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CULTURAL PLURALISM AND INTERNATIONAL RIGHTS

Kory Sorrell[†]

A North-American Indian is well pleased with himself, and is honoured by others, when he scalps a man of another tribe; and a Dyak cuts off the head of an unoffending person, and dries it as a trophy. The murder of infants has prevailed on the largest scale throughout the world, and has met with no reproach; but infanticide, especially of females, has been thought to be good for the tribe, or at least not injurious.— Charles Darwin, *The Descent of Man*¹

I don't mind being some kind of relativist, as long as I am not the kind that renders individuals' or societies' moral self criticism incoherent, or that declares intergroup or intercultural moral evaluation and criticism impossible or forbidden. I do not think there are too few (or no) facts pertinent to moral beliefs and their assessment, but that there are often too many. I certainly do not think that "anything goes" at home or elsewhere.— Margaret Walker, *Moral Understandings*²

Since its adoption in the Universal Declaration of Human Rights in 1948, the concept of human rights has gained broad international currency.³ As Jack Donnelly points out, "All states regularly proclaim

[†] J.D., Yale; Ph.D., Pennsylvania State; M.A., Fordham. This essay is dedicated to Vincent Michael Colapietro, Josephine Carubia, and Maria Alicia Lopez Freeman, wonderful friends and teachers. Special thanks go to W. Michael Reisman for improving this essay through good conversation and trenchant criticism.

1. CHARLES DARWIN, *THE DESCENT OF MAN* 314 (Robert Maynard Hutchins ed., 1952).

2. MARGARET WALKER, *MORAL UNDERSTANDINGS: A FEMINIST STUDY IN ETHICS* 182 (1998).

3. This is not to say that there was no prior tradition of civil and political rights. The British Magna Carta and Bill of Rights, the French Declaration of the Rights of Man and Citizen, and the United States Constitution and Declaration of Independence, made

their acceptance of and adherence to international human rights norms, and charges of human rights violations are among the strongest charges that can be made in international relations."⁴ The idea that human rights are universal and provide the best available framework for constructing common norms among nations and across cultures is rhetorically powerful and attractive. It is deeply inclusive, providing a "picture" in which all persons, however culturally and historically diverse, may recognize themselves and see others as having something important in common with them, their "humanity." It is also compelling insofar as persons who may have little else in common may mutually recognize each other's needs, aspirations, and sufferings. The rhetoric of universality and humanity thus provides both basis and motive for international rights. By virtue of the bare fact that one is human, one has rights to which one is entitled and may enjoy free of constraint by other persons or institutions.⁵ These rights merit protection and, if threatened, other persons are obliged to intervene or to assist on their behalf.⁶

However appealing, the concept of universal rights is notoriously problematic in practice. Even if all states recognize the existence of international rights, there is controversy as to: (1) what those norms are or should be, (2) exactly how they derive their justification from a concept of human nature, (3) what counts as a violation of those recognized norms, and (4) what is to be regarded as acceptable intervention or mediation. And these questions are as important as they are thorny, since the answers

significant contributions. See HOWARD TOLLEY, JR., *THE U.N. COMMISSION ON HUMAN RIGHTS* 1 (1987).

4. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 1 (1989).

5. See Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 *HUM. RTS. Q.* 201, 203 (1998).

What is meant by *human* rights? To speak of *human* rights requires a conception of what rights one possesses by virtue of being human. That does not mean human rights in the self-evident sense that those who have them are human, but rather, the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit.

Id.

6. Throughout this essay, "Right" is understood very thinly as follows:

[T]o say "X is entitled" or "X is obligated" is not to make a bare statement of fact; each of these statements has a prescriptive dimension. "X is entitled" means that she *ought* to be permitted to do or to have whatever she is entitled to; "X is obligated" means that he *ought* somehow to fulfill the obligation, to act so as to implement it or behave in such a way as to show that he acknowledges it.

BETH J. SINGER, *PRAGMATISM, RIGHTS, AND DEMOCRACY* 26 (1999).

not only limn the boundaries of individual and state power, but also provide conditions under which some members of the international community may justifiably intervene in the practices of other members of the community on behalf of those whose rights they recognize as threatened or suffering violation.⁷

The difficulty is now widely understood to lie in what is commonly described as the problem of relativism or cultural pluralism. Although it is *prima facie* apparent that all human beings have something in common that may ground international norms, it proves difficult in practice to identify what this underlying feature is. First, it is now broadly accepted as empirical fact that different cultures embrace a broad range of values, interpretive frameworks, and moral criteria in their respective “ways of life” when discerning what practices are acceptable and which are not. Different cultures rely on, and reproduce, narratives and practices that privilege some values over others, explain those regnant hierarchies, offer rules for resolving different sorts of conflict among competing values, as well as locate decision-making authority among members of the community in significantly different ways. What counts as acceptable behavior, what marks the differences between, for example, pain and pleasure, cruelty and discipline, rewarding initiation in a culture and subjection by a culture, acts worthy of praise and those demanding censure are all difficult to remove from the way of life that sustains and reproduces it.⁸

Second, it is also important to note that value and practice are so intertwined that one cannot separate them for comparison. What one feels, enjoys, or disdains is tightly bound to the cultural practices in which she is immersed. As John Dewey pointed out (and Freud before him), impulses/instincts are indeterminate and starting points of assimilation. “They are tentacles sent out to gather that nutrition from customs which will in time render the infant capable of independent action.”⁹ And as Herbert Marcuse made clear, even brutally oppressive systems gain legitimacy and enjoyment by transforming the values of those it controls.

7. See Robert D. Sloane, *Cultural Pluralism and Relativity: Understanding the Universality of International Human Rights* 3 (May 24, 2000) (unpublished manuscript, on file with the author).

8. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973). See generally JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 21-54 (1988).

9. JOHN DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* 68 (1988).

The established values become the people's own values: adaptation turns into spontaneity, autonomy; and the choice between social necessities appears as freedom. In this sense, the continuing exploitation is not only hidden behind the technological veil, but actually 'transfigured.' The capitalist production relations are responsible not only for the servitude and toil but also for the greater happiness and fun available to the majority of the population – and they deliver more goods than before.¹⁰

If Marcuse is right, then any appeal to human feeling as a basis for criticism of a way of life becomes fraught with difficulties. Is someone in pain because the practice of a culture is "inherently" a source of human misery? Or is it part of the suffering required to produce the goods in which the individual readily and with pleasure participates? Are not tradeoffs like this made all the time by all cultures? Conversely, and this will prove especially sticky later on in this essay, is the individual *really* happy with his way of life? Or is the pleasure he takes a function of his having internalized perverse ways of living? Can the individual be extricated and, if so, would he *really* be better off? Would he, in the end, agree with, and express gratitude for, the intervention? Given even what little we know about culture and about human nature, the answers to these questions are difficult to discern and their lack of resolution is an implicit barrier to making claims about internationally acceptable norms of conduct.

Finally, even very broad generalizations, such as a concept of the "human" or of "rights," are now seen to reflect the values, analytical frameworks, and habits of interpretation of the community that produces them. As Donnelly points out:

Human rights represent a distinctive set of social practices, tied to particular notions of human dignity, that initially arose in the modern West in response to the social and political changes produced by modern states and modern capitalist market economies. Most non-Western cultural and political traditions, like the premodern West, lacked not only the practice of human rights but also the very concept.¹¹

Part of the human rights discourse in the last twenty-five years has been an attempt to show that other cultures do embrace a notion of human rights that is significantly like that promoted by the West. It has been argued, for example, that the Koran includes some universal fundamental rights for all human beings; that traditional African societies include a

10. HERBERT MARCUSE, AN ESSAY ON LIBERATION 13 (1969).

11. DONNELLY, *supra* note 4, at 50.

conception of human rights in their views of humanism; and that the Chinese enjoyed the basic rights of man even though these rights were not expressed in the language of human rights.¹² But Donnelly is careful to show that these conceptions are intrinsically different insofar as they draw their justifications from very different sources. They depend on, and draw their content from, sacred texts, divine commandments, or other political philosophies – not from the view (as does the West) that humans have rights by virtue of their humanity only.¹³ This means that beyond the differences in the details, i.e. what is the content and limitations of these rights in each respective culture, the concepts are essentially different, dependent on the culture which produced it, and thereby equally susceptible to the charges of pluralism and relativism. What is understood by a particular community as universal may be (some argue inevitably is) actually quite provincial, undermining and marginalizing values and arrangements that are essential or dear to members of communities immersed in other ways of living.¹⁴

Perhaps more important than these empirical facts is the epistemic one that these differences often and easily escape notice. As Margaret Walker suggests:

[W]e learn from and are taught by others to recognize what states of others' souls are expressed in their comportment, gesture, visage, and expression; and others must know what subjective states our comportment, gesture, visage, and expression show, in order to teach us

12. *Id.* at 50-54.

13. *Id.*

14. This occurs not only, perhaps not even principally, when members of different cultures are so far apart from one another as to be unable to recognize the limits of their own representations *vis-a-vis* the representations of others, but also among members of the same culture who have different and diverging understandings of what is shared and what is not. Sandra Harding, for example, addressing relations between men and women in western cultures, writes:

Women are thus excluded from men's conceptions of culture and its conceptual schemes of "the social," "the historical," "the human." Finally, women's actual experience of their own labor is incomprehensible and inexpressible within the distorted abstractions of men's conceptual schemes. Women are alienated from their own experience, for men's conceptual schemes are also the ruling ones, which then define and categorize women's experience for women.

SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 156 (1986). See also NANCY SCHEPER-HUGHES, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* 478-504 (1992) (providing differing representations of Carnival in Brazil and showing how each conceals relevant features of the events for, and from, differently located participants).

to name and describe our own psychological, emotional, or intentional states.¹⁵

Without competent understanding of the code of recognition that connects personal displays with meaning, it is difficult, if not impossible, to grasp the meaning or significance of the practices in which others are involved, much less evaluate those practices. This would not be a problem if codes of recognition turned out to be quite similar, readily identifiable, or easily learned. But as Walker suggests,

Expressions of respect, sadness, courtesy, anger, or shame may vary significantly and globally between cultures, but often also vary substantially among class or ethnic or age groups, or between males and females, within the same culture. Even where expressions are native to and spontaneous to human beings, such as smiles or certain reactions to pain, there are still specific meanings attached to variations on these displays and to the significance of the situations and interactions in which they occur. There are polite smiles, demure smiles, seductive smiles, angry smiles, greedy smiles, condescending smiles, leering smiles, and pained ones. But which smiles are such, in which contexts, is not the same everywhere, and is not something anyone is born knowing. It must be learned from others in a particular social setting.¹⁶

One must know a great deal about another's way of life in order to interpret even relatively simple and broadly prevalent gestures. This includes not only a range of context-specific rules of interpretation, but also within any given culture, competing and diverging understandings and use of those rules, as well as the changes that these have endured across time. Cultural representations evolve, sometimes quite quickly, in response to changing circumstance, to the inroads made by other cultures, and even by chance.¹⁷ There appears, in short, practically no limit to what is required in order to adequately grasp meanings generated by those differently situated from us.

This is all relevant, of course, because in fashioning social norms that are to be legitimately prescriptive across cultures, it is crucial to be able to know and to mark boundaries between what is desirable and what is not, what marks the difference between pain that is somehow warranted and that which is not, what might count as an attractive change to a present

15. WALKER, *supra* note 2, at 182. See also W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 105 (1999) (pointing out that power structures vary considerably depending on context and that the indicia of those structures not only differ but may also be significantly misleading).

16. *Id.* at 182-83.

17. See CLIFFORD, *supra* note 8, at 206-09.

practice, and how a community may be justified in its intervention of another community's or state's activities. Since there is such empirical divergence, for international rights to succeed there must be some way to choose among competing practices and it would seem that there must be some way to distinguish *really* painful, harmful, exploitative, repressive practices from those which only *seem* to be so due to differences in cultural preferences and experience.

In light of these empirical conditions, the cultural pluralist/relativist suggests that no such means may be gathered from the rhetoric of human rights; that the appeal to universals is propped up by an essentially vacuous notion of human nature; and that, because the content of this notion must be filled by particular cultural understandings of the human, its use is tantamount to the arbitrary imposition of some set of values on others who do not share them. Indeed, the lodestar of international rights, a universal humanism, turns out to be its own biggest obstacle. In order to understand her better, it is important to see what the relativist – at least as she is represented in this essay – is not saying.¹⁸ First, this is not the sort of relativism that is commonly characterized as “crude relativism” and promptly dismissed. It does not hold, as John Tilley tersely describes one form of cultural relativism, the proposition that “although for every culture some moral judgments are valid, no moral judgment is universally valid. Every moral judgment is culturally relative.”¹⁹ A common corollary to this view is the further claim that, since judgments are relative, one should not judge other cultures.²⁰ This view is easily dismissed as self-referentially inconsistent. On behalf of relativism it posits one universal descriptive claim (“all judgments are relative”) and one universal prescriptive claim (members of cultural A are morally culpable if they censure members of another culture B for not conforming to the mores of culture A). Pluralism/relativism is also recognized as committing the naturalistic fallacy. From a fact of pluralism it derives a particular norm of non-interference. This is an unacceptable inference because it derives what ought to be from what is. For both of these reasons (inconsistent and fallacious), pluralism/relativism is not a defensible doctrine.²¹

But the pluralist/relativist described above clearly does not hold this view. First, she is not self-referentially inconsistent because she does not

18. Obviously, “relativism” has received numerous formulations. The one presented here is introduced because I think it the most plausible.

19. John Tilley, *Cultural Relativism*, 22 HUM. RTS. Q. 501, 505 (2000).

20. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 193 (1996).

21. See Sloane, *supra* note 7, at 62.

insist that every claim is relative. She only recognizes that different cultures, and different persons within respective cultures, have a myriad of different ways of living; that persons are to various degrees attached to these choices; and that there are a broad range of narratives which justify why different individuals and groups do things differently. The pluralist sees this as an empirical fact that vexes attempts to choose "once and for all" among competing ways of living, especially when past efforts to do so have revealed themselves as concealing under the cover of universality what are in fact quite specific preferences.

She also does not commit the naturalistic fallacy of moving from the empirical fact of pluralism to the supposed corollary that judgment of other cultures is categorically wrong. She claims only that the dominant rhetoric of human rights cannot do the work required for the construction of internationally binding social norms and expresses considerable puzzlement about how this might be done. She recognizes, as does Annette Baier, that the rights sustained within a community reflect the values it holds, and that these are constantly balanced, adjusted, and compromised. As Baier writes,

Different groups make different tradeoffs among the candidates for universal rights. We in the late twentieth century give more weight to the universal right to free expression than to what might well seem the equally vital universal right to an unmolested childhood. We in effect allow child pornography, and we even tolerate, in the name of freedom, the market in sexual excitants in the form of so-called snuff movies, which the purchasers believe, sometimes correctly, to have involved the actual abuse, torture, and death of the involuntary child (and other) "actors." Our current tradeoff of universal rights is as bizarre as was the Shakers,' and seems almost to vindicate their belief that sex is the devil.²²

The question is not whether or not judgments may or should be made. They obviously are and existential circumstances demand that they be continually made – regardless of how haphazardly or clumsily. The question is *how* to best make these decisions in a way that is non-arbitrary and promotes a set of norms to which all participant members of the international community may consent. Lists of international rights are necessarily vague; how do we decide what their boundaries are? How do we know when there has been a violation? And when may members of the international community intervene? Does any form of child pornography violate the rights of children or do only snuff-films? Are these legitimate

22. ANNETTE C. BAIER, MORAL PREJUDICES: ESSAYS ON ETHICS 228 (1994).

grounds for censure (dare one say intervention?) by the world community? The pluralist/relativist, as I understand her, is both eager to protect cultural difference from arbitrary imposition (even if it is well intended) and exercises a healthy degree of skepticism with respect to the approaches so far taken toward resolving these problems. But, and this is the second feature that separates her from the crude relativist, she also recognizes that some sort of accord must be found, some way of adjudicating among competing practices and representations if international rights are to maintain their legitimacy and widespread currency.

In what follows, I carefully assess some recent efforts to address the concerns alluded to above. Instead of broadly canvassing the extant literature on human rights, the essay focuses in sections one and two on recent approaches to developing, grounding, and discriminating legitimate candidates for human rights. Each author has been chosen precisely because she so ably represents the view she advocates and criticism is aimed not at the particular writers, but at the methods each recommends. One approach is provided by Martha Nussbaum, who draws on an Aristotelian conception of human nature, and the other, introduced by Laurie Shrage, suggests that a hermeneutic model is best for both incorporating cultural pluralism and sorting out better from worse practices. Although significant ground is gained by these strategies, I argue that each is problematic (for different reasons) and I will introduce in section three an alternative approach to the problem of international rights. For reasons that will be made clear below, the term "universal" is dropped because the rights claimed remain contingent, historical, and fallible. The term "human" is also omitted because "humanity" does not provide a non-relative foundation for the justification of particular enumerated rights. But in exchange for this attenuated account of rights, my approach offers means by which a pluralistic world community may shape and give significant, even if limited, content to internationally binding norms. Finally, in section four, I discuss my model in conjunction with some actual conditions under which international rights may be invoked. Although brief, this is intended to inspire some confidence in my way of handling the problem.

I. CAPACITIES AS CULTURAL UNIVERSALS: A PLAUSIBLE
SOLUTION OR MORE “BAWLING ON PAPER?”²³

In *Sex and Social Justice*, Martha Nussbaum offers a new solution to the problem of defending a conception of human rights in the face of cultural pluralism and relativism. This approach may be the most plausible of its kind, and a close look at the details will more specifically highlight the difficulties that pluralism and relativism pose to the articulation of international rights and show why approaches that start with human nature are likely to fail.

A. *Grounds for Cultural Universals and a Response to the Pluralist/Relativist*

Although her strategy is Aristotelian in nature, Nussbaum argues that there are good empirical – rather than metaphysical – grounds for supporting the view that there are universal conceptions of the human found across cultures.²⁴ She cites Aristotle to the effect that, “One may observe in one’s travels to distant countries the feelings of recognition and affiliation that link every human being to every other human being.”²⁵ Despite differences, human beings do much that is similar that is recognizable by others who are not part of the particular culture that provides the basis for claiming at least some very general cultural universals.²⁶

Nussbaum begins by asking an empirical question: “What activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human?”²⁷ The answers to this question form the basis of a list of “Central Human Functional Capabilities.”²⁸

23. This is Jeremy Bentham’s assessment of natural rights discourse. Bentham writes that, “Right is a child of law; from real laws come real rights, but from imaginary law, from laws of nature, come imaginary rights Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.” See Shestack, *supra* note 5, at 208 n.16.

24. This is one of the ways Nussbaum’s account differs from Marx’s more classically metaphysical approach. Instead of empirical grounds, Marx drew on Aristotle’s concepts of freedom and essence in order to develop a notion of “species being” and alienation. See KARL MARX, *SELECTED WRITINGS* 82 (1977) [hereinafter *SELECTED WRITINGS*]; KARL MARX, *CAPITAL: VOL. 1* 546-48, 716 (1977) [hereinafter *CAPITAL*].

25. MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 38 (1999).

26. *Id.*

27. *Id.* at 39.

28. *Id.* at 41. This is the other significant way in which Nussbaum departs from earlier attempts to appropriate from Aristotle a method for producing human rights. Typically, rights are discussed in terms of “needs.” Marx, for example, argued that human beings are

Among them are “life, bodily health, free exercise of emotions and practical reason, play, and control over one’s environment.”²⁹ The list is deliberately quite general, according to Nussbaum, so that “[e]ach of its components can be more concretely specified in accordance with one’s origins, religious beliefs, or tastes”.³⁰ But widespread observation still secures the cultural universals needed to provide the foundation for international rights because different cultures do not disagree with respect to what functions they characteristically have; they only differ in their manner of expression.³¹ Since it cannot be determined in advance which of these capacities will be exercised by a particular culture, in what manner, or to what degree, Nussbaum argues that only the capacity, not its exercise, must be protected.³²

In developing her view, Nussbaum identifies three challenges that pluralists and relativists pose to universalism and argues that her approach can handle them. First, Nussbaum suggests that pluralists are worried that her approach neglects historical and cultural differences. People understand life in very different ways across cultures and any attempt to mark universals will “enshrine” the understanding of a dominant group at the expense of a minority one.³³ Nussbaum thinks her approach handles this easily. She claims that her “normative conception of human capability is designed to make room for a reasonable pluralism in specification.”³⁴ The list of basic capacities is general precisely so that it may gain content from persons located in specific cultures. Moreover, the list is not intended to be exhaustive; it simply marks some important functions on which we can agree and on which we can focus political action.³⁵

The second charge posed by pluralists is that universalism neglects the autonomy of other people. It determines in advance what elements of

essentially incomplete unless they express themselves in nature and so “need” this relationship. See *SELECTED WRITINGS*, *supra* note 24, at 104. Nussbaum presumably eschews this approach because it is notoriously difficult to decide which needs are primary or how many there may be – if any beyond basic sustenance.

29. NUSSBAUM, *supra* note 25, at 41.

30. *Id.* at 40.

31. Even though Nussbaum insists that her approach is not metaphysical in nature, this is a peculiarly Aristotelian metaphysical formulation: an abstract form becomes determinate by its combination with some particularity. This should make one wonder how this happens, as well as what exactly the general term “contains” on its own prior to its becoming particular – in short, it invokes all of the problems that have vexed attempts to defend realism (and universals) from nominalism since the 13th century.

32. *Id.* at 43.

33. *Id.* at 38.

34. *Id.* at 47.

35. *Id.*

human life are important, projecting the values of some on others, and preventing others from choosing what form of life is best for them according to their own historical and cultural lights.³⁶ Nussbaum thinks this charge fails for much the same reason as the first one. Her approach, far from neglecting this possibility, turns on the fact that various persons and groups will give broadly different content to the norms she provides. Indeed, it is self-referentially built into the list. Persons must have the capacity to exercise their practical reason, by which Nussbaum means that they must be free "to form a conception of the good and to engage in critical reflection about the planning of one's own life."³⁷ The only limitation imposed on persons is that these capacities are to be protected broadly. Everyone has the right to exercise these capacities freely. Consequently, one cannot exercise one's own capacities in a way that impinges on those of others and one should protect the rights of others to exercise their capacities in equally free ways.³⁸

Finally, pluralists seem to worry that a universal conception of the human may be applied arbitrarily in the sense that only some persons will be granted human status. Historically, the powerless, such as women or slaves, were not considered fully human. Consequently, they would not qualify for the protection offered under the rubric of human capacities. Nussbaum thinks that this charge has merit, that Aristotle himself was guilty of this practice, but that the problem is quite contingent and may be addressed. Indeed, she thinks that the conception of the "human" has been instrumental over time in showing up these arbitrary applications. By recognizing that others are truly of the same kind, that "they" are no less human than "we" are, the concept has provided a powerful source of moral claims of injustice.³⁹ The powerful try to mark these sorts of distinctions, but a universal conception of the human forestalls it. According to Nussbaum, "to deny humanness to beings with whom one

36. *Id.* at 38.

37. NUSSBAUM, *supra* note 25, at 41.

38. See SINGER, *supra* note 6. This follows from a very general definition of rights and gives content to Nussbaum's claim that "reasonable" pluralism is acceptable in her view. Nussbaum claims that:

The approach is therefore very close to Rawl's approach using the notion of primary goods The primary difference between this capabilities list and Rawls's list of primary goods is its length and definiteness, and in particular its determination to place on the list the social basis of several goods that Rawls has called "natural goods," such as "health and vigor, intelligence and imagination."

Id. at 45.

39. *Id.* at 50.

lives in conversation and interaction is a fragile sort of self-deceptive stratagem, vulnerable to sustained and consistent reflection, and also to experiences that cut through self-deceptive rationalization.”⁴⁰ Though the notion of the human has been misapplied over time, it also provides the means, according to Nussbaum, for correcting these mistakes (or arbitrary expressions of power). Consequently, the record provided by rhetoric based on human nature is grounds for ongoing hope, not the dismay suggested by the pluralist/relativist.

B. Further Criticism: Significant Grounds for Concern

Even if a capacities approach admirably accommodates some objections that a pluralist might have, there are others Nussbaum does not appear to notice. First, this normative view is less empirical than it seems. Although she claims to begin with observations of human nature revealed through travel, Nussbaum clearly frames the inquiry in terms of the long-standing debate between universalism and anti-essentialism – a concern specific to western philosophical discourse. The question, for her, is whether there are cross-cultural universals that apply everywhere and always or do different cultures truly have nothing in common. This is important, she thinks, because in order for some judgments to be binding on all, regardless of cultural difference, there must be universal ground to stand on. Otherwise, no culture may legitimately judge another.

This is problematic, not because it claims something in common which is not, but because this way of framing the discussion inevitably sets the stage for the horns of an unnecessary dilemma. This approach forces one to choose: either universals in common and non-arbitrary judgment is possible, or no universals and no cross-cultural judgment is legitimate. And the career of the philosophical discourse has been the argument between these choices, neither of which is satisfactory. It also forestalls a far more fruitful inquiry. It fails to look at how persons actually go about making judgments, some of which are inevitably cross-cultural. Presumably, when Aristotle traveled, he made such judgments (what else are *recognitions*, if not a kind of judgment?) and others formed opinions of him, of his character, of what was due him, and what should legitimately be expected of him as a stranger to their parts. Likewise, in our pluralistic society, we constantly find ourselves in situations where such judgments must be made, negotiated, informed, and continuously transformed. All of this goes on, it would seem, without recourse to a philosophical doctrine of universality, and more or less well at that. How this actually happens is an

40. *Id.*

empirical question that should inform the further consideration, which is normative, of how these practices of judgment may be improved. Unfortunately, when framed as a choice between universality and strict pluralism/relativism, this question remains beyond the domain of the discussion. I will suggest below that it is crucial and provides a helpful thread for finding our way through some of these difficulties.

Second, Nussbaum successfully avoids the metaphysical features of traditional accounts of human nature by drawing her cultural universals from observation. She also avoids the naturalist fallacy because she does not rely on these "empirical universals" as a basis for normative agreement. She does not misstep by concluding that, since these functions are in common, they should be protected. Nevertheless, expression of these faculties is considered a good, and this normative step must come from somewhere. Nussbaum recognizes it as premise to her discussion when she writes that:

The basic intuition from which the capability approach starts, in the political arena, is that human capabilities exert a moral claim that they should be developed We believe that certain basic and central human endowments have a claim to be assisted in developing, and exert that claim on others, and especially, as Aristotle saw, on government. Without some such notion of the basic worth of human capacities, we have a hard time arguing for women's equality and for basic human rights.⁴¹

Basic human worth is a *sine qua non* for justification, but Nussbaum does not indicate how this worth is in turn to be grounded. Moreover, she does not suggest how this notion is expected to trump other interests that a group of persons may have.

Consider, for example, Carl Schmitt's view of politics as a conflict between those who identify with one another against strangers, a conflict whose final arbiter is power. According to Schmitt, "each has to decide for himself whether in the concrete situation the otherness of the stranger signifies the negation of his own way of life so that he has to be fended off and fought in order to preserve the way of life that is existentially important."⁴² In our effort to preserve our way of life, according to Schmitt, we may find it necessary to destroy someone else's and the ability to do so is its own justification. According to the human capacities approach, however, Schmitt's individual should refrain. He should recognize reasonable limits to his own way of life, and these include not

41. NUSSBAUM, *supra* note 25, at 43.

42. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 27 (1976).

impinging on the opportunity of others who do not share it to express their capacities in ways pleasing to them. In other words, Nussbaum's approach would surely blunt the sort of conflicts that Schmitt approves. The difficulty lies in her inability to explain *why* the worth of others should be embraced. Why should the worth of another individual dampen my interest in expressing my capacities in ways that please me, regardless of whether this causes suffering on others? By remaining strictly empirical in her approach in order to avoid metaphysical complications, Nussbaum seems to have left herself without the resources necessary to provide this normative bite. Unfortunately, the lacuna is not merely philosophical but deeply practical. Everyday persons must choose between paths of realization that are selfish but potentially rewarding and paths that limit their options on behalf of some communal good. A compelling philosophical theory of moral choice must be able to explain why they should take the latter rather than the former.

The third reason why a pluralist may be reluctant to accept Nussbaum's approach focuses on her use of particular cultures to provide content for particular forms of expression. This is disconcerting because, when one looks closely at a way of life, the narratives that inform it are not just about what values, in what order, to what extent, and under which conditions, but *why* those values, that way, in such and such proportion, then. The justification is intimately related to these other features, lends them narrative coherence, and, above all, makes these features sensible choices in the historical and cultural contexts in which they are operative. Separating out the justificatory elements, so that the remainder may be rewoven on a universalist framework leaves those persons with (perhaps in reality but at least seemingly to them) arbitrary choices and a foreign understanding of why those preferences are good or acceptable. For in making the transition, practices and their meanings do not remain unchanged. Indeed, there are many subtle shifts and some of the practices that define a particular culture may now appear unacceptable, embarrassing, and worthy of censure. And the reason for the changes – the effect of “reasonable limits” – may have little or nothing to do with what sustains the values or practices in the first place.

Consider, for example, how a group might understand the legitimacy of the need to change, eliminate, or even just “tone down” a practice that in the culture was handed down by God in a divine narrative that tells the story of the group – all because it doesn't conform to the list of human capacities and the need for their free expression. Nussbaum's strategy of providing very general cross-cultural universals that depend on specific cultures for content looks appealing, especially in the light of anticipating the answers it provides to oncoming challenges from pluralists. But it gives

considerable pause in the application. The metaphor of "pouring in" specific content cannot conceal the fact that real constraints are imposed; that these constraints are likely to be very foreign to those subjected to them; and that the justification for doing so is, to say the least, difficult to find.

Curiously, in the interest of creating a basis for shared understanding and collaborative action, this approach generates a depiction of persons, of their practices, and of their relation to others in which many may in fact not recognize themselves as represented. Or if they are represented, in ways that are distorted and that reflect the preferences of other, more powerful persons. And the point, of course, is not only to produce claims to which many or all involved may give consent, but that all may recognize as a projection, at least to some extent, as an extension of their own way of life and find compelling.

Fourth, the pluralist and relativist may wonder just how much work this framework is capable of performing. The capacities approach is promising because it sets forth reasonable *minima* that no person or group may violate. This provides a decision-making procedure for determining whether some practice is an acceptable one or not. Does the practice of the one, or the group, impinge on the capacities of others to freely express themselves within reasonable limits? Notice that this approach does not ask the unhelpful question, does this action preclude some other's acting or acting differently? This question is not illuminating because this sort of thing happens all the time and is a necessary feature of persons and groups making real choices among competing goods. These sorts of tradeoffs are ubiquitous. They become pernicious only when some *lose the ability* to act in other ways and this freedom is what must be protected. It marks the difference between the culture that forces some women into the sex trade industry and one that allows it as a free option. The latter is an unencumbered exercise of practical reason, while the former violates the right to work as a human being.⁴³

This approach works when it is clear that someone or a group is being subjected to a practice that they find disagreeable and they articulate their unwillingness to participate. But what about cases where this is not clear? Take for example the practice of "penis-feeding" in New Guinea. The Sambia and the Etoro communities believe that in order for boys to become men they must at a certain point be placed in an entirely masculine environment. Part of this practice is the belief "that, in order for boys to develop the qualities of men, they need to ingest male fluid or

43. This is not Nussbaum's example but it follows readily from her explanation of the list of capacities. See NUSSBAUM, *supra* note 25, at 41-42.

semen, much as we believe that young infants need their mother's milk or some equivalent to be properly nurtured".⁴⁴ This commonly involves a ritual where boys fellate older males, usually their uncles.⁴⁵

Presumably, this practice would make those reared in the West uncomfortable. But is it a practice that should be condemned? Under Nussbaum's approach, we should ask whether it is a practice that is freely entered into, or does it subject some members to activities that violate their right to the enumerated human capacities? Assuming that no one objects (neither those "feeding," those "fed," or other "onlookers" in the society), how would one, as an onlooker, know this? More to the point, how would those who actually participate know this? If it is true that persons enculturated with the mores of a particular society learn to freely express as their own choices those preferences borne by the community, how would one discern the difference between a free choice of exercising one's capacities in a particular way and a compulsory one? Wouldn't they look to us, and even feel to them, indistinguishable? Would it be possible to teach those persons how to make this distinction without fixing the outcome in advance and according to our lights what their preferences should be? On the other hand, suppose that someone did object (anyone situated in any of the three possible positions). How should we understand that person's rejection? Have their capacities for free expression *really* been violated? That is, how do we know what rises to the level of a violation? Is the practice really pernicious, or does the group have an ingrate on its hands? What are the standards for this? And does it matter whether or not the person making the objection understands his or her refusal in the same way that we do (as a violation of human capacities)? What if he or she is objecting for other reasons? (For example, a mother may simply want to resist the practice of complete separation from her child, but be largely indifferent to the practice of penis-feeding.)

The difficulty with the capacities approach is that it seems to offer little guidance in resolving the very questions that it prompts us to ask. The *minima* turn out to be very flexible boundaries and it is hard to determine what falls within them, and what without. Consequently, the approach seems to work in those "obvious" situations where it isn't needed, but is unhelpful in those "hard cases" where it is.

Finally, the pluralist/relativist is not likely to share Nussbaum's confidence that a concept of human capacities is useful in correcting

44. LAURIE SHRAGE, *MORAL DILEMMAS OF FEMINISM: PROSTITUTION, ADULTERY, AND ABORTION* 126 (1994).

45. See generally GILBERT HERDT, *RITUALS OF MANHOOD* (1982); DAVID D. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY* (1990).

abuses. Nussbaum herself admits that the concept has been manipulated and misapplied in the past. She only suggests that these are fragile and vulnerable strategies, susceptible to criticism in light of a human capacities approach. But how fragile are they? And are these the sort of strategies to which the application of a theory of human nature would be helpful? For particular context, consider the International War Crimes Tribunal's efforts to address the crime of rape during the Bosnia-Herzegovina war. It is estimated that some 20,000 rapes occurred, and Serbians perpetrated the vast majority of these against Muslim women.⁴⁶ In 1992, Serbian television, in the interests of stirring up nationalism, aired what appeared to be Muslims raping Serbian women and it was widely spread that Muslims were committing a four-fold crime against Serbian women. Muslims were intent on removing women from their families, impregnating them, making them bear a stranger, and then taking the child from the mother.⁴⁷

What is significant, for our purposes here, is that the Serbian propaganda clearly recognized this behavior as criminal. It usurped the use of women's bodies, violated their integrity, and subjected them to several different and very painful forms of humiliation. It's clear that the Serbian community recognized this as heinous behavior because that is what made the propaganda powerful. And yet we have learned that this representation accurately depicted events, not primarily (though to some extent) of the Muslims, but in reverse – of the Serbians committing atrocities against Muslim women.⁴⁸ The truly pressing question is: how is this possible? How were members of the elite able *both* to recognize the crime when perpetuated on their own, *and* enact it on others? While it is surely beyond the purview of this essay to explain how this is possible, this much may be discerned: moral weight is often placed differently depending on who is acting, what the history of interaction between those persons/communities has been and how those persons/communities understand themselves and their prospective futures. These facts form a narrative background against which differential assessment is made. As Margaret Walker suggests,

A narrative of relationship is a story of the relationship's acquired content and developed expectations, its basis and type of trust, and its possibilities for continuation. A response may be owed to others because some prior history of actual contact and understanding makes it

46. Todd Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348 (1998).

47. *Id.* at 353.

48. *Id.* at 354.

reasonable for them to depend on me for something and reasonable for me to know of their reasonable expectation. Then it is morally important for us to acknowledge the past character, present state, and future possibilities of the relationship. It shows us what is owed, why it is owed, and what latitude there may be for postponement, substitution, or release.⁴⁹

Rights and obligations are not distributed wholesale, in discrete packets. As Annette Baier pointed out, they are negotiated, reworked, and sometimes dropped, depending on the situation. In the present case, Serbians obviously did not see themselves as bound to respect the bodily integrity of Muslim women. One way of making sense of this fact would be to say that these persons inconsistently recognized the human worth of women's bodies: Serbians cherished and respected their own women while intentionally violating the women of a different culture. One might then suggest that pointing out this consistency will go some distance towards rendering what Nussbaum called a fragile strategy of self-deception.

But I suspect that this has neither empirical purchase nor much promise as a response. What is at work here is not a duplicitous application of a universal formula, but a complex set of valuations that result from what is obviously a long and conflicted history between two groups of persons. Serbians were able to justify this differentiation not through duplicity (or what is much more suspect, the ascription of self-deception), but by reference to a past history of violation and a deeply uncertain and tenebrous future. One end the propaganda disseminated by the Serbians served, was to explain why they were released from treating others, specifically, the other group's women, in ways in which they would expect their own women to be treated by strangers. The rationale that this behavior is acceptable, *because that is what they have already done to us*, is obviously a powerful one. It wasn't the violation of women in general that they found so repugnant, but the violation of *their* women, and it is not hard to see how this helps to set and re-inscribe evaluations that are widely differential. It now makes sense to employ the same stratagem in reverse.

What this suggests is that it is not necessary to see those others as inhuman, or as not qualifying for protection, but as human others who, because of their actions, *deserve* to have this treatment visited upon them (perhaps *because* they are human!). Consequently, what looks like self-referential moral inconsistency by Nussbaum's lights, is in fact a consistent, common feature of moral deliberation. For this reason, it is very difficult to see how Nussbaum's approach is of any help here. Presumably she would argue that it is *never* appropriate to treat another in this fashion,

49. WALKER, *supra* note 2, at 111.

regardless of their history of action with regard to you. These would, again, be the minimal constraints on expression articulated by the capacities approach. But, again, without saying more, it is difficult to see how that argument may be justified. One must not only recognize that humans are intrinsically worthy, but that this is inviolable, subject to no exception, and her approach clearly does not have the resources to insist on this. At the very least, it is clear that such a framework is a considerable imposition, not only in terms of content, but also in terms of how people actually go about making moral evaluations. It is a far cry from Nussbaum's representation of a framework for common agreement that is neutral to the practices and expressions of particular cultures.

II. PLURALISM, INTERPRETATION, AND CRITIQUE

The last section looked closely at a recent universalist approach to international rights in order to suggest some of the difficulties incurred by theorists who employ this sort of strategy. In this section, I consider a relativist's attempt to do the same thing. Unlike other essays on the subject, I do not think the interesting question is whether or not cultural self-criticism or inter-cultural criticism is possible. I take that as a fact, one that shifts the traditional inquiry by focusing it on how this may be accomplished without becoming the arbitrary expression of power. The following effort is particularly relevant, because it is one of the few attempts that both embraces strong pluralist/relativist premises and seeks ground for reasonable criticism. The idea is that even granting pluralism and relativism, there are still means available for constructing shared norms that may in turn become the basis of internationally protected rights. This has special appeal, because if successful it would avoid many of the difficulties that Nussbaum's capacities approach incurred. I think the approach fails in significant ways, but it highlights some important obstacles that any response must overcome to be successful and further clears the way for my own view.

A. *Pluralism and Political Consensus*

In *Moral Dilemmas of Feminism*, Laurie Shrage defends a pluralistic approach to feminist moral theory. In place of methods that are reductive and possibly ethnocentric, she offers a hermeneutical approach that recognizes human diversity and the possibility of real incommensurability. Her pluralism strives not for moral consensus among parties, but for political compromise among competing alternative ways of living. Shrage believes that she is capable both of providing resolutions to moral problems like prostitution or "penis-feeding" and of defending herself against charges of impotent relativism. While promising in terms of

epistemic responsibility and moral constraint, Shrager's project flounders repeatedly on her effort to seek compromise and set agendas. In seeking political convergence, Shrager assumes a distinction between making moral judgments "for us" and forming compromises among groups whose views are at odds; she believes that the latter does not depend on or seek moral convergence. But I will show that the project of political compromise cannot be distinguished in this way and that Shrager's approach, as she employs it, pursues, and even requires, moral convergence. Also, Shrager's efforts to fashion political policies in response to moral dilemmas lead her to make claims that are incompatible with her relativist position. I will point out what some of these are and how they occur. This should more than suffice to show that shared norms cannot be constructed in the way that Shrager supposes, and that her approach is not a viable one for constructing international rights.

According to Shrager, moral judgments of diverse human practices cannot be responsibly made without thoroughly understanding the cultural contexts in which they occur. This requires a hermeneutical method that resists the temptations offered by positivist and objectivist accounts of human knowledge.

On an anti-objectivist account, human creations and human behavior reflect meanings and purposes that are neither exposed nor well understood through objective description. Human creations and behaviors are more like texts that require interpretation. Thus, instead of a positivist approach that tries to reach a perspective on diverse phenomena somewhat beyond a mere human one in order to generate more objective understanding, an "interpretive" or hermeneutical approach tries to see from within diverse human perspectives in order to understand the intentional and symbolic character of human phenomenon.⁵⁰

Rather than claiming knowledge of other perspectives through data offered by the social sciences, Shrager urges us to understand human practices in the terms of those who participate in them.⁵¹ In this way we may gain "thick descriptions" for interpreting and evaluating the practices of others. This approach does not provide the possibility of finding a single, best, most rational answer with respect to social practices because the meanings and purposes of other cultures are sometimes truly

50. SHRAGE, *supra* note 44, at 7-8.

51. *Id.* at 8-9.

incommensurable with our own. But it does inform us of the contingency of our own practices and of the wider range of extant human possibilities.⁵²

The point of recovering the cultural self-descriptions of others is to make us epistemically responsible. By gathering the insights of another perspective we may not only learn to make moral judgments of others' behavior, according to their lights (i.e. how they judge them), but see also how they might respond to our moral norms. The intended effect is a "decentering" of our own position. Reversing perspectives gives us a critical angle of vision on ourselves. But their view is not taken "too seriously" either. In recovering others' self-descriptions we do not simply adopt their view as superior to ours, since this would amount to another form of ethnocentrism.⁵³ Rather, we continue to rotate perspectives. Each self-description is susceptible to criticism from the other in an ongoing manner.

Once we gain a critical awareness of ourselves and learn the incommensurability of certain conceptions that others hold, we may begin to make non-ethnocentric transcultural judgments.⁵⁴ Far from marooning us in "vulgar relativism," i.e. one in which other cultures may only be judged by their own lights, Shrage insists that real pluralism only restricts judgment to particular situations and under specific conditions. Citing Charles Taylor, Shrage writes:

Yet if we have recovered the perspectives of others without adopting their perspectives, and have genuinely decentered some of our culturally ingrained notions, then our transcultural judgments will be relatively free of cultural distortion, i.e., relatively free of ethnocentrism . . . relativism involves a process of cross-cultural comparison that provides the moral theorist with the sort of exposure to human affairs that can engender serious criticism. It frees her criticism of the sort of distortion and naivete that is present in the critic who has seen only one play and one human way of playing.⁵⁵

While we must use our own values in making transcultural judgments of superiority, we can make them relatively free of cultural bias if we have genuinely decentered ourselves by comparing cultures and reversing cultural perspectives.

52. *Id.* at 9, 27. Shrage cites Clifford Geertz to this effect: "Understanding a people's culture exposes their normalness without reducing their particularity It renders them accessible: setting them in the frame of their own banalities, it dissolves their opacity."

53. *Id.* at 10, 22-24.

54. *Id.* at 24.

55. *Id.* at 27.

Shrage freely admits that her pluralism is a kind of relativism. But she claims it has distinct advantages over other mainstream accounts and argues that it is not vulnerable to the charges habitually brought against it. With respect to the former, she criticizes feminist accounts that are non-pluralist and therefore non-interpretive. Moral theories that depend on formalist methods (e.g. Selya Benhabib's) or single standards for evaluation (e.g. care ethicists like Rita Manning) are, according to Shrage, reductive accounts that are ultimately susceptible to charges of ethnocentrism.⁵⁶ This amounts to irresponsible and premature moral criticism, in Shrage's opinion.

With respect to the latter, Shrage claims that relativism is neither apolitical nor requires universal toleration. Rather, *contra* writers like Kathryn Addelson, she claims it provides practical tools for setting moral agendas.⁵⁷ Instead of moral convergence, which requires reductive approaches and tends toward ethnocentrism, relativism seeks practical compromise among divergent and possibly incommensurable views.⁵⁸ Shrage claims that it is a *modus vivendi*, a way to get along that both respects incommensurability and guides political practice.

B. *Compromise or Real Convergence in Disguise?*

Shrage claims that, "By taking an interpretive and pluralist approach to abortion and prostitution, we develop political agendas that express the incommensurable values of differently situated social actors."⁵⁹ In this way, her moral theory turns on a distinction between political compromise and moral convergence. But is she able to distinguish this project from one that imposes a moral view? More importantly, does she actually stick to this re-orientation in fashioning political policy? The answer to both questions, it seems, is no. Engaging in sustained attempts at political compromise, as well as the enduring task of reforming political practice in accordance with agreements made, itself depends upon a judgment made in light of moral values. In order to advocate this option (Shrage's), one has to think it better to pursue political compromise rather than moral homogeneity. If Shrage is correct in claiming that moral practices are historically and culturally contingent, i.e. that there is more than one human way of playing, then a community might think the important goal is

56. SHRAGE, *supra* note 44, at 12-21 (showing how Shrage both unravels Benhabib's formalist version of discourse ethics to expose ethnocentricity and highlights dilemmas incurred by the reductive approach employed by care ethics).

57. *Id.* at 14, 174-75 (for Addelson's criticism of relativism, its political implications, and why Shrage disagrees with her).

58. *Id.* at 14, 169.

59. *Id.* at 169.

neither having the "right, most rational" practice nor agreeing on a practice we can live with despite incommensurate views. Rather, it might be considered in some measure irrelevant which particular practice is preferred, so long as moral consensus is achieved. Or, as seen above, it might be that a group approves whichever practices are in reality the most powerful. Considered this way, Shrage's injunction for political consensus, which might at first seem natural and value-free, now appears as one valued option among several possible alternatives.

More specifically, Shrage's own bias seems to share the Enlightenment ideal advocated by John Stuart Mill in *On Liberty*. Mill emphatically "recognized the necessity to the mental well-being of mankind . . . of freedom of opinion, and freedom of the expression of opinion . . ."⁶⁰ But this pluralistic divergence of opinion did not extend to political practice. The liberty of the individual must be limited to acts that did no unjust harm to others. The common weal of mankind therefore required, in Mill's view, both loose political convergence and freedom of personal opinion.⁶¹ Shrage's position approximates Mill's Enlightenment view, one that is clearly rooted in the development of Western European thought. But she fails to recognize this bias in her project when she elevates political compromise over moral convergence. She claims that "fashioning political policies that give each disputant part of what she wants, without giving any party all of what she wants"⁶² is the best chance for delivering non-ethnocentric judgments.⁶³ By assuming that the emphasis on compromise does not depend on a specifically moral judgment, she does not see that she is actually requiring divergent cultural groups to conform to a political practice whose values are rooted in Shrage's own moral culture. To achieve her political agenda, all parties must share the same ideal, namely the Enlightenment one of politically "getting along" by restraining behavior within certain limits, while morally believing whatever one prefers to be good.⁶⁴ In this sense, Shrage's

60. JOHN STUART MILL, *ON LIBERTY* 50 (1978).

61. *Id.* at 53. See also JOHN STUART MILL, *UTILITARIANISM* 40-46 (1957). See also RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 63, 196 (1989).

62. SHRAGE, *supra* note 44, at 43.

63. *Id.*

64. It is worth noting the extent to which Nussbaum and Shrage coincide in their conclusions, despite the differences between their respective approaches. One appropriates Aristotle and the other the recently fashionable hermeneutic turn, but both reach a position consistent with Western liberal contract theory: the autonomy of individuals must be protected, with limitations thereon justified only on behalf of the common good. Compare JOHN RAWLS, *A THEORY OF JUSTICE* 10 (1971); JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 8 (1986). This understanding of the individual, the nature of rights,

interpretive approach does not avoid ethnocentric judgment as she had hoped.

Strangely, Shrage herself criticizes Selya Benhabib's formalist approach to ethics precisely because it uncritically operates under Enlightenment assumptions.

Benhabib's assumption that conceptual frameworks are commensurable takes for granted a significant degree of cultural homogeneity, and thus may obscure important differences between ourselves and cultural others In short, Benhabib's communicative ethics belie the Enlightenment conceptions of human selves and human reason contained in the Kantian and liberal theories from which interactionist universalism is derived.⁶⁵

But by embracing the Enlightenment ideal of political compromise, Shrage exposes herself to her own criticism. Moreover, she may well be guilty of imperialist ethics despite her claim that "interpretive and pluralist ethics can promote the formation of non-imperialist, feminist practical political agendas."⁶⁶ Mediating divergent and possibly incommensurate views under the auspices of political compromise compels even those who do not share Shrage's political ideal of a *modus vivendi* to conform to her ideal and reform their own moral practices, if not their beliefs, according to its lights.

An illuminating example of this is Shrage's treatment of prostitution. Prostitution poses vexing problems to the construction of shared norms for a number of reasons. Not only is the practice widespread, across space and time, but it also receives widely varying meanings and evaluations, depending on where it is practiced and on how it is practiced within a culture. In the West, it is broadly thought that prostitution is harmful and psychologically damaging to the prostitute. But in his study of prostitution in Nepal, Tom Cox concludes that because prostitution has the status of an occupational norm, it does not cause this sort of damage. "Badi girls . . . are not usually emotionally traumatized by prostitution. They are no less (or more) happy than the rest of us. They accept prostitution as their fate,

and the limitations that may be placed on autonomy has proved an obstacle to the global acceptance of human rights. As Peter Van Ness points out, "Most in the non-Western world are determined not to let the United States impose its particular definitions of democracy and human rights upon them, especially if that imposition tends to violate central moral principles of their own cultural communities." PETER VAN NESS, *Introduction* to *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA 13* (Peter Van Ness ed., 1999).

65. SHRAGE, *supra* note 44, at 14.

66. *Id.* at 169.

the only way of life open to them.”⁶⁷ Moreover, it is commonly thought that aggressive solicitation by prostitutes indicates the desperation, isolation, and even selfish behavior of the prostitution. But Luise White found in her study of prostitution in colonial Kenya that such aggressive behavior was characteristic of prostitutes who enjoyed their family’s sanction. They were working to support the family. Conversely, women who were discreet, arranging private meetings with clients, were those seeking personal gain and trying to distance themselves from family relations and hierarchy.⁶⁸ Given these sorts of variability, it is difficult to see how any consensus with regard to prostitution may be achieved. And yet, it is difficult to let go of the notion that prostitution is harmful, and that its practitioners cry out for assistance and intervention.

In her discussion of the problem, Shrage begins by exposing the inadequacies (biases) of other feminist accounts of the origin and nature of prostitution, such as that offered by Christina Overall.⁶⁹ Next, she decenters “our” notions of prostitution by comparing it to other forms across space and time. Prostitution turns out, as we have seen, not to be necessarily degrading or marginalizing, but only contingently so.⁷⁰ Shrage then evaluates “our” practice of prostitution in light of the hermeneutic approach and finds that it contributes to pernicious myths that harm all women and should be deterred.⁷¹ Consequently, she proposes a compromise. Feminists and prostitutes alike think that prostitution should be decriminalized. Shrage agrees, but in light of her concerns about the effects of sex commerce (as our culture understands it) on all women, she advocates regulations for prostitution. This is intended both to prevent a laissez-faire climate for sex commerce from developing and to ultimately deter the practice of prostitution.⁷² In the meantime, persons should endeavor in various ways to improve the status of prostitutes and their working conditions.

Recognizing the incommensurability of practices and moral judgments, Shrage urges political compromise. It is a problem, however, that Shrage avoids directly addressing the demands of those who actually live “the life,” although she claims that her ethnographic studies are drawn

67. TOM COX, *THE BADI: PROSTITUTION AS A SOCIAL NORM AMONG AN UNTOUCHABLE CASTE OF WEST NEPAL* 11 (1993) (on file with Harvard University).

68. LUISE WHITE, *THE COMFORTS OF HOME: PROSTITUTION IN COLONIAL NAIROBI* 20 (1990).

69. See SHRAGE, *supra* note 44, at 89-98.

70. *Id.* at 119.

71. *Id.* at 158.

72. *Id.* at 84, 158.

in part from prostitutes and their advocates.⁷³ She claims that the question of prostitution is a problem for women, but does not distinguish between two relevant and significantly different voices, i.e., prostitutes and non-prostitutes. Addressing this gap in her study, exactly what are the demands made, for example, by prostitutes in the United States and Canada? It turns out that they want decriminalization, but no regulations. In fact, they don't want to "make a deal" at all. They just want to be left alone:

- And what we are basically saying is, let us take care of ourselves. We're perfectly capable of doing it. We have been doing it for years under the most distressing conditions We want to be able to work and control our business and our lives by ourselves.⁷⁴

- My last word is: please, try not to let the government interfere in this common market.⁷⁵

In short, the women for whom Shrage proposes regulations do not appear to share her Enlightenment ideal of compromise; their bottom line is both moral incommensurability and political autonomy to practice in accordance with their view.⁷⁶ Given this, the imposition of Shrage's framework appears tantamount to the imposition of outside moral agenda on the moral views and practices of prostitutes. Those in "the life," though not amenable to this kind of intercession, have experienced it before: "Don't pretend you're interested in our politics if you're only pimping us . . . a number of outside groups have come in and tried to help in our politicization. Ultimately they end up attaching a lot of their own agenda, which means they redefine our issues for us."⁷⁷ Shrage assumes that in seeking political compromise one can bypass moral convergence. In practice, however, she imposes a moral convergence on at least one value.

73. *Id.* at 127.

74. Valerie Scott, *Working Girls*, in *GOOD GIRLS/BAD GIRLS* 179-80 (Laurie Bell ed., 1987).

75. Margot St. James, *The Reclamation of Whores*, in *GOOD GIRLS/BAD GIRLS*, *supra* note 74, at 86-87.

76. Interestingly, Nussbaum agrees with the prostitutes, not Shrage, even though she thinks the practice generally pernicious for women. She writes that, "This does not mean that we should not be concerned about ways in which prostitution as currently practiced, even in the absence of force and fraud, undermines the dignity of women But the correct response to this problem seems to be to work to enhance the economic autonomy and the personal dignity of members of that class, not to rule off limits an option that may be the only livelihood for many poor women and to further stigmatize women who already make their living this way. See NUSSBAUM, *supra* note 25, at 297.

77. St. James, *supra* note 75, at 114.

In doing so, Shrage precludes the possibility of those concerned from realizing their most fundamental goal, that of moral and political autonomy.

This prompts one to ask a more general question of Shrage's approach. Is her emphasis on political compromise a re-orientation of moral theory towards compromise or is it actually a theory of moral convergence in disguise? The above discussion of moral convergence guided by Enlightenment assumptions is the first clue that it is. Shrage's discussion of prostitution offers others. First, although Shrage claims that she is seeking political compromise for incommensurate views, she provides strategies explicitly intended to achieve a feminist agenda. In chapter four she says:

Given the cultural associations that exist between particular sexual customs and particular sexualized, raced, classed, and gendered social groups, feminist moral analysis of these diverse sexualities run the danger of contributing to existing societal hostilities toward marginalized social groups. This danger is one that any program for a feminist sexual politics needs to consider.⁷⁸

Shrage then claims that prostitution is not always a morally objectionable practice. Those instances that occurred in ancient Babylon and colonial Kenya, for example, served valuable social interests and may be approved.⁷⁹ But Shrage opposes prostitution in the United States and offers specifically *moral persuasion* for her position. She claims that the sex trade "is organized and reproduced by particular cultural beliefs about sexuality, race, and gender".⁸⁰ These beliefs serve to perpetuate not only the sex commerce industry but marginalization of women and minorities as well. Chapter six is devoted to identifying these pernicious beliefs and tracing their relations both to sex commerce specifically and social practices at large. For example, the culturally produced belief in the fundamental dominance of men is reflected in the model of men as buyers of sex commerce and women as sellers who please their customers.⁸¹ Because these practices serve to harm all women, all women should endeavor to deter prostitution.⁸² Although this is a specifically political response, it is motivated by moral judgments that one should not sanction practices that marginalize groups within a dominant culture. Where exactly, one should ask, did these values come from?

78. SHRAGE, *supra* note 44, at 79.

79. *Id.* at 119.

80. *Id.* at 125.

81. *Id.* at 133.

82. *Id.* at 125.

Shrage's compromise position, a strongly regulated decriminalized prostitution, is ultimately not undertaken on behalf of finding a *modus vivendi* for sundry groups with incommensurate views. Rather, her position emerges from an agenda searching for compromises that will facilitate the deterrence of marginalizing practices. Again, while redressing the marginalization of groups within a culture may be a worthwhile endeavor, it certainly stems from a moral judgment. Moreover, it is a judgment that is explicitly Shrage's own and may not be held by any of the concerned parties. More importantly, the incommensurate views of concerned parties (e.g. those who wanted strict prohibition and the prostitutes themselves who called for strict autonomy) are actually subsumed by these "more significant" considerations of Shrage's. It is convergence on these specific values that is sought, not merely political compromise that respects value-pluralism.

Second, Shrage makes it explicitly clear that the goal of her feminist politics is not enduring compromise but the eventual subversion of beliefs she considers pernicious to women. Commerce in sex in the U.S. is based on "social myths" that give prostitution its meaning. In order for prostitution to continue without its harming women, these myths must be transformed.⁸³ She opposes mere decriminalization (the actual demand of the prostitutes) precisely because it fails in this regard: "Decriminalizing prostitution, without putting in place any positive social regulations, is also impractical for deterring prostitution, and it does not contribute to the subversion of the pernicious myths that serve to organize it in American society."⁸⁴ The regulatory practices that Shrage suggests are intended to undermine the beliefs perpetuating the negative image of the prostitute in our culture. But they are also employed in an effort to deter her very existence as a sex worker.⁸⁵ Shrage's "compromise" not only subsumes the view of the prostitute under her moral position, it seeks to erase the existence of this supposedly "incommensurate" position in its implementation. In fairness to Shrage, she does place much emphasis on transforming the symbolic understanding of prostitution and instituting practices that elevate the prostitute's status. But should one recall the demand of the prostitutes, he would realize that this too is unwanted intervention, an intervention employed ultimately to reform the moral beliefs of those around her. The weight placed on deterrence looks far more like an effort at moral convergence that employs the techniques offered by Shrage's hermeneutic approach to subvert "social myths" than a

83. *Id.* at 141.

84. SHRAGE, *supra* note 44, at 158.

85. *Id.* at 125, 158.

political compromise respectful of the differing views of those who struggle to live in accordance with them.⁸⁶

C. *Relativism Compromised*

So far it has been shown that one cannot distinguish political compromise from moral convergence in the way Shrage claimed. It has also been suggested that her political proposals amount to moral intervention. This section highlights specific ways in which Shrage's efforts to fashion political compromise and trans-cultural intervention violate premises of her interpretive approach and are incompatible with genuine relativism.

In Shrage's model, individuals decenter themselves by recovering "thick descriptions" of other, culturally alien practices. Although it helps us learn something about how others understand their own practices, it is primarily praised as a way to learn about ourselves.⁸⁷ We learn more about our practices and are constrained in our moral judgments of others. Shrage claims that recovering thick descriptions allows one to take no position as incorrigible, since each may be criticized from the perspective of the other. And Shrage expresses confidence that this is sufficient for making increasingly non-ethnocentric judgments and fashioning political policy:

But *Contra* Benhabib, I would argue that an understanding and appreciation of the virtues of incommensurable practices offers a sufficient basis for these political agreements . . . by relying on the former basis for political compromise . . . we are much less likely to deliver ethnocentric judgments.⁸⁸

In moving from moral judgment to political compromise, however, Shrage assumes a privileged position that goes unacknowledged. Two consequences inconsistent with her relativistic, interpretive approach

86. Shrage's brief discussion of surrogate motherhood could also be cited as exemplary of her proposal's intention to restructure beliefs according to feminist political agenda. She claims, "what makes the kind of surrogate contract we now have seem like an appealing option to 'us' are the dominance of social perspectives that ignore the meaning of pregnancy for women in the U.S., and the widespread social assumption that motherhood has to be unambiguous and singular for effective parenting." *Id.* at 172. Shrage offers a different version of surrogacy which will serve to subvert these beliefs. This may well be an efficacious strategy to cope with the dilemma of surrogacy, but it is not a demonstration of respect for a differing, contingent view. Shrage's approach is to install a practice which will actual subvert the pernicious view which misrepresents the meaning of pregnancy for women (a feminist enterprise). *Id.*

87. *Id.* at 179.

88. *Id.* at 43.

ensue. First, relevant voices in the discussion are effectively covered over. In *Moral Dilemmas of Feminism*, Shrage faults Benhabib for this very reason: "Is not Benhabib obscuring the voices of actual Third World women in her universalist condemnation of polygamy, while constructing an imagined dialogue for First World feminist purposes?"⁸⁹ But Shrage does no better when she moves beyond the constraints of her relativism in fashioning political policy. In her case, the voices are First World, instead of Third, is indeed heard in terms of self-description and moral incommensurability. But they are heard specifically with feminist purposes in mind. While voices may be heard in terms of description, they fall on deaf ears in terms of political demands (which are made on behalf of moral judgments expressed in those "thick" descriptions). For example, although Shrage documents prostitutes' struggle for their own self-descriptions, the demands of these women are not similarly attended in Shrage's discussion. As we have seen, these are subsumed by her endeavors to redress the pernicious myths associated with prostitution that harm all women.

Second, Shrage takes the contents of these concerned views too lightly in these debates to be consistent with the "thick descriptions" of her approach. In becoming "ethnocentrically decentered" Shrage emphasized that one cannot take a view (culture) "too seriously." But achieving political compromise, despite Shrage's claim "that an understanding and appreciation of the virtues of incommensurable practices offers a sufficient basis for these political agreements,"⁹⁰ is simply not the same as becoming non-ethnocentric. To reach genuine compromise both the demands made by those holding divergent views and the social, economic, and hermeneutical conditions that constrain and give meaning to these voices must be carefully considered and heeded. Her failure to do this indicates that Shrage does not take reversing perspectives *seriously enough* in moving toward compromise. (Indeed, she can't if she is to hammer out the compromise she seeks). For example, Shrage's regulation solution suggests that prostitutes be registered, be expected to pass college-level courses, and even be trained to administer medical examinations to themselves and possibly their clients. But if it is the case that women are often forced into prostitution to maintain a minimal subsistence, sometimes in their early teens, then how legitimate is it to expect prostitutes to conform to these demands? What happens when they can't or refuse? Do they lose the legal status of legitimate work and the legal protections which accompany that status? Moreover, as Shrage suggests,

89. SHRAGE, *supra* note 44, at 16.

90. *Id.*

we must consider how those persons are going to perceive “us” proposing a transformation of “their” practices. In the case of surrogacy, for example, how are we to expect would-be parents to react if told, as Shrage suggests, that they must “share” their daughter/son with a heretofore stranger?⁹¹ I think it unlikely that they will perceive the displacement of social myths that do not adequately represent the experiences of women as “more pressing” than their desire for a daughter “of their own.” They will instead perceive it as unwanted intervention from outsiders who have their own priorities. In short, Shrage makes persuasive claims about the need for epistemic responsibility in terms of learning the practices of others in their own terms. But she then treats these terms as “social myths”: constructs that should willingly suffer reconstruction by way of transformed social practice (political policy) on behalf of feminist goals. The former tendency is consistent with her relativism; the latter is not.

The point of this discussion, of course, is not that Shrage fails to live up to her own ideals. The point is that her efforts show that she cannot remain true to her pluralist and relativist premises and still deliver political compromise. In order to reach consensus, it appears that she *must* compromise her commitments to real pluralism and relativism. The approach was initially appealing because it held out the possibility of political consensus without moral agreement, thereby eschewing the many difficulties posed by trying to find universal ground common to all persons and cultures. Such difficulties were the lesson of the section that focused on the capacities approach to cultural universals. But the many obstacles that Shrage faces suggests that her approach is no more attractive than Nussbaum’s for fashioning shared norms that may subsequently provide the basis for international rights.

III. CULTURAL PLURALISM AND INTERNATIONAL RIGHTS

The principal reason for reviewing the two approaches outlined above is discovery. It uncovers shoals that any attempt to construct shared, cross-cultural norms must navigate. The approach I advocate, in order to handle these difficulties, is essentially a pragmatic one. In the first section below I do some analytic work, distinguishing among different situations where norms are contested, and suggesting that these situations place differing demands on the struggle for normative agreement. In the second, I discuss deliberative constraints that may be employed for producing agreement and show how it avoids the worst of the errors highlighted above.

91. *Id.* at 173 (suggesting a compromise solution to problems of surrogacy).

One difference between the foregoing approaches and this one, however, should be noted at the outset. It is a common philosophical assumption that consensus cannot be achieved unless there is something shared in common that supports the agreement. In order for widely divergent groups or cultures to settle on one opinion in the midst of difference, there must be *something else* that they do share. In Nussbaum's approach it is a common set of human capacities that need free expression; in Shrage's it is the (supposedly) common recognition that compromise is necessary if political agenda are to be set. In my view, no such commonality is required even if it is to some degree sought. Strong pluralism incorporates the empirical fact that cultures not only do different things for different reasons, but also may agree to do the same or similar things – also for very different reasons. Because this approach does not require one ultimate justification that must be recognized as shared by culturally distinct parties, all that is required is the same conclusion.

This helps address the issue in several ways. First, this sort of agreement, which I call “overlapping consensus,” neutralizes the ongoing debate as to whether the concept of “human rights” is a peculiarly western concept and whether its use constitutes a western imposition on other cultures.⁹² There are a number of ways to achieve consensus on values and behavior without requiring the same narrative of justification (however tidy that would be). Since one common narrative appears to be unavailable, it is best to settle for “consensual justification.” In other words, *it doesn't matter* what set of reasons buttresses a particular agreement so as to be grounds for an international right, so long as there is sufficient overlapping consensus with regard to the right to be protected. Such justification is, of course, not ultimately non-question begging, in the sense of not depending on contingent beliefs and practices. Indeed, it rests on a potentially unlimited number of contingent beliefs. But this is not a flaw – at least not a fatal one – so long as it provides agreement for setting political agenda.

92. This refers to the question as to whether the concept is itself Western in nature. See DONNELLY, *supra* note 4, at 50-65. It also refers to whether the content of what counts as human rights is inevitably Western. “Traditionally the West has glorified the individual, while manifesting a distrust for groups. As a result, first generation rights, for the most part, have their origins in Western culture and the development of natural law.” Linda Butenhoff, *East Meets West: Human Rights in Hong Kong*, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA*, *supra* 64, at 104. I borrow the term “overlapping consensus” from John Rawls, but free of his very particular meaning of the term. All I intend is that there is general agreement about some values that should be protected, even if the reasons why the parties think so diverge considerably.

It is this common agenda that is captured by the notion of an international right as that is defined in this essay. An international right here refers to freedoms and entitlements that multiple groups agree must be provided for individuals. Rather than a universalist approach, in which a Right is granted to everyone, this is a multilateral approach. Rights are built up piece-meal, contextually, out of agreements among interacting groups. The difference between the two approaches is that one is the obverse of the other. A universalist approach sets out a general right applicable to everyone. It is necessarily vague, as Nussbaum points out, and must gain content in particular circumstances. The pragmatic approach takes content more seriously. It begins with particular norms and *extends outward*, developing a more general reach. While it doesn't adhere to the ideal of universality, it does struggle to make Rights as general – that is, as widely applicable – as is possible given the differences in cultural terrain. *How* general these rights are can only be learned as a result of the inquiry and conversation, not at the outset.

Second, approaching the question of shared norms in this way provides both a strategy for consensus building and a constraint on that very process. It is a useful strategy for the obvious reason that it bypasses the labor of finding something, one thing in common – a value, a description of our situation, or a rule of decision making – and cuts to what we can agree on despite the many differences.⁹³ The constraint comes from the fact that the ends agreed upon, those norms that *ought* to be implemented across cultures and provide the basis of international rights, are only those upon which such agreement can be found. This may well turn out to be significantly less than the domain of consensus sought, or held out by, a more universalist approach. It nevertheless possesses the virtue of eschewing ethnocentrism and imperialist ethics by refusing to let hold of the particular differences of culture.

Third, this approach leaves open the door for considerable specificity in terms of critique and intervention. As noted above, practices have widely different meanings and even if those who participate in them disapprove of their practice, those persons may desire a range of different adjustments to the situation. In order to avoid the kind of imposition of which Shrage is guilty – imposing foreign and unwanted solutions to problems widely recognized – one must take these differences into account and also honor them in practice when transforming a practice that different cultures see as problematic for different reasons and want different outcomes. I will show below how this is built into a pragmatic approach to the problem.

93. See Sloane, *supra* note 7, at 59.

A. *Context Matters: How Different Types of Situation Place Differing Demands*

Confronted by cultural relativism with regard to particular values and their respective justifications, writers commonly seek non-question begging reasons for normative claims that they value. Since it appears that any justification somehow tied to a particular culture will fail to have any purchase on the preferences of those encultured differently, it seems necessary to develop a view that is essentially independent of any particular culture. While it inevitably must be born somewhere, the view should (somehow) not rely on any of the values that produced it if it is to have compelling effect on cultures very different from its own. This is, in some measure, the human nature approach. Although it originated in the West, proponents argue that it is applicable to all cultures, regardless of whether it shares other ideals embraced by Westerners.

This search for a non-relative position from which to adjudicate, however, frequently involves a “forgetting” of the specific situations in which the justification is supposed to prove compelling. This is unfortunate because different situations place different demands on a justificatory framework and significantly determine whether it is sufficient. In the *vast* majority of cases, a *less* than completely non-question begging framework suffices, so to the extent that we need justification, it is usually in reach. Where it exceeds our grasp, there are two possibilities. One is that it isn’t necessary anyway, that it is only an excessive devotion to foundational justification that prevents us from seeing that there is genuine consensus. The other is that this fact, that we can’t justify one way of life over another, is an excellent sign of just that – *that our way is unjustifiable and so should not be imposed on others*. If this is, then on one hand most efforts to achieve consensus shoot at, and fail to reach, a goal that is unnecessarily high. Aiming lower should help us overcome our anxious need to produce this sort of theory and clear the way for genuine consensus. On the other, we often respond improperly to failure in reaching a foundational agreement. Rather than trying to find another way to get to this type of agreement, we should understand it as a caution against insisting on consensus at all.

It is now commonplace to insist that individuals can only know from particular places, about the situations in which they find themselves, and that this knowledge is inevitably limited, fallible, and subject to critique from other positions.⁹⁴ When questions of justification come to the fore,

94. See WALKER, *supra* note 15, at 57. See also VINCENT COLAPIETRO, *The Ground of Semiosis*, PEIRCE’S DOCTRINE OF SIGNS: THEORY, APPLICATIONS, AND CONNECTIONS 137

however, these epistemic facts recede into the background and argument again takes a universalist form. But as the following points out, “positionality” matters not only what and how we know, but also how we explain – and what must be explained – in particular circumstances. To this end, I identify four different contextual situations and their salient features.

The first situation is one in which some members of “our” community argue that our values should be held by others among us. Some of us in a community in which other members substantially share similar values seek to constrain the values and behaviors of others within the same community. This may be done by appealing to still other values that members hold, or to some decision-making framework that all already recognize to some degree. By “decision-making framework,” I mean only some narrative that recognizes the relevance of particular values to the community and justifies the choice of some values over others when they conflict. Several features of this relatively internal situation are important. One is that, even if members of a group share a good deal in common, there still may be substantial disagreement about how to live and no self-evident or non-question begging way of adjudicating among the choices.⁹⁵ There is, in short, no need to suppose broad cultural incommensurability to generate a problem with the same essential features as those that worry Shrage and Nussbaum. The second is that there is often available a decision-making framework – a court of last resort – that has broad acceptance in the West, namely the liberal tradition in which only minimal constraints on individual autonomy are permitted and the individual has inalienable rights against social intrusion. This is, of course, a culturally and historically contingent framework, dependent on a host of Western assumptions about the nature of individuals, of rights, and of proper governance. But in this situation it is often enough, since persons advancing contending views already share it. The liberal approach rules out some ways of life, as being intrusive, and frowns on persons who intrude on all the other remaining ways.⁹⁶ It is also important to recognize that this framework, or way of judging acceptable practices, is notoriously difficult for Westerners to shed (as it was with Shrage in her consensus

(1996) (for a semiotic argument for perspectival realism); JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* 109 (1991) (for insistence on contextualism).

95. It is common to assume in cross-cultural debates that individual cultures are themselves homogeneous. This is of course mistaken, as a culture inevitably supports internal differences, competing views of the good life, and ways of negotiating among them. Situation one is important, if for no other reason, then for highlighting this fact.

96. Much as Nussbaum suggested, there is broad pluralism along with reasonable constraints.

approach). Since it ineluctably casts at least some light by which we in the West appraise others, I think it best to *assume* this fact in developing a tenable approach to handling charges of ethnocentrism in our judgments and actions. We Westerners use this model while those enculturated differently often use other ones; the question then becomes, how do we achieve consensus, given these practical differences?

The second situation is where members of a given community argue that members of a *different* community should constrain their values in accordance with the first community's preferences. This takes the form of: "they" should have to do what "we" do because what "we" do is "right." This is commonly the situation in which persons (often elites) are haggling over what norms are to be mutually recognized. What of course is lost here is the comfortable set of background assumptions: although guided by the Western liberal tradition, we cannot appeal to it to persuade others to come over to our way of thinking and doing things. Without this, is there anything left to do? Is there anything to which we can resort to guide our actions? If the above discussion has exposed the difficulty of finding something else in common, does the situation ultimately reduce itself to crude relativism or the exercise of arbitrary power (as Schmitt insisted)? While I think that there are options, these are epistemic in nature, not moral or empirical. This is a model of collaborative inquiry and deliberation that is coupled with the pluralistic constraints identified above. This model, developed below, seeks both to make it possible for us to genuinely modify our preferences and expectations in light of other ways of living and make it possible to persuade others to modify their views without inadvertently or forcefully compelling their compliance.

It is also an approach that is to be adopted *by us* in our encounters with other cultures. This is an important point, because were this a model that was imposed on all in a *a priori* fashion, regardless of how they related to us, then I would be making the same mistake Shrage made: in the interests of producing some sort of consensus I would insist on the acceptance of values and methods that others do not already share. It is tempting to do this, because, seen from a bird's eye view, it may appear necessary in order to generate agreement. But it isn't necessary and this is where remembering and remaining *within* the context is crucial. We cannot forget our position and what we need is, setting out from our cultural self understandings and understandings of others, a way to produce agreement without imposing our understandings on those others. That agreement does not require common assumptions; it need only be freely agreed upon by them in accord with their way of life and their preferences.

The third situation is one in which members of our community seek to justify intervention on behalf of another community or sub-community

against a third group or community. This is the situation most commonly at issue when international rights are invoked. We may feel provoked to act, for example, to mitigate the practices of prostitution or female circumcision; we may want to intervene when we witness the acts of the Taliban or Serbian nationals; we may suspect that foreign elite is excessively exploiting the labor and resources of an impoverished underclass. In situations like this, there is often substantial agreement between those intervening and those benefiting from the act. The difficulty lies in providing justification to those who suffer the intervention, that is, those whose acts of cruelty or exploitation are curbed. In some sense, this is the situation that drives the philosophical enterprise to extremes. Faced by those who disagree with us and resent our intrusions, we feel compelled to give reasons that they will find convincing – indeed, that they will *have* to accept because rational (but non-coercive). Two observations are in order here. First, the justification for our intervention does not come from an encounter that looks like situation two above. It comes from the more obvious source that persons or groups who are being exploited or abused by those who disagree with us are soliciting it. Rather than elites arguing about what norms should be posted, this is commonly a situation in which some relatively empowered group seeks to protect another group that is somehow impuissant in the face of a third, relatively stronger group. Second, the conditions and potential for reaching agreement with those whom we oppose are essentially the same as situation two above. The need to reach consensus here, however, is considerably different and likely not even necessary. This is best seen when the situation is inverted. Here one supposes a situation in which the acts of group A on group B are found to be hurtful, etc. by group B (the victim) and by group C (which is in the position of onlooker), and still holds out the possibility that the acts of group A are *really* acceptable after all. That is, it suggests that the justification of A for their acts really outweighs any grounds B and C has for objecting, even if they are in agreement as to its pernicious character. This of course presumes not moral relativism, but the superiority of one way of living over two others and the absence of any need of that way of living to justify itself to others – even those whom they injure. It is difficult to imagine why the burden should be on B and C to justify themselves rather than vice versa, or why this situation should give us much pause in making judgments or offering intervention on behalf of exploited groups. At the very least, the onus should be on the aggressors to explain why our actions are unjust, not on us to justify our acts.

Moreover, this situation offers crucial opportunities for discerning cross-cultural agreement. When passively looking on to a culture,

judgments about their practices are hazardous. It is unclear what disagreement or disapproval reflects. It may suggest something about them, namely that some of their practices are suspect, or it may indicate our own culture contingencies – that given our history and preferences, we wouldn't do things as they do them. But in this situation, in which two very differently situated groups agree with respect to the activities of a third group, our views are substantiated. Agreement here does not mean that our views *really* were right after all, or that our way of justifying those values is the better way or even that those others share that manner of justification. It just means that we agree, and that there may be a number of reasons for not accepting some given practice or set of acts. Judgment remains contingent, and it continues to rely on respective cultural narratives for its justification; nevertheless, there is real agreement and this is genuinely all that is needed for carving out shared norms.⁹⁷

Lest this sort of agreement appear too thin, it is important to notice several features of its occurrence. First, whereas Nussbaum has difficulty in providing normative grounds for her view (beyond an initial assumption), this sort of consent is rife with obligation. Each party to the agreement has an abundance of reasons for joining in, drawn from its own culture. Each has reasons for joining that are *compelling to him*, including reasons why he should agree. Unlike Shrage, who has her reasons for imposing compromise from without, in this scenario these emerge from respective cultures and may well significantly differ from party to party. This difference means that the agreement is seen by each as a significant *extension* of that party's way of life. It may be seen, as it often is in the West, as accepting minimal constraints on autonomy, but it certainly need not be.

97. My approach resembles that suggested by Abdullahi A. An-Na'im and Charles Taylor, to the effect that we must accept pluralism and rely on the resources that each provides for justification in order to achieve shared norms across cultures. See Abdullahi A. An-Na'im, *The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia*, in *THE EAST ASIA CHALLENGE FOR HUMAN RIGHTS* 147 (Joanne R. Bauer & Daniel A. Bell eds., 1999). See also Charles Taylor, *Conditions of an Unforced Consensus in Human Rights*, in *THE EAST ASIA CHALLENGE FOR HUMAN RIGHTS*, *supra*, at 144. But there are differences. Rather than relying on multiple cultures to avoid crude relativism, I suggest looking to the actual practices that these views legitimate and how those persons who participate in them regard the practice and the justification. So in one instance I draw on the differences to give different grounds for general consent, but in the next – and this is the crucial aspect – draw on the internal features of a culture to substantiate criticism of those practices and their legitimacy in order to bridge cultural differences and provide cross-cultural criticism. Tersely put, cross-cultural judgment gains warrant when those in the culture agree with the judgment, whether for same or different reasons.

Perhaps more importantly, norms constructed in this fashion significantly derive their content from the parties themselves. Unlike a human nature approach, which introduces a set of values along with a very particular narrative of justification, this way of going about things allows those values – that is, the *content* of these shared norms – to emerge from the participants and still retain their reasons for being embraced. Naturally what is agreed to is some subset of what all would accept, since there is difference, and the reasons for holding that subset would vary significantly. And the application of these norms must differ depending on where they are applied. But not only is this not problematic in theory, it closely reflects, if Annette Baier is correct, the way in which we *actually go about* this activity in practice. As she writes, “Human beings are not merely claimants and contestants, we are plea bargainers, compromisers, fixers, and adjusters.”⁹⁸ The fact that the preferences expressed by particular groups must be curtailed in the face of interaction with other groups is not a specifically Western phenomenon; how we go about making those tradeoffs is. The key to avoiding the sort of ethnocentrism that worries Shrager is to recognize, and honor, that others go about this differently and to focus on the result, not the means by which it is done.

The last situation is more difficult and leads to a different result. It is triadic like the previous one with one essential difference: we find some practice troubling, but both those who do it and those who endure it offer no objection. The practice of prostitution in Nepal is a good example. If it is true that “Badi girls . . . are no less (or more) happy than the rest of us,”⁹⁹ then how can we disapprove of it? How can there be a shared norm that protects women from this practice, if they are content in it? What basis would there be for an international right not to be assigned to a caste that included prostitution? In fact, there may be no such basis. But this surely does not mean that nothing may be done. First, there is an abiding suspicion that things are not what they seem in such examples. Are they *really* just as happy? Does the fact that they have no other way of life open to them make a difference? In short, a good deal more information is needed about the conditions those persons face and the sources of our knowledge about those conditions. Second, intervention comes in degrees, not wholesale. While it may be inappropriate in this situation to interfere in a practice in Nepal, it doesn’t mean that real options cannot be provided to those persons. For example, asylum may be offered to those who indeed are not so happy with the life of prostitution – or at least unhappy enough to leave. This would increase their range of choice and give us

98. BAIER, *supra* note 22, at 228.

99. COX, *supra* note 67, at 11.

some indication of how those persons really regard the activity (making it more like situation three above). It is one thing to embrace a way of life when none other is available, an entirely different one to cling to it when alternatives present themselves.

To insist on this sort of choice is not to impose Western views. It does not impose a specifically liberal framework, a Western view of the self, or characteristically Western choices about which values should have relatively more protection in comparison to others. Rather, this is a situation where some group enculturated in ways significantly different from ours suggests to us that their choices are freely chosen and embraced by their members, by all of them, even those whom we sense are being misused or exploited by an elite. In this case, we only ask whether this is really so, whether, *given their way of life*, those persons for whom we express concern would really continue those practices. Given some choice would they choose differently? Offered a free and open encounter, without reprisal, would they not signal some disapproval for the practice? If this happens, if real choices are present and they freely speak their consent, then it is not difficult to settle, in this instance, on cultural incommensurability. In this case, there would be a way of life, so foreign to us as to be unintelligible, in which human others flourish.

Finally, presuming that cultural incommensurability of this sort does occur, such differences may well serve a useful purpose. Shared norms, if they are to prove the backing of international rights, must be sensitive to a great deal of differentiation in practice. They must recognize that not all forms of a practice are pernicious, while some are especially so, and find ways to preserve the former while eradicating the latter. In other words, confronted by this sort of genuine incommensurability, we should not seek a theory that can somehow overcome it, but rather develop methods that honor those differences in practice. In those few, perhaps very few, circumstances that reflect this situation of disagreement, considerable caution should be the order of the day. It must be recognized that, though we may promulgate a right to be free of the slavery that is called prostitution, there may well be practices extant that, given the context in which it occurs, does not count or rise to the level of an instance of this sort of slavery. Rather than undermining the construction of international rights, pluralism and a strong sense of relativism, when properly regarded, may make these rights and their applications accountable to cultural specificity. Pluralism teaches us to carve rights carefully, so that we get at the practices that truly are pernicious for those subjected to them, without under the guise of good intentions stigmatizing or rooting out practices that bring genuine happiness to the participants.

B. Some Epistemic Guidelines for Producing Less Constrained Consensus

The above classifications suggests that situations two and four serve up the most difficulty in producing consensus for the kind of shared norms that may ultimately provide support for internationally protected rights. When there is general disagreement about the value of a practice, how are we to determine whether that disagreement reflects innocuously different choices about how to live or indicates that it is truly an undesirable practice, one that should be censured and even resisted? If there are no neutral values or neutral decision-making procedures, then how does this *not* reduce to a question of who is more powerful?

First, it is important to notice that this is not, at least initially, a problem of moral relativism (the cultural incommensurability question), nor a metaphysical issue (the human universals question), but an epistemic one. Morally problematic situations arise when it becomes unclear what values should be produced, what practices embraced. This fact sets a specifically epistemic task for inquiry with regard to the nature of the situation. While experience and choice may be individual or specific to a particular group, this sort of knowledge is not. A fully adequate understanding of "what is the case" demands that all those relevantly involved render an account of events.¹⁰⁰ This is a shared narrative in and through which individuals understand developing events and their own actions in relation to others and the occurrences in which they are participants. Such narratives are inevitably partial and in situations where real cultural differences are at work, such narratives naturally reflect the preferences borne of enculturation. Only in dialogue with others present, but differently situated, can personal or group experience be confirmed, corrected, and complemented. Discourse furthers understanding because various accounts both overlap and diverge. The view of each may be checked through recourse to other persons and to existential conditions that in turn further qualify the account.¹⁰¹ The understanding of all

100. As Dewey writes, "Knowledge cooped up in a private consciousness is a myth, and knowledge of social phenomena is peculiarly dependent upon dissemination, for only by distribution can such knowledge be either obtained or tested." JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 138 (1988).

101. There is a large amount of literature that develops the problem of bias and authority in communal representations and offers various solutions to it. See, e.g., GEERTZ, *supra* note 8, at 21-54 (reviewing four approaches taken by anthropologists to handle the distortive effects of authority in representation along with the difficulties that each incur). See also REISMAN, *supra* note 15, at 102-47 (discussing the peculiar features and difficulties of speaking across power differences). My claim here needs only be a weak one: such bias may be progressively eliminated and any going representation, recognizing that there is some distortion, is acknowledged to be a fallible one, subject to further correction through dialogue. As Dewey suggests, "Discussion, as the manifestation of intelligence in political

improves as narratives are freed from arbitrary bias and refined in the details by complementarity.

This sort of communicative inquiry contours the features of the situation. It does not go any distance toward determining moral questions, such as which values are better or how decisions like this are to be made. Nor does it do what Shrage had hoped for. It does not allow us to make non-ethnocentric claims about other cultures by “reversing perspectives.” It uncovers the values, practices, and habits of interpretation manifest in the situation. And it reveals precisely what sort of situation we are in, i.e. which of the types of situations outlined above we face. Confronted by the practice of prostitution in Nepal, for example, it only demands that we listen to all those who have a stake in the practice, including their expressed preferences, as well as why those persons believe as they do, in our representation of the situation. It may be that “we” are made uncomfortable by it, while those who do it, those who frequent them, and those who are aware of it within the respective culture think it everyday and intrinsically worthy of neither praise nor blame. The point in doing this is to assess very carefully what is shared, what is not, and why not – all from our point of view.

Communicative inquiry also seeks to define through dialogue with those undergoing the practice exactly what about it is disturbing or offensive. Even when a high degree of consensus is reached concerning the situation, individuals and communities do not always agree on what is *problematic* about it.¹⁰² Because persons and communities have distinctive moral self-understandings, histories, and trajectories, events often have divergent significance among those implicated. What is at stake in the situation cannot be isolated from other values and practices to which the individual is committed. In the case of prostitution in colonial Kenya, for example, only certain sorts of prostitution were frowned on. Women who participated in the sex industry in order to support their families were not only tolerated but gained approval. On the other hand, those who engaged in discreet encounters were regarded a threat to the family and it is this practice which elicited blame. This suggests that what will count as an acceptable solution to those involved is in part determined by how one understands the problem and what other values are already at stake. What is most important to see here is that the nature of the problem, just like the nature of the description, must be part of the communicative discourse if it

life, stimulates publicity; by its means sore spots are brought to light that would otherwise remain hidden.” John Dewey, *Liberalism and Social Action*, in EXCELLENCE IN PUBLIC DISCOURSE 129 (1986).

102. See DEWEY, *supra* note 94, at 108.

is to avoid being ethnocentric in its pronouncements. In order for us to see what is problematic about the practices of others, it is crucial that we understand what those others find problematic about them. This knowledge is necessary if a solution satisfactory to all involved is to be achieved.

Second, available solutions to problems must be developed and implemented through communicative interaction. Persons involved in a situation have distinctive understandings of what the situation calls for because of personal experience and expertise. One person or group may have direct knowledge of the problem but no resources for its resolution. Another may have expertise in that he sees possible resolutions others do not. Each has partial knowledge but only together can the situation be satisfactorily resolved. Together, adequate resolutions may be developed that sufficiently answer the problematic situation as those involved understand it and in such a way that it secures or cultivates those values considered decisively important.

Engaging in this sort of communicative inquiry leaves open considerable room for failure. First, groups may not agree that a practice is harmful. If this fact persists, despite the discussion and the constraints discussed above in the context of situations two and four, then failure to agree is a sign (though a non-dispositive one) that there is real incommensurability at work and so neither judgment should be made nor act implemented. This appears threatening, but I submit that it is so rare in practice, that we can afford to be fallible at least to this extent.

Third, even if they do agree that it's harmful, they may have different reasons for thinking so, and so see different features as problematic. This would again be cause for limiting implementation of a norm. Either nothing done, or only so much that may be agreed upon, would appear acceptable. This would be more prevalent than the last situation, but also more salutary. It allows the particular features of individual instances to constrain judgment and action so that one group does not surreptitiously decide what is an appropriate way of life for another. Moreover, in this context, in which we are willing to assist others in their resistance of some practice being perpetrated on them, there is no reason to want to help them beyond the limits that they themselves desire. We may be puzzled by where they stop, but can identify this as the sort of incommensurability that compels us to stop short of where we might ourselves go.

Beyond these two limiting possibilities, however, lies much undiscovered country for agreement in both judgment and normative constraint. There is room for, and indeed there has been, broad acceptance of norms that have achieved the status of internationally protected rights. When these are recognized as the overlapping agreement of culturally

diverse parties, emerging from and sustained by widely differently narratives of justification, and not subject to the suspicious situations highlighted above, they may be regarded as free of charges of ethnocentrism and “imperialist ethics.” This is not to say that they defeat the relativist or the pluralist. On the contrary, the concerns of both are incorporated, seen as a source of strength and means for refinement in the implementation of right. But their concerns need not subvert either consensus or our confidence that such agreement is freely achieved.

IV. BACK TO THE ROUGH GROUND

As indicated at the outset, human rights are internationally recognized among states and have become a staple of political discourse. Accusations by one state that another infringes on the human rights of its citizens are not taken lightly, as they may signal significant losses of political capital among other members of the international community. Moreover, it is also often on this level that cultural pluralism may be invoked as a defense: a state may well say, with some plausibility, that charges of abuse are unfounded; that disagreement between two states reflects the difference between their respective values and practices, not the exploitation of some members of a community by other members; and that interfering in those practices amounts to a kind of cultural imperialism and unchecked ethnocentrism.¹⁰³

This may not, however, be the most common, or most important, level at which international rights operate to protect the lives of individuals subject to a wide range of cultural, political, and even natural conditions around the world. Although political exchanges among state elites draw attention and sometimes have dramatic effect, it may be no less important to secure international rights for the purpose of legitimating international courts. And while these institutions are no doubt political in their right, they operate differently, that is, they fall into a different category among those delineated above. I conclude this essay by highlighting some of the differences between the two.

It is not difficult to see that argument among elites of different states broadly reflects situation two. It occurs when “we” want “them” to do things differently, and they heartily disagree. The deliberative model suggested in section three above helps, not because it will lead to agreement – something I do not think it wise to depend on a *theory* to do – but because it shifts the problematic. It nudges the question out of a moral dead end (is our practice, compared to theirs, better/right?) and sets an

103. See generally, VAN NESS, *supra* note 64.

empirical task. It makes sure that those involved represent their situations and needs, instead of relying on stories told by elites who stand to profit from misrepresentation. It does this, in some measure, by forcing a situation two into choosing between a situation three and situation four (as outlined above). Do those who participate *also* share the view of the elites who are defending a practice to other elites who do not share it? The answer will not provoke agreement, but rather provide a clue to whether we are justified in taking action.

Obviously, the suspicion is that in many or most cases what looked initially like cultural pluralism and incommensurability will, when the smoke clears, reveal exploitative relations. In other words, we will end up being right in judging some practices unacceptable and, in the rare case that this doesn't happen we can be largely content to refrain from interfering. Epistemically fallible, we can afford to be reluctant to rush in, lest we tread on a valuable but fragile cultural practice. No doubt, there will be situations where we are tempted to intervene anyway, and when we do so, besides taking responsibility, we may see this as an opportunity for further inquiry. It may subsequently turn out that those whom we "invaded" are grateful after all, or they may resent it a great deal. If the former, we will feel the wiser, and if the latter, then we can withdraw with apologies and reparations. Regardless, and this is the important general point, situations like this (resembling situation two, then three or four) must incorporate concern for cultural pluralism in order to avoid undesirable imperialism. But given the very thin constraints suggested in section three, not only is it rare that this problem will confront us, but (and this is *crucial*) we are very likely to know *when* it is a legitimate possibility. Rather than a blind elephant, in most cases, if we have been empirically diligent, cultural imperialism will be a recognizable risk and, depending on the broader context of the situation, may be one worth running.

Conversely, if the argument between elites is unlikely to lead to a violation of cultural pluralism, then the likelihood that activities of an international court will do so is almost nil. One reason to think this is that the sorts of situations that look problematic, such as penis-feeding (discussed above), lie well beyond the focus of international rights. International lawyers may well be more concerned to protect the right to life, or the right to be free from torture, than with the culturally idiosyncratic practices of the Sambia or Etoro. Such examples, precisely because they are so eccentric, artificially drive the discourse toward relativism and needlessly compromise our efforts to protect core rights. And if a practice does happen to appear controversial in this way, the international lawyer and her court can pass it over; there are plenty of other, far more obvious violations demanding attention.

The difficulty with this claim is not that it isn't true – it surely is – but that it does not go far enough. On one hand, it doesn't provide a principled distinction for identifying those practices which should be addressed from those which should be protected. It doesn't tell us the difference between a situation in which a practice is so idiosyncratic that an international court will pass it over and one in which a practice is regarded as idiosyncratic *because* the court passes it over. It also doesn't explain how we know a particular event qualifies as an example of a violation of a core right from one that doesn't. It doesn't address the question of whether it's a violation because it *really* violates the norm, or because the court claims that it does (a version the old Socratic question of, is it good because the gods love it or do the gods love it because it is good?). Consequently, with only this to go on, it is difficult to tell whether or not ethnocentrism is in fact at work in a particular situation. On the other hand, this approach fails to cast the normative "net" broadly enough. The fact that a practice lies outside what many regard as core examples of violation does not by itself tell us whether the practice deserves scrutiny. Penis-feeding is certainly idiosyncratic, and the pragmatic allocation of scarce judicial resources surely encourage courts to address more mainstream acts, but this says nothing about whether or not penis-feeding should be approved by an international community. It is at least not enough to say that we are not guilty of ethnocentrism only because we only intervene in practices that we recognize as highly violative of our way of life; for there may be no less an obligation to intervene – or rather, assist – others who suffer greatly from practices we don't think of central importance but which significantly affect the participants. In other words, what counts as central or worthy of attention again opens the door for the arbitrary determination of an ethnocentric culture and may lead to a failure to help.

Fortunately, more may be said. First, it should be noted that this general situation usually falls under the class of situation three as outlined previously. This is a situation in which "we" seek to intervene in the practices of a given cultural community by assisting some members of that community over and against other members of that community. Court intervention resembles this situation because a court's attention is brought to bear by the petition of a participant party. For example, W. Michael Reisman points out that in the Inter-American Court of Human Rights, "A case begins on receipt of a petition alleging a violation of human

rights.”¹⁰⁴ The case is then subject to threshold requirements, such as having names, signatures, and allegations of facts that tend to establish a rights violation.¹⁰⁵ While these requirements may vary, the point here is a simple but important one: inquiry by the court (a type of intervention) goes forward when members of some community object to treatment by still others in their group and respond by appealing to an international community for assistance. Consequently, it appears that it isn't *possible* for a problem of cultural pluralism to get started in this situation. There is indeed intervention; but because it is invited by some subset of the culture in question, it is clear that neither situation two nor the really problematic situation four is operative. In fact, the minimal requirements I suggested as a pragmatic agreement have been met: a party, finding some act or set of acts objectionable, alleges facts that the international community recognizes as a violation. *Why* those facts are objectionable may well vary among the parties; but in order for the court to get moving there is the minimal agreement that they are violative, and this, initially at least, is all that is required.

A different sort of problem remains, however. To the extent that the international community has an explanatory framework different from that of the various cultural groups that may appeal to it, there may be a gap between what the international community will recognize as violative and what members of a particular community may want them to recognize. For example, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries recognizes the rights of these peoples to their own customs and institutions, but only “where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.”¹⁰⁶ It is not difficult to imagine a situation where it is unclear whether an international court should intervene (is it incompatible or not?) or situations in which an international community refuses to accept the protest of an indigenous community that some practice is acceptable among those who participate in it. And this may well be a form of cultural imperialism, since it amounts to a refusal to protect some practices in lieu of others.

The best available solution to this sort of difficulty, I suggest, is again the model of communicative inquiry. This approach opens the possibility of allowing those whose practices we may want to protect, even though we

104. W. Michael Reisman, *Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience*, SAINT LOUIS-WARSAW TRANSATLANTIC L.J. 89, 92 (1995).

105. *Id.*

106. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) June 27, 1989, 28 I.L.M. 1382, 1386.

fail to understand or approve of them, to show that these activities are central to their way of life. So long as they can do so, without also revealing ways in which others are subjected to deleterious effects of those practices, we may well agree to recognize them and intercede when they are identified as having been violated. If it turns out, however, that a group's practices turn out to be non-innocent in the sense of imposing on others an undesirable way of life, we are again fully justified in *refusing* to recognize those acts. Why? Because here situation three is recursively applied. In a situation where some subgroup (A) wants us to intervene on their behalf against a dominant group (D), we may find that that subgroup champions a practice that yet another, further subgroup (B) is compromised by. Consequently, (B) may well appeal to us to refuse to allow this and we may be justified in refusing to intervene against (D) on (A)'s behalf because this amounts to an intervention on behalf of (B). If this is so, then communicative inquiry – which, again, is an epistemic task, not a moral one – allows us to determine more precisely just how widely our normative net should be cast and what justifiably falls outside of it. Again, this is a fallible process, but as I hope to have shown, one much less likely to be subject to cultural imperialism than it may have at first appeared. It at least gives some ground for confidence in the legitimacy of international rights and their implementation in international courts. What those rights are, of course, is a function result of this process. While we may still speak of a Right, this is not an *a priori* claim, universally applied, but one resulting from collaboration and communication.

V. CONCLUSION

This essay differed from its predecessors in several ways. One is that it understood the claim of cultural pluralism in a far more robust way than it is usually conceived. Rather than thinking relativism itself crude, it regards common representations of relativism as crude representations. This is seen as problematic, as it seems unlikely that a responsible solution to the difficulties that cultural pluralism imports for the articulation of international rights will come from an attenuated understanding of what cultural pluralism is. Also distinct was the response this essay offered: instead of dissolving the problem of pluralism by somehow showing that it isn't really a problem after all, it identified a place for cultural pluralism in our approach to formulating and implementing international rights. At the very least, so it held, pluralism demands caution in the form of moral and epistemic fallibilism. It also suggests that some methodology, such as the one offered above in section three, is needed. Although one cannot ever be absolutely certain that one's acts are not guilty of cultural imperialism,

the burden of most of this essay was to persuade the reader that these occasions are rare, sometimes extremely so, and that the observation of some procedural safeguards makes them rarer still. The problem of cultural pluralism, at least with regard to charges of cultural imperialism, is greatly exaggerated in most instances and this means that considerable confidence in our ability to fashion international rights is warranted. Properly understood and regarded, cultural pluralism, rather than undermining such claims, refines and contours them. Pluralism reminds us that there are many ways of living and that responsibly protecting those that are worthy of preserving requires much attention to details and differences. The task is fallible and ongoing, but not impossible.