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## Human Rights and Nation-Building in Cross-Cultural Settings

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# HUMAN RIGHTS AND NATION-BUILDING IN CROSS-CULTURAL SETTINGS

*Burns H. Weston*

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## HUMAN RIGHTS AND NATION-BUILDING IN CROSS-CULTURAL SETTINGS\*

*Burns H. Weston\*\**

### I. DELIMITATION OF THE PROBLEM

Values are preferred events, “goods” we cherish; and the value of respect, “conceived as the reciprocal honoring of freedom of choice about participation in value processes,”<sup>1</sup> is “the core value of human rights.”<sup>2</sup> In a world of diverse cultural traditions that is simultaneously distinguished by the widespread universalist claim that “human rights extend in theory to every person on earth without discriminations irrelevant to merit,”<sup>3</sup> the question thus unavoidably arises: when, in human rights decision-making, are cultural differences to be respected and when are they not? The question arises early in the nation-building enterprise where demands to preserve cultural traditions clash with demands to adhere to universal (and largely external) human rights standards.

This question was perhaps most famously first posed internationally in the late 1980s when Iran’s Ayatollah Khomeini issued a death threat against British novelist Salman Rushdie for publication of *The Satanic Verses*<sup>4</sup>—and, as well, a *fatwa* to suppress its distribution. Outrage at this theocratic salvo, condemned by Western

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\* Adapted from Burns H. Weston, *The Universality of Human Rights in a Multicultural World: Toward Respectful Decision-Making*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 65 (Burns H. Weston & Stephen P. Marks eds., 1999) with continuing intellectual indebtedness to David Baldus, Upendra Baxi, Stephen Burton, John Dugard, Basel El-Kasaby, Richard Falk, the late Erich Mathias, Michael Reisman, Jerome Shestack, Serena Stier, Mark Terrink, Marta Cullberg Weston, and Andrew Willard. Reprinted by permission.

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1. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 7 (1980). My indebtedness to this treatise is apparent throughout.

2. *Id.* at 451. The authors impose an individualistic perspective on the meaning of this “core value.” They write: “[R]espect is defined as an interrelation *among individual human beings* in which they reciprocally recognize and honor each other’s freedom of choice about participation in the value processes of the world community or any of its component parts.” *Id.* (emphasis added). No explanation or justification is given for this individualistic skew, however. And just as well. I see no reason why this otherwise useful definition of the value of respect cannot and should not apply to *groups* of human beings as well as to individual members of the human family. Indeed, a more inclusive definition, even one that extends to animate and inanimate nature, is more in keeping with the very idea of human rights, certainly of *universal* human rights.

3. Burns H. Weston, *Human Rights*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://search.eb.com/eb/article-219325> (last visited Feb. 11, 2008). Reconsidering this phrase, I am today inclined to add “capability” to “merit” (and possibly also “basic need” insofar as it is not a function of “capability”) as potentially a permissible basis for discrimination in otherwise equal arenas of claim and decision.

4. SALMAN RUSHDIE, THE SATANIC VERSES (1988).

leaders as “deeply offensive to the norms of civilized behavior,”<sup>5</sup> was duly recorded, to be sure. But a palpable hesitancy and timidity in its expression at the time, discernible especially at the beginning of the episode, suggested a concern for more than diplomatic niceties. It suggested also a haunting uncertainty as to whether the forceful advocacy of free conscience and speech was not simply giving voice to a set of idiosyncratic biases of one’s own, neither wanted nor relevant in a faraway Islamic land shaken by claimed apostasy. Perhaps bedeviled by the absolute that there are few if any moral absolutes, supposed universal human rights ran up against the variability of a human culture.

The Rushdie affair, however, is only one of a long history of occasions in which the universal validity of moral judgments has been called into question. Indeed, in recent decades, the issue has jostled interstate relations even to the point of armed conflict.

The provocations, however, have been more nationally than internationally situated, and preponderantly within countries of non-Western origin that emerged from the dismantling of colonial empires after World War II and, later, the Cold War. The reasons are several and diverse, but separately and together they have signaled the engagement of countries bent on “nation-building,” a mantra of geopolitical consolidation that often has reflected one culture’s struggle for domination over another. They are seen in conflicts stemming from territorial boundaries drawn by erstwhile colonizers insensitive to cultural and ethnic fault lines; in governments intent on erecting centralized control on the precarious scaffolding of peripheral loyalties; in the fusion of church-state institutions and procedures that privilege “the chosen” at the expense of “the other”; in the glorification of patrimonial and other traditions that serve well the interests of power elites but poorly the interests of the powerless many; in the mounting of barricades against political, economic, and—now increasingly—environmental refugees perceived to threaten established economic and political order; and so forth. The following table lists many of the cultural practices well-known for the cross-cultural controversies they can and often do generate in these settings.<sup>6</sup>

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5. Thomas L. Friedman, *Bush Finds Threat to Murder Author “Deeply Offensive,”* N.Y. TIMES, Feb. 22, 1989, at A1 (quoting statement of President George H.W. Bush on the issue). For equivalent comments by the Ministers of Foreign Affairs of the European Community, including reference to “the universal values of tolerance, freedom and respect for international law,” see *Text of European Statement*, N.Y. TIMES, Feb. 21, 1989, at A8.

6. The practices—neither exhaustively nor altogether unambiguously stated—are listed in alphabetical order according to the physical and behavioral dimensions of human existence. The inner existential (spiritual) dimension of human existence does not seem apt for separate categorization inasmuch as all cultural practices for which relativist claims have been or might be made to appear to affect the human psyche in some way, mental or psychological torture most directly of course.

### Table of Physical and Behavioral Practices

#### *Physical Practices*

1. Abortion
  - a. Mandatory
  - b. Permitted, prohibited
2. Cannibalism
3. Corporal disfigurement
  - a. Foot binding
  - b. Genital cutting
    - (1) Male (*e.g.*, circumcision)
    - (2) Female genital cutting (FGC, a/k/a “FGM” and “FGS”)<sup>7</sup>
  - c. Scarring, tattooing
4. Corporal punishment
  - a. Public (state imposed/sanctioned)
    - (1) Amputation
    - (2) Caning, flogging, lashing, spanking, whipping
    - (3) Death/Execution
      - (a) Electric chair
      - (b) Firing squad
      - (c) Hanging
      - (d) Lethal injection
      - (e) Stoning
  - b. Private (*e.g.*, familial)
    - (1) Spanking, slapping, whipping
    - (2) “Honor killing”
5. Euthanasia
6. Genocide, “ethnic cleansing”
7. Imprisonment
  - a. Life
  - b. Solitary
  - c. Hard labor
8. Infanticide
9. Torture (physical, mental)

#### *Behavioral Practices*

1. Banishment, “ethnic cleansing,” ostracization
2. Discrimination, segregation
  - a. Age
  - b. Caste/Class
  - c. Ethnicity
  - d. Gender, sexual orientation
  - e. Health (*e.g.*, HIV, lepers)
  - f. Merit/Basic need
  - g. Nationality
  - h. Political opinion
  - i. Race
  - j. Religion
3. Divorce, separation
  - a. Unilateral
4. Dress codes
  - a. Body covering
  - b. Veil wearing
5. Marriage
  - a. Arranged child marriage
  - b. Bride price, dower
  - c. Forced marriage
  - d. Homosexual
  - e. Polygamy/polygyny
6. Slavery, forced labor
7. State-sponsored deprivations
  - a. Civil/political deprivations
    - (1) Assembly, association
    - (2) Expression, opinion, speech
    - (3) Other
  - b. Economic/social deprivations
    - (1) Education
    - (2) Employment
    - (3) Other

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7. “Female genital cutting” (FGC) is a value-neutral term that I borrow from *The New York Times* and other media to avoid the pre-judgment bias of “female genital mutilation” or “FGM.” I choose the term in lieu of “female genital surgery” because this latter implies a greater degree of precision and refinement in the practice than I believe is empirically warranted overall.

Further, the more global modernization unfolds and “culture contact” grows, the more are such occasions—both within and between countries—likely to arise and insist upon answers. Consider, for example, the practices of child betrothal and fixed marriage widespread in the Third World. Sooner or later one must ponder Article 16 of the Universal Declaration of Human Rights (UDHR) proclaiming that “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family” and “only with the free and full consent of the intending spouses.”<sup>8</sup> Similarly, sub-Saharan communitarian traditions that define personal identity and status in terms of birthright, sex, age, and group membership, or occasional Hindu and Muslim traditions that segregate women on a widespread basis (*Harem, Purdah*), cause one to puzzle over the reach of the UDHR’s guarantees of equality and nondiscrimination irrespective of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>9</sup>

Such illustrations of the possible non-universality of allegedly universal human rights are of course many and in no way restricted to Third World settings. The long-standing resistance of the capitalist countries, particularly the United States, to socioeconomic rights, and of the communist countries, past and present, to civil and political rights, attest forcefully to this fact. So too do the abortion and nuclear weapons policies in the industrialized world, challenging the “right to life” set forth in UDHR Article 3 just as do the practices of infanticide and female sacrifice, (*Sati*, for example) in “pre-modern” societies. Add to the mix the disagreements that shadow the very existence of some claimed universal human rights and, as well, their interpretation and enforcement when not existentially challenged (for example the prohibition of torture), and the argument of cultural relativism<sup>10</sup>—that there are no overarching moral truths and that local customs and traditions therefore fundamentally determine the existence and scope of rights in any given society<sup>11</sup>—may be seen to loom large.

The issue remains with us today. Since 1989 especially, when cultural variabilities were freed from the silencing grip of Cold War loyalties, it has been forcefully argued in several—particularly Asian—quarters that, as Pascal observed some three centuries ago, what may be truth on one side of the Pyrenées may be error

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8. Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR], reprinted in 3 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS III.A.1 (Burns H. Weston & Jonathan C. Carlson eds., 1994) [hereinafter 3 Weston & Carlson].

9. *Id.* art. 2.

10. The term is borrowed from anthropology and moral philosophy. For helpful explication, see Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT’L L. 869, 885-88 (1985).

11. See John F. G. Hannaford, *Truth, Tradition, and Confrontation: A Theory of International Human Rights*, 31 CAN. Y. B. INT’L L. 151 (1993).

Relativists make an argument of the following kind: for too long western civilization has been obsessed with finding concrete and objective truths. Yet no consensus has formed around the various offerings. This is so precisely because there have never been truths to be found. Therefore, we should recognize that there is no truth beyond ourselves and the institutions we create; and, in admitting this, we should recognize the limitations of our convictions.

*Id.* at 152.

on the other (“Verité au-deça des Pyrenées, erreur au-delà”).<sup>12</sup> In the wake of such assertions, there ensued not a little debate among governmental officials, scholars, and others about the extent to which, if at all, cultural particularities should be allowed to determine the existence and scope of rights promised to individuals and groups by universalist human rights instruments<sup>13</sup> such as the UDHR,<sup>14</sup> the International

12. BLAISE PASCAL, PENSÉES 135 (Garnier-Flammarion 1976) (1897).

13. Anticipating this debate, see especially JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989) [hereinafter DONNELLY, UNIVERSAL HUMAN RIGHTS]; HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Adamantia Pollis & Peter Schwab eds., 1979); RELATIVISM: INTERPRETATION AND CONFRONTATION (Michael Krausz ed., 1989); RETHINKING HUMAN RIGHTS: CHALLENGES FOR THEORY AND ACTION (Smitu Kothari & Harsh Sethi eds., 1989) [hereinafter RETHINKING HUMAN RIGHTS]; THE FUTURE OF INTERNATIONAL HUMAN RIGHTS (Burns H. Weston & Stephen P. Marks eds., 1999) [hereinafter Weston & Marks]; Howard R. Berman, *Are Human Rights Universal?*, 17 INTERCULTURE 53 (1984); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) [hereinafter Donnelly, *Cultural Relativism*]; Cornelius F. Murphy, Jr., *Objections to Western Conceptions of Human Rights*, 9 HOFSTRA L. REV. 433 (1981); Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982); Tesón, *supra* note 10.

Among the many post-Cold War contributions to the debate should be noted at least the following: REZA AFSHARI, HUMAN RIGHTS IN IRAN: THE ABUSE OF CULTURAL RELATIVISM (2001); JESSICA ALMQVIST, HUMAN RIGHTS, CULTURE AND THE RULE OF LAW (2005); PETER R. BAEHR, HUMAN RIGHTS: UNIVERSALITY IN PRACTICE (1999); LYNDA S. BELL ET AL., NEGOTIATING CULTURE AND HUMAN RIGHTS (2001); EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (2001); BRET L. BILLET, CULTURAL RELATIVISM IN THE FACE OF THE WEST: THE PLIGHT OF WOMEN AND FEMALE CHILDREN (2007); DONALD E. BROWN, HUMAN UNIVERSALS (1991); ROBERT PAUL CHURCHILL, HUMAN RIGHTS AND GLOBAL DIVERSITY (2005); WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); YASH P. GHAI, UNIVERSALISM AND RELATIVISM: HUMAN RIGHTS AS A FRAMEWORK FOR NEGOTIATING INTERETHNIC CLAIMS (2000); RHODA E. HOWARD, HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY (1995); HUMAN RIGHTS AND CHINESE VALUES (Michael C. Davis ed., 1995); HUMAN RIGHTS AND GLOBAL DIVERSITY (Simon Caney & Peter Jones eds., 2000); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1992); HUMAN RIGHTS ON COMMON GROUNDS: THE QUEST FOR UNIVERSALITY (Kirsten Hastrup ed., 2001); HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990); AKIRA IRIYE, CULTURAL INTERNATIONALISM AND WORLD ORDER (1997); SARAL JHINGRAN, ETHICAL RELATIVISM AND UNIVERSALISM (2001); SATISH KANITKAR, CULTURE AND HUMAN RIGHTS (2000); XIAORONG LI, ETHICS, HUMAN RIGHTS AND CULTURE: BEYOND RELATIVISM AND UNIVERSALISM (2006); RUTH MACKLIN, AGAINST RELATIVISM: CULTURAL DIVERSITY AND THE SEARCH FOR ETHICAL UNIVERSALS IN MEDICINE (1999); CLAUDIA MOSCOVICI, DOUBLE DIALECTICS: BETWEEN UNIVERSALISM AND RELATIVISM IN ENLIGHTENMENT AND POSTMODERN THOUGHT (2002); RODA MUSHKAT, INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES (2004); CHANDRA MUZAFFAR, HUMAN RIGHTS AND THE NEW WORLD ORDER (1993); RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES (Javaid Rehman & Susan C. Breau eds., 2007); ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990); WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? (2005); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); UNIVERSAL HUMAN RIGHTS: MORAL ORDER IN A DIVIDED WORLD (David A. Reidy & Mortimer N.S. Sellers eds., 2005); CLAUDE EMERSON WELCH & VIRGINIA A. LEARY, ASIAN PERSPECTIVES ON HUMAN RIGHTS (1990); Larry Catá Backer, *Human Rights and Legal Education in the Western Hemisphere: Legal Parochialism and Hollow Universalism*, 21 PENN ST. INT'L L. REV. 115 (2002); Upendra Baxi, *Voices of Suffering, Fragmented Universality, and the Future of Human Rights*, in Weston & Marks, *supra*, at 101; Anne F. Bayefsky, *Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies*, 9 RATIO JURIS 42 (1996); Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 HUM. RTS. Q. 641 (1996); Amy Small Bilyeu, *Trokosi—The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs.*

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*Human Rights*, 9 IND. INT'L & COMP. L. REV. 457 (1999); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211 (1999); Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT'L & COMP. L. 1 (2005); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994); Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998); Michele D'Avolio, *Child Labor and Cultural Relativism: From 19th Century America to 21st Century Nepal*, 16 PACE INT'L L. REV. 109 (2004); Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007); Paul Dubinsky, *What is Human Right? Universals and the Challenge of Cultural Relativism*, 11 PACE INT'L L. 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Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>15</sup> and its companion International Covenant on Civil and Political Rights (ICCPR)<sup>16</sup> (together constituting what has come to be called the “International Bill of Human Rights”).

The interplay between the landmark 1993 Vienna Declaration and Programme of Action,<sup>17</sup> adopted by acclamation by 172 states at the UN World Conference on Human Rights that produced it, and the provocatively relativist Bangkok Declaration that emanated from the 1993 Regional Meeting of Asian and Pacific States preparatory to the Vienna Conference,<sup>18</sup> makes this debate clear. The Bangkok Declaration, after reaffirming in its preamble a “commitment to principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights,” stresses “the urgent need to . . . ensure a positive, balanced and non-confrontational approach to addressing and realizing all aspects of human rights”;<sup>19</sup> emphasizes “the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure”;<sup>20</sup> and recognizes that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”<sup>21</sup> In language renunciative but reminiscent of this Bangkok Declaration, the 1993 Vienna Declaration provides:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic

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*Universal?*, COMMENTARY, Feb. 1995, at 43; Burns H. Weston, *The Extension of Human Rights in a Divided World*, in LES DROITS DE L’HOMME: UNIVERSALITÉ ET REVUE: 1789-1989, 363 (Guy Braibant & Gérard Marcou eds., 1990) [hereinafter Weston, *Divided World*]; Burns H. Weston, *The Universality of Human Rights in a Multicultural World: Toward Respectful Decision-Making* in Weston & Marks, *supra*, at 65; Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 109; Amartya Sen, *Human Rights and Asian Values: What Lee Kuan Yew and Li Peng Don’t Understand About Asia*, NEW REPUBLIC, July 14, 1997, at 33.

14. UDHR, *supra* note 8.

15. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR], *reprinted in* 6 I.L.M. 360 (1967) *and in* 3 Weston & Carlson III.A.2, *supra* note 8.

16. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR], *reprinted in* 6 I.L.M. 368 (1967) *and in* 3 Weston & Carlson III.A.3, *supra* note 8.

17. World Conference on Human Rights, June 14-25 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*], *reprinted in* 32 I.L.M. 1661 *and in* 3 Weston & Carlson III.U.2, *supra* note 8.

18. Regional Meeting for Asia of the World Conference for Human Rights, Bangkok, Thailand, Apr. 7, 1993, *Final Declaration*, A/CONF.157/ASRM/8, A/CONF.157/PC/59 [hereinafter Bangkok Declaration], *reprinted in* 14 HUM. RTS. L.J. 370 (1993). The Declaration was based heavily on a proposal authored by China. See Jin Yongjian, *Asia’s Major Human Rights Concerns*, 36 BEIJING REV. 10, 19-25 (1993).

19. Bangkok Declaration, *supra* note 18, ¶ 30.

20. *Id.* ¶ 5.

21. *Id.* ¶ 8.

and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>22</sup>

This outcome, Australian human rights scholar Dianne Otto observed a few years later, “can be read as supporting either the universalist or relativist position.”<sup>23</sup> It “reflects the paralysis of the debate,” she added, “and leaves the issue firmly on the international human rights agenda for another day.”<sup>24</sup>

I believe that Otto may have exaggerated the long-term impact of the relativist position on the Vienna Declaration. Judging from lectures, conferences, and symposia honoring the fiftieth anniversary of the UDHR, however, she correctly concluded that the relativist-universalist debate itself remains strong on the human rights agenda.<sup>25</sup>

A survey of the literature reveals that the vast majority of commentators choose not an analytically neutral position but, rather, one that champions one side of the debate or the other. It also reveals that the greatest number—most of them intellectually indebted or otherwise sympathetic to Western thought and tradition (doubtless because they are the most likely to have ready access to relevant journals and other current sources of information)—come down, not surprisingly, on the side of universalism. Cultural relativism, if it is not being criticized for preventing cross-cultural moral judgments altogether, is repeatedly denounced as a new excuse for an old strategy,<sup>26</sup> used “to justify limitations on speech, subjugation of women, female genital mutilation, amputation of limbs and other cruel punishment, arbitrary use of power, and other violations of international human rights conventions.”<sup>27</sup> Where once the old Adam of territorial sovereignty served generally to prevent outside intervention into “the domestic jurisdiction” such as might offset major abuse, now, in a world where state sovereignty is becoming more and more porous, cultural relativism is seen increasingly to substitute in this role. In both the building and perpetuation of nations, cultural relativism is invoked to prevent intranational and international judgments and policies, both legal and moral, about genocide, ethnic cleansing, torture, rape, and other such acts of human violation whenever and wherever they occur.

Are these choices and conclusions unequivocally favoring universalism over relativism legitimate? In an objectively critical sense, I think not, though not because they are the result of simplistic a priori reasoning or even that they are wrong. To the contrary, as Martha Nussbaum has pointed out, relativism, as a normative thesis about how we should make moral judgments, suffers from major conceptual problems of its own making:

First, it has no bite in the modern world, where the ideas of every culture turn up inside every other, through the internet and the media. . . . Many forms of moral relativism . . . use an unrealistic notion of culture. They imagine homogeneity where there is really diversity. . . . Second, it is not obvious why we should think the

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22. *Vienna Declaration*, *supra* note 17, ¶ 5.

23. Otto, *supra* note 13, at 11. Cf. Hannaford, *supra* note 11, at 151.

24. Otto, *supra* note 13, at 11.

25. See, e.g., Symposium, *International Human Rights at Fifty*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 113 (1998).

26. See generally Bayefsky, *supra* note 13.

27. Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 *HUM. RTS. Q.* 201, 231 (1998).

normative relativist thesis true. Why should we follow the local ideas, rather than the best ideas we can find? Finally, normative relativism is self-subverting: for, in asking us to defer to local norms, it asks us to defer to norms that in most cases are strongly nonrelativistic. Most local traditions take themselves to be absolutely, not relatively, true. So in asking us to follow the local, relativism asks us not to follow relativism.<sup>28</sup>

Furthermore, sympathetic (Westerner) as I am to the expansion and invigoration of universal human rights norms and practices, I am much taken by the idea that universalist international human rights law can and should serve as a basis for rendering cross-cultural normative judgments.

My concern is that, without an analytically neutral approach for deciding when cultural differences are to be respected and when not, pro-universalist choices and conclusions undermine the credibility and defensibility of their own particularistic objectives and thus make the idea of international human rights law as a basis for rendering moral judgments very difficult, perhaps even unworkable on occasion. One-sided assertions of legitimacy and priority, which by definition discount the centrality of the value of respect in human rights, invite countervailing charges of cultural imperialism (defending against real or imagined claims of cultural superiority—“colonizing”) and cultural ethnocentrism (defending against real or imagined claims of cultural bias—“Westernizing”). Accordingly, they defeat the core goals they seek to achieve. True, cultural relativists also express themselves in ways that subvert their own credo, for example, when non-Western and sometimes even Western proponents of cultural pluralism evince absolutist outrage at the supposed moral decay of the West. But this is only to prove my point. Any human rights orientation that is not genuinely in support of the widest possible embrace of the value of respect in the making and enforcement of human rights norms in a multicultural world is likely to provoke widespread skepticism if not unreserved hostility.

It is of course tempting to argue that international human rights law itself settles the issue. In human rights convention after human rights convention, after all, states have committed themselves to the universality of human rights, both regionally and globally. Therefore, given the rudimentary—indeed, foundational—international law principle *pacta sunt servanda*, they are duty-bound to uphold that universality.

This argument, however, falls woefully short of the cross-cultural challenge. There are at least four reasons why.

First, not all states, certainly not all “relativist” states, have ratified even some of the core international human rights instruments, thus thwarting the *pacta sunt servanda* argument ab initio in many if not most instances of relativist-universalist contestation. Furthermore, given that the vast majority of international human rights law is conventional in kind (a powerful reminder of the resilience of the state sovereignty principle despite its increasing permeability), the instances in which customary international human rights law, binding on all states, may be said to apply, are exceedingly rare.

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28. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 49 (2000).

Second, while many cultures share common values, much of international human rights law, particularly as it relates to such “first generation” or “negative” rights as are reflected in the ICCPR,<sup>29</sup> may be said to be Western inspired,<sup>30</sup> thus fueling the conflict rather than resolving it.<sup>31</sup> That sometimes “[t]he universalist position completely denies that the existing universal standards may themselves be culturally specific and allied to dominant regimes of power”<sup>32</sup> does not alter this fact. So, when Jack Donnelly writes that “[l]ife, social order, protection from arbitrary rule, prohibition of inhuman and degrading treatment, the guarantee of a place in the life of the community, and access to an equitable share of the means of subsistence are central *moral aspirations* in nearly all cultures,”<sup>33</sup> we must be careful to read him and other keen observers like him precisely; the language of morality is not to be confused with the language of law even though the former invariably shapes the latter and vice versa.

Third, all human rights instruments are filled with ambiguity and indeterminacy, sometimes deliberately to ensure signature and ratification. Thus they require interpretation to inform the *content* of universalism even when the *concept* of it has been accepted.<sup>34</sup> When, for example, does a cultural practice—say, caning in Singapore or death by electrocution, firing squad, hanging, or lethal injection in the United States—run afoul of formal promises that “[n]o one shall be arbitrarily deprived of his life”<sup>35</sup> or “subjected to torture or to cruel, inhuman or degrading treatment or punishment”?<sup>36</sup> As Philip Allot reminds us,

[i]n all societies governments have been reassured in their arrogance by the idea that, if they are not proved actually to be violating the substance of particularized human rights, if they can bring their willing and acting within the wording of this or that formula with its lawyerly qualifications and exceptions, then they are doing well enough.<sup>37</sup>

The current U.S. government claim that “waterboarding” does not constitute torture comes to mind.

Finally, when their plenipotentiaries are not signing or voting for human rights resolutions and treaties “as mere gestures for temporary public relations purposes,”<sup>38</sup>

29. ICCPR, *supra* note 16.

30. On human rights and the Western tradition, see JOHAN GALTUNG, *HUMAN RIGHTS IN ANOTHER KEY* 1-26 (1994).

31. One relatively recent observer is unambiguously blunt about this Western influence and what to do about it, in noting that “the 1948 UDHR should be treated as a Western document; . . . other cultures and religions should produce their own similar documents and . . . out of these a genuinely universal declaration may then be forged.” Arvind Sharma, *Human Wrongs and Human Rights*, in *HUMAN RIGHTS: POSITIVE POLICIES IN ASIA AND THE PACIFIC RIM* 29, 40 (John D. Montgomery ed., 1998).

32. Otto, *supra* note 13, at 8.

33. Donnelly, *Cultural Relativism*, *supra* note 13, at 414-15 (emphasis added).

34. Even relativists agree; author Rhoda Howard points out that “the *concept* of human rights is universal, but the *content* (what, substantively, are or ought to be rights) varies among different societies.” HOWARD, *supra* note 13, at 54 (emphasis added).

35. ICCPR, *supra* note 16, art. 6(1).

36. *Id.* art. 7.

37. PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 288 (1990).

38. Stephen P. Marks & Burns H. Weston, *International Human Rights at Fifty: A Foreword*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 113, 119 (1998).

states, including those that profess the universality of human rights, typically hedge their bets by resort to reservations, statements of understanding, and declarations so as to ensure that certain practices deemed central to their legal or other cultural traditions will not be rendered unlawful or otherwise anachronistic. Observes eminent Indian legal scholar Upendra Baxi:

Any international human rights lawyer worth her or his calling knows the riot of reservations, understandings, and declarations that parody the texts of universalistic declarations. The “fine print” of reservations usually cancels the “capital font” of universality. In this sense, claims concerning the universality of human rights enunciations are diversionary, embodying the politics *of*, rather than *for*, human rights.<sup>39</sup>

Formal commitments to the universality of particular human rights doctrines, principles, and rules are thus commonly qualified by the operational codes of everyday life.<sup>40</sup>

In sum, the invocation of international human rights law does not of itself settle the relativist-universalist debate. There is, consequently, no escaping the fact that claims of cultural relativism demand and deserve thoughtful responses. Given the centrality of the value of respect in human rights, the onus is on the human rights advocate to provide a reasoned and intelligent—respectful—response to them.

But how is this to be done in the particular case? How do we reach the conclusion that a particular claim of universalism should trump a competing claim of cultural relativism or vice versa?

The remainder of this Essay explores this question, detailing a *methodology of respect* according to which competing relativist-universalist claims can be assessed objectively and thereby hopefully escape allegations of cultural imperialism and ethnocentrism, whether nationally or internationally charged. I begin by delineating what I believe to be the observational standpoint that, in the building as well as the post-building management of states, is necessary to render human rights judgments about particular cultural practices in cross-cultural settings in an objectively respectful manner. Next, I postulate the world public order goals that would likely result from that observational standpoint. I then outline the intellectual tasks—five in all—that I believe are required to facilitate such goals. Thereafter I conclude with an appraisal and recommendation. Be it noted, however, that I approach this multiple task with humility, recognizing my own vulnerability to cultural bias at least insofar as I rely upon analytical concepts that derive from my own culture to describe and assess realities in others.

## II. DELINEATING THE OBJECTIVE OBSERVATIONAL STANDPOINT

The observational standpoint required to resolve a relativist-universalist controversy in a genuinely respectful manner is, I believe, that of rational persons of diverse identity (creed, gender, race, etc.) acting privately (not, for example, as state representatives) and in their personal self-interest relative to the policies or values they believe

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39. Baxi, *supra* note 13, at 132 (footnote omitted).

40. See, e.g., W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS, 15-36 (1979).

should define the world public order of which they are a part, but behind a “veil of ignorance” as to the particular circumstances of their own personal condition within that order. Persons familiar with legal philosophy will recognize the influence of neo-Kantian John Rawls. The true principles of justice, Rawls argues, are those of “fairness”—to wit, those that “free and rational persons concerned to further their own interests would accept in an *initial position* of equality as defining the fundamental terms of their association.”<sup>41</sup> While a purely hypothetical starting point, this intellectual device does greatly minimize, even if it does not eliminate altogether, the influence of the biases and prejudices of the observer or decision-maker.<sup>42</sup> The assumption is of thinking men and women who, each in their private capacity in some original social setting, but without knowledge of the details of their own physical and social identity, freely choose a public order that is fair to all in its distribution of benefits (rights) and burdens (duties) because, rationally contemplating their own self-interests, they choose a public order that will not cause anyone, including of course themselves, to be disadvantaged in the real world; they choose principles of governance that are good for all, not simply for some or a few. The result is a set of public order value preferences that transcend parochial interest and selfish motive, a map of basic values or blueprint of fundamental laws that can win the assent of persons everywhere, and thereby facilitate respectful decision when it comes to legal and moral judgments about particular cultural practices across national boundaries.

Is this proposed observational standpoint subject to criticism for being too Western inspired, too individualistically oriented? After all, Rawls comes from a long tradition of discourse dating back to the Enlightenment that, at an earlier time of flourishing, had no apparent conceptual difficulty in promoting rights and the rule of law in the West while colonizing and subjugating much of the rest of the world.<sup>43</sup> The fact is that a subtext can be discerned here of *rational* (not spiritual) persons making *atomistic/deductive* (not holistic/dialectic) choices in their *individual* (not group) capacity and self-interest, unaware of the particularities of their *idiosyncratic* (not general) situation in the world, including their potential for membership in some social group. The skeptic might therefore contend that a Western/individualistic skew has

41. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971) (emphasis added).

42. Rawls himself acknowledges that his “initial position” device, corresponding to the state of nature in traditional social contract theory, “is not . . . thought of as an actual historical state of affairs, much less as a primitive condition of culture.” *Id.* at 12. Intentionally, his “initial position” does not concede the unequal and otherwise unjust realities of the “real world.” This failing, it might be said, undermines the usefulness of the “initial position” device in the present “real world” context of cross-cultural decision-making; and it is apparently for such reasons that Rawls has since modified his observational standpoint so that his “original position” has yielded to a system of “overlapping consensus.” JOHN RAWLS, *POLITICAL LIBERALISM* 14-15 (1993). However, one does not have to agree either with Rawls’ premises (or, for that matter, his conclusions) to find heuristic utility in his contrivance. *Cf.* Shestack, *supra* note 27, at 223 (“Critics of Rawls’ theory maintain that it was designed to support the institutions of modern democracy in a *domestic* state context. But even if that were the case, the criticism does not refute his moral thesis, nor an international extension of it.”).

43. Baxi, *supra* note 13; *see also* Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies*, in *RETHINKING HUMAN RIGHTS*, *supra* note 13, at 152 (“John Rawls, at the end of a spectacularly cogent and massive analysis in *Theory of Justice*, is able to say, without a frown on his face, on page 543 of his well-acclaimed work, that the lexical priority of liberty, after all, may not apply to societies where basic wants of the individual are not fulfilled!” (citing RAWLS, *supra* note 41)).

been insinuated into the “initial position” decision-makers’ role. By assuming ignorance as to class, ethnicity, nationality, race, religion, tribe, sex, and other such indicia of social position, and thus, it might be argued, ignorance as to actual membership in a social group, we preclude the spiritual/dialectic or collectivist/communitarian person from participating in the evaluation of a cultural practice—and consequently make the above-defined observational standpoint for cross-cultural decision-making questionable at best.

But this argument, I submit, misses an important point. Merely because Rawls’ “initial position” decision-makers may be acting individually and behind a “veil of ignorance” as to their *actual* positions does not mean that they are acting individually and behind a “veil of ignorance” as to their *potential* positions. As rational people, they are capable of foreseeing the possibility that they will belong to social groups that espouse spiritual/dialectic and collectivistic/communitarian as well as Western/individualistic values, and that therefore they may belong to a public order that embraces all of these community values. The essential thrust of the observational standpoint thus remains valid: the rational “initial position” decision-maker will choose the world public order that will most guarantee the fairest distribution of benefits (rights) and burdens (duties) among all social groups as well as all individuals and thereby ensure that groups as well as individuals will benefit as much as possible and suffer the least possible disadvantage.

Of course, whatever one may conclude about the influence of Western individualism upon the observational standpoint recommended here—the perspective of free and rational persons acting in their own self-interest in an “initial position” of equality behind a “veil of ignorance” as to the precise terms of their societal circumstance—the actual attainment of such an observational standpoint is most likely impossible in the real world. No social psychologist would vouchsafe a person’s capacity, whether individualistically or collectivistically inclined, for complete objectivity in legal and moral decision-making. The legal realists long ago—and the proponents of Critical Legal Studies more recently—certainly have taught us this.

In any event, an observational standpoint that identifies more with the human species as a whole than with the primacy of any of its individual or group parts remains, at least for anyone committed to global justice, an ideal to be pursued even if it is never to be fully realized. Hence the observational standpoint recommended here. Absent the core value of respect at the center of all inquiry into the relativist-universalist debate—which is to say objectivity, at a minimum—there will be no extending human rights values of any kind without rancor, possibly even violence. Needed is an objective guidepost for community-wide decision-making that will at least facilitate a fair—just—public order in both individualistic and collectivistic or communitarian terms. As stated above, one-sided characterizations of legitimacy and priority, by definition discounting the centrality of the value of respect in human rights, are likely (over the long term at least) to undermine the moral credibility of their proponents and the defensibility of their particularistic objectives.<sup>44</sup>

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44. See discussion *supra* Part I.

## III. THE POSTULATION OF BASIC PUBLIC ORDER GOALS

So what map of basic values, what fundamental principles of decision-making, should our “initial position” decision-makers choose to guide their cross-cultural judgments about particular cultural practices? If they are to be consistent with the observational standpoint recommended above, such values or principles cannot represent only the exclusive interests of a particular segment of the world community. They must reflect, rather, an inclusive approach to humankind’s great diversity.

Rawls argues that his “initial position” decision-makers would choose two “principles of justice,” each intuitively derived. Rawls’ “First Principle” stipulates that “[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a system of liberty for all”<sup>45</sup> (essentially the value of liberty). His “Second Principle” enjoins that “[s]ocial and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged . . . and . . . attached to offices and positions open to all under conditions of fair equality of opportunity”<sup>46</sup> (essentially the value of equality). Together these two principles achieve—with help from a “Difference Principle” that compensates for comparative disadvantages and a “Reconciliation Principle” that facilitates the common interest when the values of liberty and equality clash—Rawls’ general conception of justice: fairness to and for all. A difficulty with Rawls’ argument, however, is that, as explained below,<sup>47</sup> cultural practices for which relativist claims have been or might be made commonly reach beyond the values of liberty and equality that Rawls stresses. Therefore, neither liberty nor equality are sufficient to serve adequately as the exclusive determinants of relativist-universalist contests.

An alternative choice, emphasizing the *postulation of empirically premised* public order goals in contradistinction to their *intuitive* derivation in the manner of Rawls, is, as proposed by McDougal, Lasswell, and Chen, “the greatest production and widest possible distribution of *all* important values, with a high priority accorded persuasion rather than coercion in such production and distribution.”<sup>48</sup> The Yale scholars have in mind “[t]he comprehensive set of goal values . . . which today are commonly characterized as the basic values of human dignity or of a free society,”<sup>49</sup> such as “those [values] which have been bequeathed to us by all the great democratic movements of humankind and which are being ever more insistently expressed in the rising common demands and expectations of peoples everywhere.”<sup>50</sup> The phrasing of this choice, however, while appealing to a confirmed believer in the “free society” and “great democratic movements,” betrays a distinct Western bias that appears to prejudge the outcome of the very issues and policy concerns that often are at stake in relativist-universalist controversies in the first place.<sup>51</sup> Indeed, as evidenced by their

45. RAWLS, *supra* note 41, at 302.

46. *Id.*

47. See also discussion *infra* Part IV (regarding the community policies that are actually and potentially at stake in all or most relativist-universalist controversies).

48. MCDUGAL, LASSWELL & CHEN, *supra* note 1, at 90 (emphasis added).

49. *Id.*

50. *Id.*

51. It is a bias that seems not at all dispelled by the authors’ subsequent acknowledgment of the “many different cultural and institutional modalities” by which their proposed goal values might be formulated and accepted worldwide. See *id.*

invocation of the United Nations Charter, the UDHR,<sup>52</sup> the two covenants born of the UDHR,<sup>53</sup> and “their host of ancillary expressions”<sup>54</sup> to lend authoritative support to their postulate, it seems clear that their bias, heavily favoring universalist international human rights law (which, as observed above, cannot of itself settle the relativist-universalist debate),<sup>55</sup> is not just Western but also universalist, clearly not a neutral posture in the relativist-universalist debate under scrutiny here.

Thus, a compromise is in order, drawing from both Rawls and McDougal, Lasswell, and Chen. The map of basic values or fundamental decision-making principles that should guide national and transnational judgments about particular cultural practices should be one that is both more expansive or inclusive than that proposed by Rawls and, consistent with the observational standpoint from which they would be postulated, simultaneously less vulnerable than the McDougal, Lasswell, and Chen formulation to accusations of Western/universalist bias—ergo one chosen by Rawls’ “initial position” decision-makers that embraces the following self-interested *desiderata*:

- the widest possible shaping and sharing of *all* the values of human dignity, including but not limited to (political) liberty and (socioeconomic) equality,
- without discrimination of any kind save that of merit and basic need (for example, physical/mental handicap, rank poverty) in many though not necessarily all instances,
- consistent with the truism that in a world of finite possibility, “most assertions of human rights . . . are qualified by the limitation that the rights of any particular individual or group in any particular instance are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest.”<sup>56</sup>

It need here be added only that, in choosing this policy guide to respectful relativist-universalist decision, our “initial position” decision-makers might substitute Martha Nussbaum’s (and Amartya Sen’s) language of “capabilities”<sup>57</sup> for the more commonly used language of “rights”—for example, thinking upon all the values of human dignity not in terms of *abstract goals* but in terms, rather, of the concrete *measurable needs* that all people must have satisfied to fulfill at least the minimal requirements of human dignity however defined.

#### IV. THE INTELLECTUAL TASKS OF RELATIVIST-UNIVERSALIST DECISION

It is tempting to argue that local practices that are indisputably destructive of the values (or capabilities) of human dignity must be altogether rejected and that such rejection should not be confused with disrespect for cultural differences or the

52. See UDHR, *supra* note 8.

53. See ICESCR, *supra* note 15; ICCPR, *supra* note 16.

54. MCDUGAL, LASSWELL & CHEN, *supra* note 1, at 90.

55. See *supra* text preceding and following note 29.

56. Weston, *supra* note 3.

57. See Martha C. Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, in Weston & Marks, *supra* note 13, at 25.

principles of nonintervention and self-determination that afford them protection. I have in mind such policies and practices as genocide, ethnic cleansing, imposed starvation, physical and mental torture, arbitrary arrest, detention, and execution, slavery, forced labor, and racial *apartheid*. If they are not entirely without cultural basis in the first place, the threshold question in all instances of relativist–universalist decision-making, these policies and practices are now so widely condemned that they no longer can be justified by any local custom or rationale.

Or so it might be initially argued. In an earlier essay, I took this starting position, arguing that “[i]f cultural relativism is to function in these and like instances it does so only as a cloak for despotism, stripping international human rights law from all expectation of assuring . . . ‘basic decencies.’”<sup>58</sup> And I was not alone.<sup>59</sup> These observations, intuitively reached, remain valid, in my view precisely because the practices mentioned appear to be without cultural basis in the first place. But without having first subjected each of them to the intellectual tasks of policy-oriented inquiry for the purpose of facilitating fully respectful decision when cross-cultural legal and moral judgments are being rendered, they were intellectually premature. It is, I believe, incumbent upon fully respectful cross-cultural judgment to enter first upon *all* the intellectual tasks that seem required when having to resolve, from an “initial position” policy-oriented perspective, a particular relativist-universalist controversy: (1) the clarification of community policies relevant to the specific cultural practice at issue; (2) the description of past trends in decision relevant to that practice; (3) the analysis of the factors affecting these decisional trends; (4) the projection of future trends in decision relevant to the specific cultural practice in question; and (5) the invention and evaluation of policy alternatives to that practice. An analytical flow chart of these relevant intellectual tasks looks as follows:



Although they are presented in a logically sequenced order here, they must be applied configuratively (as the two-way arrows suggest) and not in isolation from one another, each task informing and being informed by the others, to achieve as comprehensive a contextual analysis as possible. The goal is to test each of these dimensions of policy-oriented inquiry for their ability to contribute to rational but respectful choice in decision, and to obtain guidance in the development of national and international community policy relative to the practices in question. Of course, as already

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58. Weston, *Divided World*, *supra* note 13, at 366 (citation omitted).

59. See, e.g., DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 13, at 112-15.

intimated, a preliminary issue is the threshold question of whether or not the practice in question is a *cultural* practice as distinct from one that might be, say, *idiosyncratic* to the particular governing elite involved. If the latter, then the relativist-universalist issue is by definition not implicated, and a decision about the practice may be taken according to potentially different policy criteria. If, however, the practice in question can be properly denominated a cultural one, then it is incumbent upon us, from the standpoint of our “initial position” decision-makers, to pursue the policy-oriented inquiry outlined.

#### A. Clarification of Community Policies

At the outset of this Essay, I listed, according to human life’s physical and behavioral dimensions, as many cultural practices as I can think of that are well known for the cross-cultural controversies they generate or might generate.<sup>60</sup> The policy issue most fundamentally underlying each of these two existential categories concerns the intensity and scope of power being exercised—more precisely, the *necessity* of the intensity and scope of power being exercised—by one group of people (public or private) in relation to another in the administration of the practice in question. This comes as no surprise, of course, because it is alleged abuses or excesses of power that characterize most if not all human rights controversies.

Spanning these two existential categories, however, are at least two other dimensions of human experience that merit attention. They hint at still more precise ways of identifying at least the principal policies that are at stake when cross-cultural normative judgments are being attempted: the societal functions of (1) punishment and (2) social differentiation.<sup>61</sup>

Regarding punitive practices, relativist-universalist disagreement centers essentially on the severity of the punishment in question or, alternatively, its proportionality vis-à-vis the alleged precipitating social transgression. Which is to say that it centers on the community policies that regulate resort to coercion in the administration of cultural practices.

Regarding socially differentiating practices, relativist-universalist disagreement centers mainly on the justification given for the differentiation in question, and thus on community policies that regulate the legal and moral rationales of cultural administration. Significantly, these policies tend to be gender-based and favoring men over women (patriarchy) in many if not most instances. Women’s issues lie at the heart of many relativist-universalist controversies, both directly and indirectly, particularly at the intersection between masculine hegemony and women’s sexual and reproductive identities. As feminist scholar Arati Rao has observed, “[n]o social group has suffered greater violation of its human rights in the name of culture than women.”<sup>62</sup>

From a policy-clarifying standpoint, some of these practices are less easily diagnosed than others. Exceedingly difficult, for example, even though obviously

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60. See *supra* Table of Physical and Behavioral Practices accompanying notes 6-7.

61. These two social functions are not coextensive with my two existential categories, and are not jointly to serve as an alternate typology, particularly in a global social process of ever-shifting elements from which nation-building cannot escape.

62. Rao, *supra* note 13, at 169.

involving power relationships, is the matter of abortion. This is so not because of the emotional politics that surround the practice (in the United States at least). Rather, it is because, central to the issue of abortion, there is fundamental disagreement on what it means to be human, ergo fundamental disagreement on whether it is the human rights of the fetus that are at stake (the right to life, the “pro-life” position) or the human rights of the mother (the right to liberty, the “pro-choice” position). Adding to the complexity is the matter of mandatory or forced abortion as a function of population control. It is likely that both “pro-life” and “pro-choice” proponents would agree that forcing a woman to have an abortion without her consent is a clear violation of human rights—but whose human rights, espoused by whom?

Also complicating policy clarification are the competing philosophical traditions of individualism (liberty) and collectivism/communitarianism (equality) that, as already intimated, have greatly influenced at least Western moral thought and action throughout most of the last two to three centuries. Typically they are invoked to prioritize civil and political (“first generation” or “negative”) rights, on the one hand, or economic and social (“second generation” or “positive”) rights, on the other, even to the complete denial of one generation in favor of the other, thus to the disregard of the fundamental indivisibility that exists between each. But they serve also to rationalize most, perhaps even all, the physical and behavioral practices that have proved controversial in the cross-cultural setting. Exalting liberty and equality to the disregard of other principles or values, they have diverted responsible attention from the centrality of respect in human rights decision-making and thus thwarted clear-headed thinking about the relativist-universalist choice.

Consider, for example, a cultural practice that privileges one group of people over another. As such, it contradicts the collectivist/communitarian value of equality (as commonly understood to mean the same measure/quantity or privilege/status as another) and therefore, a fortiori, such human rights (individual or group) as are premised on the value of equality. If, then, equality as commonly understood is to serve as our policy guide (a not unreasonable universalist inference given the egalitarian content of the world’s existing human rights instruments),<sup>63</sup> it follows that relativist defenses of the practice must be rejected. All of which will seem reasonable enough if the local differentiation is based on, for example, gender or race, and we shun gender- or race-based discrimination or segregation as incompatible with equality. But what if it is based on, say, age, basic need, capability, or merit? What decision then? The point is, of course, that the answer is not self-evident from the standpoint of equality. Notions of equality do not of themselves provide a reliable exit from the relativist-universalist conundrum. Caught up in a swirl of normative tautology in which we find ourselves providing answers according to the very questions that are at issue in the first place, we are not any closer to the objective understanding we seek. For this reason we must be guided by something else.

Similar confusion sometimes accompanies the cross-cultural assessment of physical practices, at least in theory. Consider, for example, the Islamic (*Qisas*)

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63. See, e.g., ICCPR, *supra* note 16, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . .”).

practice of hand amputation for thievery in formerly theocratic Afghanistan and imprisonment for thievery in the secular United States. Clearly each practice contradicts the individualist value of liberty (as commonly understood to mean the condition of being free from restriction and especially governmental control). But given the widespread acceptance of deprivations of liberty for socially deviant behavior, surely it is not this contradiction or infringement that inclines us to reject a relativist defense of the theocratic culture in the first instance, nor to accept a relativist defense (depending on other variables) vis-à-vis the secular culture in the second instance. The issue here is not whether liberty may be infringed, but, as earlier suggested, to what extent, in what proportion. Just as notions of equality do not of themselves provide a reliable exit from the relativist-universalist conundrum, neither do notions of liberty. Again we must be guided by something else.

This “something else,” this guide to respectful decision, is, of course, that map of basic values or fundamental principles of decision-making that our hypothetical “initial position” decision-makers would choose behind a “veil of ignorance” to ensure the greatest possible equal distribution of benefits (rights) and burdens (duties) within the public order of which they are a part—to wit, *all* the values (or capabilities) of human dignity postulated to be appropriate and necessary for national and transnational judgments about particular cultural practices. Only by relating these broad postulated goals to specific instances of relativist-universalist controversy—for example, hand amputation in Afghanistan or outright execution in the United States—will it be possible to ensure respectful decision about the competing values of cultural pluralism, on the one hand, and of universalist principle, on the other. True, the task of relating these broad goals to specific cultural practices is no easy one. Nor is it made easier by the fact that, behind the relativist-universalist debate and evident on *both* sides of it (particularly evident in the “Asian values” controversy), there lurks a desire less to ensure cultural pluralism than to further the interests of the private and public governing elites who, in the post-Cold War phenomenon we inadequately call “globalization,” are engaged in a grand struggle for local-to-global economic and political influence. This hidden or unstated agenda, it must be added, requires utmost vigilance when judging cross-cultural human rights controversies. To the dishonor of those who pursue it, it commonly reflects a shameful disregard of the “Other”—the “huddled masses, yearning to breathe free”<sup>64</sup>—who typically are the victims of globalization’s highly uneven, indeed unjust, distribution of economic benefits and burdens<sup>65</sup> and whose pain always must be central to human rights discourse and action.<sup>66</sup> The relativist-universalist debate is not merely a conflict between differing cultural and universal norms; it is in many ways a high-level confrontation between competing conservative and liberal versions of capitalism, none of which is a priori superior to the other, especially when expressed in cultural terms. Neither the

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64. Emma Lazarus, *The New Colossus*, in 1 THE POEMS OF EMMA LAZARUS 202-03 (1889) (from the inscription on the Statue of Liberty in New York Harbor).

65. For insightful commentary, see, for example, GLOBALIZATION: CRITICAL REFLECTIONS (James H. Mittelman ed., 1996); Kamal Hossain, *Globalization and Human Rights: Clash of Universal Aspirations and Special Interests*, in WESTON & MARKS, *supra* note 13, at 187.

66. Upendra Baxi, *supra* note 13, at 126 (“To give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights narrative and discourse.”).

relativist nor the universalist thus may dismiss the other's claims without a reasoned response. The policies that underwrite their claims must be understood for what they are, and they must be properly measured for their compatibility with the wider public order goals that our neutral "initial position" decision-makers would have chosen to ensure respectful decision when rendering cross-cultural moral judgments.

### *B. Description of Past Trends in Cross-Cultural Decision*

A key task in cross-cultural decision-making is to describe past trends in decision relevant to the particular cross-cultural controversy. An understanding of past cross-cultural decision can reveal the extent to which a community, from local to global, has actively denounced/supported, passively opposed/tolerated, or otherwise disapproved/condoned the particular practice across space and time, and thereby reveal the extent to which one should or should not take serious objection to it. The essentially passive official response to the caning of a young U.S. national for adjudged vandalism in Singapore in the mid-1990s, for example, might usefully be examined from this perspective. In addition, assuming a desire to repeal or reform a local practice in keeping with some universalist perspective, past trends can instruct us on the cross-cultural difficulties that are likely to be encountered when subjecting provisional formulations of the desirable to the discipline of the possible; they encourage sensitivity to the potential for excessively burdensome demands for change, a particularly important concern when developing countries engaged in nation-building are involved. Our concern, it bears re-emphasizing, is the tension between the core value of respect, on the one hand, and all other values (or capabilities) that may be espoused in any particular relativist-universalist controversy, on the other hand, and our policy challenge is to figure out how to reconcile this tension objectively, how to promote and protect the values (or capabilities) that reflect the unity of human aspiration and, simultaneously, cultural diversity.

### *C. Analysis of Factors Affecting Cross-Cultural Decision*

Next it is important to analyze the factors that have influenced decisional trends and thus also the case at hand. It is important because such analysis helps us to understand not only how and why relevant precedents were reached but also what factors are likely to serve as useful indicators for present and future decisions, particularly as they may prove useful in guiding our evaluation and recommendation of policy alternatives. The following conditioning factors, derived from the compound question of *who does what to whom, why, when and where, with what capabilities, how, and with what short- and long-term results*, constitute the principal elements of social process. It is therefore reasonable to assume that they have shaped cross-culturally controversial practices in the past and that for this reason, whenever a particular cultural practice is challenged by universalist principle, it is logical that they be accounted for in the present and future. Respectful decision-making in this realm demands as much. Only by asking such contextually oriented questions is a truly objective decision-maker likely to be able to sift fact from fiction and cause from consequence so as to permit sharp delineation of the critical public order policies that are at stake and thereby acquire the comprehensive understanding of a given cultural practice that is necessary to reach a respectful decision about it. The following

impressionistic forays, *by no means exhaustive*, should help to clarify what I have in mind—understanding that it is seldom the investigation of one conditioning factor alone but, rather, the in-depth exploration of all of them both severally and jointly that is going to provide the cumulative, comprehensive knowledge that is needed to achieve the respectful decision that is our objective.

### 1. *Participants*

In all cultural practices, individual human beings are the ultimate actors, either because they are themselves the *masters* of the practice or its *servants*, or because they are affiliated with a group that is either way directly involved.<sup>67</sup> If only just to comprehend the practice, therefore, it is important to ask, as an anthropologist or historian might do, such descriptively-oriented questions as: Who are the key participants in the practice? Who is responsible for the practice, who are its principal masters? Who is the object of it, who are its primary servants? What biological characteristics (race, sex, age, sexual orientation), culture (ethnicity, nationality), class (wealth, power), interest (group membership), or personality (authoritarian, submissive) may be attributed to each? And so forth. But participatory questions such as these, helping us to understand the identity and roles of the different participants involved, also greatly assist the issue of whether or not to honor a cultural practice, particularly where the resolution of that issue turns on the legal and moral rationales given for social differentiation. Indeed, together with other considerations, they may, in such instances, prove decisive in the given case.

Consider, for example, the practice of racial apartheid in pre-1990 South Africa. In addition to violating our general “initial position” postulate of nondiscrimination in the shaping and sharing of all values, the fact that it privileged minority whites of European origin over majority blacks of indigenous origin obviously had much to do with the world’s having outlawed it. Might similar conclusions be reached vis-à-vis the Hindu and Muslim traditions in Central and South Asia and in the Middle East of segregating women (*Harem, Purdah*)? Of veil wearing (*Chador, Hijab, Niqab*) and total body covering (per the *Shari’a* doctrine of *Urf*)? Of the erstwhile Chinese practice of female foot binding were it still exercised today?

In light of our nondiscrimination postulate, surely the participatory (patriarchal) dynamics of such practices (privileging men over women) are important, sometimes perhaps even decisive, to the issue of whether they should or should not be honored in cross-cultural judgment. If the practice involves a broad cross-section of society participating in decision-making about it, including its servants as well as its masters, we might tentatively conclude that the practice has at least some *prima facie* legitimacy. If, on the other hand, only privileged persons make the relevant decisions

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67. There are no perfect words of common usage to identify the key participants in cultural practices. Therefore, for lack of more suitable alternatives and for purely descriptive purposes (that is, free of bias or preference), I adopt the term “master” to refer to those persons who define, execute, administer, and otherwise govern cultural practices, and the term “servant” to refer to those persons who follow or who are expected to follow such practices. It must be understood, however, that neither the masters nor servants of cultural practices are restricted to their most distinctive participatory characteristics. On many occasions, the same participant or participants perform both roles simultaneously.

about it, we would apply, in light of the postulated public order goal values of our “initial position” decision-makers, a higher level of scrutiny to the cultural practice. Likewise, if only one group benefits—particularly if the benefit is at the expense of another group or if only one group “loses”—the practice, according to the same criteria, should be called into question.

## 2. Perspectives

Individuals and groups who participate in cultural practices bring with them predispositional variables or perspectives—objectives (value demands), identities (for whom values are demanded), and expectations (about the fulfillment or nonfulfillment of demanded values)—which, together with environmental factors, affect cross-cultural judgment about the legitimacy of a given practice from the standpoint of our “initial position” decision-makers. Those objectives and perspectives, be they of the masters or the servants of the cultural practice in question, are important in the relativist-universalist judgmental setting as well: What are the objectives, identities, and expectations of the master(s) of the practice? The servant(s)? To what extent do the former affect the fulfillment or nonfulfillment of the latter and vice versa? Are the perspectives of the master(s) constructive and expansionist, believed to increase aggregate values for all, or are they defensive, intended to protect the existing values of exclusive groups? Are the perspectives of the servant(s) opposed to the given practice, or are they in support of it? Does the master of a given practice seek power, wealth, or some other value at the expense of the servant? Does the servant willingly acquiesce to such demands? Unwillingly? Do the identities of the participants relate to the common interest of all members of the culture or only to the interests of a few? Do all or some of the participants, masters and servants alike, perceive an intrinsic value in fulfilling one’s role in the cultural practice? If so, which ones? Are they conditioned to personal/social security or insecurity as part of their daily routine? Consider in these lights the death threat and literary suppression imposed by Iran’s theocratic government upon Salman Rushdie for his Shiite apostasy, claimed necessary for the promotion and protection of religious rectitude. Consider also the imposition of the death penalty in the United States, professedly to deter crime and otherwise promote civic virtue.

It is of course not only the express or stated perspectives of the participants that must be taken into account. As events in the Balkans and in Africa bear witness, such inherent or quasi-inherent identities as ethnicity, race, color, sex, religion, political or other opinion, language, nationality, age, and life-style are commonly the victims of policies officially proclaimed and justified by their masters on the grounds of, but bearing no real relation to, capability or merit. An example from United States history is the closing of public nursing homes and swimming pools allegedly for economic reasons or concerns for public safety or health, when the real objective was to deny access to minorities.<sup>68</sup> Similarly, in a world where processes of socialization

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68. See, e.g., *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962) (affirming the integration of public swimming pools, nursing homes, and other municipal facilities). But see *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (ruling in a 5-4 decision that the city of Jackson, Mississippi did not violate the Equal Protection Clause of the Fourteenth Amendment in its claim that it could not “safely and economically”

commonly promote the internalization and toleration of patterns of inequality and, in so doing, subordinate the objectives, identities, and expectations of the servants of cultural practices to the demands of those who enforce them, it is of utmost importance to question the extent to which acquiescence to the given practice in issue is freely given. While by no means the exclusive determinant of cross-cultural judgment, it is in this light that one should assess, for example, the female dress codes of veil wearing (*Chador, Hijab, Niqab*) and total body covering (per the *Shari'a* doctrine of *Urf*) in certain Islamic societies; likewise the tradition of arranged child betrothal in South Asia and elsewhere. In such cases, if we are to be consistent with the postulated public order goals of our “initial position” decision-makers, a high level of scrutiny is warranted.

### 3. Situations

Spatial, temporal, institutional, and crisis-level features of social process also set the parameters within which cultural practices must be judged. Is the practice confined to a single country or subnational unit or does it extend across national frontiers to embrace whole regions or continents? Is it of long-standing or short duration, sporadic or continuous, thriving or dying out? Does it operate exclusively in the private sphere—say, as part of the institution of the nuclear family or clan—or is it initiated and/or sanctioned by governmental, religious, or other institutions of national scope and sway? Is it a function of emergency situations or is it an everyday organic occurrence? Consider in these lights, for example, resort to the death penalty in the United States; female genital cutting (FGC)<sup>69</sup> outlawed in Egypt a short while ago<sup>70</sup> and reportedly on the decline in Kenya and the Côte d'Ivoire;<sup>71</sup> female “honor

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operate integrated public swimming pools). This decision has never been expressly overruled; however, later cases have held that a law valid on its face may still violate equal protection, and may be read as having significantly limited if not altogether abrogated *Palmer*. See, e.g., *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993); *Hernandez v. Woodard*, 714 F. Supp. 963 (N.D. Ill. 1989).

69. See discussion *supra* note 7.

70. See Susan A. Dillon, *Healing the Sacred Yoni in the Land of Isis: Female Genital Mutilation is Banned (Again) in Egypt*, 22 HOUS. J. INT'L L. 289, 321 n. 280 (2000) (discussing the banning of female genital cutting by the Egyptian Council of State after a period of controversial debate in Egypt); see also Barbara Crossette, *Court Backs Egypt's Ban on Mutilation*, N.Y. TIMES, Dec. 29, 1997, at A3; *Court Reinstates Ban on Female Circumcision*, MIDDLE EAST TIMES, Jan. 4, 1998; *The Addis Ababa Declaration*, INTER-AFR. COMMITTEE NEWSL. (Inter-Afr. Comm. on Traditional Practices Affecting the Health of Women and Children, Addis Ababa, Eth.), Dec. 1997, at 3; *Egyptian Health Minister Defends Female Circumcision Ban*, AGENCE-FRANCE PRESSE, Feb. 13, 1998; John Lancaster, *Egypt to Enforce Circumcision Ban; Health Minister Decries Practice on Females, Challenges Court Ruling*, WASH. POST, July 12, 1997, at A17.

71. Regarding Kenya, see for example Cèsar Chelala, *An Alternative Way to Stop Female Genital Mutilation*, 352 LANCET 126 (1998); Cèsar Chelala, *New Rite is Alternative to Female Circumcision*, S. F. CHRON., Sept. 16, 1998, at A23; Judy Mann, *From Victims to Agents of Change*, WASH. POST, Apr. 29, 1994, at E3; Judy Mann, *Rituals: Replacing the Bad with Good*, WASH. POST, June 15, 1994, at E15; Malik Stan Reaves, *Alternative Rite to Female Circumcision Spreading in Kenya*, ALL AFRICA, Oct. 23, 2000, <http://allafrica.com/stories/200101080370.html>. Regarding the Côte d'Ivoire, see for example Melvis Dzisah, *FGM Practitioners Start to Abandon the Trade*, INT'L. PRESS SERV., Oct. 13, 1998; *Female Genital Mutilation in Nigeria*, WIN NEWS, Jan. 1, 1998; Melvis Dzisah, *Ivoirian MPS Split on How to Tackle Genital Cutting*, INT'L. PRESS SERV., Mar. 27, 1998.

killings” in Jordan (to protect one’s family’s reputation) in violation of Jordanian public policy;<sup>72</sup> and the curtailment of civil liberties in the presence of civil conflicts or in the wake of national disasters. If the practice extends broadly geographically, or has been around for centuries or is growing in use, or is sponsored or actively supported by national governmental or religious institutions, or is a function of normal everyday life, might it not deserve at least *prima facie* deference? By the same token, if it is geographically confined, relatively new or dying out, carried out without church/state participation or approval, and/or implemented only or mainly during “manufactured crises,” surely greater skepticism regarding claims of “cultural tradition” would be warranted. Guiding our assessment of the answers to these questions are, of course, the public order goals postulated by our “initial position” decision-makers.

#### 4. Bases of Power

Potentially, all values (the “welfare values” of wealth, well-being, skills, and enlightenment; the “deference values” of power, respect, rectitude, and affection)<sup>73</sup> may be, alone or in combination, bases of power to ensure the continuity or discontinuity of given cultural practices. They are, indeed, the essential components of empowerment in any social process. Careful scrutiny of their availability to the masters and servants of a cultural practice in any given case would seem, therefore, axiomatic. Notably requiring attention is the availability or non-availability of particular values (or capabilities) in the absolute sense. Often this will explain both the intensity and the character of selected courses of action or inaction—the enforcement (execution or maintenance) of a cultural practice, on the one hand; its reception (acceptance or toleration), on the other—and thus the cross-cultural deference that should or should not be extended to it. Perhaps even more important are the relative value positions of the masters and servants of a cultural practice since significant disparities between them, relative to each other and to the wider community of which they are a part, might well tip the scales of cross-cultural judgment. It is well known, for example, that masters of cultural practices such as family clans, ethnic and religious groups, and governments commonly possess greater effective influence (power) and control more resources and personnel (wealth, enlightenment, skill) than the servants of such practices. In such circumstances, one’s evaluative guard must be up. Bearing in mind the postulated public order goals of our “initial position” decision-makers, a cultural practice that continues because those with the most resources are able to force others to submit to it should be subject to intense scrutiny, as in the case, for example, of caste-based social arrangements in which only “upper”

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72. See *Blood for Honor* (CNN television broadcast Jan. 11, 1999) (report by Christiane Amanpour); see also Mary Curtius, *Paying a High Price for Honor*, L.A. TIMES, Mar. 12, 1995, at 1; Irene R. Prusher, *Spotlight on Killing of Women for “Family Honor”*: Jordanian Journalist Rana Hussein Broke a Job Barrier to Probe a Deadly Tradition, CHRISTIAN SCI. MONITOR, Oct. 23, 1998, at 6.

73. For this typology, I am intellectually indebted to the germinal work HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950). “By ‘welfare values’ we mean those whose possession to a certain degree is a necessary condition for the maintenance of the physical activity of the person. . . . Deference values are those that consist in being taken into consideration (in the acts of others and of the self).” *Id.* at 55-56.

caste members may hold positions of power and influence while “lower” caste members are relegated to laborious jobs and poor living conditions. The examples are of course legion.

### 5. *Strategies*

The strategies employed by both the masters and the servants of cultural practices commonly embrace the whole range of instruments of policy—diplomatic, ideological, economic, and military—that invariably are available to public and private officials. Typically the masters will resort to some or all of them to ensure the vitality and continuity of such practices, and the servants of them will do likewise either for the same reasons or, alternatively, to resist their continued exercise. Thus, because the type of strategy employed may sometimes shape cross-cultural judgment about a given practice and thus its acceptability within the social framework within which it is exercised, it is useful to ask what strategies the participants employ to secure their objectives. For example, again recalling the public order goals postulated by our “initial position” decision-makers, one might legitimately look askance at cultural practices the continued maintenance of which depends upon, say, bribery and other corrupt measures (economic instrument) or resort to the use of force (military instrument). However, as implied, the type of strategy employed is less relevant than the differing degrees of coerciveness and persuasiveness with which they are employed. From the standpoint of the masters of cultural practices, this calls for responsible attention to alleged abuses of power that manifest coercive or disproportionate means of enforcement. All other things being equal, again recalling the public order goals of our “initial position” decision-makers, practices implemented largely through highly coercive or arguably disproportionate uses of power—examples include amputation and stoning in the Middle East and the death penalty and solitary confinement in the United States—should come under greater scrutiny than those that are characterized mainly by persuasion and with all or most of the participants freely choosing to take part in the practice in question. From the standpoint of the servants of cultural practices, it is well to consider the intensity of commitment or resistance to the practice, thus to the degree of persuasiveness or coerciveness with which it is greeted by them. If a practice is carried out or served voluntarily, it warrants, all other things being equal, at least *prima facie* deference or respect in cross-cultural decision-making. Likewise, if it is violently resisted, its legitimacy is in doubt.

### 6. *Outcomes and Effects*

Perhaps most important to cross-cultural judgment about given cultural practices are the short-term outcomes and long-term effects of the interactions between the masters and servants of the cultural practice in question. When all is said and done, it is the balance sheet of net value gains and losses, both short- and long-term, absolute and relative, resulting from the practice that commonly determines whether the practice is to be honored or dishonored in cross-cultural judgment. Hovering over the balance sheet is the issue of necessity—the necessity of the value losses relative to the gains for cultural diversity or pluralism.

The following kinds of “outcome” questions are thus exceedingly pertinent: Does the continued exercise of the practice spell a “win-win” outcome for the

participants involved? A “win-lose” outcome? If the latter, who “wins” and who “loses,” and in what ways? In other words, if the continued exercise of the cultural practice can be seen essentially to reflect the shared aspirations of persons engaged in a cooperative community enterprise (a “win-win” outcome), then at least preliminary deference should be shown that practice. If, on the other hand, its continued exercise may be found to benefit only a small group of “winners,” say, at the expense of a large group of “losers,” then a high degree of scrutiny is warranted, particularly when the “losers” manifest distinctive “minority” identity. Even if the masters of a cultural practice do not intend a discriminatory result, the postulated public order goals of our “initial position” decision-makers compel us to account for the fact of discriminatory deprivation or nonfulfillment as such.

As for the long-term effects of the cultural practice in dispute, which potentially can impact beyond the immediate participants involved, again cross-cultural decision-making must take heed. Suppose, for example, that the continued exercise of a given cultural practice were to result in racially discriminatory outcomes that would spark instability and violent uprisings in large parts of the country involved, even perhaps beyond—as indeed occurred in pre-1990 South Africa in response to the continued exercise of the then claimed cultural practice of racial apartheid.<sup>74</sup> What then? If we are faithful to the postulated public order goals of our “initial position” decision-makers, then, logically, cross-cultural decision-making should look upon the practice with skepticism. Suppose, however, that the opposite were true, for example, that the continued exercise of the cultural practice—say, discriminations based on merit or basic need—were to have a net positive effect for the society in question as a whole. Then, just as logically and based on the same criteria, cross-cultural decision-making should display at least initial great deference.

The point is, of course, that cultural practices can have both beneficial and detrimental outcomes and effects relative to the postulated public order goals of our “initial position” decision-makers. Precise characterization of them and therefore cross-cultural judgment about them will hinge at least in part on whether and how one appraises their short- and long-term consequences.

### 7. *General Conditions*

If cross-cultural decision-making is to respond adequately to the vicissitudes of our times, it must be made to account not only for the primary characteristics of the particular relativist-universalist case, but also for those influential general conditions of the larger global context within which those characteristics live. Of course, the wider influential context within which such decision-making operates is ever-changing. Moreover, what may be relevant in the wider context for one relativist-universalist controversy may not be germane for another. Nevertheless, certain features of the current world scene, many of them contradictory but all of them influential within as well as beyond national borders, seem especially significant and therefore worthy of

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74. One is reminded, in this regard, of the question attributed to former U.S. President John F. Kennedy: “[I]s not peace, in the last analysis, basically a matter of human rights . . . ?” President John F. Kennedy, Address at the American University’s Spring Commencement (June 10, 1963) (transcript available at <http://www.american.edu/media/speeches/Kennedy.htm>).

at least passing consideration when attempting cross-cultural judgment at the present time:

- the United States as perhaps a declining superpower, the emergence of serious interstate rivalry, and thus an ambiguous geopolitical environment for global decision-making of all kinds, fundamentally influencing, inter alia, the United Nations and other experiments at international, cross-cultural collaboration;
- the accelerating socio-economic “globalization” of the world, commonly on unequal terms as between “modern” and “traditional” peoples and cultures;
- a consequent expanding interpenetration and interdependence of the world’s peoples and their cultures (however uneven) and simultaneous decline of state power (the United States included);
- increased resort to intercultural civil conflict (ethnic, religious, tribal) together with increased even if hesitant resort to external “humanitarian intervention,” on the one hand, and decreasing resort to major international warfare, on the other, Iraq notwithstanding;
- a growing fragility of national and international controls over weapons of mass destruction and, at the same time, a marked tendency toward inter-civilizational/inter-cultural national and international terrorism (both state and non-state) of the most violent sort;
- a hesitant but persistent trend toward democratization and the rule of law midst widespread disillusionment with democratic processes born of, inter alia, inter-civilizational/inter-cultural tensions and unrewarded experiment;
- a widening disparity in economic position between the world’s “haves” and “have-nots” (both between and within the North and South) and simultaneously declining public funds for economic development, thus deepening and expanding the culture of poverty and the formidable obstacles to progressive change that inhere in it; and
- mounting ecological emergencies of regional and global—indeed, extra-terrestrial—dimension (climate change, for example) and hesitant support for environmental protection and the cultures that are ecologically dependent.

Comprehensive assessment of these and other “secondary” contextual conditions would seek richer indication of their specific relevance to diverse cultural practices and to the fundamental policies that are deemed pertinent in relation to them.

#### *D. Projection of Future Trends in Cross-Cultural Decision*

The projection of probable future developments relative to given cultural practices—in the sense of the broad trend, not the particular instance—is an important variable in cross-cultural decision-making for at least two reasons. First, it can help us see whether continuation of the practice will reveal movement toward or away from the postulated public order goals of our “initial position” decision-makers. If so, the practice merits at least *prima facie* deference; if not, then the opposite. Second, to minimize the diminution of cultural pluralism where continuation of a given practice reveals movement away from the postulated goals of our “initial position” decision-makers, it can help creativity in the invention and evaluation of alternatives to the

manner in which the given cultural practice is exercised, making it comport with our postulated public order goals while simultaneously preserving its essence. This is no easy decisional task. No simpleminded extrapolation of the past, it requires a disciplined analysis of all the relevant features of the practice under scrutiny and of the primary and secondary contextual factors that condition it.

#### *E. The Invention and Evaluation of Alternatives*

The final intellectual task of respectful decision-making in relativist-universalist controversies relates to the deliberate search for, and assessment of, alternatives either to the given cultural practice itself or to the manner in which it is exercised in cases where it may be found that the practice or, more precisely, its manner of exercise, is at odds with the postulated public order goals of our “initial position” decision-makers. It is the last task towards which all the preceding intellectual tasks accumulate and therefore the one to be pursued after all of its predecessors have been credibly exhausted. The point is that the ultimate goal of respectful decision-making in the relativist-universalist context is not to declare a “winner,” but, rather, to enhance the possibility of ensuring the world’s rich diversity (cultural pluralism) while at the same time serving the values of *human* dignity as defined by the postulated public order goals of our “initial position” decision-makers. Thus, where a particular cultural practice is found, on final analysis, to conflict with those goals in the manner of its exercise but not necessarily in its innate purpose or social function, one would look to encourage or reward initiatives that can make the practice consistent with the values of human dignity embedded in the goals. A case in point is found in the rites of female passage and sexual purification in sub-Saharan Africa where, for generations, these rites have been administered via female genital cutting (FGC).<sup>75</sup> In recent times in Kenya and the Côte d’Ivoire, for example, the focus of responsible attention has shifted to emphasize the innate purpose of the ritual rather than the modality of its implementation and thus to preserve the ritual and simultaneously lessen or eliminate its severity. To the extent feasible, respectful decision-making in cross-cultural context should seek integrative solutions characterized by maximum gains and minimum losses for all sides of the relativist-universalist debate; it should seek diversity in unity.

#### V. APPRAISAL AND RECOMMENDATION

In the preceding pages, I have sought to outline in at least impressionistic fashion the key intellectual tasks and inquiries required to serve respectful decision in relativist-universalist contexts and that are at the core of contemporary nation-building and post-conflict reconstruction tasks. To say that they are the *key* intellectual tasks and inquiries, however, is not to say that they constitute *all* the study that is needed. Additionally critical is an honest assessment of the very decision process pursuant to which that judgment is being rendered. As any sophisticated law student knows, who decides what, why, when, where, and how often has as much and sometimes more to do with the resolution of legal controversies as the facts and pertinent doctrines,

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75. *See supra* note 7.

principles, and rules themselves. Indeed, for precisely this reason, a thorough approach to respectful decision in the relativist-universalist context would identify and analyze that process just as it would identify and analyze the process of decision in any controversy—that is, not simply as just one more factor generally conditioning the controversy, but, rather, as a separate yet intimately interrelated central part of the total social process surrounding the controversy that merits discrete analysis in its own right.

For reasons of efficiency and space, however, I leave this further exploration to another day. Suffice it here to say that questions concerning the identity, perspectives, decisional arenas, bases of power, strategies, and other attributes that help to define those who render cross-cultural judgments about relativist-universalist controversies have also to be seen as conditioning factors necessarily to be taken into account if a genuinely respectful decision is to be rendered. The core value of respect demands at a minimum that the process of cross-cultural decision-making itself prove its own legitimacy when it comes to challenging, possibly eliminating altogether, a demonstration of cultural pluralism.

In any event, one thing is certain: if one is to take seriously the proposition that respect is “the core value of all human rights,”<sup>76</sup> there is no escaping that cross-cultural decision-making about relativist-universalist controversies cannot be a simpleminded affair. Necessarily, it must reflect the complexity of life itself, implicating a whole series of interrelated activities and events that are indispensable to effective inquiry and therefore to rational and respectful choice in decision. And to this end, I therefore join other human rights theorists and activists in advocating the importance of dialogue across cultures and societies.<sup>77</sup> But not only ethical or moral dialogue. Also needed is that kind of cross-cultural dialogue that can yield substantial detailed consensus on the many factual and policy-oriented questions that absolutely need to be asked by all participants engaged in nation-building—hopefully systematically in keeping with the *methodology of respect* that I have urged here—so as to guarantee that the core value of respect will be present in all relativist-universalist decision-making both within and between states. This Essay is offered as a modest preliminary contribution to that end.

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76. MCDUGAL, LASSWELL & CHEN, *supra* note 1, at xvii; *see also id.* at 451-67.

77. *See, e.g.*, Abdullahi Ahmed An-Na'im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in WELCH & LEARY, *supra* note 13.