

INTERNET GOVERNANCE AND HUMAN RIGHTS IN  
A MINOR KEY:  
AN ANTHROPOLOGICAL PERSPECTIVE

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This paper explores the intersection of human rights and internet governance with the field of anthropology. Regimes of internet governance and platform content moderation are carried out on a global scale. They engage with cross-cultural issues that are central to anthropology, such as cultural relativism and legal pluralism. The discipline of anthropology has a long tradition of skepticism towards the international human rights movement. However, in recent decades many anthropologists have developed approaches to universal human rights that have overcome their natural objections and concerns. An examination of the ways that rights-focused anthropologists have addressed these concerns provides a productive way to refine and fortify human rights approaches to internet governance. This paper illuminates points of convergence between a rights-focused anthropology and the specific approaches to internet governance that have been developed in circles outside of anthropology.

**INTRODUCTION**

In recent decades, internet governance has emerged as a new area of study. With the rise of internet-based communication, this field is dedicated to understanding the challenges posed by new ways that people and institutions interact within the World Wide

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Web.<sup>1</sup> Classic themes in law and public policy (such as privacy, defamation, antitrust, security, public safety, surveillance, corporate responsibility, and copyright infringement) are well represented in this area of study, and the stakes are high. However, as we think about the rise of the internet and the corresponding challenges of internet governance, it is important to take note of the ways in which the legal and policy framings that present themselves in this area resonate deeply with heavily studied subjects in anthropology and other humanistic social sciences.<sup>2</sup> These include subjects such as cultural relativism/universalism, critiques of Eurocentrism, new forms of colonialism and imperialism, technologies of control and power, the nature of freedom,<sup>3</sup> as well as utopian and alternative forms of democratic participation and citizenship.

Consider the following list of new hybrid (i.e. machine-human) words and phrases that are closely related to internet governance and have entered the modern lexicon, both in popular usage and as analytical terms. These terms echo a previous generation of anthropological debates and redirect contemporary ones: “data colonialism,” “internet freedom,” “cybersovereignty,” “algorithmic racism,” “computational propaganda,” “artificial intelligence,” “netiquette,” “data nationalism,” “surveillance capitalism,” “big data,” “open access,” “digital divide,” “net neutrality,” “social computing,” “machine learning,” “cyberbullying,” and “online harassment.” Terms like these pair the

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<sup>1</sup> Milton L Mueller & Farzaneh Badieli. *Inventing Internet Governance: The Historical Trajectory of the Phenomenon and the Field*, in RESEARCHING INTERNET GOVERNANCE: METHODS, FRAMEWORKS, FUTURES 63 (2020).

<sup>2</sup> Anthropologist Anna Cristina Pertierra describes the “four basic premises of Anthropology” as the following: 1) cultural relativism 2) holism 3) “deliberate esoterism”—that is, attention to the marginal—4) ethnographic. ANNA CRISTINA PERTIERRA, MEDIA ANTHROPOLOGY FOR THE DIGITAL AGE 5-8 (2018).

<sup>3</sup> LAURA DENARDIS, THE INTERNET IN EVERYTHING: FREEDOM AND SECURITY IN A WORLD WITH NO OFF SWITCH 187 (2020).

worlds of computer networks with classic social science preoccupations relating to social life.

How and why should we study the discourses and debates that have emerged around these themes from an international ethnographic point of view? For example, is social media content moderation an exercise in “moral imperialism” given the generation of these policies in the metropolises and application in the global peripheries?<sup>4</sup> Can and should content moderation standards be adapted to the local cultural and social contexts in which they are applied? What about the Utopian language of the early internet that envisioned the “World Wide Web”<sup>5</sup> as a “place” that would offer people the potential for freedom from the constraints of national and corporate power? How and why should we study the emergent discourses of globalism and deterritorialization that the rise of the internet has precipitated? These are questions that lie at the intersection of anthropology, human rights, and internet governance.

One way to address these questions from an anthropological perspective is to examine the engagements that anthropology has made with the human rights movement.<sup>6</sup> There are many reasons that considering the postwar human rights movement alongside the emergence of internet governance in the digital age is a productive undertaking. Both represent attempts at creating new forms of global

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<sup>4</sup> MORAL IMPERIALISM: A CRITICAL ANTHOLOGY (2002).

<sup>5</sup> TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB (2009).

<sup>6</sup> I have in mind an expansive definition of the “human rights movement” that combines: 1) the notion of rights that extend to all humans regardless of citizenship 2) the advocacy networks that ground their work in this notion and 3) the formal institutions of international human rights law that anchored by the Universal Declaration of Human Rights (UDHR) and subsequent UN Human Rights conventions. Distinguishing the broader term, “human rights movement,” from the more specific term, “human rights law,” is common in the scholarship of human rights. See ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION (2015).

governance.<sup>7</sup> Both appeal to rhetoric of the diminished salience of national borders and the harms of unqualified national (or corporate) sovereignty.<sup>8</sup> Both employ “constitutionalist” approaches—lists of rights meant to constrain the abuse of power.<sup>9</sup> Both attempt to intervene in geopolitical conflicts that are talked about on a “civilizational” scale—e.g., consider the tense East-West dynamics of the “The Great Firewall of China.”<sup>10</sup> Both are initiatives that struggle with the reality of “American exceptionalism” and its “unique mission to transform the world.”<sup>11</sup>

Anthropology as a discipline has a long tradition of skepticism regarding the international human rights movement for many reasons including the contention that the movement (in many of its variations) fails to live up to its universalist pretensions given the Western dominance and eurocentrism of its foundation and institutionalization. However, in recent decades many anthropologists have developed approaches to universal human rights that have overcome their natural objections and concerns<sup>12</sup>—going “from skepticism to embrace” in the words of legal scholar Karen Engle.<sup>13</sup> My contention in this article is that an examination

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<sup>7</sup> Monika Zalnieriute & Stefania Milan, *Internet Architecture and Human Rights: Beyond the Human Rights Gap*, 11 POL. & INTERNET 6 (2019).

<sup>8</sup> MILTON MUELLER, WILL THE INTERNET FRAGMENT?: SOVEREIGNTY, GLOBALIZATION AND CYBERSPACE (2017).

<sup>9</sup> Lex Gill et al., *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, BERKMAN CENTER RSCH. PUBL’N NO. 2015-15 (2015).

<sup>10</sup> RONALD DEIBERT, RESET: RECLAIMING THE INTERNET FOR CIVIL SOCIETY (2020); PEN America, *Forbidden Fees: Government Controls on Social Media* (2018), [https://pen.org/wp-content/uploads/2018/06/PEN-America\\_Forbidden-Fees-report-6.6.18.pdf](https://pen.org/wp-content/uploads/2018/06/PEN-America_Forbidden-Fees-report-6.6.18.pdf).

<sup>11</sup> AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2005).

<sup>12</sup> MARK GOODALE, SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS (2009).

<sup>13</sup> Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536 (2001).

of the ways that rights-focused anthropologists<sup>14</sup> have addressed these concerns provides a productive way to refine and fortify human rights approaches to internet governance. In the process I will illuminate points of convergence between a rights-focused anthropology and specific approaches to internet governance (and social media content moderation) that have been developed in circles outside of anthropology.

**CONTENT MODERATION AND SOCIAL MEDIA:  
RIGHTS AND “MERE WANTS”**

Facebook, WeChat (China), Vkontakte (Russia), Twitter, and the rest of the social media platforms are engaged in an international law-like exercise when they establish “content moderation” rules for how user-generated content will be regulated on a global basis. They are attempting to establish a single set of standards that will be used to screen content in order to “facilitate cooperation and prevent abuse.”<sup>15</sup> Internet reformers have appealed to human rights law as a set of mechanisms with which to address the problems associated with the centrality of social media in contemporary life. Proponents of a “rights-oriented regulation” promote the fortification of legal and political remedies that are built around those articles of the United Nations International Covenant on Civil and Political Rights that pertain to freedom of speech,

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<sup>14</sup> For the purposes of this essay, I define “rights-focused anthropologists” as anthropologists who orient their work around struggles with the promise and limitations of human rights rhetoric and institutions. For an influential elaboration of this tradition, see Ellen Messer, *Anthropology, Human Rights and Social Transformation*, in *TRANSFORMING SOCIETIES, TRANSFORMING ANTHROPOLOGY* (1996).

<sup>15</sup> James Grimmelmann defines moderation in online communities as “the governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse.” James Grimmelmann, *The Virtues of Moderation*, 17 *YALE J.L. & TECH.* 47 (2015).

particularly Article 19.<sup>16</sup> In the words of David Kaye, legal scholar and former UN Special Rapporteur on the promotion of freedom and protection of the right to freedom of opinion and expression, “It’s time to put individual and democratic rights at the center of corporate content moderation and government regulation of the companies.”<sup>17</sup>

Content moderation is the area of the broader world of internet governance that most obviously collides with the classic anthropological concerns with culture and cultural relativism. Seemingly more culturally sterile issues such as global network security and espionage fall under the umbrella of internet governance, but because content moderation consists of evaluating the details of user-generated content, it inevitably begs the question of who is doing the judging and on what basis. The basis on which a given norm is applied is a classic concern in anthropology that is often referred to as cultural relativism. The Oxford English Dictionary gives the following definition of the term: “The theory that there are no objective standards by which to evaluate a culture and that a culture can only be understood in terms of its own values and customs.”<sup>18</sup>

Typically, internet companies have two ways of setting the ground rules for what will be acceptable on platforms—terms of service and community guidelines.<sup>19</sup> Terms of service are set up as contracts that establish rules and obligations between platforms and

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<sup>16</sup> DAVID KAYE, *SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET* (2019); Michael Karanickolas, *Squaring the Circle Between Freedom of Expression and Platform Law*, PITTSBURGH J. TECH. L. & POL. 177 (2020).

<sup>17</sup> KAYE, *supra* note 16, at 17.

<sup>18</sup> *Cultural Relativism*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/45742?redirectedFrom=cultural+relativism#eid129084834> (last visited Jan. 2, 2021).

<sup>19</sup> JAMILA VENTURINI ET AL., *TERMS OF SERVICE AND HUMAN RIGHTS: AN ANALYSIS OF ONLINE PLATFORM CONTRACTS* (2016).

their users. Community guidelines are didactic and aspirational documents. They lay out “the platform’s expectations of what is appropriate and what is not,” and announce “the platform’s principles, and list prohibitions, with varying degrees of explanation and justification.”<sup>20</sup> All of the major global platforms commit themselves to monitoring and promoting the community guidelines which they publish. Tarleton Gillespie in his study of content moderation notes that these are “strikingly similar.”<sup>21</sup> How these documents construct on a global scale what will be considered normal vs. abnormal, polite vs. offensive, respectful vs. sacrilegious, or tolerant vs. racist is a difficult exercise. Critics contend that the major platforms have failed to, in the words of Facebook’s Mark Zuckerberg, “develop the social infrastructure to give people the power to build a global community that works for all of us.”<sup>22</sup>

Facebook has an elaborate set of rules called “Community Standards” that they use to regulate speech on the platform.<sup>23</sup> These are divided into six categories: Violence and Criminal Behavior, Safety, Objectionable Content, Integrity and Authenticity, Respecting Intellectual Property, and Content-Related Requests and Decisions.<sup>24</sup> Some of these policies pertain to behaviors around which the matter of cultural relativism is not apparently relevant

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<sup>20</sup> TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* 46 (2018).

<sup>21</sup> *Id.* at 52.

<sup>22</sup> Mark Zuckerberg, *Building Global Community*, <https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/> (last visited Jan. 2, 2021).

<sup>23</sup> In 2018 and 2019, I served on an academic advisory group chaired by the faculty directors of the Justice Collaboratory of the Yale Law School called DTAG—Data Transparency Advisory Group. We released a report that assessed Facebook’s methods of measuring and reporting on its Community Standards enforcement policies. The Just. Collaboratory, *Data Transparency Advisory Group*, <https://law.yale.edu/justice-collaboratory/our-work/projects/data-transparency-advisory-group> (last visited Jan. 2, 2021).

<sup>24</sup> Zuckerberg, *supra* note 22.

because the behavior at hand is not considered to vary along cultural lines. So, for example, Facebook's Community Standards lay out a policy against spam, which they describe as "content that is designed to deceive, or that attempts to mislead user to increase viewership" and that is designed "to artificially increase viewership or distribute content on masse for commercial gain."<sup>25</sup> All can agree that spam is a deceptive technique for distributing content, but what constitutes spam does not generate cross-cultural controversy. However, the broader Facebook policies on "authentic identity" do bring up fascinating cross-cultural issues on what anthropologists call "personhood," which, in the context of online social life, includes practices of anonymity and what it means to have multiple identities online.<sup>26</sup>

Many of the other areas addressed by Facebook's Community Standards clearly do pertain to norms that vary widely across the world. For example, Facebook regulates five kinds of "Objectionable Content": Hate Speech, Violent and Graphic Content, Adult Nudity and Sexual Activity, Sexual Solicitation, and Cruel and Insensitive. Attempts at monitoring and enforcing each of these areas has triggered many controversies, and Facebook and other platforms have had to frequently modify their policies in response to objections that, fittingly perhaps, have emerged on their own platforms (e.g., Instagram's "#freethenipple" hashtag).<sup>27</sup> For

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<sup>25</sup> *Integrity and Authenticity*, FACEBOOK, [https://www.facebook.com/communitystandards/integrity\\_authenticity](https://www.facebook.com/communitystandards/integrity_authenticity) (last visited, Jan 2, 2021).

<sup>26</sup> PAUL DOURISH & GENEVIEVE BELL, DIVINING A DIGITAL FUTURE: MESS AND MYTHOLOGY IN UBIQUITOUS COMPUTING 53 (2011)

<sup>27</sup> Julia Jacobs, *Will Instagram Ever 'Free the Nipple'?*, NEW YORK TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html>; Jillian York, *The Global Impact of Content Moderation*, ARTICLE 19 (Apr. 7, 2020), [www.article19.org/resources/the-global-impact-of-content-moderation/](http://www.article19.org/resources/the-global-impact-of-content-moderation/); Frederik Stjernfelt & Anne Mette Lauritzen, *Nipples and the Digital Community*, in YOUR POST HAS BEEN REMOVED 95 (2020).

example, reference to cultural differences has been explicitly cited as being responsible for the difference between European and North American approaches to nudity and free speech, respectively. The argument is that Europeans are, for cultural reasons, more open to being exposed to nudity. In accordance with its absolutist values towards freedom of speech, the U.S. has been traditionally less willing to censor hate speech. This differs from countries like Germany, which have created freedom of speech restrictions in the context of Holocaust Denial.<sup>28</sup> Discussing cultural differences between the USA and France when it comes to internet governance, Jeffrey Rosen remarks, “Americans want to be famous, while the French want to be forgotten.”<sup>29</sup> I will return to these cultural-based arguments in the next section, but for the moment, it is important to note the tension between “illusions of a borderless world” fostered by global internet platforms, and the realities of cultural borders.<sup>30</sup>

Applying human rights principles and institutions to the task of global content moderation represents an exercise that was not anticipated by the drafters of Universal Declaration of Human Rights (UDHR) and the subsequent human rights covenants. First, human rights law was created to check abuses of power by states, rather than private companies. Whereas human rights focus on the inherently universal concept of the “human” (as opposed to the citizen of a given nation-state), the equivalent concept in content moderation is the “user”—who elects to use what is often a nominally free service, one that admittedly has become like a utility.

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<sup>28</sup> JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); Noah Feldman, *Free Speech in Europe Isn't What Americans Think*, BLOOMBERG (Mar. 19, 2017, 10:33 AM), <https://www.bloomberg.com/opinion/articles/2017-03-19/free-speech-in-europe-isn-t-what-americans-think>; JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 145 (2019).

<sup>29</sup> Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 *FORDHAM L. REV.* 1525 (2012).

<sup>30</sup> JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006).

Another key difference is that a postulate of human rights is that they are supposed to be “fundamental,” meaning that they pertain to “basic needs” and not “mere wants.”<sup>31</sup> However, a glance at the community guidelines of platforms demonstrates that fundamental issues like the right to life and freedom of speech are present but so are matters that are hardly fundamental. Wanting to shield users from content that might make some uncomfortable is a matter of consumer satisfaction and in that sense represents part of the product that each platform is engineering. “Rights-oriented regulation” must make a case for stretching the concepts of human rights into these areas.<sup>32</sup>

But before discussing this issue, I want to turn to a discussion of some of the historical and ongoing concerns of the field of anthropology with the human rights movement that was launched with the Universal Declaration of Human Rights and the foundation of the United Nations at the end of World War II. My argument is that understanding the approach to culture and cultural relativism that has emerged in anthropology in the context of the conversations and debates about human rights give important insights on the challenges of internet governance, particularly as it pertains to content moderation.

#### **FALSE UNIVERSALISM AND “THE RIGHTS OF MAN”**

Finding ways to describe and translate the norms and standards by which people live but avoiding evaluating these based on one’s own standards is historically a central puzzle of the anthropological endeavor. Anthropologists are trained to avoid “ethnocentrism” and to strive for an “emic approach”—to

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<sup>31</sup> Burns Weston, *Human Rights*, ENCYCLOPEDIA BRITANNICA ONLINE, <https://www.britannica.com/topic/human-rights> (last visited Jan. 2, 2021).

<sup>32</sup> NICOLAS SUZOR, *LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES* 9 (2019).

understand societies from an insider's perspective. Anthropologists naturally place cross-cultural scrutiny on attempts to create universal standards of any kind. In the case of the human rights movement, anthropologists have struggled with the concern that human rights standards reflect Western values and that they represent "false universalism."<sup>33</sup>

In 1947, Melville Herskovits, a leading anthropologist of the time, published a strongly worded rejection of a draft of the "Declaration on the Rights of Man," which was the document that would later become the Universal Declaration of Human Rights.<sup>34</sup> This document was being drafted in upstate New York by a commission organized by Eleanor Roosevelt. UNESCO had reached out to Herskovits for input as part of broad consultations with civil society.<sup>35</sup> In Herskovits's "Statement on Human Rights" he asserted that the document failed to address the following fundamental question: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?"<sup>36</sup> Foreshadowing contemporary concerns regarding the universalist ambitions of "content moderation" and internet governance more broadly, Herskovits stated:

Today the problem is complicated by the fact the Declaration must be of world-wide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The right of Man in the Twentieth Century

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<sup>33</sup> Clive S Kessler, *Globalization: Another False Universalism?*, 21 THIRD WORLD Q. 931 (2000).

<sup>34</sup> Goodale, *supra* note 12, at 20-21.

<sup>35</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

<sup>36</sup> The Executive Board of the Am. Anthropological Ass'n, *Statement on Human Rights*, 49 AMERICAN ANTHROPOLOGIST, NEW SERIES 539 (1947).

cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings.<sup>37</sup>

What “single culture” did Herskovits have in mind in 1947 as he responded to a foundational document of the emergent United Nations that was being formed with the leadership of the United States and its triumphant allies in the aftermath of World War II?

Herskovits’ objections to the nascent UDHR went beyond a concern about general ethnocentrism—an ethnocentrism that does not distinguish between who is doing the centering. Rather, he specifically warned against a kind of ethnocentrism that was combined with geopolitical power. He was particularly concerned about the newly unrivaled geopolitical power of the United States and its allies, notwithstanding their triumphant defeat of fascism. He identified the Western practice of “ascribing cultural inferiority” to non-Westerners as a key ideological buttress to a Western hegemony that he feared would not be overcome by a newly reconfigured geopolitical order that included the United Nations and a budding human rights system. He wrote:

Doctrines of the “white man’s burden” have been employed to implement economic exploitation and to deny the right of control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations. Rationalized in terms of ascribing cultural inferiority to these peoples, or in conceptions of their backwardness in development of their “primitive mentality,” that justified their being held in the tutelage of their superiors, the history of the expansion of the western world has been marked by demoralization of the human personality and the

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<sup>37</sup> *Id.* at 543.

disintegration of human rights among the peoples over whom hegemony is established.<sup>38</sup>

From a contemporary perspective Herskovits' defense of cultural relativism manifested glaring weaknesses and contradictions.<sup>39</sup> Once more his "Statement on Human Rights" was not in itself an influential document among anthropologists moving forward, much less the drafters of the UHDR. For my purposes, what is noteworthy about this history is that Herskovits's is an early expression of the ways in which many anthropologists since that time have struggled to reconcile been concerned about how seemingly well-intentioned universalist principles can be exploitative. Mark Goodale argues that "...Herskovits drew from history in making the argument that declarations of human rights were often legal smokescreens for the oppression of one group of humans by another."<sup>40</sup>

### **Data Colonialism and Legal Smokescreens**

In the context of the contemporary internet and the debates over how to govern it, scholars have identified troubling parallels between traditional colonialism and "data colonialism" as, according to Couldry and Mejias, "historic appropriation of land, bodies, and natural resources is mirrored today in this new era of pervasive datafication."<sup>41</sup> When it comes to the particular area of content moderation, "the specter of imperialism" is manifest as free speech policies generated in, for example, Silicon Valley and subsequently applied to the rest of the world.<sup>42</sup> We should not forget,

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<sup>38</sup> *Id.* at 541.

<sup>39</sup> Alison Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 67 (1988).

<sup>40</sup> Goodale, *supra* note 12, at 28.

<sup>41</sup> NICK COULDRY & ULISES A. MEJIAS, *THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM* (2019).

<sup>42</sup> Goodale, *supra* note 12, at 64

of course, that this kind of intellectual inequality in which legal standards are manufactured in the first world and then exported to the third world is accompanied by traditional forms of labor inequality of the kind that media and technology scholar Sarah Roberts has documented. Roberts chronicles the ways in which the actual human labor of content moderation is exported to the third world in exploitative ways.<sup>43</sup>

In one version of an anti-imperialist critique of content moderation, the problem is not so much their conceptual ethnocentrism but rather their irresponsibility. In other words, platforms may fail to plan to account for the fact that they are generated in the world's metropolises but are put to the test in places where democracy is most fragile.<sup>44</sup> Legal scholar Michael Karanicolas recognizes "...the tension between implementing a moderation system which governs political discourse all over the world, but is disproportionately focused on impacts in the U.S."<sup>45</sup> He writes:

This is always going to be a difficult balance to set, but it's made vastly harder by the differences across local contexts that are subject to the platforms' content moderation systems. A racially charged statement in Canada might cause psychological harm, but in Sri Lanka, it might lead to lynchings and communal violence. As recently as August, violent clashes in Bengaluru, India, were triggered by a Facebook post about the Prophet Muhammad. The potential harms, in other words, vary enormously.<sup>46</sup>

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<sup>43</sup> SARAH ROBERTS, *BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA* (2019).

<sup>44</sup> Karanicolas, *supra* note 16, at 183.

<sup>45</sup> Michael Karanicolas, *Moderate Globally Impact Locally: The Countries Where Democracy Is Most Fragile Are Test Subjects for Platforms' Content Moderation Policies* (Nov. 30, 2020), <https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/moderate-globally-impact-locally-countries-where-democracy-most-fragile-are-test-subjects-platforms>.

<sup>46</sup> *Id.*

Here cultural difference is invoked as a way of acknowledging that different kinds of harm that may result from decisions that are made regarding permissible speech. In another version of an imperialist critique, the problem is that the United States has a particular 1<sup>st</sup> Amendment-based free speech tradition that, while it may or may not be appropriate for the United States, is a hazardous international export.<sup>47</sup> The hitch is that U.S.-based social media platforms export this approach while, arguably at least, “American approaches to freedom of expression diverge dramatically from those accepted in most of the remainder of the open and democratic world.”<sup>48</sup>

Given the controversy around the globalization of content moderation standards, it is not surprising that people outside of the United States make nationalistic appeals to the defense of national sovereignty vis-a-vis other platforms and, at times, other standards. For example, such a scenario emerged in the aftermath of the call by the U.S. right wing to boycott Twitter and Facebook and enroll in Parler. In response to the alleged anti-conservative bias of Facebook and Twitter, Indians were presented with a homegrown alternative to U.S.-based social media called Tooter. Twitter and Facebook’s content moderation policies have both run afoul of the Indian government in recent times.<sup>49</sup> In a recent case, the ruling the Bharatiya Janata Party criticized Twitter for allowing postings by a

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<sup>47</sup> Cara Curtis, *Facebook's Global Content Moderation Fails to Account for Regional Sensibilities*, THE NEXT WEB, (Feb. 26, 2019), <https://thenextweb.com/socialmedia/2019/02/26/facebooks-global-content-moderation-fails-to-account-for-regional-sensibilities/>.

<sup>48</sup> Frederick Schauer, *Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 48 (Michael Ignatieff ed., 2005)

<sup>49</sup> Chinmayi Arun, *Rebalancing Regulation of Speech: Hyper-Local Content on Global Web-Based Platforms*, BERKMAN KLEIN CENTER FOR INTERNET AND SOC. (Jan. 23, 2018), <https://medium.com/berkman-klein-center/rebalancing-regulation-of-speech-hyper-local-content-on-global-web-based-platforms-1-386d65d86e32>.

comedian that “lampooned India’s Supreme Court” in ways that were deemed “obscene” and “degrading.”<sup>50</sup> Tooter, the fledgling alternative micro-blogging platform, pitches itself as a *swadeshi* (Hindi for “native”) version of Twitter that mirrors the aesthetics and format of Twitter.<sup>51</sup> The founders of Tooter are reported to have provided a nationalistic justification for their entry into the market: “We believe that India should have a Swadeshi social network. Without one we are just a digital colony of the American Twitter India Company, no different than what we were under the British East India Company.”<sup>52</sup> The press coverage of Tooter in a lighthearted vein covered the memes that responded to the growth of Tooter. In a humorous way, most of the memes self-deprecatingly played with the idea that Tooter was a cheap Indian imitation of an American social media goliath. This expressed a dynamic that is well known across the developing world—wanting to value one’s own while recognizing that one’s own does not always measure up to global standards.<sup>53</sup> Tooter’s creators, notwithstanding their anti-colonial pronouncements, explicitly promoted adherence to the First Amendment of the U.S. Constitution. They stated that their content

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<sup>50</sup> Garavi Gujarat, *Twitter faces renewed heat in Indian over inaction against anti-court posts*, GG2, (Nov. 20, 2020), <https://www.gg2.net/twitter-faces-renewed-heat-in-india-over-inaction-against-anti-court-posts/>.

<sup>51</sup> Pallavi Punder, *What It’s Like Using Indian, Twitter, Called Tooter*, VICE NEWS (Nov. 26, 2020), <https://www.vice.com/en/article/88ax85/india-twitter-tooter-hindu-nationalism-alt-right-socil-media>.

<sup>52</sup> Krishna Priya Pallavi, *Tooter, the Indian Twitter, sparks meme fest online*, INDIA TODAY (Nov. 26, 2020), <https://www.indiatoday.in/trending-news/story/tooter-the-indian-twitter-sparks-meme-fest-online-best-reactions-1744229-2020-11-26>.

<sup>53</sup> Brent Luvaas describes practice such as these in which graphic artists outside of the metropole take “cut and pasted” images from global marketing campaigns and repurposes them aesthetically in a subversive aesthetic process that he calls “brand vandalism.” Brent Luvaas, *Designer Vandalism: Indonesia Indie Fashion and the Cultural Practice of Cut ‘n’ Paste*, 26 VISUAL ANTHROPOLOGY REV 1 (2010).

moderation policies would “not punish users for exercising their God-given right to speak freely.”<sup>54</sup>

The global imposition of U.S.-based legal standards via private media companies is one fear and one kind of legal smokescreen. However, the concern that scholars of the relationship between social media and global democracy express has to do with the ways in which government may appeal to internet sovereignty in order to justify the restriction of legitimate speech and opposition politics.<sup>55</sup> Here, governments do not protect themselves from outside impositions but rather “prevent data from flowing out through data localization” with authoritarian intent.<sup>56</sup> The metaphor changes from “keeping out” to “keeping in.” In attempts to find a way to impose territorial models for controlling the flow of information, the matter of the nationality of the servers on which data will be stored becomes a subject of legislation and negotiation.

When it comes to how social media has been co-opted by authoritarian governments, Bradshaw and Howard describe how “computational propaganda is being used as a tool of information control in three distinct ways: to suppress fundamental human rights, discredit political opponents, and drown out dissenting opinions.”<sup>57</sup> Beyond monitoring the application of content moderation standards by social media companies, many NGOs, think tanks, independent scholars, UN human rights mechanisms, and global internet watchdogs have emerged in recent years, intent on tracking the record of national governments who use the internet

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<sup>54</sup> Pallavi, *supra* note 52.

<sup>55</sup> For a wide-ranging set of essays about these issues, see SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM (2020).

<sup>56</sup> Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L. J. 677 (2015).

<sup>57</sup> Samantha Bradshaw & Philip Howard, *The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation*, PROJECT ON COMPUTATIONAL PROPAGANDA (2019).

to subvert democracy.<sup>58</sup> Cases in which national sovereignty is used to subvert democracy in a post-colonial context inevitably challenge relativistic, and anti-colonialist, concerns with Western cultural hegemony. This is a part of the puzzle that social media governance, as it emerges from the metropole, must solve without repeating the mistakes of previous efforts.

### **Geopolitics and the Internet: Revisiting the Asian Values Debate**

Delving into the details of the ways in which social media is used for illiberal ends is beyond the scope of this essay. My objective here is to recognize a connection between newer controversies regarding internet governance and older controversies regarding general human rights-based approaches to international law. These controversies have been a chronic stumbling block in the development of the human rights movement, and indeed, the

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<sup>58</sup> THE ELECTRONIC FRONTIER FOUND., <http://www EFF.ORG> (last visited Jan. 2, 2021); ARTICLE 19, <http://www ARTICLE19.ORG> (last visited Jan. 2, 2021); RANKING DIGITAL RIGHTS, <http://rankingdigitalrights.org> (last visited Jan. 2, 2021); GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org> (last visited Jan. 2, 2021); David Morarand Bruna Martins dos Santos, *Online Content Moderation Lessons from Outside the US*, BROOKINGS (June 17, 2020), <http://www.brookings.edu/blog/techtank/2020/06/17/online-content-moderation-lessons-from-outside-the-u-s/>; ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (2008); ACCESS CONTESTED: SECURITY, IDENTITY, AND RESISTANCE IN ASIAN CYBERSPACE INFORMATION REVOLUTION AND GLOBAL POLITICS (Ronald Deibert et al. eds., 2012); Library of Congress, *Initiatives to Counter Fake News in Selected Countries* (2019), <https://www.loc.gov/law/help/fake-news/counter-fake-news.pdf>; Collaboration on International ICT Policy for East and Southern Africa (CIPESA), *Despots and Disruptions: Five Dimensions of Internet Shutdowns in Africa* (2019)m [https://cipesa.org/?wpfb\\_dl=2832020](https://cipesa.org/?wpfb_dl=2832020); Global Information Society Watch, *National and Regional Governance Forum Initiatives (NRIs)*, ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (2017), [https://www.giswatch.org/sites/default/files/giswatch17\\_web.pdf](https://www.giswatch.org/sites/default/files/giswatch17_web.pdf); Ben Hassine, *Digital rights advocacy in the Arab world and the Universal Periodic Review*, ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (2016), <https://www.apc.org/en/pubs/digital-rights-advocacy-arab-world-and-universal-p>; David Kaye, *Report on Content Regulation*, Presentation to the 38th session of the Human Rights Council (Apr. 6, 2018). <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx>.

development of the United Nations. Specifically, I am referring to the clash between the prerogative of national governments to exercise their sovereignty according to homegrown principles versus the global ambitions of reducing human misery by limiting abuses of power by the governments of the world. In the context of the universalism vs. human rights debate, one of the ways that this issue has manifested itself is in the form of the so-called “culture defense.”<sup>59</sup>

In a narrower legal sense, the culture defense has to do with the admissibility of cultural evidence in the courtroom. However, in the broader context of human rights policy and law, the culture defense has to do with areas in which culturally rooted norms appear to be at odds with the law. In the most sensationalistic and inflammatory framing of the issue, what happens “when culture kills”? In her book on the subject, legal scholar Alison Dundes Renteln addresses classic cross-cultural cases that involve homicide, children, drugs, animals, marriage, attire and “The Dead.”<sup>60</sup> How can one establish a universal age that divides childhood and adulthood? In what cases are the sacrifice of animals in religious contexts exempt from being treated as animal cruelty? In what context should polygynous marriages be tolerated and/or promoted? Renteln makes a case for the formal recognition in law of the culture defense but often scholars point to the cynical and self-serving ways in which governments invoke the culture defense to create a legal smokescreen for their abuses. This historic human rights dynamic resonates with contemporary concerns about internet governance.

One place where these lines of debate are well worn in general human rights discourse is in the so-called “Asian Values

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<sup>59</sup> ALISON DUNDES RENTELN, *THE CULTURE DEFENSE* (2005).

<sup>60</sup> *Id.*

Debate.”<sup>61</sup> The essence of the debate when it comes to human rights is whether or not the supposedly universal values that are expressed in the UDHR (or more broadly the European Enlightenment political philosophies that were drawn upon to construct the liberal democracies of the West) are compatible with “Asian culture.”<sup>62</sup> Different authors populate the list of supposed cultural differences between East and West but the following traits are commonly cited: 1) emphasis on the community and societal harmony rather than individual personal fulfillment, 2) a sense of loyalty and duty toward one's family, 3) self-reliance and thrift, 4) a general tolerance of benign authoritarianism, 5) a stress on education, 6) respect for the elderly, 7) and respect for the accumulation of wealth.<sup>63</sup>

It would be easy to dismiss these characterizations as harmless generalizations, misguided orientalism and/or understandable expressions of regional pride in a post-colonial context, but they have geopolitical implications. Notwithstanding the 2012 ASEAN Rights Declaration, Asia does not have a fully developed regional human rights system. This stands in contrast to other world regions that do have regional instruments: the Organization of American States, the European Union, African Union, and the Arab League.<sup>64</sup> Whether or not the absence of inter-governmental human rights infrastructure in Asia has a significant

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<sup>61</sup> Michael Freeman, *Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values'*, 16 NETH. HUM. RTS. Q. 25 (1998). See Goodale, *supra* note 12, at 51-56 for an anthropologist's perspective on this polemic.

<sup>62</sup> Burns Weston, *The Universality of Human Rights in a Multicultural World: Toward Respectful Decision-Making*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION (2006); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability in Human Rights*, HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (1979).

<sup>63</sup> Harriet Samuels, *Hong Kong on Women, Asian Values, and the Law*, 21 HUM. RTS. Q. 707 (1999).

<sup>64</sup> Dinah Shelton, *Breakthroughs, Burdens and Backlash: What Future for Regional Human Rights Systems*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION (2006).

impact on the ground, what is important here is to note the particular ways in which cultural reasons have been invoked to justify the restriction of civil liberties and political freedoms in Asia.

At different moments in time, many government leaders in Asia have actively embraced Asian Values discourse, often in order to justify a perceived tradeoff between civil liberties and economic growth.<sup>65</sup> The late Lee Kuan Yew, the “founding father of Singapore,” actively promoted Asian Values rhetoric and campaigns during his years as Prime Minister from 1959 to 1990.<sup>66</sup> In Neil Englehardt’s article on the “Singaporean Confucian Ethics Campaign” of the 1980s, he demonstrates how Yew imposed a version of “Asian Values” on the Singaporean people in order to justify repressive policies.

These included measures such as “a restrictive press law designed to prevent criticism of the government, hampering freedom of expression and restricting access to alternative sources of information.”<sup>67</sup> Englehardt describes how the campaign used the affinity that Singaporeans were inclined to have for elements of Chinese culture (from which in many ways they felt alienated) in order to promote values of obedience to authority and the “submergence of individual identity in collective identity.”<sup>68</sup> Annette Marfording makes a similar critique of the ways in which the Japanese government and corporations cynically have enlisted the “Nihonjinron” literature (a genre that represents a Japanese take

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<sup>65</sup> Han Sung-Joo, *Asian Values: An Asset or a Liability*, in CHANGING VALUES IN ASIA; THEIR IMPACT ON GOVERNANCE AND DEVELOPMENT (1999).

<sup>66</sup> Michael Barr, *Lee Kuan Yew and the ‘Asian Values’ Debate*, 24 ASIAN STUDIES REV. 309 (2000).

<sup>67</sup> Neil Englehart, *Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore*, 22 HUM. RTS. Q. 548 (2000)

<sup>68</sup> *Id.* at 549

on Japanese culture) for their own advantage.<sup>69</sup> This history is important to remember as we consider contemporary geopolitics of the internet that are replaying themselves along the cold war lines, among other lines of contention, between the United States, Russia, and China,<sup>70</sup> the two other main social media platform-producing countries. The U.S. has accused them of extending authoritarian governance into the realm of the World Wide Web while the Snowden documents remind us of the use of the internet in mass surveillance by the United States.<sup>71</sup> If a truly global and just approach to social media governance is to emerge it will need to confront the claim that it must accommodate different cultures of privacy, surveillance, and conceptions of liberty.

#### CAPACITIES AND CAPABILITIES

How does a discipline that prides itself on the celebration of cultural difference and anti-imperialism<sup>72</sup> reconcile this fundamental commitment with seemingly misplaced appeals to culture and sovereignty that are used to justify the exercise of power by global elites at home and abroad—as illustrated by our brief description of the culture defense and the Asian Values debate? In other words, how can one separate genuine from spurious

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<sup>69</sup> Annette Marfording, *Cultural Relativism and the Construction of Culture: An Examination of Japan*, 19 HUM. RTS. Q. 431 (1997).

<sup>70</sup> To cite just one example of saber rattling over internet espionage, the U.S. Secretary of State states on its website for “The Clean Network” government cybersecurity initiative, “We will keep doing all we can to keep our critical data and our networks safe from the Chinese Communist Party.” *The Clean Network*, U.S. STATE DEPARTMENT, <https://www.state.gov/the-clean-network/>.

<sup>71</sup> Jeffrey Knockel et al., *We Chat, They Watch: How International Users Unwittingly Build up WeChat’s Chinese Censorship Apparatus* (Citizen Lab Research Report No. 127, 2020) <https://tspace.library.utoronto.ca/bitstream/1807/101395/1/Report%23127--wechattheywatch-web.pdf>; TAYLOR OWEN & EMILY BELL, *JOURNALISM AFTER SNOWDEN: THE FUTURE OF THE FREE PRESS IN THE SURVEILLANCE STATE* (2017).

<sup>72</sup> Peter Pels, *What has anthropology learned from the anthropology of colonialism?*, 16 SOC. ANTHROPOLOGY 280 (2008).

representations of culture?<sup>73</sup> How can one celebrate cultural difference while also recognizing that appeals to culture can be used to oppress? And how has the discourse of human rights provided intellectual leverage with which to resolve these related dilemmas? Whereas some have been willing to declare human rights universalism provisionally victorious,<sup>74</sup> anthropologists have found ways to defend the concept of culture, a focus on the human and specific versions of cultural relativism while embracing the relativistic spirit of the American Anthropological Association's (AAA) original dissent.<sup>75</sup> Mark Goodale captures this paradox when he states, "...what human rights needs is more humanist restraint and appreciation for particularity and less enlightenment triumphalism."<sup>76</sup> Anthropological supporters of the human rights movement lend their support by resisting the temptation to recognize the victory of human rights universalism. This is what Marie-Benedicte Dembour means when she describes the "pendulum" that anthropologists walk between relativism and universalism in which they "err uncomfortably between the two poles."<sup>77</sup>

In 1999 the membership of the American Anthropological Association (AAA) adopted a statement on human rights that represented a formal reversal from the contrary stance penned by Herskovits on behalf of the AAA in 1947. One of the ways that this

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<sup>73</sup> Richard Handler & Jocelyn Linnekin, *Tradition: Genuine or Spurious*, 97 J. AM. FOLKLORE 273 (1984).

<sup>74</sup> Jack Donnelly's work is known for the strongest and most celebratory defense of universalism; JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS (2nd ed., 1999); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2003).

<sup>75</sup> Engle, *supra* note 13.

<sup>76</sup> Goodale, *supra* note 12, at 16.

<sup>77</sup> Marie-Benedicte Dembour, *Following the Movement of the Pendulum: Between Universalism and Relativism*, in CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 59 (Jane Cowan et al. eds. 2001).

document juggles the paradox that I mention above is that rather than defending any particular set of rights it defends the “capacity for culture.” The 1999 Statement on Human Rights states:

The capacity for culture is tantamount to the capacity for humanity. Culture is the precondition for the realization of this capacity by individuals, and in turn depends on the cooperative efforts of individuals for its creation and reproduction. Anthropology’s cumulative knowledge of human cultures, and of human mental and physical capacities across all populations, types, and social groups, attests to the universality of the human capacity for culture. This knowledge entails an ethical commitment to the equal opportunity of all cultures, societies, and persons to realize this capacity in their cultural identities and social lives. However, the global environment is fraught with violence which is perpetrated by states and their representatives, corporations, and other actors. That violence limits the humanity of individuals and collectives.

Though 50 years earlier Herskovits had rejected the UDHR on the grounds of its Eurocentrism, the 1999 Statement endorses the UDHR (and subsequent UN Human Rights Conventions) as tentative “working definitions” of “respect for concrete human differences.” It reminds us that these UN formulations of human rights represent only “the abstract legal uniformity of the Western tradition.” The statement presents the definition of human rights as a “constantly evolving” process and invites members of the AAA to get “involved in the debate on enlarging and understanding human rights on the basis of anthropological knowledge.”<sup>78</sup>

This tentative embrace of human rights via the notion of a “capacity for culture” parallels the “capabilities approach” to human rights that political philosopher Martha Nussbaum and development

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<sup>78</sup> Committee for Human Rights, *1999 Statement on Human Rights*, AM. ANTHROPOLOGICAL ASS’N, <http://humanrights.americananthro.org/1999-statement-on-human-rights/> (adopted by the AAA membership, June 1999).

economist Amartya have developed in a much more elaborate and programmatic way.<sup>79</sup> The capabilities approach has been applied in a wide variety of ways, but as far as the matter of the universality of human rights is concerned, it adds philosophical heft to documents like the UDHR that might otherwise be viewed as sterile laundry lists of rights. Nussbaum takes the rights of the UDHR (e.g., Article 3 on the right to life and Article 19 on the right to freedom of expression) and shows how they correspond with essential capabilities that all human beings share.<sup>80</sup> For example, Nussbaum takes Article 18 of the UDHR (“freedom of thought, conscience and religion”) and notes these are expressed as basic entitlements. She then generates a list of the underlying “capabilities” that correspond to each of the human rights in the UDHR. In the case of Article 18 the capability that corresponds to this article is “practical reason,” which she defines in the following way: “Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. This entails protection for the liberty of conscience and religious observance.”<sup>81</sup>

The following two aspects of her approach are the most relevant in the context of the intersection of human rights, anthropology and internet governance.

First, Nussbaum grounds her approach in a kind of universalism that aspires to not be grounded in any particular articulation of human rights nor in any particular cultural tradition. Rather she grounds them in the universality of the human person and the fundamental capabilities (“life,” “bodily health,” “bodily

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<sup>79</sup> MARTHA NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1999).

<sup>80</sup> Martha Nussbaum, *Capabilities, Human Rights and the Universal Declaration*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* (1999).

<sup>81</sup> *Id.*

integrity,” “senses,” “emotions,” “practical reason,” “affiliation,” “friendship,” “play,” etc.) that we all share regardless of how our cultures shape their expression. Addressing a fundamental anthropological ambition, she creates a framework that establishes “the unity of humankind” as a point of departure. Secondly, the capabilities approach creates a human rights methodology that is based on “appreciation for particularity” (to return to the above quotation from Mark Goodale).

This sets the stage for an approach to human rights that is referred to as the “indivisibility” of human rights and “human rights holism.”<sup>82</sup> A holistic approach requires us to consider the ways in which the interaction between human rights enables their full enjoyment. Particularly in a polarized cold war context where the Socialist and Non-Aligned countries argued that social and economic rights were more fundamental than the civil and politics that were prioritized by the Liberal Democracies, the capabilities approach refuses to create a “hierarchy of rights” by insisting on drawing our attention to their relationship.<sup>83</sup> This perspective is most succinctly captured by Amartya Sen’s famous thesis: “No famine has ever taken place in the history of the world in a functioning democracy.”<sup>84</sup>

What does the capabilities approach and the appeal of it to anthropologists<sup>85</sup> have to do with the issue of social media governance? The capabilities approach is a methodology that is about making judgments on whether a person is suffering harm, and it requires us to dig into the details of that person’s life as a member

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<sup>82</sup> A. Belden Fields, *A Holistic Approach to Human Rights*, in RETHINKING HUMAN RIGHTS FOR THE NEW MILLENNIUM (2003).

<sup>83</sup> Tom Farer, *The Hierarchy of Rights*, 8 AM. U. INT’L L. REV. 115 (1992).

<sup>84</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 16 (1999).

<sup>85</sup> Mark Goodale, *Introduction: Human Rights and Anthropology*, in GOODALE, *supra* note 12.

of their social and political worlds in order to make these kinds of determinations.<sup>86</sup> It is about making cross-cultural determinations. It requires the adjudicator to go beyond, “How satisfied is person A?” and ask, “What is A actually able to do and be?”<sup>87</sup> What are their ambitions and what are the opportunities that are available to that person? In the words of Nussbaum, “It looks at not what people feel about what they do, but about what they are actually able to do.”<sup>88</sup>

So, for example, if we are to determine whether a woman is enjoying the right to vote we must also ask whether her mobility and access to education and employment are not limited by political and/or cultural restrictions. She may have the formal right to vote but in the context of her particular life circumstances we may determine that she does not truly enjoy that right. Remedies would also need to avoid narrowing in on the formalities of the voting system and address broader considerations such as gender discrimination in the areas of healthcare, education, transportation, etc. Anthropological methodologies, such as participant-observation and other ethnography, provide the in-depth understandings of people’s “everyday life” that are required to put the capabilities approach into practice.

### **Mental Autonomy and Architectural Regulation**

What might this rights-oriented and ethnographic approach to making determinations look like in the emergent context of content moderation and internet governance? Legal scholar Eveyln Aswad has detailed one such approach to regulating privacy, censorship and free speech on the internet that is grounded in appeal

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<sup>86</sup> Samuel Martinez, *Searching for a Middle Path: Rights, Capabilities, and Political Culture in the Study of Female Genital Cutting*, 22 THE AHFAD J. 31 (2005).

<sup>87</sup> Nussbaum, *supra* note 80.

<sup>88</sup> *Id.*

to Article 19 of the ICCPR concerning the right to “hold opinions without interference.”<sup>89</sup> Her perspective builds on the institutional efforts in this area within the UN human rights system including the efforts of David Kaye and Irene Khan, the former and current Special Rapporteur on the Right to Freedom of Opinion and Expression.<sup>90</sup> Aswad argues that the wording of Article 19 invites us to think more expansively and holistically about what it means to enjoy the freedom of speech in an internet age characterized by the proliferation of a digital economy that runs on “digital extraction and the monetization of digital data.”<sup>91</sup> The threats to the enjoyment of human rights in her opinion stem from the following aspects of the internet companies: (1) designing digital products to maximize time spent on platforms, (2) leveraging user engagement to continuously extract personal data, and (3) using and selling that data to target users with highly particularized information in order to affect their views and behavior.<sup>92</sup>

Rather than focusing on whether any particular kind of speech should or should not be allowed on a platform, Aswad’s approach asks us to dig deeper and ask whether these aspects of the “business model” of the platforms infringes on the “basic ability to think and form opinions.”<sup>93</sup> In her approach, a human rights based approach to platform governance must be dedicated to protecting the “mental autonomy” of the public that at present is at a “high risk of manipulation.”<sup>94</sup> She concludes by offering a series of

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<sup>89</sup> Evelyn Aswad, *Losing the Freedom to Be Human*, 52 COLUM. HUM. RTS. L. REV. 306 (2020).

<sup>90</sup> *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN OHCHR, <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/mandate.aspx> (last visited Jan. 7, 2020).

<sup>91</sup> Aswad, *supra* note 89, at 369.

<sup>92</sup> *Id.* at 369.

<sup>93</sup> *Id.* at 310.

<sup>94</sup> *Id.* at 369.

recommendations for leveraging Article 19 of the ICCPR and the UN Guiding Principles on Business and Human Rights (UNGPs), such as regulations related to Free, Prior and Informed Consent and the “deployment of digital literacy campaigns.”<sup>95</sup>

Aswad does not mention the capabilities approach nor the importance of ethnographic research, but her work obviously resonates with a human-rights oriented anthropology. It is built on the recognition of fundamental human abilities and an appreciation of the fact that these cannot be understood in isolation from the broader constraints and possibilities that exist in a person’s life. Laura DeNardis and Francesca Musiani have written about the “turn to infrastructure”<sup>96</sup> in internet governance that brings our attention to the ways in which governing effectively in the internet world requires attention to the ways in which control is embedded in the structures of the platforms. They caution us on approaches that pay too much attention to just “content and expressive freedom.”<sup>97</sup> Laura DeNardis writes:

...the diffusion of digital technologies into the material world necessitates a radical reconceptualization of freedom and human rights. Traditional notions of Internet freedom are disconnected from actual technical, political, and market conditions. “Internet freedom” usually pertains to content, especially freedom of expression, intellectual property rights, and freedom from government regulation of content. Rarely has it involved technical architecture itself, although interestingly the philosophical principles of freedom and openness have some historical roots in the Internet’s engineering design community. When human rights concerns do invoke infrastructure, this

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<sup>95</sup> *Id.* at 368.

<sup>96</sup> Laura DeNardis & Francesca Musiani, *Governance By Infrastructure*, in *THE TURN TO INFRASTRUCTURE IN INTERNET GOVERNANCE* (Francesca Musiani et al. eds. 2016).

<sup>97</sup> LAURA DENARDIS, *THE INTERNET IN EVERYTHING: FREEDOM AND SECURITY IN A WORLD WITH NO OFF SWITCH* 183 (2020).

connection has primarily focused on access rights that affect the flow of content, such as broadband penetration rates or net neutrality, both infrastructure issues that reside very close to human users rather than embedded in technical architecture.”<sup>98</sup>

Lee Tien makes similar observations regarding “architectural regulation” in which control mechanisms are “embedded into settings of equipment.”<sup>99</sup> His critique of this kind of hidden regulation in which “code is law,”<sup>100</sup> as opposed to traditional “sanctioned-backed” legal approaches, resonates in stimulating ways with the capabilities approach to human rights. Architectural approaches focus on the mechanisms through which computer and network infrastructure limit and channel behavior in often unseen ways as they constrain even the ability to imagine other choices and possibilities. Considering these dynamics is critical if we are to productively apply human rights principles to the particular challenges of internet governance. Sen and Nussbaum, engaging different literatures and contexts, have provided invaluable insights into holistic and cross-cultural ways of doing this.

### **Vernacularization and Translation**

The late Sally Engle Merry was a leading anthropologist who wrote about the internationalization of the human rights movement, particularly regarding the worldwide struggle against domestic violence against women.<sup>101</sup> Her work on the subject provides examples of how the field can both dedicate itself to

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<sup>98</sup> *Id.* at 164-65.

<sup>99</sup> Lee Tien, *Architectural Regulation and The Evolution of Social Norms*, 7 YALE J.L. & TECH. 1 (2005).

<sup>100</sup> Lawrence Lessig, *Code is Law: On Liberty in Cyberspace*, HARV. MAG. (Jan.-Feb. 2000).

<sup>101</sup> Tragically, Sally Engle Merry died on September 8, 2020. Philip Alston et al., *In Memoriam: Sally Engle Merry*, CHR&GJ (Sept. 9, 2020) <http://chrgj.org/2020/09/09/in-memoriam-sally-engle-merry/>.

understanding culture-transforming global social movements while also affirming its traditional commitment to cultural relativism. She studied the ways in which human rights discourses traveled—from global campaigns to transnational activists to local practitioners and then back again. She saw this not as a process of imposition nor the replacement of one culture by another but rather as a process of “translation” which she called human rights “vernacularization.”

Ideas like rights are said to be vernacularized when they “are adapted to local institutions and meanings.”<sup>102</sup> Resisting the pressures of the universalism-relativism debate, Engle Merry paid attention to the ways in which human rights circulate between global contexts like UN conferences and academic panels to the places and institutions where programs to deter gender violence were being put into practice like India, China, Fiji, Hong Kong, Hawai’i, and Massachusetts.<sup>103</sup> Michael Ignatieff has recognized the importance of this process of vernacularization of human rights in the following way: “As a language of moral claims, human rights has gone global by going local, by establishing its universal appeal in local languages of dignity and freedom.”<sup>104</sup> If human rights principles and institutions are going to be used effectively in content moderation policy than they must find a way to craft standards that are not so flexible that they are meaningless while they also must appeal to local concepts that have particular resonance in their respective contexts.

In her global study of the globalization of human rights-based programs against gender violence, Sally Engle Merry

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<sup>102</sup> Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 39 (2006).

<sup>103</sup> SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

<sup>104</sup> Michael Ignatieff, *Introduction*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 37 (Michael Ignatieff ed., 2005).

observed that in many of the places that she visited there were cultural and political barriers from even recognizing gender violence as a serious social problem at all. For example, in India, “cruelty” had been the term that historically had been used to label what is now widely called “domestic violence.”<sup>105</sup> As she studied the ways in which the new concept of domestic violence was mobilized in each of the places that she studied, she attempted to trace how human rights principles, such as those expressed in CEDAW (the UN Convention on the Elimination of All Forms of Discrimination Against Women), were adapted and transformed by cultural “translators” who bridged the global women’s rights movement and the various local contexts.

In the case of India, she examined the cultural specificities of gender violence in a context in which the politics of dowry payments in marriages sometimes spiraled out of control. She noted that in the “criminalization” stage of Indian initiatives against domestic violence, various strategies were used that took these features into account. In the 1980s, special police stations were formed that were focused on dowry conflicts. In the 1990s, all-women police units and specialized family courts were formed. The ironic observation that she made was that initiatives in the area of domestic violence became more harmonized with international principles and practices rather than less harmonized. This was partially the result of pressure from transnational Indian women’s rights activist who were guided by CEDAW.<sup>106</sup> In her multi-country comparison she revealed that “the most striking finding is the extent to which despite significant variation in cultural background, political power, and history of each country, the palette of reforms

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<sup>105</sup> MERRY, *supra* note 103, at 139.

<sup>106</sup> *Id.* at 139-43.

is similar.”<sup>107</sup> At the end of day, she confesses that much of the translation into local cultural terms is “a kind of window dressing.”<sup>108</sup>

As an activist committed to global women’s solidarity, she refused to accept culturally-rooted justifications for the violence that women suffered daily—whether that be in the India or the United States. On the other hand, she needed to recognize that the effectiveness of social movements that were perceived as alien sometimes faced obstacles to their acceptance but at other times benefitted from their foreignness. As an Anthropologist she might be inclined to at least hope for the possibility of acknowledging homegrown approaches to domestic violence that were built on a primarily pre-existing cultural substrate. But she found that, to the contrary, transnational domestic abuse intervention programs “acquire local symbolic elaboration, but retain their fundamental grounding in transnational human rights concepts of autonomy, individualism, and equality.” In other words, they were “appropriated and translated but not fully indigenized.”<sup>109</sup>

Merry’s answer to the specter of “moral imperialism” involves two parts. The first is essentially an ethnographic response. She creates a framework for studying the very process into which people make the difficult tradeoff between pro-rights reform and the cultural transformations that accompany them. Rather than seeing global human rights reform movements as a purely political phenomenon she encourages us to view them as sites of transformation in which appeals to culture are made strategically to “vernacularize” and “indigenize” global human rights norms. She states this succinctly, “Instead of asking if human rights are a good

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<sup>107</sup> *Id.* at 177.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 178.

idea, [an anthropological approach to human rights] explores what difference they make.”<sup>110</sup> The second part of her response that I want to highlight in the context of this paper is the fact it represents a quiet, but in its own way, quite forceful defense of human rights universalism. After all, why would a field that celebrates cultural difference and cultural sovereignty accept the homogenization that comes along with human rights reform?

When it comes to the reform of social media content moderation policies, what are the benefits of a consideration of Merry’s approach to human rights vernacularization? The content moderation policies of all of the major platforms have fallen into the same trap. As we noted above, they have created a single set of standards and they use computers and reviewers to attempt to apply these standards to the online behavior of the people who use their services. They have understood this process as universalist exercise that requires them to be inflexible precisely because it is a universalist exercise. As Merry has shown us, however, the promotion of universalism does not require inflexibility. Rather it is an invitation for policy makers to vernacularize universal principles through careful consideration of the cultural milieus in which they will be designed and implemented as well as, more importantly perhaps, a careful consideration of the ways in which the internet intersects with the daily lives of people across the globe.

## CONCLUSION

It is beyond the scope of this paper to delve into the details of the virtues of a human rights approach to content moderation and internet governance. In recent books and other forums, scholars such as Tarleton Gillespie, Nicholas Suzor and David Kaye have made

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<sup>110</sup> *Id.* at 39.

robust arguments in favor of such an approach, which Suzor calls “New Constitutionalism.”<sup>111</sup> It is even more beyond the scope of this paper to delve into details about the virtues of a human rights approach to global governance in general.<sup>112</sup> This has been an exercise in triangulation in which I put scholarship on human rights governance in conversation with scholarship on internet governance in conversation with anthropological approaches to human rights. I argue that the ongoing work of reforming content moderation policies will benefit from understanding the histories and debates that I have outlined here in order to avoid some of the pitfalls that are inherent in this particular kind of global governance. The objective of this exercise has been to put into conversation concepts that are isolated from each other such as “capacity for culture,” the “capabilities approach,” “architectural regulation,” “mental autonomy,” and “vernacularization.” These topics lie at the intersection of anthropology, political philosophy, and media studies.

What lessons should we take away from this exercise in triangulation? Anthropology has long struggled with a concern about whether the idea of human rights (or any other globalizing ideology, for that matter) is or will become a technique of “moral imperialism.” I have briefly outlined one intellectual tradition within the discipline that has arrived at a version of human rights universalism—one that is composed, in the word of Mark Goodale, in a “minor key.”<sup>113</sup> Goodale states that “...an anthropology of human rights envisions a future transnational or post national normative framework that is based on the imperatives of ethical

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<sup>111</sup> See Gillespie, *supra* note 20; Kaye, *supra* note 16; Suzor, *supra* note 32.

<sup>112</sup> For a general discussion of the human rights concept in theory and practice, see HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUE AND ACTIONS, (Burns Weston & Anna Grear eds., 4th ed. 2016).

<sup>113</sup> Goodale, *supra* note 12, at 132.

restraint, humility, and legal pluralism.”<sup>114</sup> Given the geopolitics of internet governance and social media content moderation, human rights principles represent a critical tool in establishing cross-cultural legitimacy for the new strategies of governance that will emerge. But with the unprecedented reach and power of global technologies of communication and control, the importance of truly universal solutions, ones that will be embraced across the globe, is unmistakable.

This paper is intended to point internet governance scholars in the direction of a body of literature in anthropology that might be overlooked and that provides an important set of questions and methodologies that are worthy of review and consideration. Although I have not proposed concrete examples of how future reforms of internet governance should look, I hope that this exercise gives us at least a better idea of how these reforms should sound.

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<sup>114</sup> *Id.* at 133.