well-being combined with the factual conception that a primary education advances one's well-being.

However, the definition of a private act does not capture why private information and states of affairs are protected. For that a separate, but related, definition of a private state of affairs is needed. \textit{"A state of affairs is private with respect to a group of other actors if and only if there is a convention, recognized by the members of the group, that defines, protects, preserves, or guards that state of affairs for the performance of private acts.}\textsuperscript{475} The first definition works to define what a private act is. The second works to identify the privacy interest at stake where information and places are causally connected to private acts. The two definitions are related because what other people know or can find out about another may inhibit a person from the performance of private acts. They are also

\textsuperscript{174} See infra notes 179-91 and accompanying text (discussing Bowers v. Hardwick, 478 U.S. 186 (1986), a case demonstrating how the right to privacy can be overridden by other factors, particularly the interests of the state).

\textsuperscript{475} SAMAR, supra note 22, at 73.
related because people sometimes need a private space to feel the personal satisfaction that makes worthwhile the performance of private acts. Thus, while the first definition is part of what is meant by privacy, the second definition comes about because of the psychological/causal connection between private acts and what others can find about them.

Turning to the second question, a justification for the right to privacy begins with autonomy as a value. Properly understood, autonomy, in the sense meant here, refers to the conditions under which one acts, as opposed to privacy, which involves the nature of one's action. The conditions under which one acts, if autonomous, should follow out of the nature of the action itself and not from any outside forces. So, for example, if individuals play the stock market, their choices are autonomous even when limited by the economic laws of supply and demand, but they are less autonomous when SEC regulations mandate additional, non-market rules. Understood in this way, the value associated with autonomy is the value associated with self-rule, in which the individual is free to act unless doing so would jeopardize the equal autonomy of others. That said, one could use this notion of justified autonomy itself as a justification for privacy rights.

The justification works as follows. If autonomy is a value, then the most idealized instance of autonomy must also be a value. Since privacy, according to our definition, involves only actions that do not affect others in the first instance, it must be a value if autonomy is valued. One often wants to say that autonomy is limited only when another's interest is at stake. However, since privacy, by definition, involves only those actions where another's interests are not at stake, at least not in the first instance, to value autonomy at all, *eo ipso* is to value privacy.

Beyond protecting private acts, this notion of autonomy also justifies democratic government and private states of affairs. Where the former justification of private acts is *a priori*, the latter two are *a posteriori*. That is to say, where, in the former situation, the value of private acts follows out of what it means to value autonomy at all, in the latter situation the value of private information and states of affairs derive from the causal connection

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176 See Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 314 (Ferdinand David Schoeman ed., 1984) (arguing that privacy "is a right which protects my capacity to enter into intimate relations ... because it enables me to make the commitment that underlies caring as my commitment uniquely conveyed by my thoughts and witnessed by my actions").
autonomy has to both democracy and private states of affairs. That connection is that protecting these latter two ends preserves autonomy generally. Promoting democracy protects autonomy by ensuring that everyone can engage in self-rule; protecting private states of affairs guarantees autonomy by providing individuals with the opportunity to perform private acts. Interestingly, democracy and the protection of private states of affairs are inter-justificationally related because, if one has the opportunity to engage in private acts or to discover information about them, one can be a more informed voter. And if one is an informed voter, one will seek to protect private states of affairs as a condition under which that information is obtained unless there would be some harm caused to others in the process. So, even from a minimal understanding of autonomy, such as involving the idealized protection of private acts, one can derive safeguards for the protection of private places and private information.

Having said this, one considers how important the protection of privacy is relative to other rights and interests the state may also be seeking to protect. This is the third question to be discussed. Here one notes that even though autonomy is a basic value, it is not the only one. As a basic value, autonomy can support a number of rights including: the right to travel and asylum; to change nationality; to own property; to freedom of thought, conscience and religion; to hold and express opinions; to peacefully assemble; to be able to take part in government, and, of course, the right to privacy. Privacy also encompasses some of these other rights, such as the right to travel and freedom of thought, although it does not encompass freedom of speech or the press since those rights are meant to engage others, and even sometimes conflict with privacy. When that happens, because they are all active rights—i.e. rights that can be justified by autonomy—promotion of autonomy serves as a common denominator to determine which right should govern in conflict situations.

Alternatively, privacy may also conflict with certain state interests that are also supported by autonomy. This occurs where the state asserts a compelling interest—that is, an interest more essential to the protection of autonomy generally than protection of individual privacy. One can imagine, for example, the right of freedom to travel being restricted because the state discovers that the individual carries a deadly disease spread by an airborne virus. In that case, it is not even the promotion of autonomy, but its very protection, that justifies the state's interest as sufficiently
compelling to interfere with individual travel. It is also not, strictly speaking, a conflict of rights situation because no other person is asserting a right.\textsuperscript{177} Rather, it is the state, acting in its capacity to protect the democratic end of autonomy, that is raising the challenge. Privacy in the sense of freedom to travel is overridden, in this situation, because its very justifying ground would be undone if travel were not restricted.

But autonomy may not be the only general value restricting privacy. Setting forth a certain type of economic system (capitalism, for example) may be a basic value, but not necessarily an autonomy-based value. When privacy appears to conflict with a right based on another value, the conflict is purely illusory for, in that instance, the other right would be seen as a basic interest of the respondent (i.e., a passive right), rather than as an active right. As such, there would be no conflict because, by definition, privacy cannot conflict with a basic interest of any of its respondents.\textsuperscript{178} In other words, this apparent conflict gets resolved on the basis of how privacy is defined.

All of this suggests that the theoretical difficulties posed by conflicts of rights are not real challenges to a right to privacy. Even so, there may be certain practical difficulties related to how such conflicts get recognized that require information from disciplines other than law or philosophy, such as sociology. But these factual matters are not unfamiliar to judges and legislators, who can gather the means to help resolve them. So, one can now ask: What does the human right to privacy mean specifically for gay-rights?

It means that laws, which prohibit adult consensual same-sex activities in the home, are morally illicit and should be held

\textsuperscript{177} See, e.g., REASON AND MORALITY, supra note 77, at 142-44 (discussing an apparent conflict of rights scenario raised by the issue of abortion).

The justifying criterion for having the generic rights is that one is a prospective agent who has purposes he wants to fulfill. When someone is less than a full-fledged prospective agent, his generic rights are proportional to the degree to which he approaches having the generic abilities constitutive of such agency, and the reason for this proportionality is found in the relation between having the rights and having the generic abilities required for acting with a view to purpose-fulfillment.

\textsuperscript{178} See supra text accompanying note 178 (providing a definition of a "private act" central to the law of privacy).
unconstitutional if the constitution is to be interpreted as affording basic human rights protections. This is particularly the case in the United States, since the U.S. Supreme Court ruled in *Bowers v. Hardwick*\(^{179}\) that states can constitutionally pass sodomy statutes that prohibit adult consensual same-sex conduct in the home.\(^{180}\) What is most evident from that decision was its total avoidance of any claim that the petitioner had a prima facie privacy right even if it were overridden by a compelling interest of the state. Rather, what the Court said was that its own prior case law involving the use of contraceptives by married and unmarried persons,\(^{181}\) the right to watch pornography at home,\(^{182}\) and the right to an abortion\(^{183}\) did not extend to covering two consenting adults seeking to engage in same-sex sexual sodomy in the home.\(^{184}\) In other words, for a majority of the Court, privacy was not even an issue in this case.\(^{185}\) But this is clearly a mistake, given what has been said concerning a private act. A mere description of the action involved in *Bowers* does not impinge the basic interest of any other person in the relevant group of actors.\(^{186}\) The Court should have first acknowledged this, and then if it so thought, said what the basis was for any derivative interest trumping privacy. The Court did none of this, and that failure more than even its conclusion marks this case as a particularly notorious departure from the traditional protection afforded fundamental human rights.

Beyond the initial criticism of what the Supreme Court did in *Bowers*, the decision has often been cited to justify discriminating against gays and lesbians in housing, employment, and public

\(^{179}\) 478 U.S. 186 (1986).

\(^{180}\) See id. at 196 (noting that the respondent asserted that the only rational basis for the law was "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" and that such basis was inadequate). The Supreme Court was unpersuaded and observed, "[t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.*


\(^{182}\) Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that it is unconstitutional to make private possession of obscene materials a crime).

\(^{183}\) *Roe v. Wade,* 410 U.S. 113, 164-66 (1973) (concluding that making an abortion decision is a qualified right of personal privacy).

\(^{184}\) *Bowers,* 478 at 196 (holding that there is no fundamental right to engage in homosexual sodomy).

\(^{185}\) See id. at 190 (indicating the Court's disagreement with the finding by the court below that the right to privacy extends to homosexual sodomy).

\(^{186}\) *Id.* at 187-88.
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basis for the homosexual be Supreme notions of ad under the prescribing and to make obvious decisions. homosexual court below accommodations, and to prevent gays and lesbians from serving in the military, from marrying, and from raising children. In this way, Bowers becomes the poisonous tree whose fruit infects other areas of the law. It is the central case in the devolution of gay and lesbian people. In its history, the U.S. Supreme Court has had some unfortunate examples of where one morally illegitimate law is used to bolster and support other laws that restrict basic human rights. It is time for the modern Supreme Court to bring

187 Bomer v. Evans, 517 U.S. 620, 638 (1996) (Scalia, J., dissenting). Justice Scalia described Colorado's amendment 2 to its state constitution—that prohibited the state legislature and all municipalities from passing any pro-gay anti-discrimination legislation—as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores." id. (Scalia, J., dissenting). Justice Scalia's dissent was, in part, based on his belief that the majority opinion was contrary to the Court's previous ruling in Bowers. See also Shahar v. Bowers, 114 F.3d 1097, 1110-11 (11th Cir. 1997) (en banc) (affirming a lower court's decision concluding that terminating employment because of the female plaintiff's purported "marriage" to another woman did not violate her constitutional rights); Jantz v. Muci, 976 F.2d 623, 626, 631 (10th Cir. 1992) (granting summary judgment in favor of a defendant who allegedly rejected the plaintiff for a full-time teaching position due to his homosexual tendencies); Iriarte v. Bd. of Educ., No. 99-CV-8581, 2000 U.S. Dist. LEXIS 12414, at *6 (N.D. Ill. July 26, 2000) (dismissing the complaint because "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater constitutional protections").

188 See Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991); Pruitte v. Cheney, 943 F.2d 399 (9th Cir. 1991); Ben-Shalom v. Marsh, 851 F.2d 454 (7th Cir. 1988). Prior to Bowers, challenges to the military's policy barring gays and lesbians were usually based on privacy grounds. See, e.g., Dorenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984). Since then challenges to the military's policy have focused on first amendment and equal protection grounds. See, e.g., Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Elkinberg v. Perry, 97 F.3d 266 (8th Cir. 1996). A particularly interesting dissent with respect to the relation of Bowers to equal protection occurred in a case that was later modified on other grounds. Watkins v. U.S. Army, 487 F.2d 1428, 1451 (9th Cir. 1982) (Reinhardt, J., dissenting), modified, 875 F.2d 669 (9th Cir. 1989) (en banc).


190 See, e.g., Dept. of Health and Rehab. Serv. v. Cox, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993) (holding that a statute prohibiting adoptions by homosexuals did not violate the Florida constitutional right of privacy). However, it should be noted that the effect of Bowers on parenting decisions is diminishing as more states allow gay people to adopt. Compare In re Adoption of Charles B., 552 N.E.2d 884, 889-90 (Ohio 1990) (granting a petition by a single homosexual male to adopt an eight-year-old boy), with Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (failing to cite any evidence to support its finding that the child would suffer as a result of the parent's sexual orientation). In the years after the Ohio Supreme Court's decision, several other states, including New York, New Jersey, Vermont, and Massachusetts followed suit. See Heapher J. Langanak, The "Best Interest of the Child": Is A Categorical Ban on Homosexual Adoption an Appropriate Means to this End?, 88 MARQ. L. REV. 826, 838-41 (1999) (criticizing In re Adoption of Evan, 583 N.Y.S.2d 997 (N.Y. Supr. Ct. 1992); Adoption of Tanumy, 619 N.E.2d 315 (Mass. 1994); In re Adoption of Two Children by H.N.K., 566 A.2d 535 (N.J. Super. Ct. App. Div. 1990); In re Adoption by J.M.G., 632 A.2d 560 (N.J. Super. Ct. App. Div. 1993); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993)).

191 See, e.g., Korematsu v. United States, 323 U.S. 214 221-24 (1944) (sustaining a Civilian Exclusion Order by President Roosevelt which required all persons of Japanese ancestry to
this pattern to an end, and a good way to do this to would be by reversing its decision in Bowers v. Hardwick.

B. Freedom of Speech

Over the years, a variety of different justifications have been offered for protecting freedom of speech. Some of the most famous are John Stuart Mill’s arguments that freedom of speech advances the discovery of truth by allowing all ideas to be debated in an open marketplace where no idea is forced into silence.\textsuperscript{192} Mill also argues that freedom of speech adds to people’s heartfelt convictions by pushing them to go beyond mere professions of faith, by founding their beliefs upon the rationality of their positions.\textsuperscript{193} Other commentators have afforded different justifications for freedom of speech, including that it contributes to democracy and political stability, and that it adds to the good life.\textsuperscript{194} Still, as important as all these arguments are to the protection of human rights generally, there is a sense in which they are all circumstantial rather than direct protections of human rights.

While each provides an important condition for human rights emerging and being maintained in society, none of them are derived from the same foundation that justifies human rights as such. The difference is that all these other justifications are based on collateral virtues, such as truth, democracy, and a conception of the good life. If one could gain truth without a marketplace of ideas, or gain autonomy without democracy, or have a conception of a good life that does not require openness of ideas, then freedom of speech could be dispensed with. So, to make the argument that freedom of speech should matter in every situation (regardless of whether it is ultimately determinative), one would have to find that freedom of speech is itself a human right. One way to establish that would be to show that freedom of speech is essential to the possibility of

\textsuperscript{192} See JOHN STUART MILL, ON LIBERTY 64-67 (Curran V. Shields ed., The Liberal Arts Press, 1956) (1859).
\textsuperscript{193} See id. at 64 (asserting that, absent freedom of opinion and freedom of expression, an individual’s character will be gravely affected).
\textsuperscript{194} See FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 35-59 (1982) (cautioning that, if we are to have a strong right to freedom of speech, it must be separated from the idea of “general liberty”).

relocate to a military detention centers); Plessy v. Ferguson, 163 U.S. 537 550-52 (1896) (upholding a Louisiana statute that required “separate but equal” accommodations on trains for members of the races).
human dignity, and that human dignity is supervenient on human agency. 195

Treating these two questions in reverse order, to reflect the
greater generality of the latter, what is important to see now
is that just as the needs of agency justify the ascription of
human rights, so it is certain features of agency that serve to
ground this justificatory status on the part of the needs of
agency and thereby serve as the basis of human dignity.
These features of agency ultimately consist in the necessary
element of purposiveness that enters into all agency. To be
an agent is to have the double capacity to reflect on and
control what ends or purposes one sets for oneself and to
control one’s behavior with a view to attaining these ends.
Because of this reflective end-setting, every agent must
attribute worth to his purposes. As we have seen, every
agent regards his purposes as good according to whatever
criteria enter into his purposes. Hence, he attributes worth
to his purposes; he regards them as worth attaining and
hence as justifying whatever efforts he makes toward
attaining them. . . .

The argument indicates how human rights are grounded in
human dignity or worth. For it is from the worth that each
agent attributes to her purposes and hence, a fortiori, to
herself as purposive agent that there necessarily follows the
claiming of rights to the necessary conditions of acting in
pursuit of those purposes. 196

Put another way, actual, potential, or prospective human agency
is supervenient on there being human dignity. To the extent human
dignity is not present, neither is human agency present. 197
Moreover, the relation is logical and not contingent, arising, as it
does, from what it means to be a human agent. 198 Where human

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195 "Properties of type A are supervenient on properties of type B if and only if two objects
cannot differ with respect to their A-properties without also differing with respect to their B-
properties." THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 96, at 778-79 (under
the term "supervenience").

196 SELF-FULFILMENT, supra note 117, at 168-70 (citations omitted).

197 Circularity is avoided because the two approaches to the argument accomplish different
tasks. The first approach shows that human dignity, is reached by a conceptual analysis of
human agency ratio cognoscendi. The second approach that human dignity is directly related
to human agency, is reached by a normative deduction of human dignity from human agency
ratio essendi.

198 SELF-FULFILMENT, supra note 117, at 173 (looking at "the necessary connection
between (a) acting for a purpose, (b) regarding that purpose as worth achieving, (c) regarding
agency is thought to be possible, human dignity is necessarily present.

Returning to freedom of speech, one finds freedom of speech directly related to human dignity because the communications one utters reveals aspects of who one is. This is a general to specific approach that grounds freedom of speech in the ends that it serves. But it is also one that treats freedom of speech generally not in terms of any specific ends of the speakers. Thus, even if the person is merely engaging in abstract academic discourse, or playing a devil’s advocate, his engaging in that discourse itself suggests that he considers it to be a worthwhile activity. It also suggests that the activity has value for him as an end just because it is his own end. Still, one could say that this does not make freedom of speech any more a human right than, for example, eating at a gourmet restaurant is a human right, which also reflects an end worth doing because it is one’s own end. But this is to misunderstand the nature of the right to freedom of speech. When Gewirth says that human dignity arises out of the worth one assigns to oneself and, by implication, to one’s actions, 199 he is not suggesting that every action to which one assigns worth is worthy of being pursued. Especially if there are limited resources or better uses for one’s efforts, in the sense of supporting human agency, such pursuits would seem to squander resources and, thus, be a limitation on human actions. Additionally, Gewirth notes,

Since [our agent] must acknowledge that the rights are had by all humans equally, this also serves to impose a universalist moral restriction on the purposes she is justified in regarding as worth pursuing, and hence, too, on her ascription of worth or dignity to herself. Thus, although the existence of human rights follows dialectically from the worth or dignity that every agent must attribute to himself, the content of that dignity is in turn morally modified by the universal and equal human rights in which the argument eventuates. 200

In addition, freedom of speech suffices as a universal human right because all people, subject to only relatively mild restrictions, can

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199 See id. at 170 (acknowledging that, though rights follow from the dignity an individual attributes to him or herself, the dignity is “morally modified by . . . universal and equal human rights”).

200 Id. at 170.
hold on to it equally. Where restrictions apply, they are only to prevent clear, actual, and imminent danger to others.\textsuperscript{201} This latter result is rare because it is in the nature of freedom of speech to provide its own method to prevent overreaching. Thus, the best remedy to protect against speech one does not like is more speech, not enforced silence.\textsuperscript{202} Moreover, in most contexts, freedom of speech will benefit human rights by bringing to light conditions and circumstances that prevent human dignity from coming to fruition.\textsuperscript{203} This is especially true in the context of gay-rights.

In the communication that a gay, lesbian or bisexual person makes when he or she comes out of the closet, speech, in the sense of enhancing human dignity, is present both in the utterance and in the content. For, in that situation, the individual has provided worth to his or her identity not only by the making of the utterance, but also by the personal information conveyed. Consequently, when limitations are put in the way of such utterances being made, because the content is thought to be undesirable, the effect is to devalue the worth of the individual who would otherwise present it. The situation is even more patently offensive where the individual not only has to refrain from certain speech, but actually has to affirm speech in which the content presents a false or misleading picture of him or herself. In that case, the individual is being devalued in two ways: first, by being prevented from making the utterance he or she might prefer to make; and, second, by making a false or misleading statement about who he or she is.\textsuperscript{204} The individual is being told that a person who would say such a thing either is morally not a worthwhile person or is psychologically sick.\textsuperscript{205} The former has the effect of lowering one’s self-respect in the

\begin{footnotes}
\item[201] See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (striking down Ohio’s Criminal Syndicalism Act as it “impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments”). The statute “purpos[ed] to punish mere advocacy and to forbid... assembly with others merely to advocate the described type of action.” Id.
\item[203] The conclusion arises from common sense: If people are forced into silence, reality will undoubtedly be stifled. See, e.g., Justin Richardson, M.D., Uncle Sam Wants You to Live a Lie, NY TIMES, June 10, 1993, at A26 (concerning coming out in the military).
\item[204] See HUMAN RIGHTS, supra note 15, at 57 (stating that when a person makes misleading statements, a violation of personal rights occurs and “his action is morally wrong and he contradicts himself”).
\item[205] See id. at 56.
\end{footnotes}
sense of making one believe that one is morally wrong. The latter lowers self-esteem in the sense of making one believe one is not in control of one's life. Additionally, by making someone state a false or misleading statement, the moral problem is made much worse: first, because now the person is also disrespecting others by lying to them; and, second, because she may be putting herself into a position to suffer psychological disengagement with who she is.206

Since one concern of this article is to show how law and political institutions might operate to secure human rights for gays, lesbians, bisexuals and transgendered people, the remainder of this section will focus on the particularly oppressive American military policy known as "Don't Ask, Don't Tell."207 That policy provides that

"[a] member of the [American] armed forces shall be separated from the armed forces . . . if . . . the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . [;] stated that he or she is a homosexual or bisexual . . . [;] or has married or attempted to marry a person known to be of the same biological sex."208

Although several American courts have considered whether the policy was constitutional on a number of different theories, to date all have upheld its constitutionality against all challenges, including those premised on First Amendment freedom of speech.209 No similar policy is present in many other advanced industrialized countries. Among NATO countries, in particular, only the United States and Turkey prohibit gays in the military.210 And, most recently, the European Court of Human Rights ordered Great

temperance, and prudence is hindered by actions that promote a climate of fear and oppression, or that encourage the spread of physically or mentally harmful practices . . . especially as these bear on persons' ability to act effectively in pursuit of their purposes.

Id.

206 See id. at 57 (noting that these rights to freedom and well-being may conflict with one another); see also Richardson, supra note 203, at A26 (presenting the believe-what-you-want paradox that occurs when homosexuals are forced, by their silence, to lie about their sexuality).

207 See 10 U.S.C. § 654(b) (1994) (stating the armed force's policy regarding homosexuality); Richardson, supra note 203, at A26.


209 See, e.g., Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied; 119 S. Ct. 794 (1999); Richenberg v. Perry, 97 F.3d 296 (8th Cir. 1996); Able v. United States, 88 F.3d 1260 (2d Cir. 1996); Thomasson v. Perry, 89 F.3d 915, 934 (4th Cir. 1996) (en banc) (holding that the plaintiff's claims "that his discharge [from military service] violated due process . . . are without merit").

210 See Alfredo S. Larioz, Don't Ask, Don't Tell? Don't Bother, CHI. TRIB., July 30, 2000, sec. Perspective, at 1, zone C.
Britian to integrate its military, which has now been done and seems to be working fine.

Still, in America, even where only speech is involved, the courts treat the admission of being gay to be a statement of a propensity and, therefore, evidence of the fact that the speaker would engage in homosexual conduct. However, as one dissenting judge, after considering its evidentiary status, commented,

The tenuous connection the government seeks to draw between speech and propensity (and then between propensity and conduct) cannot withstand scrutiny under the First Amendment. The difference between being a homosexual and saying one is a homosexual is precisely that—one has said what is a fact. The presumption that one who speaks truthfully is more likely to engage in prohibited conduct than one who conceals or lies about his homosexual status is plainly unsupportable. It is at least as likely that the homosexual who has acknowledged his sexual orientation, and who knows that everyone is aware of his preferences, will be willing to refrain from conduct that would lead to his discharge as it is that a homosexual who has selectively concealed his status, leads a covert and secretive life and hopes not to be discovered, will refrain from "illicit" encounters.

Stated in terms of the human rights analysis advanced earlier, one sees the impact of the "Don’t Ask, Don’t Tell" policy if one considers the following probably typical scenario as articulated by another commentator on this subject:

At an Air Force base outside Colorado Springs, Colorado, early in 1996, two young officers have gotten together after

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211 See Marco R. della Cava & Andrea Stone, British Military to Allow Gays to Serve: Defense Minister to Release Code of Conduct Today, USA Today, Jan. 12, 2000, at 15A (“The catalyst for the code was a judgment by the European Court of Human Rights in September that ordered Britain to end the ban.”); see also Lustig-Frean and Beckett v. United Kingdom, 29 Ecr. Ct. H.R. 548, 587 (1999) (finding that the plaintiffs were wrongly discharged “on the grounds of their homosexuality”); Smith and Grady v. United Kingdom, 29 Eup. Ct. H.R. 498, 533 (1999) (finding that the applicants were denied “respect for their private lives” when dismissed from military service on the grounds of their homosexuality).


213 See Lanier, supra note 210, at 2 (discussing cases involving attacks on the constitutionality of the "Don’t Ask, Don’t Tell" policy).

work to have some coffee and relax. One of the two, Anne, is a lesbian. Since the time she entered the service, Anne has assiduously avoided making any reference to her sexual orientation, as the Don’t Ask, Don’t Tell policy requires. None of her friends or fellow officers know that Anne is gay, and Anne never talks about “gay issues” around the base. The other officer, Nancy, is straight. Nancy has known Anne since the two started officer training together a few years earlier. The following conversation—an unremarkable one for the two friends—takes place on a wintry Tuesday evening.

Nancy: So what are you doing for Easter next month?
Anne: Going to my folks’ house, probably. (She smiles wryly.) Once I graduated from high school and left home, my parents decided that the holidays were Extremely Important Events that required my attendance. You?
Nancy: I’m going with Dave to visit his family in Michigan.
Anne: And are we happy about these plans?
Nancy: Oh, Dave’s family is great. Dave, himself, however, turns into a space alien whenever we go to visit them. (They laugh.) Oh, Annie, you know how a man acts when he takes you home to meet the family for the first time, right?
Anne: (Anne’s eyes drop for a moment and her smile fades a bit.) I . . . guess we all know about that.
Nancy: Well, Dave hasn’t quite managed to move beyond that uptight phase yet. I figured that he would loosen up around his family after we got engaged last fall, but that hasn’t happened. If anything, he’s gotten more uptight.
Anne: At least it probably means that Dave won’t make you visit the in-laws too frequently after you two get married.
Nancy: True, true. Still, I suggest you stand far away from the bouquet toss at our wedding this summer. Believe me, you have enough to worry about in “this man’s Air Force” without also taking on a man’s set of issues with his family! (Nancy laughs heartily; after a slight hesitation, Anne joins in.)215

The scenario just described should illustrate the way “Don’t Ask, Don’t Tell” doesn’t just require silence. It leads to inevitable

situations where, in order to make the policy work, lesbian or bisexual people have to overtly lie and mislead by projecting false personae as his or her own. In this way, the policy not only fails to promote human dignity, but out-right attacks it. It has absolutely no justification from the standpoint of human rights, and, as it attacks human dignity this means there are human rights reasons for why it should be done away with.

C. Equal Protection

Up to now this article has tried to show how privacy and freedom of expression, as justified human rights, are able to protect some of the freedoms that gays and lesbians legitimately seek. Another approach to protecting gay and lesbian rights is through equal protection analysis. Here one makes explicit reference to an American constitutional ideal separate from privacy (in particular) because, as has already been noted, privacy in the United States has been construed rather narrowly. In effect, it may be that systems like the American one do not have constructions that are fundamentally different from the morally justified privacy one suggested above, but they just separate it under two different names: due process and equal protection. This does not mean that equal protection and privacy in American law are coextensive with the concept of privacy, but rather that together they encompass much of it. This also provides a moral sense to what one commentator has described as equal protection's forward-looking aspect, in contrast to the due process (privacy's American parent concept) backward-looking view. That is to say, where due process (including its offspring, privacy) is used to protect "an existing or time-honored convention, described at the appropriate level of generality," from attack, equal protection is used "to invalidate practices that were widespread at the time of its ratification and that were expected to endure." The difference between this American construction and the one offered here might be more a matter of emphasis than theory. Still, it may explain why the U.S. Supreme Court in Bowers was so reluctant to find a right for two adults to be able to engage in same-sex sodomy in the home, since the Court's focus in that case was on protecting time-honored

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217 Id. at 1163.
traditions.\textsuperscript{218} Nevertheless, taken together, American privacy and equal protection law arguably capture much of the same ground that the more expansive conception of privacy would suggest.

This can be seen when one recognizes that equal protection analysis in American law involves two classes of concerns. First, that a fundamental right is not being denied to a group by virtue of a discriminatory practice, even if it is deeply ingrained and longstanding in the society. Second, that the group itself is not one that warrants heightened judicial scrutiny because (1) it is characterized by a history of purposeful discrimination, (2) that embodies a gross unfairness sufficiently inconsistent with the ideals of equal protection to classify it as "invidious", and (3) the group lacks the political power necessary to obtain redress from the political branches of government.\textsuperscript{219} A third equal protection approach which has only recently been recognized, concerns the fact that some denials of rights may be so grossly unfair that regardless of the class or right involved, to allow the denial would involve a per se violation of equal protection.\textsuperscript{220}

In effect, what these criteria do is render to equal protection analysis those same aspects of the earlier privacy analysis that the American courts have failed to recognize. This includes the legitimacy of a liberty interest where an act does not, in the first instance, affect the rights of any other person in the relevant group, even if its protection is not part of a long-standing tradition. In \textit{Loving v. Virginia},\textsuperscript{221} for example, we had the superimposition of the then recently recognized fundamental right to marry onto an equal protection claim because the state of Virginia had prohibited interracial couples from marrying solely on the basis of prejudices that could no longer be maintained.\textsuperscript{222} Having said this, consider how lesbians and gays as a class might fit under equal protection so understood. And here, because the analysis is not too different from the otherwise standard equal protection analysis of the problem, only a cursory treatment of the matter need be presented. Here one might begin with the question of whether the group warrants heightened scrutiny.

\textsuperscript{218} Bowers v. Hardwick, 478 U.S. 186, 192-95 (1986) (stating that "\textit{proscriptions against same-sex sodomy} have ancient roots" and that the Court is not inclined to find it as a "new fundamental right imbedded in the Due Process Clause").


\textsuperscript{221} 888 U.S, 1 (1987).

\textsuperscript{222} Id. at 4, 12.
While just about all courts that have considered this question of heightened scrutiny have found gays and lesbians to suffer a history of discrimination, many have disputed whether gays and lesbians are unfairly treated because of an immutable characteristic and whether they truly lack political power. Part of the problem here goes to what courts mean by immutable. Do they mean a trait that cannot be changed or simply a trait that would be very difficult to change? Religion is considered a trait that one can change, yet people are afforded equal protection against discrimination by virtue of religion. As for political powerlessness, it is probably not fair to say gays and lesbians have political power just because in a few urban areas, where many openly gays and lesbians have concentrated, they have been able to obtain political change. The question here, as the Supreme Court saw in *Romer v. Evans*, is how isolated the political power concentration is. Can it be changed by a simple change in the arithmetic of who gets to decide whether a state or municipality can pass an anti-discrimination law? In *Romer*, the Court struck down a Colorado constitutional amendment that prohibited the state or any of its municipalities from passing laws or other regulations that prevented sexual orientation discrimination on the basis that such an amendment was supported by pure animus.

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225 See *Romer*, 517 U.S. at 647 (1996) (Scalia, J., dissenting) (arguing that Coloradans “sought to counter both the geographic concentration and the disproportionate political power of homosexuals”)

226 See Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (holding that the city denied Jehovah’s Witnesses equal protection of the laws by denying them a permit to congregate in a public park).

227 Cf. *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting) (attributing the political power of gays and lesbians to their concentration in specific communities, among other factors).


229 Id. at 633 (stating that “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remains open on impartial terms to all who seek its assistance”).

230 See id. at 646-47 (Scalia, J., dissenting) (framing the issue in *Romer* in terms of the rights of statewide voters to counter the disproportionate influence of gays and lesbians in local municipalities).

231 Id. at 635-36 (concluding that “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else”).
From a human rights point of view, what is guaranteed by equal protection of the laws is a basic concern of justice applied to fundamental rights. That concern can be described using a basic schematic for justice developed by Gewirth just as earlier was done for rights. That schematic provides: it is just that A do (or receive) X in comparison with B by virtue of Y, where A is the subject of justice, X is the object, B is the person or group who serves as the comparison point, and Y is the reason or justification for justice.\textsuperscript{232} While that schematic calls attention to the fact that comparison is always a part of a just analysis, it leaves open what X might be. Where X is a contingent benefit based on some subjective desire, the schematic merely requires equality either in the simple sense of the equality implied by having a general rule or, perhaps, in the appetitive sense of the Golden Rule: “do unto others as you would have them do unto you.”

This point about whether X is contingent or not is important because in cases where justice is merely procedural or appetitive, one can imagine cases where X could be easily denied. In the procedural case, where justice simply requires treating like cases alike, one can refuse to allow anyone a benefit by adopting a general rule that treats everyone in the same way within a given class.\textsuperscript{233} “Thou shall not kill” prevents everyone from killing. That the constitution does not protect anyone’s right (gay or straight) to engage in same-sex sodomy is another such general rule. No distinction is made between the moral principle in the first and the violation of privacy in the second. Even where justice involves the appetitive case, X can be denied if one is willing to forgo the same right for oneself.\textsuperscript{234} If one is willing to forgo the right to parent if one turns out to be gay or lesbian, then one can deny that same right to others. Where, however, X is filled in by necessary rights that all humans must have, simply by virtue of being purposive agents, these consequences do not arise. Justice requires that the rights be granted to all persons alike regardless of whether one would grant them to oneself or not.\textsuperscript{235}

\textsuperscript{232} Taken from lecture given by Alan Gewirth at the University of Chicago in Political Philosophy, Feb. 13, 1978.

\textsuperscript{233} See REASON AND MORALITY, supra note 77, at 162 (explaining that the logic behind the rule is that “what is right for one person must be right for any relevantly similar person”).

\textsuperscript{234} See id. at 163 (classifying this as the “appetitive-reciprocal principle”).

\textsuperscript{235} See id. at 164 (noting that the PGC requires an agent to “act in accord with the generic rights of his recipients” regardless of “whatever he may happen to accept or on his variable self-interested desires or ideals”).
Now, it has already been mentioned that one goal of American equal protection analysis is to avoid a denial of fundamental rights. And it has also been argued that a morally justified general right to privacy would support freedoms where no other interest was involved in the first instance. It now seems appropriate to ask whether equal protection analysis might provide a means to encompass those aspects of privacy guaranteed by the PGC that American privacy law ignores. That is, whether the Court could legitimately superimpose what is left of the broad sense of privacy onto an equal protection footing to ensure its protection. If so, then the state’s failures to recognize these rights, including its more particular failures to recognize same-sex marriage and parenting, would violate equal protection.

Here the grounds for saying that American equal protection law might encompass these other aspects of the broader right to privacy is that they are essential to voluntary purposive action. Without the recognition of the rights that these aspects represent, voluntary purposive agency will necessarily be limited to the prejudices and biases that have constituted so-called time-honored (but perhaps not morally correct) traditions. So the aspect of equal protection analysis that protects against loss of fundamental rights could serve to guarantee to lesbians and gays such rights as the broader privacy principle would encompass if the analysis were developed in this manner. That being the case, if American equal protection law is to be morally justified, the courts might make use of it to restore those legitimate human rights the Bowers decision seemed to take away.

VI. CONCLUSION

This article has tried to show that gay-rights are a subcategory of human rights when properly understood. It has also tried to show that when courts, following more traditional legal doctrines like due process and equal protection, ignore legitimate moral claims, it is because they have performed an inadequate analysis of the problems before them. The article thus provides both a basis for

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236 See supra notes 228-31 and accompanying text (discussing the Supreme Court case Romer v. Evans).
237 See supra notes 159-91 and accompanying text (exploring the nature and meaning of the right to privacy).
238 See supra Part V (discussing the human rights components of rights claimed by gays and lesbians).
239 See, e.g., supra notes 179-91 and accompanying text (criticizing the Bowers v. Hardwick court for failing to consider privacy issues in the specific cases and criticizing equal protection jurisprudence for failing to consider violations of liberty interests in the first instance).
criticizing court decisions that fail to follow a morally just standard for resolving legal disputes and a path for how such courts might act in the future. It remains for future generations to determine whether the approach offered here proves influential in persuading future courts, legislatures, and the public at large to rethink the restrictions placed in the way of gays and lesbians in securing their most basic human rights.