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AUTONOMY, GAY RIGHTS AND HUMAN SELF-FULFILLMENT: AN ARGUMENT FOR MODIFIED LIBERALISM IN PUBLIC EDUCATION

VINCENT J. SAMAR*

INTRODUCTION

In this article, I argue that public education should provide a constructive forum for discussing aspects of lesbian and gay lifestyles in both primary and secondary schools.1 My argument is that such action is necessary to offset the way the dominant culture limits the capacities of gays and lesbians to achieve human self-fulfillment. In making this argument, I recognize that I am going beyond merely promoting social tolerance, often advocated by liberals as the proper role of government, to legitimizing an actual place for discussion of the needs and interests of gays and lesbians in the society at large. Although I do not intend to confine this article to the values of any one culture, I draw many of my examples from American society, as I am more familiar with it than any other society. Still, the principles I will apply to make this argument will not strictly conform to nor contrast with standard American constitutional interpretations. Indeed, because the principles on which I rely are broad, they are not specifically situated in legal philosophy (concerning the nature of law and its validation), but rather, principles of normative political philosophy (concerning ethical justifications of governmental institutions). A description of the principles I have in mind is most prominently found in the United Nation's Declaration of Human Rights of 1948.2 These principles are generally applicable to liberal educational institutions worldwide and meet American constitutional requirements, provided that certain interpretative adjustments are recognized particularly

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1. I mean to include bisexual lifestyles here as well. As those involve combinations, with varying degrees of accommodation of heterosexual and homosexual lifestyles, where the former is already part of the dominant culture, I do not make separate reference to bisexuality.

in regard to the Fourteenth Amendment's Equal Protection Clause. Indeed, the American constitutional system might be seen as an example of how these principles generally can be instantiated to constitutional democracies. Although the focus of this article will be on publicly supported primary and secondary education, I also envision that the principles applied would, as a matter of political morality, have other applications and that this article may foster discussions of their application to related areas of social discourse.

Education provides the primary focus because of its ability to extend human aspirations to their maximum and human capacities in service to those aspirations.

The principles I will endorse support liberal education by continuing to make openness to new ideas and different ways of thinking a central value of public education. Nonetheless, I will not be advocating the kind of multiculturalist position that would grant almost every group, including gays and lesbians, an exemption from certain portions of the curriculum that might offend them, especially if the result may be that important aspects of their members' individual identities are sacrificed in the process. The sense of liberty that emerges will not be unconditioned. I will not be arguing that public education should merely accept as equal any social norms that may be alleged to underlie individual self-fulfillment.

I also take a position somewhat different from that of Brian

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3. See U.S. Const. amend. XIV. This raises an interesting liberty versus equality question, because American First Amendment law generally requires that the state maintain viewpoint neutrality when it comes to restricting freedom of speech. It prohibits restrictions on speech from focusing on the viewpoint of the speaker. See Cass R. Sunstein, Democracy and the Problem of Free Speech 13 (1993). I am not arguing so much for restrictions on speech as I am for the inclusion of a certain form of promotional speech. This distinction is admittedly difficult to make. See id. at 199-201. For a broader discussion of how the principles that are used here might fit human rights laws generally, see Vincent J. Samar, Gay Rights as a Particular Instantiation of Human Rights, 64 Alb. L. Rev. 983 (2001).

4. For example, these principles might justify governmental financial sponsorship of serious works of art and music by gays and lesbians, as well as state-provided information about the contributions that these groups of people have made to the society at large. I also envision government-provided information about the threats lesbians and gays confront from social intolerance and inadequate health information, as with AIDS and other STDs. This information could be provided as part of school curricula and in other appropriate educational formats in which governmental support is necessary. I also envision a continuation of what several communities have already begun in the form of public recognition, via parades and other public events, of the contributions of gays and lesbians, and the enactment of hate crimes and antidiscrimination laws, especially in areas of employment, housing and public accommodations. Finally, I envision the extension of all laws benefiting heterosexuals, such as laws regarding marriage and parenting, to lesbians and gays. Discussion of these issues might become part of social science curricula.

Barry in *Culture and Equality*, who argues that government should neither grant exemptions to illiberal groups nor be focused on promoting an ideal of autonomy in which individuals are encouraged to question their basic beliefs and probe the institutions and practices of where they live. To the contrary, my position is to endorse public schools taking an active role in supporting both human freedom and well-being, in order to provide the conditions upon which gays and lesbians can discover, for themselves, their own identities and what is best for them. My definitions of 'human freedom' and 'human well-being' follow those of Alan Gewirth, who emphasizes with respect to freedom, the procedural conditions that allow one to control his or her behavior by his or her own unforced choice with knowledge of relevant circumstances and with respect to well being, "the various substantive conditions and abilities" necessary both to acting itself and to "achieving one's purposes through one's action." For this reason, my view emphasizes learning techniques of critical evaluation in addition to exposing students to different kinds of cultural values that might lead to various conceptions of the 'good life.' Indeed, it is this juxtaposition of liberty and well being, as dually necessary to the effective development of human self-fulfillment, that warrants describing my view as a modified form of liberalism and not mere social tolerance.

I am mindful of recent arguments by Barry and others that show how often very sincere approaches to the protection of well being, for example, in some views of multiculturalism, work to undermine democratic principles and harm the very people that they are supposed to benefit. These effects occur, as Barry correctly points out, only when illiberal subgroups are given privileges that do not allow their members easy escape from the obligations of membership. An example of this is when well-meaning fundamentalist Christians are allowed to take their children out of public schools and restrict the books that are read or are available in the school library, in order to discourage the

6. *Id.* at 118-23.
7. In fact, Barry may believe in such an ideal, but he shies away from making it a primary focus of government. See *id.* at 120.
8. I follow a point made by Joseph Raz, that "success and failure in the pursuit of our goals is in itself the major determinant of our well-being." JOSEPH RAZ, THE MORALITY OF FREEDOM 297 (1986). Conflicts between freedom and well-being are not theoretically foreclosed, but neither are they of much concern for our purposes here.
10. *See* BARRY, supra note 5, at 11.
11. *Id.* at 239-45.
children from learning about alternative lifestyles, specifically same-sex relationships.\textsuperscript{12} It also occurs when public educational authorities substitute cogent argumentation with 'politically correct' ideals that label any counter argument as homophobic, racist, or sexist before examining the merits of the arguments to show their reliance on untrue, or partially true, stereotypes or other misleading information.\textsuperscript{13} Here, it seems too easy to use the argument that everyone's voice must be given equal attention to dilute the very valuable contributions gays and lesbians as a subcultural, nonilliberal group make to their members' achievement of self-fulfillment. Especially in cases where the mainstream culture is the source of the illiberality, as is typical in the context of gender roles, it is important for public education to affirm various positive lifestyles to ensure that individuals are not prohibited from discovering who they are or what they can achieve. Of course, this raises an important question of what lifestyles get affirmed and on what basis they are affirmed. This is a question that I will examine more fully below.

By culture, I mean the total set of expressions including symbols, rituals, practices (ways of performing certain recognized institutional activities including marriage and even sporting activities), values, forms of dress, and styles of belief that define a particular group of human beings. I take this to be an anthropological notion of culture, as distinguished from a humanist notion that treats culture as the best that humans can obtain.\textsuperscript{14} The latter notion can provide a

\begin{itemize}
  \item \textsuperscript{12} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing the Amish to remove their children from pubic schools after age fourteen in order to protect their traditional way of life). Although not specifically directed to the same issues, Yoder provides a ground for other parents to remove children from public schools to protect their cultural value systems.
  \item \textsuperscript{13} Barry admits the need for such argument when it comes to showing a fallacy with the multiculturalist position. See Barry, supra note 5, at 274. Barry shies away from the state taking "as its mission the inculcation of autonomy." Id. at 119. Perhaps, this is because he sees the inculcation of autonomy, as it is sometimes professed, as exhibiting too little rigor. See id. at 222-25. Barry also suggests that a well-educated person is one who, presumably using rules of formal logic and evidence, is able to "recognize when they do not have an adequate basis for having a view on a topic." Id. at 225. Society has an interest in producing such persons. See id. at 225-33.
  \item \textsuperscript{14} Alan Gewirth distinguishes an anthropological concept of culture from the humanistic concept. The former is "a way of life as it is understood, symbolized, and evaluated by the group that lives it; it is a set of both group practices and of related beliefs." The latter is a normative concept, which in Michael Arnold's definition, is "a pursuit of our total perfection by means of getting to know, on all the matters which most concern us, the best which has been thought and said in the world." See Gewirth, Self-Fulfillment, supra note 9, at 128-29 (citing Michael Arnold, Culture and Anarchy 6 (1960)). As will become clear, I employ the former notion to set out the conflicts that may arise between a dominant culture and various subcultures and the latter concept to say what ultimately should be done to resolve these conflicts.
\end{itemize}
normative ground for assessing the former and need not be confined to any specific time or place. However, the former provides a good basis to begin as it lays the foundation of what is to be explored. Using the anthropological notion, a dominant culture exists when more than half the population within a given geographical location pervasively accepts a particular set of expressions. By the same token, a subculture exists when a particular subset of the population (defined by some characteristic other than their deviation from the dominant culture) shares a set of expressions not commonly shared, or only shared to a limited extent, by the population at large. In this sense, the mere use of illicit drugs would not constitute a subculture, although being identified by religion, nationality, or ethnicity might. Subcultures can exist alongside a dominant culture or, where no dominant culture exists, alongside other subcultures, as we see in the aftermath of the dissolution of the former Yugoslavian state. In this essay, I will approach this anthropological notion of culture from within a human rights ('humanist cultural') perspective. It will thus treat gay and lesbian individuals as identified by their sexual orientation, which is distinct from the various lifestyles they may adopt for themselves. Following this approach, gays and lesbians can be found to be both part of the dominant culture and often part of various subcultural groups as they seek to engage sometimes competing norms to discover higher ordered goods. In this sense, the humanist concept of culture will dominate my approach, as it will place liberalism ultimately on a foundation of autonomy (individual self-rule), in which individuals can best determine, with proper training, what will benefit their lives. It is important to understand that by ‘autonomy,’ I mean the conditions under which one acts in the absence of outside constraints versus the nature of the action (whether, for example, it is self-regarding or not). I recognize that I may be accused of beginning this discussion from within a certain Western cultural bias. This bias, to whatever extent it exists, will be attenuated, as I show that the foundation for my position must apply cross-culturally if human rights are to be truly preserved.

By giving a degree of respect and positive public support to lesbians and gays, among others, public education may offset mainstream cultural imperialism in a way it could not accomplish.

16. In this instance, the cultures that exist side by side are in constant strife, and it is unclear whether they will be able to overcome their mutual animosities.
17. By 'higher ordered goods,' I mean those goods that go beyond mere fulfillment of desires to include what can add to the greatest benefit of all who seek them out.
by strictly following a hands-off position on cultural change. In this way, by not playing a neutral role, public education may actually achieve a neutral result in revealing the variety of ways individual self-expression and self-fulfillment can be obtained. The fact that this may go against certain mainstream cultural norms that advocate neutrality in education on matters that are controversial is all the more reason for providing it, because refraining from action is not a neutral act but an affirmation of the cultural status quo. Here the task for the philosopher is not to identify specific positive actions that public school officials should take to provide a more enlightened education. That is best left to teachers and educators who are likely to be better acquainted with the means for bringing about a good liberal education. The political philosopher’s task, rather, must be to clarify the principles for when a liberal society should break with the mainstream culture’s counter-liberal attitudes to affirm the needs of a subgroup via an already established system of public education. It is also the philosopher’s task to establish limits on how far public education should go in affirming the needs or interests of any given subcultural group so as not to substitute one form of cultural imperialism for another. Even though this means that public education will no longer be ‘neutral’ in the viewpoints it affirms, provided those viewpoints are based on rational and objective evidence, that should not provide a reason for objection.

Section I of my discussion explores the ways mainstream culture in Western countries, specifically the United States, marginalizes gay and lesbian people. Section II discusses two different approaches to liberalism in Western societies and their respective limitations. Section III then provides an argument for why human rights to freedom and well-being should be thought to provide the baseline for all social interactions, including those that affect one’s capacity for self-fulfillment. Section IV considers

18. David McCabe’s discussion of the writings of Joseph Raz notes that Raz believes that “modern pluralistic societies are acculturated into the ideals of self-creation and self-authorship that constitute autonomy” and that individuals in such societies “can have successful lives only if they actually have access to the range of options necessary for autonomy, and state intervention may be needed to ensure this.” David McCabe, Joseph Raz and the Contextual Argument for Liberal Perfectionism, 111 Ethics 493, 519 (2001) (citing Joseph Raz, Facing Up: A Reply, 62 S. Cal. L. Rev. 1153, 1229 n.162 (1989)).

19. I recognize that, at least in American society, one of the canons of First Amendment constitutional jurisprudence is that government should always act with a neutral viewpoint when it comes to restricting different forms of speech or recognizing different ‘religions.’ However, as I attempt to show, when a dominant culture is anything but viewpoint neutral on values that most directly affect individual self-fulfillment, a government stance that is supposedly viewpoint-neutral is really just government affirming the status quo.
I. HOW WESTERN CULTURE MARGINALIZES GAY AND LESBIAN PEOPLE

Cross-cultural comparisons of homosexuality show no consistent approach to the way it is viewed or evaluated any more than they show a consistent approach to the way gender is viewed or evaluated. Even within Western culture, where science and social...
science play important educational roles, homosexuality is not
defined or evaluated consistently.\textsuperscript{23} For example, gays and lesbians
are identified in America and many European societies by their
sexual orientation.\textsuperscript{24} This means that they are identified by the
object of their sexual affections.\textsuperscript{25} In other societies, including some
in the West, whether someone is gay or lesbian is based on the role
performed in a sexual act, for example, whether the person acts as
an inserter or a recipient.\textsuperscript{26} At times, the machismo idea in some
Hispanic cultures operates in this way.\textsuperscript{27} But it is also the case that
sometimes, a person is labeled gay or lesbian without any specific
knowledge either about the object of his or her affection or the
sexual role performed. For example, if a male merely exhibits
effeminacy, he may be perceived as gay.\textsuperscript{28} If a female exhibits
masculinity, she may be perceived as lesbian.\textsuperscript{29} Such seeming
confusion of sexual orientation with stereotypical gender constructs
(in the past called 'inversion') follows a similar confusion between
sex and gender in Western culture, even though the former is
biological while the latter is a social construction.\textsuperscript{30} This confusion
not only results in misjudging those who are gay or lesbian, but also
illustrates broader social expectations about the social roles that
men and women generally are supposed to follow.\textsuperscript{31} The effect of a

\textsuperscript{23} See David Halperin, Saint Foucault, in ETHICS: THE BIG QUESTIONS 261-64 (James
Sterba ed., 1998) (building on the work of Michel Foucault, arguing that scientific and cultural
debates about homosexuality show that homosexuality is a constructed phenomenon that is
often used to cover up contradictions in heterosexuality).

\textsuperscript{24} BARRY, supra note 5, at 96.

\textsuperscript{25} See EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS
OF SEXUAL ORIENTATION 39-40 (1999); see also John Boswell, Revolutions, Universals and
Sexual Categories, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 17-36,
postscript at 35 (Martin Duberman ed., 1989) (defining "gay persons" as "those whose erotic
interest is predominantly directed toward their own gender").

\textsuperscript{26} See STEIN, supra note 25, at 34-35.

\textsuperscript{27} Id. at 35.

\textsuperscript{28} Id. at 34.

\textsuperscript{29} Id. at 35.

\textsuperscript{30} See id. at 254-57 (discussing the possibility that there may be multiple origins for
sexual orientation that fit both a sophisticated natural kind model and various social
constructionist models). For a discussion of the distinction between gender and sex, see MOHR,
supra note 21, at 141.

\textsuperscript{31} See Patrick D. Hopkins, Gender Treachery: Homophobia, Masculinity, and Threatened
how individuals who do not conform to gender norms threaten the general system of rewards
for male status); Susan Wolf, Comment, in MULTICULTURALISM 76-77 (Charles Taylor ed.,
failure to live up to these expected social constructions and consequently being labeled gay or lesbian, can have wider ranging implications than just on how one perceives oneself.

Marginalization occurs through loss of job, family, friends, and generally being socially ostracized. These are just a few of the more common repercussions that the dominant culture inflicts on gays and lesbians both in England and the United States. In other Western European cultures, the effects may be less severe. However, they can be far more severe, including punishment by death, in non-Western, particularly Islamic countries. Consequently, among those for whom the label of being gay or lesbian has been correctly attached, only some (even in the West) choose to adopt an openly gay lifestyle. Those who are falsely labeled or who seek to hide the truth of their gay sexual orientation, follow different strategies to dispel the perception. Some adopt an overtly masculine or feminine personae; others become ravenously homophobic. In each case, however, it is self-identity that is being constrained by forces, sometimes perceived and sometimes not, operating initially from outside the self. This constraint may not be just external. In cases where the self has internalized the dominant culture’s attitudes and has begun to hate itself, the results can be quite devastating, often leading to excessive use of drugs and alcohol and even suicide in the most extreme cases.

In each case, one may find himself quite incomplete yet have no clear view of how to improve. This generally occurs, because human aspirations and capacities do not exist in a vacuum. A person’s awareness and ability to develop his capacities is usually part of “existing social forms, i.e., on forms of behavior which are in fact

1994) (noting the positive and negative uses of gender roles in enhancing women’s artistic, intellectual, and professional abilities).


34. See STEIN, supra note 25, at 284.


36. MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE 32 (1997) (arguing that “the culture is infused with attitudes that support the active discouragement if not the complete prohibition of lesbian and gay intimacies and identities”).
widely practiced in his society." These social forms thus affect all of our important life pursuits including careers, leisure activities, aesthetic experience, and personal relationships. Because awareness and ability are often embodied with various myths and images drawn from the broader culture, they are partially dependent on the way the values of that broader culture are interpreted and incorporated by the self. This potentially places a very serious burden on gay or lesbian persons choosing to come out of the closet. To the gay or lesbian individual, coming out might signal an acceptance of the negative myths and images, which consequently becomes their outlook on themselves, their pursuits, and even on their own self-worth. Indeed, this translation may lead them to adopt a kind of cruel anti-liberal self-hatred towards themselves, as a result of the dominant culture's prescription.

As this article is being written, the dominant culture is in flux on gay and lesbian acceptance. Within the last two years, both the United States Senate and House of Representatives passed an amendment to the Education Bill that cuts off federal funds to any school district that excludes the Boy Scouts from use of their facilities, because the group refuses to admit homosexuals as members and leaders. According to Senator Jessie Helms, a sponsor of the amendment, the Boy Scouts' decision to ban gay members had prompted local school boards and organizations like the United Way to drop their financial support. "Radical [homosexual] militants continue to maliciously assault this respectable and ethical organization," Helms argued. Unfortunately, Helm's rhetoric is not atypical. Many mainstream religious organizations regularly attack gay and lesbian rights claims, by claiming that gays are depraved, lead troubled lives, and spread AIDS (Acquired Immune

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37. RAZ, supra note 8, at 308.
38. McCabe makes this point as a criticism that Raz's theory of liberal perfectionism needs to take into account. See McCabe, supra note 18, at 493, 512.
39. The effort to cut funds was in the form of an amendment to the 2001 Education Bill that passed both Houses of Congress. See Helen Dewar, Senate Passes Major Revamp of Education; Fight Over Funding Gap Looms, WASHINGTON POST, Jun. 15, 2001, at A1.
40. What Helms does not say is that many of sponsors who dropped their funding of the Boy Scouts did so because they have a policy not to discriminate on the basis of sexual orientation, and funding the Boy Scouts would force them into violating this policy. See Lizette Alvarez, Senate Passes Bill for Annual Tests in Public Schools, N. Y. TIMES, Jul. 18, 1992, at A1.
Deficiency Syndrome) and other sexually transmitted diseases. This is aside from the more right-wing religious groups and other groups who regularly attack gay and lesbian rights. Some of them filed *amicus curiae* briefs on behalf of the state-respondent in *Lawrence v. Texas*, recently before the U.S. Supreme Court, which held that state sodomy statutes, like the one in Texas that applies only to certain same-sex behaviors, are unconstitutional under the Fourteenth Amendment's Federal Equal Protection Clause. When combined with legislative efforts to both set and retract state and local laws prohibiting sexual orientation discrimination, one sees the deep divisions that the process of bringing gay people into mainstream society has unearthed.

Where sexual orientation is based on gender roles, additional problems are raised for reasons unrelated to social intolerance. Such descriptions can provide an overly simplified view of the diversity of lifestyles that compose gay and lesbian communities. Even among those who choose a so-called "gay" lifestyle, there is often a wide range of differences in exactly what that lifestyle includes. This diversity in lifestyles tells us that gay men and lesbians do not easily fall within any one pattern. It also suggests another reason why some choose to remain in the closet, beyond direct threat of a broader culture of intolerance. Gay men and lesbians fear the potential loss of their gender identity when made to fit mainstream cultural explanations of who they are.

In effect, all of these concerns reflect the way identity and culture coincides. Although the word 'identity' has had a variety of different meanings in philosophy and psychology, the important
overlapping concern for us is its relation to important social relationships and functions. Often connections to one's sex, social class, and sometimes one's country of residence, define not only who one is but how others perceive the individual and, essentially, are constitutive of the self. At times, these connections may appear contingent on choices one makes, which presumably one could have made a different way. At other times, these connections seem necessary as merely descriptive of one's own sense of self. In any case, it may be difficult to determine which of these two modes of connection outweighs the other. More importantly, if one's culture does not encourage one to develop a critical outlook, where both possibilities can be viewed, the former mode may dominate and this may lead to a crippling of self-respect and self-esteem. For example, in the case where one's identity reflects several separate identities, such as being an American, a Christian, and a homosexual, the conflicts can be not only wrenching, but can also reflect choices about personal morality and a more honest description of who one is. In situations like this, a person may be ridden with guilt or engage in self-denial. Moreover, similar self-conflicting situations that might arise, for example, by the Catholic Church's published position that even the desire for same sex activity is intrinsically disordered, can lead to a deep self-hatred and internalized homophobia. Under these circumstances, autonomy is reduced, even in the absence of formal legal restrictions that give support to such limitations.

Identity is at least partially determined by culture, whether the culture is that of the society at large or of a narrowly circumscribed group whose geographical boundaries are even larger than the society at large, like, for instance, the Catholic Church. If this proposition is true, as many believe it is, then a different identity

48. Here, 'necessary' refers to a mode of connection that is assertoric and seemingly unchangeable.
49. The distinction here is between a normative evaluation of oneself and a prudential evaluation of what one has achieved. I use self-respect to refer to the normative state of believing oneself to be a morally good person and self-esteem to evoke the psychological state of feeling self-satisfied with what one has accomplished or achieved. No doubt in some contexts the two overlap, even conflict, as in the case of the self-satisfied bank robber, but they need not necessarily overlap.
51. Id.
52. Stein, supra note 25, at 71.
threat may arise when gays and lesbians come out of the closet. When gays and lesbians proudly do come out of the closet, they do not directly challenge the identity of heterosexuals, because the act does not make a statement about anyone other than themselves. Nevertheless, they may indirectly challenge the identity of persons who are either uncertain about their own sexual orientation, are too ashamed of, or who lack the courage to confront it. They also may challenge a person’s identity regarding what it means to be a certain sort of Christian or Moslem if the coming out issue is not addressed. Challenges such as these can lead to violence and, doubtless, play a role, for example, in the increased levels of hate crimes based on sexual orientation, that have appeared over the past decade in the United States. Additionally, challenges to self-esteem, where one’s own orientation may not be in question but one’s need to feel superior is at issue, result from the act of coming out. This is not to say that some debate may not be worthwhile. There is a wide range of difference in the kind of debate, from where the participants are, from the start, treated as equals engaged in a fair discussion of ideas to where one group is treated as inferior to another.

Still, despite these problems, coming out of the closet may be the only way to avoid continuing marginalization by mainstream society, because in doing so, one affirms, at least to some degree, who one is. Even then, however, the benefits may not appear to outweigh the costs. Even to those for whom the orientation is natural, the costs of being open about who they actually are may simply be too high a price to pay. The costs can be as devastating as loss of jobs, social status, affection of one’s family, and even physical assault. Additionally, there is the fear of others, who, because they deny their own sexual orientation may respond irrationally, possibly even violently, when confronted by openly gay people. This is separate from the violent responses emitted by a social fabric that regards homosexuality as immoral. In these situations, it is reasonable to assume that many gay and lesbian individuals who

53. From a cultural point of view, attacks to conventional values challenges the moral respectability of those for whom these values are the basis of being a worthy person. See also GREENBERG, supra note 43, at 473-74; Daniel Goleman, Homophobia: Scientists Find Clues to Its Roots, N. Y. TIMES, Jul. 10, 1990, at C1.


are threatened either internally or externally will not even claim the rights that most Western societies offer their citizens to live open, happy and productive lives. This suggests that it is the dominant culture of Western societies, that is often made present in the way people are socialized, more than the occasional intolerant person, that is the greatest danger to individual self-respect and self-esteem. This occurs, because the dominant culture strips the 'deviant' of even the personal indicia necessary to live a fully productive, self-satisfied life.

From this vantage point, one must conclude that if morality encourages finding human self-fulfillment, at least where certain kinds of harm are not present as outlined in the latter sections of my discussion, it must include more than just the removal of legal or formal restrictions on liberty. It must also, as this analysis has suggested, recognize that the indicia of culture, including family, tradition, religion, and limitations on individual self-awareness, all need to be given attention. The key issue here is how to pay adequate attention to each of them. Certainly, it is important for the state, through the procurement of public education for its citizens, to not only take a neutral position against a background culture that would marginalize any particular group, but to take affirmative action against such marginalization. This may be most effective, because public education may be the best place for deep critical evaluation of all fundamental norms. Silence in this case in not neutral, but an endorsement of the status quo. The state might, therefore, actively support access to the possibility of alternative ways of life via literature, the arts, science, and other forms of public education to promote a complete development of the self. To do any less could be viewed as the state becoming a co-conspirator in a systematic form of oppression that undermines an important basis of human dignity, viz., individual self-respect and self-esteem, especially with respect to matters of sexual orientation identity.

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56. The rights I have in mind are to privacy, liberty, and nondiscrimination. The latter exist for non-sexual orientation discrimination only in a few countries. See generally, N.Y. TIMES, 20TH CENTURY IN REVIEW: GAY RIGHTS MOVEMENT (Vincent J. Samar ed., 2001) pt. IX, International Scene, at 527-76. In the United States they only exist in thirteen states and a growing number of municipalities, covering over 100 million Americans. See Jeremy S. Barber, Comment, Re-Orienting Sexual Harassment: Why Federal Legislation is Needed to Cure Same-Sex Sexual Harassment Law, 52 AM. U. L. REV. 493, 523 (2002).
II. THE HARM PRINCIPLE OR PROGRAM V. MULTICULTURALISM

It is perhaps too much of an ideal to believe that official
tolerance, in the absence of different points of view, will eliminate
bias and prejudice from cultural institutions. Even though it is
axiomatic of traditional liberal society to tolerate different religious
and moral opinions, opinions that certain forms of sexual conduct,
such as consensual adult homosexual conduct, are sinful or unnatural
are only theoretical, not a basis for legal proscription. Even then,
it is not clear that any theory of liberalism, when brought to the
test, will hold up to truly promote toleration. For instance, in his
now famous passage of liberal idealism, John Stuart Mill asserts
what has become known as “the harm principle”. The principle
states that “the only purpose for which power can be rightfully
exercised over any member of a civilized community, against his
will, is to prevent harm to others. His own good, either physical or
mental, is not sufficient warrant.” The principle presupposes both
that some actions do not harm anyone else and that harm affecting
others cannot be a diffused metaphysical form of harm. Rather, it
must be an actual, occurrent physical or psychological harm. Regarding the first of these two presuppositions, the requirement
that the harm affect others, Mill himself says,

there is a sphere of action in which society, as distinguished
from the individual, has, if any, only an indirect interest;
comprehending all that portion of a person's life and conduct
which affects only himself, or if it also affects others, only with
their free, voluntary, and undeceived consent and participation.
When I say only himself, I mean directly, and in the first instance:
for whatever affects himself may affect others through himself.

Mill suggests here that more should be done than just drawing
a distinction between actions which do not harm others, arguably
like alcoholism or drug abuse, from those that do, like child abuse.
In some cases, the least intrusive means of avoiding occurrences

57. BARRY, supra note 5, at 131.
58. Id.
59. Id.
60. JOHN STUART MILL, ON LIBERTY 15 (1974).
61. Id. at 68.
62. Id.
63. See ALAN GEWIRTH, REASON AND MORALITY 232 (1978) [hereinafter GEWIRTH, REASON]
(suggesting the problem expositors of Mill have confronted in interpreting the harm principle
not to prohibit arbitrary, as opposed to nonarbitrary, forms of harm).
64. MILL, supra note 60, at 71.
of the latter activity, like the parent who abuses his child when he is under the influence of drugs, may be to limit the availability of drugs. Although this is by no means certain. Mill allows for this possibility provided that the real harm to be avoided is greater than the harm created by the intervention of others. Even with this limitation in mind, some actions do seem properly outside the public's concern. This sphere of human action is sometimes labeled 'private,' reflecting the general societal consensus that certain places exist where society has little interests in regulation, because only the interests of the consenting parties are at stake.

As for the second presupposition, regarding the kind of harms that can be prohibited, Mill again provides the indicator:

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness, demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological... Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

Note that the harm prohibited is more than just physical harm but may include promise-breaking, defamation, and many other harms that would be considered morally wrong. While the harm also includes the nonphysical, to avoid being nonarbitrary, it must not be isolated to the personal moral beliefs of the person. That would make the harm far too vague and its scope far too open-ended. Even non-arbitrary, nonphysical harm may sometimes be too broad

65. Id.
67. Mill, supra note 60, at 18.
68. Joel Feinberg, Limits to the Free Expression of Opinion, in Philosophy of Law 262-77 (Joel Feinberg & Hyman Gross eds., 1986) [hereinafter Limits].
69. See Gewirth, Self-Fulfillment, supra note 9, at 232.
a category, as for instance in the case of the would-be suitor who is rejected. 70 Obviously, what is needed is a criterion that picks out harms that can be either physical or nonphysical, while at the same time non-arbitrary and morally wrong. The latter will require finding some value or set of values that every rational person must agree to, perhaps on pain of contradiction. What that basis is, of course, will be a matter of some controversy and a focus for concern in the next section.

For the present, it is worthy of note that Joel Feinberg understands these two presuppositions to recognize that "[e]xpressions of opinion harm others when they are: defamatory (libelous or slanderous), seditious, incitive to violence, malicious publications of damaging or embarrassing truths, or invasions of privacy." 71 More generally, Feinberg notes that the harm recognized by the harm principle are only those that represent setbacks to another's interests that are also wrongful within a normative theory. 72 Legitimate setbacks, such as through competition or wrongful non-setbacks, such as inadvertent trespass to land, are not sufficient warrant for harm. Wrongful setbacks to which the recipient has consented are also not sufficient warrants for harm. These include harms voluntarily inflicted upon the actor by himself, or with his approval by another. 73 Feinberg believes that the harm principle would not allow interference with individuals to avoid these types of harms, even though the harms may involve personal or psychological damage. 74 This narrow view of Mill's harm principle may not be enough to protect gays and lesbians from the kind of harm that ultimately undermines their individual self-respect and self-esteem. The problem here arises because the causes of such loss are often so pervasive and obscure that a bridge cannot always be found that would connect a particular setback with a specific wrong. This is distinguished from the kind of economic setback that can occur when one is denied employment or housing in violation of, for example, an antidiscrimination statute. In that situation, the harm may be more readily assessable. The same cannot be said if the harm principle is interpreted to prohibit sources of more ephemeral causes of harm. If interpreted differently, what redress, if any, would there be for such a problem? Unfortunately, the issue is not resolved by merely granting toleration, even if the toleration is

70. Id.
71. Limits, supra note 68, at 217.
73. Id. at 35.
74. Id.
backed by laws prohibiting discrimination. That is not to say, however, that such laws may not be important to redress these less obscure harms.\textsuperscript{75} If toleration is inadequate, then society must consider which alternative should be advanced in order to combat these more diffuse harms.

Another approach or, perhaps, another series of approaches to this problem of combating diffuse harms, that is admittedly criticized by Brian Barry, is the so-called "politics of difference" approach, also commonly referred to as program multiculturalism.\textsuperscript{76} According to Barry, supporters of these views often advocate treating people differently "in response to their different culturally derived beliefs and practices," as a way of treating them equally.\textsuperscript{77} The point here is to avoid the coercive effects of a dominant culture by allowing members of each subculture to govern themselves. In other words, equal treatment requires equal recognition and forbearance of cultural differences, rather than the eradication of such differences in order to give each person the same economic and social opportunities. The public policy means to carry these proposals out may be negative in the sense of granting exemptions, for example, like allowing the Amish to remove their children from required secondary education at age sixteen.\textsuperscript{78} The means may, in fact, be positive in the sense of providing certain advantages to individuals based on membership in some culturally defined group.\textsuperscript{79} An example of this would be an affirmative action policy that reserves a set number of seats in a law or medical school for persons who are members of groups defined by a distinctive culture.\textsuperscript{80} A multiculturalist argument that justifies these exemptions and advantages is that they are necessary for minority groups to maintain their own cultural identities.\textsuperscript{81} But why should society be concerned with promoting various minority cultures, especially in cases where the culture might itself be illiberal in its treatment of its own members?

An important problem with these multiculturalist views then, is that, despite their claims to cultural equality, they do not always

\textsuperscript{75} The problem is that we cannot find an adequate distinction between physical and nonphysical harm capable of preserving self-fulfillment. Laws that make emotional distress actionable will be unlikely to identify relevant defendants and avoid harms caused by an intolerant dominant culture.

\textsuperscript{76} BARRY, supra note 5, at 17.

\textsuperscript{77} Id.

\textsuperscript{78} See Wisconsin v. Yoder, 406 U.S. 205 (1972).

\textsuperscript{79} BARRY, supra note 5, at 17.

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 116-17.
treat others, including their own members, fairly, in that they do not grant deference to the discovery of individual goods. In the case of exemptions, for example, if an adult Amish farm worker chooses to later leave the community, other Amish shun him. This consequently prohibits him from finding work within the Amish community. At the same time, he is not in a position to find work outside of the community, because he has inadequate training due to a lack of secondary education. Similarly, when seats are reserved in professional schools for the purpose of bolstering the success of a particular cultural group, others, who are not members of the group, suffer, as a certain number of openings are not available to them. The latter benefit might be justified to bring needed services to segments of a society that are underrepresented in the professions due to historical discrimination and financial hardships, but then the claim would not be specifically to protect the existence of minority cultures. It would rather be the utilitarian goal to provide the greatest good for the greatest number. More generally, the problem with these multiculturalist positions is that they bring government to the side of groups that place specific disadvantages on individual freedom of choice.

This occurs even before recognizing that a reactionary response may also arise when government promotes minority cultures programmatically. A challenge is posed by religious groups, like ‘born again’ Southern Baptists, who proclaim the sinfulness of homosexuality and do not want schools to give their children a positive view of gay lifestyles. One must also take into account

82. Id. at 153.
83. Id.
84. See id. at 242-43.
85. For an interesting argument on this point, see Lisa H. Newton, Reverse Discrimination as Unjustified, 83 ETHICS 308-12 (1973) (arguing that no remedial rights exist for those who were never counted from the start). But see Tom L. Beauchamp, The Justification of Reverse Discrimination, 2 SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 84-110 (1976) (arguing that government policies to rectify discrimination are justified not to correct past discrimination, but to eliminate present discrimination that might otherwise remain hidden).
86. See, e.g., Thomas Nagel, Equal Treatment and Compensatory Discrimination, in PHILOSOPHY AND PUBLIC AFFAIRS 348-63 (1973) (arguing that preferential treatment in admissions may be necessary to offset secondary effects on the community due to racial and sexual discrimination).
87. This would reflect a utilitarian goal if such services are either not currently available, or, as is more often the case, available only to an inadequate degree. If that is the case, if doctors are otherwise in oversupply to more traditionally white middle-class communities, a utilitarian calculus would favor giving special admissions status to those who pledge to work a set number of years in inner city ghettos, or poor rural or migrant farm communities.
88. This challenge arises in cases where groups take offense, either on the basis of religious or cultural viewpoints, at having their tax dollars support forms of art that illustrate sadomasochism.
those parents who, again for religious or cultural reasons, choose to take their children out of English or health education courses that read novels about same-sex relationships or learn about safer sex practices. A potential solution is to provide every child with an education that accords with the beliefs and tenets of his or her specific group. Providing such diversity of education may create the cooperative conditions necessary for society to flourish. It may burden, however, in the sense of limiting aspirations, the person who may someday want to leave his or her social group. Similar to how tolerance may be too benign to deal with an intolerant dominant culture, here we see that diversity of treatment may be too aggressive to enable cross-cultural respect to develop.

Each of these two approaches (tolerance and multiculturalism) does have something to offer to the promotion of individual freedom and well-being against a dominant culture that would otherwise be oppressive. Tolerance encourages official respect for differences, even if it cannot eliminate important barriers to the manifestation of these differences. Multiculturalism allows for difference, if not public respect for difference. What I envision as modified liberalism encourages both deference and respect for difference because it places all groups on the same playing field of human rights. This will become clear, as the human rights I propose that are necessary to achieve this result are not merely those usually accepted by democratic societies as ways to resolve disputes by public reason.

89. Barry discusses some of the concerns relating to religious persons taking their children out of sex education classes and school districts that are opting out of providing or mandating such programs. BARRY, supra note 5, at 225. Barry also discusses Afro-centrists, who are seeking to ban books and change curricula that do not comport with their epistemological or value systems, as well as gender-based schools and sexual orientation-based schools seeking their own unique curricula. He sees the latter as problematic, because it goes against the modernist, as opposed to post-modernist, liberal view “that there is such a thing as truth, as against my truth or your truth.” Id. at 236.

90. We could support funding of the arts only at the level of the most noncontroversial expressions.

91. Interestingly, Plato in The Republic says that the purpose of education is to harmonize the city by limiting the poetry and rhythms that can be taught to the young. See, e.g., PLATO, The Republic, in PLATO: THE COLLECTED DIALOGUES INCLUDING THE LETTERS 424b–425a (Edith Hamilton & Huntington Cairns eds., bk.2 1961); PLATO, The Laws, in PLATO: THE COLLECTED DIALOGUES INCLUDING THE LETTERS 659f–bk. 2 (Edith Hamilton & Huntington Cairns eds., bk.2 1961).

92. Here I am in sympathy with Amy Gutmann’s point, made during her Dewey lecture at the University of Chicago on April 15, 2003, that democracies do not act justly when they either ignore or pay too much attention to the identity groups that make them up.

93. Here I note John Rawls’s view that a pluralistic society, with many different incommensurable religious, philosophical or moral doctrines, can nevertheless, hang together if the members of the society share a common view of justice, at least for the purpose of resolving disputes among themselves. See JOHN RAWLS, POLITICAL LIBERALISM 19 (1993). The
Such common approaches are usually based on shared principles of social justice and falsely presuppose that most people are willing to forego incommensurable, but deeply held, conceptions of the good. A quick perusal of Western newspapers will make clear that many people are not so willing to accept such middle-of-the-road outcomes, as is often the case involving issues such as marriage and adoption that affect gays and lesbians. Consequently, I will follow what I believe to be a stronger foundation for human rights principles, grounded in what all particularist and universalist moral systems necessarily presuppose, even if they do not always recognize that they do so. The system of values at which I will arrive will hopefully be able to adjudicate disputes, even over seemingly incommensurable conceptions of the good. Such a modified liberalism thus lies in between tolerance and multiculturalism. It is a form of liberalism that begins with the idea of freedom, but recognizes that freedom by itself is not enough unless it is also modified by a good sized dose of well-being in the sense described above.

Freedom subsumes rights to freedom of speech, press and assembly; the right to worship, travel and own property; the right to govern oneself and participate in the governance of one's society; and the right to privacy. In terms of culture, this means that no culture should operate so as to deny individuals the right to participate in the decision-making process of the group without, at least, a means to exit the group without undue burden placed upon them. Similarly, well-being by itself is not enough if the affected

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94. Even putting aside the few who engage in violent behaviors, many well-supported groups have both lobbied against and boycotted efforts to find middle of the road outcomes. See, e.g., Larry Bush, Majority vs. Gays, N. Y. TIMES, Nov. 19, 1981 (discussing the Moral Majority's efforts to have the U.S. House of Representatives overturn a District of Columbia bill that decriminalized sodomy between consenting adults); David W. Dunlap, Gay Advertising Campaign on TV Draws Wrath of Conservatives, N. Y. TIMES, Nov. 12, 1995 (describing how the Christian Broadcasting Network threatened other TV stations if they broadcast a advertisement suggesting an impact between Pat Robinson's ministry and gay teenage suicides); Mireya Navarro, Disney's Health Policy for Gay Employees Angers Religious Right in Florida, N. Y. TIMES, Nov. 29, 1995, at A20 (discussing a Florida Baptist convention resolution to boycott Disney for offering health benefits to its same-sex employee's partners); Florida Curb on Homosexuals Survives a Test, N. Y. TIMES, Oct. 4, 1981 (discussing a Florida law barring state aid to any university providing funds, a meeting place or recognition to groups advocating "sexual relations between persons not married to each other").

95. See infra text accompanying note 9.

96. See GEWITH, REASON, supra note 63, at 256, 308-09.

97. See GEWITH, SELF-FULFILLMENT, supra note 9, at 154 (arguing for cultural pluralism).
individuals have no control over the conditions under which their well-being is guaranteed. Well-being subsumes the right to a decent standard of living, including the right to work and have baseline financial protections should one become unemployed, the right to a decent education that both prepares one for a productive life and teaches the truths of science along with developing an appreciation of the arts, and the right to an adequate system of health care. Consequently, the modified form of liberalism that I am proposing must seek not only liberty in its usual sense of freedom from constraint, but liberty directed towards the attainment of a self-fulfilled life. When construed this way, liberalism is associated not with specific ends but with a set of possible noble ends, all of which can lead to the possibility of a happy and fulfilled life. My notion of liberalism promotes a robust notion of individual autonomy in that it broadens self-rule to contain the substantive relationships of one's actions to a flourishing life. I pattern my argument on Aristotle by recognizing that moral virtue is a kind of mean determined by reason and that a good (or happy) life is one where its activities are in accordance with highest virtue, or reason.

My reason for focusing on autonomy in this more robust sense of being directed towards the attainment of both a physically and a psychologically satisfying life rather than treating it as simple liberty, is to resolve a certain kind of conflict that is thought to exist when liberalism competes with various multiculturalist conceptions of the good. Liberalism attacks multiculturalism for being over-extensive in the liberties it restricts. Multiculturalism claims liberalism is too disinterested to protect important human goods.

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99. See GEWIRTH, SELF-FULFILLMENT, supra note 9, at 128.
100. Id. at 195.
101. My point here is normative. I am treating autonomy as a means to obtain what is most valuable in life. This overlays what I take to be autonomy's standard meaning: that the conditions under which one chooses to act are only those set by the activity itself, unless otherwise agreed to. In this sense, liberty is of paramount importance to my view of autonomy. It is not simply liberty that defines autonomy, as I mean it. For in choosing to engage in certain activities, one agrees to play by the rules that define those activities only because one views them as beneficial to the self. For example, one will not choose to get married unless one desires to achieve some benefit that comes from getting married. Similarly, one will not seek to acquire the status of being an educated person, unless one accepts certain standards (which at any time may be in flux) for why a good education is valuable. This means that one may need to be acquainted with different kinds of marriages and different kinds of benefits from education, if they are going to desire to engage in either of these activities.
102. ARISTOTLE, NICOMACHEAN ETHICS, bk 2, ch. 6, 1106b36.
103. Id. at 288.
In order to avoid these two problems, in the context of public education, especially regarding gay and lesbian concerns, it must be stated when liberalism should have the upper hand against multiculturalist arguments and when multiculturalist arguments should trump liberalism. An autonomy-centered approach will resolve the problem by discerning when it is appropriate for public education to affirm certain lifestyles to provide a meaningful life from when it is inappropriate. It is necessary for me to be more specific about what that sense of autonomy is and what roles it implicates for public education.

III. Why Start From Human Rights?

I have been discussing some of the roles that culture plays in respect to the development of both a social and personal identity for gay and lesbian people. I have noted that the dominant culture in several Western societies tends to marginalize this group. The dominant culture discourages group members from coming out of the closet and creates a social climate of fear and oppression that is pervasive enough to affect one's private and public life. At the same time, many gay and lesbian people, to varying degrees, still come out of the closet. They form subcultural groups to secure their needs for intimacy and self-identity, and many make demands for acceptance, to varying degrees, on the mainstream culture. Because the interplay between the dominant culture and this subcultural group is often conflicting, a normative ordering for how these groups should interact is necessary.

Here we see the need for a universal system of human rights to adjudicate between the conflicting needs for self-fulfillment of members of these different groups. More particularly, the dominant culture should recognize the needs and interests of gays, lesbians, bisexuals and transgendered people. The latter are included here because, as noted above, the conflicts between the dominant culture and gays and lesbians, in particular, are often conflicts over the meaning and roles the dominant culture and various subgroups assign to gender. In turn, all groups should value the norms of the dominant culture when the result is likely to enhance the widest freedom of choice of members of the groups. Obviously, the extent to which each group should go to accommodate the other cannot lie

104. See Greenberg, supra note 42, at 458.
105. For an interesting discussion of different views on the development of homosexual subcultures, see id. at 15-17.
106. See id.
in the values of either the dominant culture or the subcultural group. To do so would entail either a tyranny by the mainstream culture or an unjustified exception to the values of the dominant culture for the subgroups.

I propose, instead, to work this issue from within a broader system of universal human rights that would presumably govern both the dominant cultural group as well as the subcultural groups. The approach I will follow to setting out this system of rights tracks the approach of Alan Gewirth in *Reason and Morality*. This proposed broader system will inevitably be controversial, but philosophical theories that attempt to justify foundations for ultimate moral views usually are. For this reason, I will also offer an alternative system, admittedly less complete and less determinate, to unlock the principle concerns I have with regard to public education on gay and lesbian issues and suggestions to legitimize these concerns. Needless to say, the latter approach is encompassed within the broader previous approach. Here I am following a distinction made by Jeremy Waldron between justification and legitimation. The former is a concern among professional philosophers and is usually based on deciding between individual rights and utilitarianism. The latter is a concern of political theorists who want to know what the limits are on majoritarian rulemaking. The weaker approach I will take still makes use of Gewirth’s basic model, but now as an interpretative stance for opining on well-accepted U.N. documents like the Declaration of Human Rights of 1948. The last section of this essay will apply this Gewirthian interpretation to these documents to provide a semblance of a response to the cultural problems discussed.

In *Reason and Morality*, Gewirth argues that all moral theories presuppose the individuals they address to be voluntary purposive agents. Assuming this starting point to be plausible, we begin here to develop a determination of fundamental human rights. The method that Gewirth employs to accomplish this task, called “dialectically necessary,” begins with what all moral theories share in common and proceeds from there to a set of human rights that no rational agent logically can deny without contradiction. The argument proceeds, from within the internal conative standpoint of

109. *Id.* at 392.
110. *Id.*
111. *See generally Universal Declaration of Human Rights, supra* note 2.
the agent, to see what she can or cannot logically agree to when claiming to do any action for any purpose. The agent begins by asserting: (1) “I do X for purpose E.” This is a statement of what all moral theories presuppose, namely, that each agent does some action X voluntarily for some purpose E. The quotation marks signify that the agent’s assertion is from within her own point of view. Here, we are concerned with tracing out the underlying logic behind the set of claims the agent must make (at least implicitly) if she is to do any action for any purpose. From this first statement, it follows that the agent adopts (2) “E is good,” whereby “good” is not necessarily meant a moral good. It is sufficient that the “good” references a reason, motive, or pro-attitude for why the agent acts. Obviously, if the agent thought E was bad in every sense, she would not choose to do X. So, the sense of good here follows solely from the agent’s attitudinal commitment to act for some purpose of her own. Next, she asserts (3) “My freedom and well-being are necessary goods.” Here freedom pairs with voluntariness, and well-being pairs with purposiveness. Freedom means that the agent is unconstrained in her action by others and also possesses knowledge of the relevant circumstances for her action. “Well-being in the inclusive sense”, that Gewirth discusses, “comprises having the general capabilities and successfully exercising them.” In this sense, it fits in with the notion of an agent as the pursuer of particular goods. If the agent is to act for some purpose she regards as good, she must also positively value those necessary features of the action that allow her to act, namely, her freedom to act and her well-being that makes action possible. From (3), Gewirth states that the agent claims: (4) “I have rights to freedom and well-being.” The point is that the agent must, at least implicitly, claim rights to freedom and well being, if she is to claim to act at all. Gewirth sees this as a matter of pure consistency in which the claim to act presupposes the necessary conditions for generally successful action. Still, because some might object to the

113. Id. at 49.
114. Id.
115. Id. at 64.
116. Initially Gewirth discusses freedom and purposiveness as the basis of the agent’s claim, but he soon shows that the relevant sense of purposiveness at stake is what would entail well-being in the sense of fulfilling certain necessary capacities for human action. See id. at 57. If one has no legs, for example, then absent some prosthetic device, one cannot walk.
117. See id. at 62.
118. Id. at 60.
119. Id. at 61.
120. Id. 64.
introduction of the word "rights" at this point, Gewirth considers the consequences if the agent adopted the opposite position to (4).\textsuperscript{121}

First, Gewirth notes that (3) might be rewritten, without substantive alteration, to bring out its essential connection to purposive action. The revised statement, which he calls (3a), reads, "I must have freedom and well-being."\textsuperscript{122} Essentially, I must have freedom and well-being if I am to do any X for any purpose E that I regard as good. If the agent now were to deny (4), call it (4'), she would be denying "I have rights to freedom and well-being."\textsuperscript{123} Consequently, our agent must also deny (5') that "all other persons ought at least to refrain from interfering with my freedom and well-being."\textsuperscript{124} This occurs, because the rights claims she is engaging are claim-rights, signifying that they correlate with the duties of others as opposed to more general liberties or privileges which may have no corresponding respondent.\textsuperscript{125} From there, it follows that the agent must accept the premise that (6') "I may not have (i.e., it is permissible that I not have) freedom and well-being."\textsuperscript{126} However, (6') contradicts (3a), which means that either (6') or (3a) must be wrong. But, (3a) was set forth as a mere restatement of our noncontroversial premise (3); whereas, (6') was derived from our denial of the controversial premise (4). Consequently, (4), as originally written, must have been correct.\textsuperscript{127} This is, in effect, an indirect proof of proposition (4). If the opposite of a questionably logical move leads to a contradiction, the move as originally set forth must have been correct.\textsuperscript{128}

Now, it should be noted that so far Gewirth has only shown that to be consistent, if the agent wants to do X for purpose E, she must at the same time, affirm rights to freedom and well-being. Stated differently, the claim to rights by the agent is strictly prudential. This is because it is made from within the agent's internal conative

\begin{footnotes}
\item \textsuperscript{121} \textit{Id.} at 80.
\item \textsuperscript{122} \textit{Id.} at 81.
\item \textsuperscript{123} \textit{See id.} at 80.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{See Wesley Hohfeld, Fundamental Legal Conceptions 36-38 (1919). I do note that there may exist duties that are not correlated with rights like, for example, Immanuel Kant's idea of "imperfect duties," but these would not be the sort of duties with which I am concerned here. For a discussion of imperfect duties, see Immanuel Kant, Grundlegung zur Metaphysik der Sitten (1785); see also, Immanuel Kant, Foundations of the Metaphysics of Morals 39 n.10 (1976).
\item \textsuperscript{126} \textit{See Gewirth, Reason, supra note 64, at 80.}
\item \textsuperscript{127} \textit{See id.}
\item \textsuperscript{128} In logic, a \textit{reductio ad absurdum} proof, or what is sometimes called an indirect proof, suffices to prove the original claim. \textit{See Howard Kahane, Logic and Philosophy: A Modern Introduction} 92-96 (6th ed. 1990).
\end{footnotes}
point of view to do X for purpose E. To transform this same rights claim into a universal moral rights claim, it must further be shown that any agent logically must admit, on pain of contradiction, that all other agents also have these rights. In this way, the agent would be committed to giving due deference to the rights of her recipients, especially the most important matters of their concern, and herself.

To transfer the agent’s rights claim into a universal moral rights claim requires that she further (5) recognize that the sole reason for which she made her rights claim was that she wanted to do X for purpose E. In other words, no other reason than my being an agent, such as my being of certain race, gender, sexual orientation, or intelligence, played a role in my making this claim. This occurs, because nothing distinguishes one person’s claim from another’s, as all claims are being asserted alone on the basis that each is an agent. This is an illustration of the principle of sufficient reason. It also follows that the agent must, then, recognize (6) that any person who seeks to do X for purpose E could make the same claim. This is an example of the “principle of universalizability”. From these two further conditions, sufficient reason and universalizability, the agent concludes: (7) that if she denies rights to her fellow agent that on the same basis she affirms for herself, she contradicts herself. In other words, the agent concludes that she must (8) “Act in accord with the generic rights [i.e., the rights to freedom and well being] of both her recipients and herself.” The latter statement Gewirth calls the “Principle of Generic Consistency” or “PGC” for short. According to him, this is the supreme principle of morality, as it follows from what any

129. See Gewirth, Reason, supra note 63, at 79.
131. See Gewirth, Reason, supra note 63, at 104-05. The principle of sufficient reason actually come from Gottfried Leibniz, who asserted it thus: “Nothing happens without a sufficient reason, i.e. without it being possible for someone wh an adequate knowledge of things to give a reason sufficient to determine why they are that way and not otherwise.” G. W. Leibniz, Discourse on Metaphysics and Related Writings, in Principes de la Nature et de la Grace, Fondés en Raison 602-03 (1714) translated in Classics of Philosophy and Science 96 (Stuart Brown, R. Niall eds., 1988).
132. See Gewirth, Reason, supra note 63, at 133.
133. Id. at 105.
134. Id. at 133.
agent, operating within any moral system, logically must presuppose on pain of contradiction with being an agent.\textsuperscript{137} Moreover, because any person can go through this process to reach the PGC, the latter can also be asserted not just dialectically (from within the agent’s own standpoint), but assertorically (without the quotation marks), as a true ground governing all human action.\textsuperscript{138}

For our purposes, the Gewirthian analysis provides the groundwork for resolving cultural conflicts both in the first instance and as a possible means of interpretation of relevant human rights documents. For, insofar as the basic norms of any culture can impact freedom and well-being, they must, at minimum, be protective of these universal human rights. Put another way, neither the dominant culture nor any subcultural groups can limit an individual’s freedom except insofar as to protect the rights of others.\textsuperscript{139} By the same token, the PGC does recognize that individuals, as part of the development of their own well-being, may consent to conditions for themselves that are more restrictive of their freedom than what they can command for others.\textsuperscript{140} An example of this is persons who choose to live the ascetic life of a monk or nun. Under the freedom component of the PGC, individuals may place restraints upon themselves in their private lives, such as where to live, what principles to live by, and with whom to live, that they cannot place on others.\textsuperscript{141} To place such restrictions on others would be to use one’s freedom to attack another’s, which would, in turn, place one in the position of affirming rights for themselves that on the same basis one denies another.\textsuperscript{142} Such a contradictory position would amount to a failure to afford equal regard to the freedom of others, where others are equal by virtue of being agents.\textsuperscript{143} Except in contexts where the other himself is violating someone’s rights, is it appropriate, for example, to imprison a person for his or her behavior.\textsuperscript{144} Transactional inconsistency, which occurs when freedom is denied except as a rectification for the violation of rights, is

\begin{itemize}
  \item \textsuperscript{137} Id. at 145.
  \item \textsuperscript{138} Id. at 145-46.
  \item \textsuperscript{139} Id. at 274-77.
  \item \textsuperscript{140} Id. at 163.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Id. at 163-64.
  \item \textsuperscript{144} Id. at 275-77.
\end{itemize}
properly assigned to the category of invidious discrimination and in that sense raises an equality objection where all persons are not treated equally.\textsuperscript{145} Gewirth ranks the rights to freedom and well-being in order of their importance to purposive agency.\textsuperscript{146} Under the freedom component, the goods that form the objects of these rights receive equal treatment, as they have more or less equal value depending on the immediate needs of the situation.\textsuperscript{147} In contrast, under the well-being component, basic goods rank as most important, because they are necessary to simply existing as an agent.\textsuperscript{148} They include rights to life, physical integrity, and mental equilibrium.\textsuperscript{149} Next in the well-being rankings fall the nonsubtractive goods, or those necessary to maintain an undiminished level of purposive activity.\textsuperscript{150} The rights to these goods include, but are not limited to, rights not to be lied to, cheated, or made the recipient of broken promises.\textsuperscript{151} Finally, additive goods are included in these rankings.\textsuperscript{152} These goods develop and enhance one's capacity for purpose fulfillment.\textsuperscript{153} They include, among others, rights to a decent public education, adequate amounts of financial welfare, and health care.\textsuperscript{154} Together, these well-being rights represent three classes of goods, which, when juxtaposed to the PGC's right to freedom, constitute a strong ground for both tolerance and human welfare in respect to those goods that allow one both to maintain and develop purpose fulfillment.\textsuperscript{155}

The well-being rights also provide the argument for affirming the expectations of subcultural groups whose rights are often limited by a less tolerant and more austere dominant culture than what these human rights would otherwise provide. This issue is important for our discussion, because if the mainstream culture is less tolerant of differences in various conceptions of good, the PGC requires intervention to offset illiberal aspects of that dominant culture. It may not be able to directly prohibit, in all cases, the mainstream cultural attitudes, as those are often too diffuse to be the objects of a general prohibition. However, the PGC can operate

\begin{itemize}
\item \textsuperscript{145} \textit{Id.} at 206-08.
\item \textsuperscript{146} \textit{Id.} at 62-63.
\item \textsuperscript{147} \textit{Id.} at 62.
\item \textsuperscript{148} \textit{Id.} at 63.
\item \textsuperscript{149} \textit{Id.} at 63.
\item \textsuperscript{150} \textit{Id.} at 55, 63.
\item \textsuperscript{151} \textit{See Basis and Content, supra note 130, at 56.}
\item \textsuperscript{152} \textit{See GEWIRTH, REASON, supra note 63, at 63.}
\item \textsuperscript{153} \textit{Id.} at 56.
\item \textsuperscript{154} \textit{See GEWIRTH, COMMUNITY, supra note 98, at 14; see also GEWIRTH, SELF-FULFILMENT, supra note 9, at 95.}
\item \textsuperscript{155} \textit{GEWIRTH, REASON, supra note 63, at 54-55.}
\end{itemize}
less directly to achieve a similar end at least through education, if not public pronouncement.

In terms of particular moral systems, the PGC provides the baseline rights that all people deserve simply by virtue of being human agents.\textsuperscript{156} The PGC requires that adequate public education be provided in society not only to avoid misunderstandings of what goods are available, but also to highlight how different choices can impact one's life.\textsuperscript{157} This results from the fact that the PGC has both a positive and negative aspect.\textsuperscript{158} The former follows from universalizing what every agent would request on pain of contradiction when there is no comparable cost to oneself. It also follows from the fact that the additive good of education to develop one's capacities to the fullest is needful to purpose fulfillment. Thus, the PGC demands that good public education be made universally available so that every person will have the minimum requisites to develop capacities that will ultimately lead to his or her self-fulfillment.\textsuperscript{159} In short, all of the rights contained in the U.N. Declaration of Human Rights of 1948 ("Declaration") would be justified under the PGC.\textsuperscript{160}

It should also be noted that the conceptual separation between the freedom component and the well-being component does not mean that one type of right is more important than the other.\textsuperscript{161} For example, without adequate education, welfare, and health care, rights to autonomy and self-governance seem hollow.\textsuperscript{162} Similarly, without the freedom component, the provision of well being can appear very paternalistic, in effect disregarding the individual's conception of herself.\textsuperscript{163} Consequently, the normative requirements of the two components must be treated together, as both mandatory, to insure purpose fulfillment.\textsuperscript{164} Rarely, the freedom component must yield to the well-being component.\textsuperscript{165} This occurs, because basic well-being is necessary to the very possibility of purposive agency.\textsuperscript{166} Even excluding this possibility, one is inclined to ask: How is the PGC to react to a dominant set of cultural norms that appear oppressive to the self-fulfillment of gays and lesbians?

\begin{footnotes}
156. \textit{Id.} at 135.
157. \textit{See Gewirth, Self-Fulfillment, supra note 9, at 97.}
158. \textit{Gewirth, Reason, supra note 63, at 135.}
159. \textit{See Gewirth, Self-Fulfillment, supra note 9, at 97.}
160. \textit{See Vincent J. Samar, Gay Rights as a Particular Instantiation of Human Rights, 64 Alb. L. Rev. 983, 1008 (2001); see also Declaration, supra note 2 (showing what these rights are).}
161. \textit{Gewirth, Reason, supra note 63, at 250-55.}
162. \textit{Id.}
163. \textit{See Gewirth, Self-Fulfillment, supra note 9, at 112.}
164. \textit{Id.} at 121.
165. \textit{Id.} at 264-66.
166. \textit{Id.}
\end{footnotes}
Before doing that, however, I will now take the more limited approach mentioned earlier, involving an interpretation of the Declaration adopted by the United Nations General Assembly in 1948.167 Although more aspirational than binding on the member states, in the sense that the Declaration is not viewed as a treaty under international law, the document describes two classes of rights: political rights and economic/social rights.168 These rights are listed as obligations of member states of the U.N., subject only to the limitations discussed infra.169 Even setting aside legal obligations, however, these rights likely represent moral values of a democratic society adopting the Declaration, even if they may not resolve all fundamental moral conflicts within that society. Consequently, they can be subject to and made part of a moral interpretation of individual rights especially, because they were adopted by the member states making up the U.N. The primary difference between the two types of rights described is that the U.N. recognizes that economic and social rights may not be immediately achievable in every nation worldwide because of differences in economic circumstances.170 Therefore, member states enjoy flexibility in how soon they are required to adopt the social and economic provisions.171

Bearing this in mind, the specific rights adopted by the Declaration are as follows. The political category includes rights such as the rights to life, liberty, and security of person;172 to not be held in slavery or subjected to torture or inhumane treatment;173 to not be subjected to arbitrary arrest, detention, or exile;174 to a fair and public trial;175 to be treated as an equal before the law;176 to a presumption of innocence;177 to travel and asylum;178 to change nationality;179 to own property;180 to freedom of thought, conscience,

167. Declaration, supra note 2.
168. Id. (determining that certain types of rights, like social security in Article 22, shall be made available "in accordance with the organization and resources of each State," rather than distinguishing classes of rights on its face).
169. See id. at pmbl.
170. See id.
171. Id.
172. Declaration, supra note 2, at art. 3.
173. Id. at arts. 4-5.
174. Id. at art. 9.
175. Id. at art. 10.
176. Id. at art. 7.
177. Id. at art. 11.
178. Id. at arts. 13-14.
179. Id. at art. 15.
180. Id. at art. 17.
and religion;\textsuperscript{181} to hold and express opinions;\textsuperscript{182} to peacefully assemble;\textsuperscript{183} to be able to take part in government\textsuperscript{184} and to have privacy respected.\textsuperscript{185} Most of these rights are \textit{negative} in the sense of demanding noninterference with actions, although some are \textit{positive}, demanding entitlements or assistance in various forms, such as the right to own property, to change nationality, to asylum, to a fair and public trial, to a presumption of innocence, to be treated as an equal before the law, and to take part in government.\textsuperscript{186}

In contrast, the social and economic category includes almost all positive rights such as rights to an adequate standard of living;\textsuperscript{187} to education including compulsory primary education;\textsuperscript{188} to participate in the cultural life of the community;\textsuperscript{189} to social security;\textsuperscript{190} to work, rest, and leisure;\textsuperscript{191} and to a social and international order in which these rights are realized.\textsuperscript{192} This rights category of the Declaration does however, recognize at least one negative right: the right to join unions without interference.\textsuperscript{193}

An interesting historical point is that the delineated political rights appear similar to those rights traditionally thought of as natural rights.\textsuperscript{194} Thomas Hobbes and John Locke, for example, understood the use of natural rights language to bring about joint action in pursuing a common good.\textsuperscript{195} Hobbes, in particular, saw natural rights as inherent freedoms to do what one wanted when no greater force was present.\textsuperscript{196} In contrast, Locke saw natural rights as property claims first to one’s own body and the labor of one’s hands and eventually to own the products of one’s labor power.\textsuperscript{197} Both theorists essentially followed a bottom-up approach to rights that begins with the individual and moves toward the society. This

\footnotesize{\textsuperscript{181} Id. at art. 18.}\n\footnotesize{\textsuperscript{182} Id. at art. 19.}\n\footnotesize{\textsuperscript{183} Id. at art. 20.}\n\footnotesize{\textsuperscript{184} Id. at art. 21.}\n\footnotesize{\textsuperscript{185} Id. at art. 12.}\n\footnotesize{\textsuperscript{186} Id. at arts. 3-21.}\n\footnotesize{\textsuperscript{187} Id. at art. 25.}\n\footnotesize{\textsuperscript{188} Id. at art. 26.}\n\footnotesize{\textsuperscript{189} Id. at art. 27.}\n\footnotesize{\textsuperscript{190} Id. at art. 22.}\n\footnotesize{\textsuperscript{191} Id. at arts. 23-24.}\n\footnotesize{\textsuperscript{192} Id. at art. 28.}\n\footnotesize{\textsuperscript{193} Id. at art. 23(4).}\n\footnotesize{\textsuperscript{194} J. Roland Pennock, \textit{Rights, Natural Rights, and Human Rights-A Global View, in Human Rights} 2 (J. Roland Pennock & John W. Chapman eds., 1981).}\n\footnotesize{\textsuperscript{195} Id. at 3.}\n\footnotesize{\textsuperscript{196} THOMAS HOBBES, \textit{LEVIATHAN} 72 (Richard E. Flathman & David Johnston eds.) (1651).}\n\footnotesize{\textsuperscript{197} JOHN LOCKE, \textit{THE SECOND TREATISE OF GOVERNMENT} 17 (Thomas P. Peardon ed., 1982) (1690).}
contrasts to the older natural law approach that first treats broad concerns about law, justice, duty, and the public interest, and only from there moves to the individual. By following the bottom-up approach, natural rights rhetoric replaced the generally teleological, or top-down, approach of the old natural law rhetoric, which had been in common use for a long time, and had been a focus of the classical understanding of "natural rights."

In natural law rhetoric, one began with a conception of the end one hoped to achieve and, around that end, fashioned a view of how society should be organized. Contrastingly, modern natural rights rhetoric claims center on the self, even though individuals often join their claims in pursuit of some common good. Historically, this modern sense of natural rights rhetoric arose, because individuals could not count upon the state to follow principles of equality and nonarbitrariness, and human rights justified individuals' implementation of self-help in order to protect their most basic interests. Such rights were thought to be given by God, the result of humans being rational creatures, or the result of the fact that most human needs and abilities did not fundamentally differ between individuals. Still, natural rights rhetoric shared with natural law rhetoric a sense that the claimed rights were absolute and invariant. Today's human rights rhetoric does not make quite this same claim.

Juxtaposing natural rights against human rights, one discovers various similarities including that the rights proclaimed are thought to be universal, in that they are held by all peoples irrespective of any difference in social or economic class. The Declaration specifically states that the rights enumerated therein hold for all people without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Although sexual orientation is nowhere specified in the Declaration, the document does include the phrase "other status." If sexual orientation is conceived as a status, there would

198. See Pennock, supra note 194, at 1-2.
199. See id.
201. See Pennock, supra note 194, at 3.
202. Id.
203. See LOCKE, supra note 197, at 16-17.
204. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 63-64 (Mary Gregor trans., 1991).
205. See HOBBES, supra note 196, at 68-69.
206. See Pennock, supra note 194, at 6.
207. Id. at 15.
208. Declaration, supra note 2, art. 2.
be a basis under this provision for granting at least limited protection to homosexuals.\(^{209}\) Of course, this would itself be highly controversial, as the status/conduct distinction is often used to deny gays and lesbians rights to be open and honest about who they are.\(^{210}\) Still, proof that the proscribed conduct is not harmful when engaged in by consenting adults, that it, indeed, can be quite self-fulfilling might eliminate the basis for the conduct concern as an invasion of individual privacy. Indeed, Article 12 of the Declaration recognizes a right to privacy, stating, “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”\(^{211}\)

More importantly, the United Nations has adopted two covenants since the Declaration that have the force of treaties and are specifically designed to respond to discrimination, including cultural discrimination: the International Covenant on Civil and Political Rights (“ICCPR”)\(^{212}\) and Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).\(^{213}\) For example, articles 2(f) and 5(a) of CEDAW require states to alter or otherwise abolish cultural practices and patterns that discriminate against women on the grounds that they are inferior or on grounds based on stereotypes.\(^{214}\) Articles 2(1), 4(1), and 26 of ICCPR provide very broad anti-discrimination provisions.\(^{215}\) As these two conventions evince, culture is not outside the concerns of either existing international law or morality.\(^{216}\) In part this is because human rights are also like natural rights in that they are regarded as inalienable.\(^{217}\) One cannot forfeit these rights, short of intentionally attacking an innocent person.\(^{218}\) Additionally, every human being possesses the same measure of these rights.\(^{219}\)

\(^{209}\) Id.


\(^{211}\) Declaration, supra note 2, art. 12.


\(^{214}\) Id. at arts. 2(1), 4(1).

\(^{215}\) ICCPR, supra note 212, at arts. 2(1), 4(1), 26.

\(^{216}\) Id.; CEDAW, supra note 213, at 161A.

\(^{217}\) Pennock, supra note 194, at 6.

\(^{218}\) Id. (implying that when one intentionally seeks to harm another, the other can resist such harm even if that means harming the perpetrator in return).

\(^{219}\) Id. at 15-16.
With respect to the differences between human rights and natural rights, human rights are not unlimited as illustrated by the fact that social security and compulsory education are recognized by the Declaration along with its recognition of human liberty, despite the former's potential to limit the latter. Nor are human rights always absolute. It has already been mentioned that where an economy will not allow their immediate satisfaction, economic and social rights will not be obligatory. This is an example of the Kantian dictum "ought implies can," here applied to the international recognition of human rights. If a country is unable to provide its citizens with such benefits as, for example, social security, it should not have to undermine what economy it has in attempting to do so. Of course, a nation is obligated to not just sit on its hands but to significantly work toward the development of an economy that in the not too distant future will be able to meet these needs. In other words, a nation cannot rely on the status quo to be an ever-present excuse to deny these social and economic rights to its people in perpetuity. So, human rights may be overridden, but only where circumstances warrant, which means only that not overriding the right(s) will likely lead to undermining the very reasons for protecting human rights in the first place.

For example, the rights recognized by the Declaration certainly allow for adjustments to accommodate advances in technology and medicine, improved economic conditions, and increased awareness and sensitivity to various human needs, including arguably those related to the development of a cultural identity. In the instance where the right to life may be involved, it arguably would not apply to keeping alive a comatose patient in a persistent vegetative state. Here one could see a helpful interpretative role for different notions of human agency. For example, establishing the difference between actual and perspective agents, versus one who is no longer an agent helps in regard to this difficult metaphysical question. It also helps with regard to questions concerning the moral status of

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220. Declaration, supra note 2, at art. 22.
221. Id. at art. 26.
222. Id. at art. 3.
223. See discussion supra Section I, at 143.
224. See id.
227. See discussion supra Section I, at 143.
228. See generally Vincent J. Samar, Is the Right to Die Dead?, 50 DEPAUL L. REV. 221 (2000) (discussing the status of the right to die following the U.S. Supreme Court decision in Quill and Glucksberg).
the unborn.\textsuperscript{229} Here, the notion of agency might distinguish those who are only potential agents from actual or prospective agents. If taken in this light, then the rights protected ought not to be interpreted to prevent women from possessing the right to choose abortion, especially if the mother's life or health is at stake.\textsuperscript{230}

Although historically, the origin of natural rights was often sought in metaphysics or theological doctrines, some scholars are much more uncertain about the foundation for these rights.\textsuperscript{231} As my purpose here is to discuss the role of public education to offset the effects of a marginalizing dominant culture in political systems where human rights are at least acknowledged, if not fully existent, I will not attempt any further justification for such rights than the Gewirthian one already offered. My purpose is to develop a consistent approach for how such rights might implicate a set of changes in the way public education handles gays, lesbians bisexuals and transgendered people. Therefore, it is enough to leave the matter of which rights to those that are already recognized by the U.N.\textsuperscript{232} granting that words will need interpretation and that the Gewirthian approach, even at its weakest stance would afford that.

The relevance of this human rights review is the groundwork it provides for resolving potential cultural conflicts in societies that already proclaim these rights. Insofar as the basic norms of any culture can impact autonomy, those who claim to uphold these human rights should be mindful of their culture's norms and the way the norms affect personal autonomy. Put as a principle, neither the dominant culture nor any subcultural groups in these societies should limit an individual's freedom or well-being, except insofar as to protect the equal rights of others.\textsuperscript{233} This, referred to as the United Nations Human Rights Principle ("UNHRP"), serves as a guide, demanding that good public education be made available to all persons so that every person will have the minimum requisites

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\footnotesize{230. Judith Jarvis Thompson, \textit{A Defense of Abortion}, 1 PHILOSOPHY AND PUBLIC AFFAIRS 47, 50-54 (1971).}
\footnotesize{231. Alan Gewirth, for example, tries to discover these rights in what all agents logically must accept \textit{qua} agent on pain of contradiction. See, \textit{Gewirth, Reason}, supra note 63, at 64. John Rawls originally attempted to discover these rights in an intuitionistic social construction of a fair and just society. See \textit{John Rawls, A Theory of Justice} 34-40 (1971). Robert Nozick attempted to discover these rights using historical information that was not patterned. See \textit{Robert Nozick, Anarchy, State and Utopia} 153-64 (1974). Thomas Jefferson identifies these rights as "self-evident" intuitions. See \textit{The Declaration of Independence} para. 2 (1776).}
\footnotesize{232. See Declaration, supra note 2.}
\footnotesize{233. Id. at 6.}
\end{flushleft}
to develop the capacities that will ultimately lead to his or her self-fulfillment. In terms of particular cultural values, the UNHRP can provide the baseline rights, including but not exclusively reserved to the right to a decent education, that all people deserve simply by virtue of being human agents, especially when interpreted within a Gewirthian framework. It can also allow for a very limited exception, as is already thought to be the case, to this or any other right insofar as it would represent a significant economic disadvantage if proffered by an underdeveloped country. How then should the UNHRP react, especially via public education, to a specific set of dominant cultural norms in developed Western democracies that are oppressive to the self-fulfillment of gay and lesbian people?

IV. HOW OBSERVING THE UNHRP MIGHT IMPACT GAY AND LESBIAN LIVES

The question now becomes how the UNHRP, with the interpretation I place on it by the PGC, squares with a certain type of particularist morality, that just happens to be the majority's morality, if it is also oppressive to a minority group. Calling the dominant cultural norms particularist means that they may not have the universalizability that Gewirth's argument requires of the PGC. The point here is to determine if, under such circumstances, public education should do more than just encourage discussion and debate about arguably coercive values held by the majority, even if there is no official or legal enforcement of violations of the UNHRP. Stated differently, should public education stand idly beside the values the dominant culture represents, even if those values are inconsistent with the UNHRP and likely to cause harm to a subcultural group? If the answer is no, then what does the UNHRP require of public education? The UNHRP requires public education to affirmatively offset specific illiberal aspects of the dominant culture. To fully understand this issue, let us begin by asking how the UNHRP stands to particularist moralities in general. First one must examine how certain cultural attitudes that harm various group identities survive to undermine even an official view of liberal tolerance with legal prohibitions against

234. Id.
235. See id.
236. See generally GEWRTH, COMMUNITY, supra note 98, at 19 (defining the Principle of Generic Consistency (PGC)).
237. See id. at 16-20.
overt discrimination.

Consider the society that views homosexuality as a form of mental illness and same-sex desire as a pathological illness against which people need protection.\textsuperscript{238} In such a society, even the liberally minded person, or the person who may be uncertain of his or her own sexuality, might, nevertheless, believe that homosexuals should be barred from public sexual expressions and that such persons' lifestyles ought to be hidden if not condemned. As an example of such ingrained attitudes, consider E. M. Forester's Maurice, in which an English teacher comments to his student reciting a classical work of literature, "Omit: a reference to the unspeakable vice of the Greeks."\textsuperscript{239} In such a climate, it is difficult to imagine how a person, becoming aware of his own homosexuality, would take any different view of it than what the dominant culture provides. Perhaps he would consider himself loathsome, a person to be pitied, or possibly a danger that society needs to protect against.\textsuperscript{240} It is less likely, unless the person has a great capacity to see past the cultural definitions, that he would see himself as perfectly fine and his society as troubled. At best, he might consider himself as going through an unhappy phase, which, with strength of will, he might overcome. Of course, I am not saying that seeing through cultural barriers is impossible or there would never be any progress or dissension by disenfranchised groups. The possibility of that happening at any given time, is not high, especially as religion, family expectations, and public ostracization reinforces these barriers.

Consequently, it is important to recognize that the UNHRP does not require diversities of cultural norms just to offset possible dominant cultural excuses to violate fundamental human rights.\textsuperscript{241} Nor does the UNHRP justify maintaining any unexamined norms that may influence the psyche in such a way that a person cannot easily overcome them.\textsuperscript{242} This is true regardless of the popularity of the view among the dominant culture or to any subgroup.\textsuperscript{243} If there is reason to believe that these norms are not to an individual's

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\textsuperscript{239} E. M. FORESTER, MAURICE 51 (1987).

\textsuperscript{240} KAPLAN, supra note 36, at 24, 146.

\textsuperscript{241} See James Brooke, After Beating of a Gay Man, Town Looks at it Attitudes, N. Y. TIMES, Oct. 12, 1998, at A12 (noting that one of the killers of Matthew Shepard had allegedly killed him because of a pass made in a bar); see generally Declaration, supra note 2.

\textsuperscript{242} See Declaration, supra note 2.

\textsuperscript{243} See id.
\end{footnotes}
benefit to maintain, then that reason needs to be evaluated. On the other hand, the UNHRP will not require that such norms be merely discarded as unimportant for fear of covering up some truth in the process. The UNHRP does require that people be educated to take critical approaches to the norms their culture presents them in order to maintain freedom and well-being. This means that the UNHRP demands that education not only set forth an alternative set of values to offset the more harmful affects of a dominant culture’s values, but that at all levels of education where cultural norms are implicated, no critically unexamined values should dominate. This latter condition stops background coercive values from being allowed to percolating institutional structures so as to deny human rights. It also recognizes that such coercive background values can have similarly serious abusive affects on human self-fulfillment as more overt forms of human rights violations.

Obvious violations of human rights occur when a person is killed, physically harmed, lied to, or cheated, especially if the harm is such that he can no longer function as he previously could. A person is also harmed when his sense of self-worth is so demeaned by the culture that he can no longer pursue what to him would be a worthwhile life. This is evident from the way self worth is intimately connected to purposeful action. As Gewirth states it,

[central to additive well-being[,] viewed as capacities or dispositions[,] is the prospective agent’s sense of his own worth. We have seen that every agent, to the extent that he avoids alienation, regards his particular purposes as worth pursuing and hence attributes value to them. When such evaluative purposiveness is more than incidental and transient, the agent has an abiding self-esteem in that he views the worth of his goals as reflecting his own worth as a rational person. He may indeed be self-critical in that he unfavorably estimates his performance in relation to specific objectives. But amid such particular variations he must have a general acceptance of himself as a person whose life, freedom, and well-being are worthy of protection and development. In this way he has a secure sense of his own identity. As was noted above, without

244. See GEWIRTH, REASON, supra note 643 at 326; see also, MILL, supra note 60, at 22-63 (discussing the protection of freedom of thoughts and ideas as a way to insure that the truth not get lost in a process of censorship).

245. See GEWIRTH, SELF-FULFILLMENT, supra note 9, at 157-58.

246. See Declaration, supra note 2.

247. GEWIRTH, SELF-FULFILLMENT, supra note 9, at 157-58.
such self-esteem, his ability to achieve further goals becomes problematic, and with it his prospects of taking satisfaction in what he accomplishes thereby.\textsuperscript{248}

The analysis suggests an important difference in the roles freedom and autonomy perform in a human life and why mere protection of freedom is insufficient to deal with a culture that is intolerant. Tracing out two important aspects of freedom, negative and positive, one can show this difference more clearly. Negative freedom is freedom \textit{from} restrictions on one's ability to act.\textsuperscript{249} A person's negative freedom is interfered with when a person is threatened by the possibility of violence, discrimination, and social ostracization, as is the case when one is shunned by their peers or family.\textsuperscript{250} Positive freedom is freedom \textit{to} act.\textsuperscript{251} Positive freedom is interfered with when a person is not allowed to live life to its fullest potential because he is not allowed to make certain decisions regarding credit, where to live, how to entertain, or what kind of romantic relationship to pursue.\textsuperscript{252} Both of these forms of freedom involve outside actors. Moreover, both are related since every freedom \textit{from} is also a freedom \textit{to} and vice versa.\textsuperscript{253}

Autonomy fits in here because autonomy is generally understood to be self-rule.\textsuperscript{254} That is to say, autonomy involves freedom in the two senses mentioned above, because both are necessary for self-rule, but it also involves something more psychological. Autonomy requires that a person have a sense of their own identity such that any choices he makes are truly his own.\textsuperscript{255} This is an important concern of autonomy because a person's sense of their ability

\begin{footnotesize}
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\item\textsuperscript{248} Id. at 125-26.
\item\textsuperscript{249} See \textit{id.} at. 112-13; see also Sir Isaiah Berlin, \textit{Two Concepts of Liberty, in Political Philosophy} 148 (A. Quinton ed., 1973). “[P]ositive and negative freedom....One is free in the negative sense if one is not prevented from doing something by another person.” \textit{The Cambridge Dictionary of Philosophy} 632 (Robert Audi, ed., 2d ed. 1999).
\item\textsuperscript{250} “One is prevented from doing something if another person makes it impossible for one to do something or uses coercion to prevent one from doing something.” \textit{The Cambridge Dictionary of Philosophy}, supra note 249, at 632.
\item\textsuperscript{251} See Gewirth, \textit{Self-Fulfillment}, supra note 9, at 113. “More specifically, one is free in the positive sense to the extent that one has control over one’s life, or rules oneself. In this sense, the term is very close to that of ‘autonomy.’” \textit{The Cambridge Dictionary of Philosophy}, supra note 249, at 723.
\item\textsuperscript{252} “The forces that can prevent this self-determination are usually thought of as internal, as desires or passions.” \textit{The Cambridge Dictionary of Philosophy}, supra note 249, at 723. This conception of freedom probably originated with Plato who saw the person as free when the rational part of the soul ruled the spirited and appetitive parts. \textit{Id.} It is also found in the writings of Spinoza, Rousseau, Kant and Hegel. \textit{Id.}
\item\textsuperscript{253} See Gerald C. MacCallum, Jr., \textit{Negative and Positive Freedom}, 36 \textit{Phil. Rev.} 312 (1967).
\item\textsuperscript{254} See \textit{Samar}, supra note 66, at 89; see also Gewirth, \textit{Reason}, supra note 63, at 138.
\item\textsuperscript{255} Gewirth, \textit{Self-Fulfillment}, supra note 9, at 115.
\end{enumerate}
\end{footnotesize}
to engage in self-rule may be constrained not only by external forces, both negative and positive, but also by internal, sometimes nonconscious, forces. These latter forces may start from a combination of outside societal expectations, family expectations, and religion. They become ever more insidious as they lose that external character to become more a part of the person.\textsuperscript{256} It is this factor that allows these forces to limit autonomy, as they impose a kind of character onto a person rather than allowing the person to develop a character more consistent with their aspirations and goals.\textsuperscript{257}

Persons who are subject to such constraints may be debarred from controlling even which desires will figure in the aspirations they may adopt. Both their self-conceptions and their envisaged values may thereby be severely diminished. Moreover, the desire for autonomy may be counteracted by various fears and other influences. You may fear the lack of external guidance and control that comes with autonomy; and your outlook may be so dominated by external environmental influences that you reject, or do not even think of, your autonomy as itself a good worthy of support.\textsuperscript{258}

Of course, one has to be careful of overgeneralizing, from a negative societal view, that a certain lifestyle is bad or potentially harmful to the conclusion that any devaluing of that lifestyle is necessarily limiting of human autonomy. Certain lifestyles might harm the individual physically or psychologically, like a lifestyle that encourages excessive use of drugs or alcohol. If that is the case, then attempting to limit access to such lifestyles and not promoting them, especially to persons who might be vulnerable to its allure, actually supports the development of individual autonomy and purposive fulfillment. In that instance, however, there should be sufficiently objective grounds to believe the lifestyle is harmful, and those grounds should not be separable from the lifestyle they disclaim. Objectively, the grounds that determine whether the lifestyle is less worthy are similar to the grounds usually asserted for saying chemical or psychological addictions are unhealthful, namely, that they prevent a person from fully functioning in important life roles unrelated to the lifestyle. For example, if a person's alcohol or drug addiction prevents him or her from

\textsuperscript{256} See, e.g., Virgina Harris, \textit{Prison of Color}, in \textit{RACE, CLASS, GENDER, AND SEXUALITY} 66 (discussing the damage African Americans do to each other's self-esteem by adopting a color prejudice against dark skinned people).

\textsuperscript{257} See \textit{ARISTOTLE}, supra note 102, bk. 3, ch. 5 (noting that it is through one's choices that a habitual way of doing and feeling is developed).

\textsuperscript{258} See \textit{GEWIRTH, SELF-FULFILLMENT}, supra note 9, at 36.
performing in his or her job or continuing in a relationship that he or she claims to want, then such addiction would be dysfunctional to normal life activities. By the same token, if one could seriously argue that a lifestyle of addiction was good, it would probably be better to honestly consider the pros and cons of such claims stacked up against each other than to cavalierly dismiss one position just because it goes against a standard view.²⁵⁹

My argument is partially premised on being in a cultural/social minority and the limitations that consequently result from such membership. Suppose, for example, an adult artist enters into a consensual relationship with an adult seller of the drug, ecstasy, to achieve ultimate artistic expression. Is the culture obligated to not only allow, but to affirm this behavior? Here it would seem that the usual criteria for not affirming a certain practice — age, harm to others, even lack of information — may not be present. Moreover, if my general view is correct, then to say that the artistic expression might be obtainable in another way is not a good argument. Otherwise, a fundamentalist Christian might say that the benefits of a truly loving and carrying relationship might also be obtained with a member of the opposite sex. So, how is this group identity recognition to be handled?

This example cannot be handled with an argument similar to what might be made by a child molester where it is fairly easy to empirically show the psychological damage to the well-being of the molested children. In the case of a child molester, potential forthcoming difficulties might not be appreciated because of immature years. Thus, it would be incorrect to say that the child was truly free to consent. The same is not true in a different situation where both parties fully understand the dangers associated with using ecstasy but agree to its procurement and use anyway. In this example, the issue is not lack of freedom, as might be manifested in a lack of knowledge of relevant circumstances, but danger to the individual’s well-being. In the case of harmful drug use, the danger to well-being is both physical and psychological. The serious misuse of drugs can ultimately defeat one’s ability to continue being an agent thus ending all psychological and physical presence. In that sense, the situation is more analogous to whether a school system should promote students engaging in unprotected sex or to ignore that this is going on, by refusing to allow sex education classes. Clearly, it

²⁵⁹. Here we find the place of an integrated role for autonomy and education where the latter provides the necessary condition for the choices, and ultimately the character that develops from those choices. See John Dewey, Human Nature and Conduct 13-42 (1922).
would be wrong from the standpoint of preserving student well-being in terms of the goods of life, physical integrity and mental equilibrium to promote such actions. This is true even if, as a strict matter of freedom, the choice rests with the individual.

Affirming a positive view of gay and lesbian human self-fulfillment would not open the door to these dangerous practices. Rather, it would be more analogous to extolling the contributions to culture and society at large made by persons identified as members of a specific race, ethnic group, or religious affiliation, or as disabled. One question still remains, especially in the context of primary and secondary school education programs. Will the persons so addressed be mature enough to seriously engage in such a dialogue?

If public education should treat different lifestyles positively, it is important to determine at what point in an elementary or secondary education it should do this. The point is not to get the student to adopt the point of view of the teacher. Rather, the point is to get the student to critically access all points of view on rational grounds. The input of child and developmental psychologists on the matter is crucial to insure that the child was ready to understand the material in the way it was being offered. School counselors would also need to be trained to provide helpful advice to young people who might be in the process of coming out as gay, lesbian, bisexual, or as having identity problems with their physical body not being consistent with their psychological self-perspective as male or female. It is also necessary to have some standard of selection to help our choices in selecting among what to teach concerning various kinds of purposeful behavior. Teaching values in a trite or superficial way, for instance, would be too easy to either follow blindly or otherwise discard, and thus would not add to the development of critical prowess that should be a goal of public education.

In *Self-Fulfillment*, Gewirth offers two devices that should be of help in solving this problem. One has already been mentioned, namely, that the particularist morality refrain from undermining universal morality. We do not merely give into convention as to what is right but accept those conventions only after they have been determined not to violate universal morality. This by itself would certainly rule out public promotion of physical and psychological

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260. John Dewey, for instance, believed that a goal of education should not be to tie one to the past but to develop those habits of mind that enable us adequately to assess new situations and to formulate strategies for dealing with the problematic dimensions of them. The Cambridge Dictionary of Philosophy, supra note 249, at 198-200.

261. Gewirth, Self-Fulfillment, supra note 9, at 52-58.
addicting situations, such as drug and alcohol use, racism, sexism, and obvious acts of homophobia, along with various other threats that might undermine human well-being and prevent one from engaging in successful purposeful action. Beyond this, however, various particularist moralities that may nonetheless pass the universal human rights test, may only serve to promote self-esteem to various greater or lesser extents. An example that comes to mind is the reading of trite novels or popular culture over serious works of literature, especially if they concern important social topics. To handle these situations, Gewirth proposes the Purposive Ranking Thesis.

That thesis operates from within a given activity, such as the study of literature, to determine a ranking of capacities that are likely to best fulfill the purposes of the activity. Note, that insofar as an activity is itself harmful to human autonomy, like the excessive use of drugs, the human rights doctrine applies directly to deny it justification at the outset. But insofar as the activity does not violate human rights but is also capable of operating with different levels of human capacity fulfillment, then the Purposive Ranking Test provides the ground for choosing the means of performance that insure the highest capacity fulfillment consistent with the purposes of the activity. This it does by considering three separate components of any activity: (a) a kind or context of activity, (b) the purpose of that activity, and (c) the comparison or value-ranking of capacities according to their contribution to that purpose. The point is that within any activity, certain capacities will constitute a higher order of performance in the sense of being better able to critically unravel the truths that lie therein than others. This can be ascertained from the activity’s point or purpose. So, for example, in literature, a capacity for a deeper, socio-psychological interpretation of the human condition would be assigned a higher ranking than a more superficial, black and white, overview. This, of course, presumes that an important purpose of literary study is to learn more about the human condition.

Applying these concerns to what might be taught in elementary or secondary schools about gays and lesbians, one could concede teaching only as much about lifestyles as the students are psychologically prepared to understand. For instance, younger students might be taught to appreciate families with two mommies

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262. Id.
263. Id. at 69.
264. See id. at 69.
265. Id. at 70.
or two daddies, as well as families with both a mommy and a daddy or a single parent, by focusing on the love and commitment to nurturing that makes any family operate as found in various works of literature and other sources. This follows my earlier comment that one should take into account what children of different ages are capable of understanding as a product of their psychological development. One could also agree to not affirming lifestyles that either (a) violate fundamental human rights or (b) play a more distant role in the development of human capacity fulfillment. Thus, one would not promote either overt expressions of homophobia in the classroom or attempt to explain the depths of same-sex relations only through superficial means. Here the (a) condition is set by the PGC interpretation of the UNHRP and the (b) condition by the Purposive Ranking Thesis. In the case of psychologically normal adults, there would be no concern regarding psychological development to understand the material, although there would be a concern to meet the requirements of both universalist morality and the Purposive Ranking Thesis, as any good university or college curriculum illustrates.

What this analysis provides is a procedure for primary and secondary schools to follow in order to affirm individual self-esteem and autonomy. It does this through acknowledging positive aspects of various lifestyles and by making individuals aware of them. This can be accomplished by including information about the sexual orientation of some of the people whose achievements are being studied within courses on art, history, science, and music. Perhaps their lifestyles contributed in some interesting way to their accomplishments. It could also be accomplished by including information concerning the various efforts to overcome discrimination beyond the context of race, class, and sex in courses on history and social studies. Including in geography and cultural studies courses, information about the way different societies have responded to persons who were not strictly heterosexual would also add to understanding the variety of ways in which humans have understood and dealt with differences. Not to be left aside is the potential of literature courses for a wide-ranging discussion of peoples' lives in many other social venues.

The analysis also provides a means for undermining aspects of the dominant culture that may not meet either the human rights condition or the purposive ranking thesis. Through engaging the teaching process, the potential is increased for encouraging both tolerance and acceptance of different peoples' lifestyles, which may ultimately contribute to a more cooperative society at large. For
example, older students (perhaps in a social science or sexual orientation and the law seminar) could be encouraged to seriously discuss and write critical papers about same-sex marriage, gay parenting, and being out in the military, to give just a few examples. Regardless of the positions ultimately adopted, provided the arguments were well thought out, the well-being and self-esteem of all concerned should be advanced. For now it would be clear that all persons' autonomy was being respected. These discussions and paper topics need not necessarily take place strictly in social science classrooms either. They could also take place in courses on literature as one reads plays and novels that might exhibit broader social phenomena. The point in all these cases would be to let everyone know that they have a place, especially if it is a place they might wish to reconsider having. In this context too, having periodic events at the school celebrating differences in sexual orientation analogous to the ways differences in race, class, gender and ethnicity are often celebrated, would add to the appreciation of diversity and support a still broader notion of civic equality and individual self-fulfillment.

One further point is worthy of mention. Even within the limitations set, not everyone will rank the same lifestyles in the same way. This is because different people assign different normative weights to various purposes even in the same activity.\textsuperscript{266} Thus, even using the Purposive Ranking Thesis, a fundamentalist Christian might see the goal of a literature class to enhance a child's development to a certain kind of moral lifestyle. On the other hand, a more open-ended perspective on the ends to be achieved may see a positive discussion of alternative lifestyles as a way to encourage a child to think for herself and to know that she is accepted regardless of her sexual orientation. Both might seek, given their different purposes, to develop a deeper level of human understanding. And both purposes may be honestly aimed at promoting individual self-fulfillment.\textsuperscript{267} Yet, a question arises when the moral values of different groups conflict: How is a school curricula to handle such conflicts of values?

It is important to recognize a principle of civic equality to govern when other limiting criteria have been exhausted. This may require having a text supporting some positive aspect of an openly gay lifestyle along with a text supporting some aspect of a more traditional heterosexual lifestyle, perhaps the same aspect, in an

\textsuperscript{266} Id. at 71.
\textsuperscript{267} Id. at 71.
English class. Selection would still have to be exercised as to what
texts to use, as there are different views of gay and lesbian lifestyles
within the gay community, similar to the existence of different
traditional views within the broader heterosexual community. But,
at least, choices that affect significant numbers of people could be
included. So, one could imagine reaching an agreed set of purposes
in creating classroom syllabi that would allow for a representative
grouping of different texts without any suggestion that all views
were being exhausted.\textsuperscript{268} In cases where the focus of the course
would be offset by such inclusions, perhaps because it is more
narrowly directed towards a specific educational task like in math
and science courses, the inclusion of outside information would be
more limited. Similarly, where time or economic constraints
prohibited exhaustive coverage of these matters, alternatives might
be tried. Role modeling or assigning research papers to integrate
course materials into broader social concerns, especially where a
well-stocked library is available, would alleviate economic and time
constraints. A school-sponsored outside speaker series would
alleviate misdirection of classroom attention and could, in
appropriate cases, be part of a homework assignment. This affirms
a central goal for education generally, namely, to encourage
students to develop a critical appreciation of the cross-cultural
points of view that different group identities represent. It would
also, when juxtaposed with an appropriate level of respect for one's
own ability to decide what will benefit them in the long run, lead to
increased opportunities for individual self-fulfillment. The latter,
more autonomy based outcome, can thus be seen to follow from
applying the UNHRP and Gewirth's Purposive Ranking Thesis to
the dominant particularist moralities that would otherwise be likely
to stifle the self-fulfillment of nonconforming groups.

V. FITTING WITHIN THE AMERICAN CONSTITUTIONAL FRAMEWORK

Here we are at a good point to consider the affects of the
UNHRP and the Purposive Ranking Thesis in supporting the
outcomes that I just described via the law. Specifically, how these
two approaches can be reconciled within a democratic system like
that of the United States where equal protection is both a publicly
and judicially recognized value. At this level, it would be good to

\textsuperscript{268} The same would apply to government support for different works of art. The choice of
what to support would then be governed by the two limitations applicable for adults combined
with a principle of equality to insure a representative sampling of art works across the board.
remember that the focus on U.S. constitutional doctrine will have more indirect application to other democratic systems that also affirm the value of equality. Bearing this in mind, I want to begin by asking how the courts presently interpret the last provision of the first section of the fourteenth amendment to the United States Constitution. In pertinent part, the section provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.  

As a general matter, Fourteenth Amendment equal protection jurisprudence tends to follow a pattern that can be schematized as follows. If the Court finds a violation of a fundamental right such as, let us say, a right to privacy, then it will have a basis, on that finding alone, to also hold that there has also been an equal protection violation. The latter is predicated on the ground that the violation applies to only some persons but not all. In instances where this would be the finding, the courts are inclined to strictly construe whether the state has a compelling reason for its distinction. Thus far, the Supreme Court recently found a due process privacy right, which, in fact, is a negative right, i.e., a right to be free from the U.S. Constitution for protecting the rights of gays, lesbians, bisexuals or transgendered people. Even if the courts do not find a specific due process violation, they can still prohibit discrimination in the application of the law on the basis of one of three judicially recognized standards. The courts may find that those who have traditionally been the objects of discrimination constitute as a group a suspect class that requires laws operating against them to be strictly construed. Race is one obvious instance

where this has occurred.\textsuperscript{274} In cases like race, the test for determining the existence of a suspect class has been threefold:

1. whether “the group at issue has suffered a history of purposeful discrimination;”
2. whether “the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious,” (often indicated by a lack of relationship to ability, unique disabilities based on prejudice or inaccurate stereotypes, and defined by an immutable characteristic [which may not be truly unchangeable but just very hard to change]); and,
3. whether “the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government.” \textsuperscript{275}

In Watkins v. United States Army,\textsuperscript{276} Judge Norris argued that gays and lesbians meet the requirements of the above test,\textsuperscript{277} although his rationale was reversed by an en banc panel for the 9th Circuit that court held for Watkins on narrower grounds.\textsuperscript{278}

Alternatively, in a future case, the Supreme Court might find that gays and lesbians warrant an intermediate level of protection on the ground that much of the discrimination directed against them is founded on gender.\textsuperscript{279} The test is whether the government can show the distinction between men and women, in a particular context, serves “important governmental objectives” and is “substantially related to achievement of those objectives.”\textsuperscript{280} The weakest analysis a court will allow in respect to an equal protection challenge is whether a particular statute or administrative

\textsuperscript{274} Notwithstanding the specific holding in Korematsu, and given a district court's subsequent finding that the government withheld critical information from the Court when the decision to intern persons of Japanese ancestry living on the West Coast was made during World War 2, Korematsu today can be read “to 'stand' for the proposition that statutes that facially discriminate against racial minorities are almost always unjust and unconstitutional” Korematsu v. United States, 323 U.S. 214 (1944); see also CONSTITUTIONAL LAW 601 (Goeffrey R. Stone et al., 3d ed. 1996).

\textsuperscript{275} WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 666 (1997).

\textsuperscript{276} Watkins v. United States Army, 847 F. 2d 1329 (9th Cir. 1988).

\textsuperscript{277} Id. at 1345-49.

\textsuperscript{278} Watkins, 875 F.2d, at 709 (1989).


\textsuperscript{280} Craig v. Boren, 429 U.S. 190, 197 (1976). Here it might be noted that “the Court's skeptical attitude toward such justifications [as are usually provided with regard to gender] reflects a willingness to scrutinize apparent public values to see whether they are in fact the product of raw political power.” Cass Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1713 (1984).
regulation or procedure has a rational basis tied to a legitimate governmental concern.\textsuperscript{281} Here the test is whether the different treatment of the groups is relevant to a difference between them that is also related to the legitimate state goal.\textsuperscript{282} This test is weak because almost any reason the government puts forth will meet this standard.\textsuperscript{283} However, even here there has been nudging.\textsuperscript{284} The Supreme Court has distinguished different levels of rational relation depending on the objective being sought. This suggests that certain governmental objectives, like preventing individuals from seeking the protection of the law via anti-discrimination ordinances and statutes, cannot be legitimate.\textsuperscript{285}

Given that the above provides a general schematic for equal protection analysis, the next question is how promoting individual self-fulfillment, as this article has been suggesting, might fit within the constitutional doctrine. Here we see the significance of the difference of focus between the negative and positive types of freedom that the UNHRP promotes as compared to that supported by traditional equal protection analysis, which tends to be more (although perhaps not exclusively) of only the negative type. From that difference arises a normative argument based on the nature of society and liberalism that suggests at least a partial revision of the constitutional norms respecting current equal protection analysis. That normative argument is as follows: In the case of traditional equal protection analysis, the state is prohibited from arbitrary discrimination. Before the state can make distinctions in the provision of goods or services, including all the benefits of the law, it must have a reason capable of satisfying the particular degree of scrutiny, mentioned above, that the courts have recognized to be applicable for the group in question. Put another way, the freedom of the individuals who make up the particular groups is protected from imposition of an arbitrary classification scheme. In this


\textsuperscript{282} See CONSTITUTIONAL LAW, supra note 274, at 567.

\textsuperscript{283} See id. at 561.

\textsuperscript{284} City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The Court held that a Texas city's refusal to permit construction of a group home for the mentally retarded violated the minimal scrutiny requirement of equal protection since it was based on prejudice.

\textsuperscript{285} Romer v. Evans, 517 U.S. 620, 634 (1996). Justice Kennedy's opinion states: "[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (quoting Department of Agriculture v. Moreno, 413 U.S. 628, 534 (1973)).
respect, the groups are free to seek self-fulfillment without the law serving as a kind of albatross about their necks.

Two important examples of where the state has failed to set an appropriate justification for discrimination are *Brown v. Board of Education*\(^\text{286}\) and *Loving v. Virginia*.\(^\text{287}\) In *Brown*, the Court brought to an end the era of legal protection for state laws allowing so-called "separate but equal" public education for racial minorities. In *Plessy v. Ferguson*, the Court had previously upheld a Louisiana statute that provided for equal but separate accommodations for the white and colored races, on board a railroad train, on the ground that the fourteenth amendment was not intended to abolish all color-based distinctions or to enforce social as distinguished from political equality.\(^\text{288}\) That era of "separate but equal," however, came to an end when, in *Brown*, the Court took note of important social science data that showed how separation of school children by race was inherently unequal.\(^\text{289}\) The Court noted that education was crucial to the performance of our most basic responsibilities, including service in the armed forces, as a foundation of good citizenship and as an instrument to awakening the child to cultural values and professional training.\(^\text{290}\) When children were separated on the basis of race, it evoked in them an "inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\(^\text{291}\) Ironically, the Court noted this negative impact on the children’s psychology by citing the lower court’s finding that had supported separate but equal public education.

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.\(^\text{292}\)

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289. *Brown*, 347 U.S. at 495 n.11.
290. *Id.* at 493.
291. *Id.* at 494.
292. *Id.*
In effect, the Court found that the separation of the races denied each child the freedom to participate fully and in a self-fulfilling way in a democratic society. By putting to one side the particularist moral thinking that had predicated constitutional interpretation since Plessy, the Court in Brown was able to see in light of the social science data available that "separate but equal" was inherently unequal and, therefore, unconstitutional. In its place, the Court adopted a new principle that all children in public schools must be given the opportunity for an education on equal terms.

Similarly, in Loving v. Virginia, the Court considered whether a Virginia miscegenation statute violated the command of the Fourteenth Amendment to provide both due process and equal protection of the laws. As noted by Cass Sunstein, the difference between fourteenth amendment due process jurisprudence and equal protection jurisprudence is that the former is backward looking while the latter is forward looking. That being said, the challenge for the due process clause is whether "an existing or time-honored convention, described at the appropriate level of generality" has been violated. Whereas the challenge for the equal protection clause is "to invalidate practices that were widespread at the time of its ratification and that were expected to endure." In Loving, the Court held that the statute violated both clauses noting that, with respect to the equal protection clause, "mere 'equal application' of a statute containing racial classifications would not be enough to remove it from the Fourteenth Amendment's proscription" against race-based classifications. To the contrary, the Court considered whether the statute itself, including the institution of marriage as was therein created and described, could pass constitutional muster. In holding that it could not, the Court noted that:

[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose

293. Id. at 495.
294. See id. at 493.
297. Id. at 1163.
298. Id.
299. Loving, 388 U.S. at 8.
institutions are founded upon a doctrine of equality."... The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.... Marriage is one of those "basic civil rights of man," fundamental to our very existence and survival.... The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.300

Following these statements the Court held that "the [negative] freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

Contrasting this negative freedom approach of traditional equal protection analysis is the positive freedom focus suggested in Palmore v. Sidoti.302 Because I am already suggesting that this positive freedom focus is a subtle part of existing equal protection law, the point to be made here has more to do with emphasis than finding something distinctly different from previous case law analysis. In Palmore, the Supreme Court granted certiorari to determine whether a state court's judgment to divest a natural mother of custody of her infant child in favor of the natural father following her remarriage to member of a different race violated the Equal Protection Clause.303 In finding that it did, the Court stated that:

[the question, however, is whether the reality of private biases and the possible injury they may inflict are permissible considerations for the removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside of the reach of the law, but the law cannot, directly or indirectly, give them effect .... The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.304

On the surface, this case sounds like a standard negative freedom treatment of equal protection analysis as it restricts the

300. Id. at 11.
301. Id. at 12.
303. Id. at 430.
304. Id. at 433.
state from interfering with the mother's right to have custody of her child because of her remarriage to a person of another race. However, given that this case involves a choice of custody between parents where there is no claim of unfitness, the standard that usually applies in such matters is for the courts to choose the placement that represents the best interest of the child. If that is the case, then buried beneath the text of the decision is the idea that continuing the placement of a child in an interracial home must not be contrary to the child's best interest. Stated differently, the freedom that the equal protection clause is protecting here is the positive freedom of the child to obtain the best placement among the contending parents. This is an important positive freedom aspect of the case, although perhaps one that has not been fully appreciated, even though it is the aspect that appears to have been anticipated by the New Jersey Superior Court's decision in *M.P. v. S.P.*

In *M.P.*, we have a similar custody fight following a divorce and award of custody of two children to the natural mother. Only now the basis of the fight was not the interracial remarriage of the mother but that the mother admitted to being a practicing homosexual. Noting that "it is well settled that the best interests of the child are of primary concern to the court in any matter involving custody of minor children," the court reversed the lower court's change of placement and reinstated the original placement of the children back with the mother. Key to the court's holding was its finding that

[taking the children from defendant [mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others."

306. *Id.* at 1257.
307. *Id.* at 1257.
308. *Id.* at 1259.
309. *Id.*
Juxtaposing Palmore with M.P. v. S.P., the two cases can be read to stand for the proposition that even a majority group's vocal dissent cannot offset the self-fulfillment of a minority group absent a very strong (and in the context of a fundamental right, compelling) reason for doing so. And, assuming M.P. v. S.P. is not too far off from what is going on in Palmore, there is no heckler's veto that the courts are willing to sustain to credit the “harm” inflicted on an inter-racially placed child and, in New Jersey and some other states, on a same-sex placement. So, the question now arises, if federal equal protection allows for the possibility of protecting the positive freedom of a minority group to achieve self-fulfillment against an adamant dissenting majority group, how might this analysis of the case law be furthered by also bringing in the UNHRP?

As described above, the UNHRP provides not only that the freedom and well being of every person be protected, but also that the goods that constitute this freedom, namely, the basic, nonsubtractive and additive goods that sustain a self-fulfilled life, be publicly recognized. Here we note an important point about the nature of the equality that the equal protection clause protects. Contra the view that the Equal Protection Clause protects only procedural or appetitive equality, the case law under the interpretative analysis I have suggested shows that the equal protection clause is ripe for protecting “necessary rights that all humans must have, simply by virtue of being purposive agents.” In saying this, the UNHRP recognizes a norm to be able to develop one’s capacity to the fullest extent possible as a kind of personal property that the individual is “entitled to have and control for her own sake.” But recognizing that limited resources will prevent all capacities from being developed or developed fully, the UNHRP requires at the very least that these capacities not fail to be developed because a dominant negative cultural influence against a particular minority group is pervasively non-addressed through the public education system. Especially with respect to the public

310. Procedural equality occurs when one treats like cases alike without regard to what benefit or detriment is distributed provided when everyone is treated in the same way. Vincent J. Samar, Symposium: “Family” and the Political Landscape for Lesbian, Gay, Bisexual and Transgendered People (LGBT): Gay Rights as a Particular Instantiation of Human Rights, 64 ALB. L. REV 983, 1028 (2001). Appetitive equality occurs where one treats others as one would want to be treated. Id. The problem with the former is that same-sex sodomy could be prohibited to all people by virtue of it being a general rule even though its effect would be most prominent on less than all people. Id. The problem with the latter view is that one can forgo for themselves rights that others may want perhaps because they have been so conditioned to believe that they have no legitimate claim to such rights. Id.

311. Id.

312. GEWIRTH, SELF-FULFILLMENT, supra note 9, at 85.
education of gay, lesbian, bisexual and transgender youth, effective possession and control of one’s own self-esteem will not be possible if one lives in a society where the dominant culture diminishes one’s status and activities where there is no obvious harm to oneself or others. By refusing both to grant recognition to the positive contributions made by gay people or to encourage open discussions about cultural norms, the state becomes complicit in trivializing gay persons and contributing to negative stereotypes about them, which has the effect, both directly and indirectly, of limiting this group. For these reasons, the UNHRP by its interpretative capacity emboldens the federal Equal Protection Clause, and arguably state equal protection clauses as well, to meet this challenge. It does this by providing a lens with which to interpret the equal protection clause to affirm human capacity fulfillment wherever possible so as to maximize the possibility of human aspirations. Especially, in the context of public education where neutrality is a mere euphemism for affirming the particularist morality of the dominant cultural group, the UNHRP requires not just tolerance but a bold and enlivening response.

**CONCLUSION**

Since every society will promote a set of cultural values customarily, if not legally, it becomes very important to determine what the role of public education should be in adjudicating among different values. This is the case especially where people’s self-esteem may be at stake and the dominant culture is less than neutral in its devaluation of the self-esteem of certain groups. In this essay, I have suggested several criteria for how public education might be effectively used to promote the self-fulfillment of gay and lesbian youth. In doing so, I hope that I have opened the door to government not being perfectly neutral in the affirmation of various lifestyles through the provision of public education. I also hope that I have placed adequate limitations on exactly what government can do so as not simply to replace one dominant cultural viewpoint with another. My ultimate goal is that in all such situations, human dignity should be maintained by insuring that the necessary elements for individuals to discover the best way to achieve self-fulfillment are consciously provided. If this means recognizing the best aspects of various group identities, as survives the constraints imposed by the requirements of the UNHRP and Purposive Ranking Thesis, then this is exactly what must be done. Provided these steps are taken, any society, especially a democratic
one, should be able to flourish with the knowledge that all its members' chances for full self-fulfillment are adequately provided.