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BUILDING BRIDGES AND OVERCOMING BARRICADES: EXPLORING THE LIMITS OF LAW AS AN AGENT OF TRANSFORMATIONAL SOCIAL CHANGE

Ronald J. Krotoszynski, Jr.[†]

When the editors of this law review approached me regarding the possibility of participating in this colloquium, I was somewhat unsure about my ability to contribute something meaningful about female circumcision.¹ As one who generally subscribes to Socrates' admonition that recognizing and admitting one's intellectual limitations is a hallmark of wisdom,² I usually try to avoid overstepping my professional limitations.

In this particular instance, my professional limitations seemed formidable. For example, I am not a medical doctor, nor am I trained in anthropology or psychology. Similarly, although I main-

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1. Those participating in discussions and debates regarding the practice of female circumcision do not even share a common nomenclature. Those most opposed to the practice consistently refer to it as "female genital mutilation." On the other hand, many African women (including Professor Obiora) prefer the term "female circumcision" to describe the modification of the female genitalia through a variety of practices, running from *sunna* to infibulation. See L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 287-89 (1997). I have elected to adopt Professor Obiora's nomenclature in this Review Essay. This should not be interpreted to reflect, however, my approval or endorsement of the practice. Cf. Obiora, *supra*, at 289-90 (arguing that the term "female mutilation" does not accurately describe all forms of the practice and is offensive to some African constituencies).

2. As Socrates put it, a truly wise man admits that his ability to "know" anything is subject to significant doubts. See PLATO, THE APOLOGY OF SOCRATES §§ 21-23, at 25-28 (Thomas G. West trans., 1979).

tain an active interest in world affairs, I do not possess any special expertise in the field of African studies. In short, I harbored some significant doubts about my ability to contribute a useful perspective or point of view to this exchange.

Ultimately, I concluded that rather than focusing on the things that I am not, I should instead attempt to bring to bear those skills that accompany my training and profession. Whatever else I am not, I am most certainly a lawyer and, notwithstanding the current cycle of lawyer-bashing that is presently in vogue, I am proud of my profession. I know and understand the operation of the law and had the good fortune of practicing law for a number of years in a well regarded law firm in Washington, D.C.

After giving the matter some thought, it seemed to me that a (former) practicing lawyer's perspective is relevant to the ongoing debate about the practice of female circumcision in certain African cultures. After all, calls for the legislative abolition of the practice necessarily assume that legislative action will accomplish the task; once a law is on the books, the practice will cease. From a lawyer's perspective, however, the law's power as an agent of fundamental, transformational change has some rather concrete limitations.

Effective legal reform, like politics, is the art of the possible. As a general proposition, changing people's minds and beliefs is a necessary prerequisite to altering their attitudes and behaviors through modifications in the legal order. This is doubly true when the attitudes and behaviors at issue incorporate and reflect deeply held cultural values.³ As the maxim goes, "old habits die hard."

3. Speed limits in the United States provide a concrete example of this phenomenon. Lowering the speed limit to 55 miles per hour ("mph") in response to the oil crises of the 1970s did not alter the usual driving habits of most motorists. Moreover, many state highway patrol officers did not strictly enforce the speed limit, generally affording motorists a zone of administrative grace of between five and nine miles per hour. Thus, Congress' attempt to alter the driving habits of the American public failed, both as a matter of changing the behavior of individual citizens and as an enforcement priority by law enforcement officers. See generally JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 6-7 (1990) (noting that adoption of various federal statutes and regulations have not resulted in safer roads); Stephen D. Sugarman, *Nader's Failures?*, 80 CAL. L. REV. 289, 289 (1992) (reviewing MASHAW & HARFST, *supra*); Michael J. Trebilcock, *Requiem for Regulators: The Passing of a Counter-culture*, 8 YALE J. ON REG. 497, 504-05 (1991).

Significantly, non-compliance was greatest in the western United States, whose long expanses of sparsely populated land created a culture among Westerners that demanded a higher speed limit. Ultimately, they prevailed on this matter; Congress abolished the feder-

As it happens, I am also a Southerner. I grew up in Mississippi and know from personal experience the limitations of law as an agent of social change. Even now, the dismantling of the Jim Crow South remains something of a work in progress.⁴ The reason for this is relatively simple; attitudes are very difficult to change, even after the adoption and general acceptance of new legal rules that restructure economic and political relations.

Given the social and cultural importance of female circumcision in certain African communities,⁵ the immediate adoption of legislative proscriptions against the practice may have only a very limited deterrent effect on ending it, just as the adoption of the Fourteenth Amendment did not end the political, economic, and social disempowerment of black citizens living in the American South. An examination of American constitutional history will help to demonstrate the limitations of law as an instrument of social change. These lessons are germane to the project of eradicating the practice of female circumcision.

Professor Obiora's article also emphasizes the importance of culture in defining the specific content of particular human rights; she asserts that Western human rights advocates have paid insufficient attention to the cultural importance of female circumcision within the communities that observe the practice.⁶ Consistent with these observations we see that legal rules in the United States often incorporate cultural sensibilities, sometimes in arbitrary ways. Justice Antonin Scalia has repeatedly asserted that this is not an unfortunate reality, but a just and proper way of ordering our society's laws.⁷ Before we dismiss the cultural importance of a

ally-imposed speed limit in 1995. Meanwhile, Easterners living in urban areas continue to shake their heads and wonder about the root causes of what they perceive to be the recklessness and irresponsibility of speed-crazed Westerners. See Quentin Hardy, *Westerners Rev Up to Speed Legally Again*, WALL ST. J., Nov. 13, 1995, at B1 (reporting that the top speed on Western rural roads is 74.7 mph versus 64.1 mph for 85% of the cars on the nation's roads).

4. As Judge Frank M. Johnson, Jr., one of the handful of courageous federal judges who oversaw the dismantling of de jure segregation in the American South, observed in the early 1990s: "Sometimes, I think we've come a long way on race, and sometimes, I just don't know." JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS*, 470 (1993) (emphasis omitted).

5. See Obiora, *supra* note 1, at 295-98, 330 (discussing the role of female circumcision in various communities).

6. See *id.* at 283-87, 299-318.

7. See *Lee v. Weisman*, 112 S.Ct. 2649, 2679, 2682 (1992) (Scalia, J., dissenting)

practice that we find repugnant, we should first consider the culturally conditioned nature of that response. That the aversion reflects our own cultural norms of moral propriety does not make the aversion illegitimate; rather, it means that we should not be shocked or appalled if other cultures do not so view the practice from *their* moral perspective. American moral norms are not universal. Indeed, in some respects, our sense of justice could be faulted rather seriously.⁸

Cases involving religious free exercise and the right of privacy provide excellent exemplars of culturally-conditioned responses to particular legal claims. An examination of these cases will demonstrate the limited nature of our ability to accept particular human behaviors that deviate significantly from our own sense of what is "normal."

Finally, I must confess that I do not fully understand the practice of female circumcision and, moreover, that I find the adverse health consequences associated with certain forms of the practice simply horrifying.⁹ Nevertheless, Professor Obiora has identified two crucial deficiencies in the West's campaign to abol-

(suggesting that "[f]rom our Nation's origin, prayer has been a prominent part of governmental ceremonies" and arguing that "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*', i.e., immoral."); see also Clay Chandler, *Scalia's Religion Remarks: Just a Matter of Free Speech?*, WASH. POST, Apr. 15, 1996, WASH. BUS., at 7 (discussing the impact of Scalia's Christian views on his judicial capacity to render unbiased decisions).

8. Virtually alone among major Western democracies, the United States does not provide universal access to health care. See Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Foundation for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301, 306 (1992); Paul Starr, *The Ideological War Over Health Care*, N.Y. TIMES, Feb. 4, 1992, at A21. Similarly, outside of a handful of despotic nations, the United States is virtually alone in maintaining the death penalty. See Mary K. Newcomer, *Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L.J. 611, 620-24 (1995). Our moral sense does not lead us to raise taxes to pay for universal health care, nor has it compelled us to abolish capital punishment. A person standing outside our culture might suggest that we fail to possess a "normal" or "adequate" moral sense. I do not think that this is necessarily so; rather, our culture finds it acceptable that some people will go without health care and that others will be put to death by the state because such a state of affairs comports with our nation's innate sense of justice and propriety.

9. See generally Obiora, *supra* note 1, at 291 (listing shock, gangrene, and septicemia as among the potential health hazards).

ish the practice. First, the West has failed to persuade women in the societies observing the practice to abandon it. Second, it has failed to take the time to learn precisely why so many African mothers and daughters continue to observe the practice.¹⁰ As the following materials will demonstrate, I largely concur with Professor Obiora's position that addressing these shortcomings successfully is an absolute prerequisite to securing meaningful reform.

I. EXPLORING LAW'S LIMITS

Ending racial apartheid in the American South tested the outer limits of the law as an agent of fundamental, transformational change. To be sure, legal transformations ultimately supported and helped to facilitate broader social change. However, legal proscriptions standing alone failed to work transformational changes on an unwilling populace.¹¹ Instead, grass roots political agitation forced changes in the legal order; in turn, these changes helped to facilitate further social transformation.¹²

The example provided by the experience of the American South in ending de jure segregation amply demonstrates that transformational change must begin from within a society; it is the product of internal, not external, pressure.¹³ This, in turn, seems to support Professor Obiora's assertion that education and clinicalization are likely to be far more effective tools at eradicating the untoward health effects associated with female circumcision than either varied and creative expressions of international and/or academic outrage or broadly drafted but ineffective domestic legal proscriptions.¹⁴

A. *The American South*

The American civil rights movement illustrates the necessary relationship between successful social reform and grass roots commitments to change. Although Martin Luther King, Jr. has come to

10. *See id.* at 317-18.

11. *See* CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT*, viii (1985).

12. *See id.* (recognizing that "presidential timidity and congressional indifference have been shaken by dramatic events").

13. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19, 62-68 (1990) (arguing that compliance with the law is influenced by both the belief in the legitimacy of legal authority and personal morality).

14. *See* Obiora, *supra* note 1, at 350-64.

symbolize this movement, his leadership would not have been possible without the courage of hundreds of thousands of citizens; citizens who individually and collectively decided that, regardless of the personal costs, they would no longer acquiesce to the status quo.¹⁵ Thus, while Martin Luther King, John Lewis, Joseph Lowery, and the other leaders of the civil rights movement were essential to its success, the real lifeblood of the movement was the individual commitment of countless black Americans not only in cities like Montgomery, Birmingham, and Selma, but also in places with less readily recognized names, like Albany, Baton Rouge, and St. Augustine.¹⁶

The success of the movement inhered in ordinary individuals possessed of extraordinary courage, who simply stood up en masse and refused to recognize the legal or moral authority of a society that denied them basic civil rights. In the immortal words of Mrs. Fannie Lou Hamer, they had become "sick and tired of being sick and tired."¹⁷ Without the support of ordinary citizens, leaders like Martin Luther King would never have been able to overcome the entrenched white power structure that permeated the American South and wielded considerable influence in both Congress and the Democratic Party. As Julian Bond explained, it was only "[w]hen people stopped waiting for someone else and formed their own movement in the 1950s [that] the problem of legal segregation was overcome."¹⁸

15. See generally DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 48-82 (1986) (discussing "mass effort" involved in the Montgomery bus boycott); Julian Bond, *Introduction* to JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, at xii-xv (1987) (discussing organized protests). As one civil rights activist later explained: "[T]he movement made Martin rather than Martin making the movement." GARROW, *supra*, at 625.

16. The same forces that brought Dr. King to national prominence in Montgomery, Alabama manifested themselves in countless other Southern cities and towns. See GARROW, *supra* note 15, at 27, 81, 173, 316-18.

17. See KAY MILLS, THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER 93 (1993). Fannie Lou Hamer was a principal organizer of both the Freedom Summer voter registration project and the Mississippi Freedom Democratic Party ("MFDP"). See *id.* at 97, 108. Under the glare of the national press' klieg lights, the MFDP challenged the credentials of the all-white Mississippi delegation at the 1964 Democratic National Convention. See *id.* at 131-32. The daughter of a Mississippi sharecropper, Hamer's transformation from victim to activist is one of the most compelling stories of the movement. See generally WILLIAMS, *supra* note 15, at 228-49 (discussing the development of Fannie Lou Hamer's role in the civil rights movement).

18. BOND, *supra* note 15, at xiii.

Consider, for example, the Montgomery bus boycott of 1955-56, which launched Dr. King into a national leadership role in the civil rights movement.¹⁹ Rather than continue to suffer the indignities of segregation, average citizens virtually abandoned the Montgomery public transportation system and chose either to walk or to rely on an elaborate car pooling system organized within the black community.²⁰ The success of the boycott was a function of the commitment of the community to the project; the broad-based support of the black community forced the white Montgomery power structure to break. In the face of similar boycotts, other Alabama cities, like Mobile, simply abandoned the formal, enforced segregation of their public transportation systems.²¹

Not surprisingly, the Montgomery bus boycott has come to represent the birth of the modern civil rights movement. In many respects, the Montgomery bus boycott stands to the American civil rights movement as the Battle of Concord stands to the American Revolution; it constituted a kind of "shot heard 'round the world." Virtually every school child in the nation knows that on December 1, 1955, Mrs. Rosa Parks refused to give up her seat on a Montgomery city bus. In addition to its undeniable symbolic and historic importance, however, the Montgomery bus boycott also demonstrates the critical importance of broad-based community support to the success of the American civil rights movement.

It is certainly true that, following events like the Montgomery bus boycott and the Selma-to-Montgomery march, the civil rights movement benefitted from "outside" intervention in the form of federal legislation. Thus, one cannot deny that federal law played an essential role in the transformation of the South.²² However,

19. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 203-05 (1988) ("After the boycott, the mantle of fame fell ever more personally on King. . . ."); WILLIAMS, *supra* note 15, at 73-89.

20. See BASS, *TAMING THE STORM*, *supra* note 4, at 95-113 (1993); GARROW, *supra* note 15, at 26-29, 51-59, 75-82; JACK BASS, *UNLIKELY HEROES*, 56-83 (1981).

21. See GARROW, *supra* note 15, at 26, 52, 70 (discussing the "first-come, first-seated" policy as a form of compromise). See also WILLIAMS, *supra* note 15, at 60-61, 89 (same).

22. In fact, federal judicial intervention facilitated some of the mass protests that, in turn, precipitated significant (and effective) broad-based legal reforms, such as the Voting Rights Act of 1965. See GARROW, *supra* note 15, at 357-430. See also Williams v. Wallace, 240 F. Supp. 100, 110 (M.D. Ala. 1965) (enjoining the state from interfering with plaintiffs' proposed march); Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1412 (1995) (arguing that the Selma march prompted Congress to pass the Voting Rights Act of 1965).

this role was largely reactive. Federal intervention did not precipitate local activism, but instead followed it. "Outside" intervention worked only *after* local efforts created the conditions that forced changes in the legal system.

President Eisenhower's intervention at Little Rock's Central High School on September 24, 1957 provides an excellent illustration of this phenomenon. President Eisenhower did not force integration on Little Rock, Arkansas at the point of a bayonet; instead, local parents in Little Rock demanded that their children enjoy access to a desegregated public education.²³ Average people with above average courage demanded that *Brown v. Board of Education*²⁴ be more than a moral platitude.²⁵ Considered in context, President Eisenhower's use of federal force at Little Rock's Central High School was the *product* of local activism, not the *cause* of it.²⁶

Similarly, local voter registration efforts and mass protests led to the passage of the Civil Rights Act of 1960, despite local officials who sometimes met these efforts with mere intransigence and at other times with shocking brutality.²⁷ Boycotts and mass protests in Birmingham coupled with the crushing force used by local authorities to suppress them led to passage of the Civil Rights Act of 1964.²⁸ Consistent with this pattern, passage of the Voting Rights Act of 1965 *followed* the Selma-to-Montgomery march; it did not precipitate it.²⁹ Indeed, *every* significant legal step on the

23. See *Cooper v. Aaron*, 358 U.S. 1, 4, 8 (1958) (refusing to suspend school board's court-approved desegregation program which a "large majority of the residents" had supported).

24. 347 U.S. 483 (1954).

25. See *Cooper*, 358 U.S. at 8 (noting the residents' belief that the desegregation plan was "still the best for the interests of all pupils in the district").

26. BASS, UNLIKELY HEROES, *supra* note 20, at 149-155; see generally BRANCH, *supra* note 19, at 222-25 (discussing the "Little Rock crisis"); GARROW, *supra* note 15, at 98, 119 (noting that the Little Rock crisis brought the issue of segregation "'to the forefront of the conscience of the nation'"); CHIEF JUSTICE EARL WARREN, THE MEMOIRS OF EARL WARREN 291 (1977) (noting Eisenhower's failure to take a definitive stand on desegregation); WILLIAMS, *supra* note 15, at 91-119 (same).

27. See generally BRANCH, *supra* note 19, at 485-86; JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 439-40 (6th ed. 1988); GARROW, *supra* note 15, at 127-38.

28. See BASS, UNLIKELY HEROES, *supra* note 20, at 201-12; GARROW, *supra* note 15, at 249-50, 267-69; BRANCH, *supra* note 19, at 795-802; WHALEN & WHALEN, *supra* note 11, at xvii-xx, 227-29.

29. See DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 133-78 (1978); See also Krotoszynski, *supra* note 22, at

road to dismantling the Jim Crow South followed acts of social protest by individual citizens living under the system.³⁰

Again, I do not mean to suggest that law played no role in the transformation of the South. On the contrary, law was essential to the success of the movement. In particular, federal judges like Frank M. Johnson, Jr., J. Skelly Wright, John Minor Wisdom, Elbert P. Tuttle, Richard W. Rives, and John R. Brown demanded that Southern state governments observe the rule of law, often at great personal risk.³¹ The undeniable fact, however, is that legal reforms neither precipitated nor maintained the American civil rights movement.

Indeed, if law itself were capable of working such change, segregation should have come to an end swiftly after passage of the Civil War Amendments.³² As we all know, the Fourteenth Amendment did not, as if by magic, transform the South in the aftermath of the Civil War. Instead, generations after the adoption of constitutional amendments that ostensibly guaranteed basic civil rights to all citizens regardless of race,³³ black Southerners transformed their region by demanding that they be granted the equal protection of the laws, including suffrage.

In sum, changes in the law were certainly a necessary condition for the success of the American civil rights movement, but they plainly were not a sufficient condition for transformation or fundamental change.³⁴ When meaningful reform finally came, it

1412, 1427 (discussing the impact of the Selma march).

30. Even the Supreme Court decisions dismantling "separate but equal" education facilities were the product of local activism, rather than the precipitating event for such activism. See *Brown v. Board of Educ.*, 347 U.S. at 487 (1954) ("[M]inors of the Negro race . . . seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis."); *Sweatt v. Painter*, 339 U.S. 629, 631 (1950) (challenging a race-based denial of admission to a state law school); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (same); see also WILLIAMS, *supra* note 15, at 1-35.

31. See BASS, *UNLIKELY HEROES*, *supra* note 20, at 23-56, 78-82, 112-35; see also BASS, *TAMING THE STORM*, *supra* note 4, at 118-31, 142-72.

32. See generally JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* 293-338 (1948) (discussing reconstruction); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 53-83, 152-73, 168-69, 194-219 (Daniel J. Boorstin ed., 2d ed. 1994) (discussing the inadequacy of federal enforcement laws to protect African-American citizens).

33. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

34. South Africa provides a second example of the importance of local activism as a precondition to social reform. The end of *Herrenvolk* democracy in South Africa was much more the product of the individual commitment of millions of black South Africans

had much more to do with the dreams and aspirations of millions of black Americans than with the legal regime established by the "radical" Republicans who served in Congress during the late 1860s and early 1870s.³⁵

B. Lessons for the Campaign Against Female Circumcision

Professor Obiora has set forth a powerful indictment of the effectiveness of both international pressure and domestic legislation to end the practice of female circumcision. The failure of both the international human rights community and domestic governments to make significant progress toward eradicating the practice of female circumcision reflects the fact that many (and perhaps most) women in the affected cultures and subcultures do not view the practice as "mutilation." As Professor Obiora reports, "most studies on female circumcision seldom articulate personal discontent by its 'victims.'"³⁶ Furthermore "there has been no *significant* decline in the practice," reflecting a decision by "those directly affected by the issue [to] remain faithful to their traditional obligation to circumcise."³⁷

So long as those with the most direct interest in the abolition of the practice continue to view it as central to their cultures, it seems highly unlikely that legal reforms alone will have a meaningful impact on the incidence of female circumcision. If history is any guide, attempts at legal prohibition in the absence of educa-

to achieving full and equal citizenship than it was the global community's repeated statements of outrage regarding the immorality of the apartheid system. As current President Nelson Mandela explains in his autobiography: "Oliver Tambo and the ANC had called for the people of South Africa to render the country ungovernable, and the people were obliging." NELSON R. MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 461 (1994). Frustrated by generations of oppression, "[t]he anger of the masses was unrestrained; the townships were in upheaval." *Id.* As in the case of the American South, the incredible bravery of ordinary citizens was the principal cause of the collapse of a racist and oppressive system of government. *See id.*, at 451-56, 461, 477-81, 484-86, 490-505; *see also* DAVID OTTAWAY, *CHAINED TOGETHER: MANDELA, DE KLERK, AND THE STRUGGLE TO REMAKE SOUTH AFRICA* (1993); *CRUCIBLE OF FIRE: THE CHURCH CONFRONTS APARTHEID* ix-xiii, 23-31, 33-39 (Jim Wallis & Joyce Hollyday eds., 1989) (Foreword by Allan Boesak).

35. *Cf.* FRANKLIN & MOSS, *supra* note 27, at 436-70 (describing the substantial progress toward equality that black Americans achieved during the "black revolution" years of the 1950s to the 1970s); *see generally* FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR*, *supra* note 32, at 89-219; FRANKLIN, *FROM SLAVERY TO FREEDOM*, *supra* note 32, at 320-338.

36. Obiora, *supra* note 1, at 317.

37. *Id.*

tional campaigns and/or efforts to ameliorate the cultural impact of prohibition are doomed to failure.³⁸

This should not come as a surprise. In the absence of a community consensus that a particular practice or custom is unacceptable, a legal prohibition is unlikely to be effective in altering traditional behaviors.³⁹ Professor Obiora makes a compelling case for the proposition that, at least at present, a consensus does not exist within the relevant communities that female circumcision constitutes a social evil. Reformers would do well to address this state of affairs before demanding strong legal interventions.

For transformation through legal reform to be possible, there must first be local support for such change. It seems highly unlikely that the law is capable of unilaterally obliterating a practice deeply ingrained in the cultural and legal systems of a number of African nations. It is highly doubtful that an approach to reform based on condemning female circumcision and insisting on its immediate legal abolition will prove successful in eradicating the practice, any more than the Civil War and passage of the Thirteenth, Fourteenth, and Fifteenth Amendments ended Southern apartheid in the United States. At best, the legal prohibition might go unenforced, and, at worst, the prohibition might drive the practice "underground."⁴⁰

The real challenge is formulating a plan of constructive engagement that educates African women and men about the dangers associated with the practice of female circumcision and the reasons that the practice should be abandoned. Simply condemning the practice as "evil" and "immoral" is unlikely to provoke much debate within the relevant cultures.⁴¹

38. See *id.* at 329-32; see also TYLER, *supra* note 13, at 19-39, 173-78 (recognizing that people evaluate laws and legal authority in normative terms).

39. See TYLER, *supra* note 13, at 22-30, 64-68, 176-78 (discussing the ineffectiveness of social control mechanisms); see also JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 28-47 (1985) (discussing the effectiveness of the "ordinary weapons of relatively powerless groups").

40. See Neil MacFarquhar, *Mutilation of Egyptian Girls: Despite Ban, It Goes On*, N.Y. TIMES, Aug. 8, 1996, at A3 (noting concern that practice will be increasingly performed "behind closed doors"); see also Obiora, *supra* note 1, at 87 (discussing same).

41. Indeed, such an approach evokes former First Lady Nancy Reagan's remonstration to the nation's youth to "Just Say No" to drugs. The drug culture that presently blights communities in the United States has myriad causes and will not vanish upon the recitation of the "Just Say No" mantra. A legal prohibition on the sale and use of crack cocaine will never eradicate its use in the absence of sophisticated social welfare experiments aimed at reorienting the dreams and aspirations of inner city youth. Cf. James W.

Imagine, if you will, attempting to ban a widespread practice in the United States that is known to be deleterious to health—smoking. Would a ban on the sale and/or possession of tobacco products eradicate the consumption of such products? Without conducting field research on the question, I think it highly doubtful that a flat prohibition would prove successful.⁴² The American constitutional experiment with Prohibition⁴³ provides a compelling historical example of a failed attempt to use law to reshape society in a fundamental way. Although Westerners may have difficulty accepting the material equivalency of, on the one hand, a beer and a cigarette and, on the other, female circumcision, in cross-cultural terms a material equivalency may exist with respect to the inefficacy of legal prohibition as a regulatory paradigm.⁴⁴

Within the cultures that practice female circumcision, the practice is simply a cultural fact—not unlike the cultural fact of smoking and drinking in the United States.⁴⁵ That we perceive the human costs associated with that cultural fact to be significantly higher than those associated with the use of tobacco or alcohol does not alter the salience or relevance of female circumcision within the cultures that observe the practice. As Professor Obiora notes, our reaction to female circumcision is a function of our cultural sensibilities.⁴⁶

Body piercing provides an illustration of the diversity of acceptable cultural practices. In the United States, piercing has become a pop culture phenomenon: tongues, nipples, noses, eyebrows, and, yes, even genitalia are now festooned with various kinds of metal studs.⁴⁷ No hue and cry has been raised; no broad-

Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 170 (1996) (arguing that welfare policy should reflect the “multiple spheres” that influence self-worth).

42. This has certainly proven to be the case in prisons that have attempted to ban the consumption of tobacco products. See Henriette Campagne, *What's Up on the Hill: Smoking Ban at Prisons Draws Fire*, MASS. LAW. WKLY., June 17, 1996, at A27; Gordon Smith, *Will Inmates See the Light Over Smoking Ban?*, SAN DIEGO UNION-TRIB., Mar. 22, 1993, at A2; Michelle Quinn, *Smoking Ban a Problem for Prisons*, SAN FRANCISCO CHRON., Feb. 24, 1993, at A14.

43. See U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

44. See Obiora, *supra* note 1, at 371 (“[A] woman from a circumcising culture may well reject circumcision at the risk of a loss of status, respect, and support within her own group.”).

45. See, e.g., MacFarquhar, *supra* note 40 (noting that female circumcision is grounded in culture).

46. See Obiora, *supra* note 1, at 318-22.

47. See Laura Blumenfeld, *Holier Than Thou*, WASH. POST, Feb. 7, 1993, at F1; see

based movement demanding the legislative abolition of body piercing has arisen. In a pluralistic society that largely adheres to a Millsian liberty ethic, one man's vulgarity can serve as another's body decoration.⁴⁸ Our cultural sensibilities condition our response to a particular practice, just as our cultural sensibilities largely control our attraction (or aversion) to certain foods.

By no means do I equate body piercing with female circumcision—especially in its more extreme forms.⁴⁹ A particularly relevant distinction is the notion of choice: female infants and young girls often do not enjoy the luxury of electing or not electing to be “circumcised.” In the absence of meaningful choice, the practice constitutes an extreme and unjustifiable form of physiological denial.⁵⁰ I am suggesting, however, that our own sense of outrage at the practice may not be shared by those who have the most direct interest in its eradication and that this state of affairs does not necessarily reflect badly on African women who have been culturalized to embrace the practice as a natural and normal modification of their bodies.⁵¹ In the absence of a decision by African women themselves to abandon the practice, the expressions of outrage emanating from international conferences on human rights will do little to change the attitudes or expectations of African women and men toward female circumcision.

also Alex Kershaw, *FutureSex: The Final Frontier*, GUARDIAN (London), Oct. 22, 1995, at 30; Trish Hall, *Piercing Fad Is Turning Convention on Its Ear*, N.Y. TIMES, May 19, 1991, §1, at 38.

48. See generally *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that free speech rights protect the display of vulgarity on a jacket, even though it may offend a large portion of the population). Certainly, this seems to be the personal philosophy of basketball superstar Dennis Rodman. See DENNIS RODMAN, *BAD AS I WANT TO BE* (1996).

49. See Obiora, *supra* note 1, at 287-89.

50. The Supreme Court, however, has permitted Amish parents to make fundamental life choices for their children, without regard to whether the children would, if given the choice, make the same choice. See *Wisconsin v. Yoder*, 406 U.S. 205, 229-34 (1972). *But cf. id.* at 241-46 (Douglas, J., dissenting) (arguing that parents should not be permitted to make life-altering choices for their children).

51. I agree, however, with Professor Obiora that it is insulting to suggest that all African women are cultural “dupes” and therefore cannot be assumed to exercise any meaningful personal agency. See Obiora, *supra* note 1, at 302-05. Indeed, one would be hard pressed to disagree with her observation that “[t]he basic discovery of feminist studies is that women, insofar as they are oppressed of a culture, are rarely oblivious of their grievances.” *Id.* at 315. It also seems doubtful that African mothers would willingly subject their daughters to circumcision in the absence of strong cultural reasons supporting (perhaps even demanding) the practice. See *id.* at 295-98, 316-18.

This suggests that Professor Obiora's proposals for reform, including clinicalization of the practice and broad-based educational efforts, are imminently reasonable.⁵² Her agenda for change begins with modifying the attitudes of African women themselves⁵³ and, in the interim, ameliorating the worst effects of the practice.⁵⁴ Efforts of this sort are an absolute precondition to the effectiveness of legal proscriptions against female circumcision.

Law as an agent of social reform has concrete limitations; one cannot rewrite by legislative fiat the content of people's hearts and minds. Only after African women themselves begin to question the legitimacy of female circumcision, can law play an important role in accelerating the rate of change. While Professor Obiora does not reject legal proscriptions as an element of a comprehensive reform program,⁵⁵ she questions the ability of law, standing alone, to unseat long and deeply held cultural values.⁵⁶ The lessons of American constitutional and political history amply justify her skepticism regarding law's ability to effect fundamental social reforms in the absence of grass roots support for such transformations.

II. CONSTITUTIONAL TOLERANCES (AND INTOLERANCES): A LESSON IN COMPARATIVE HUMAN RIGHTS

Although Professor Obiora plainly supports reform efforts aimed at eliminating the adverse health effects associated with female circumcision,⁵⁷ she also challenges the reader to reconsider the Western human rights community's complete and unqualified condemnation of the practice.⁵⁸ Obiora's objections are not a defense or justification of the practice, but rather as a plea for the West to consider the cultural significance and status of the practice.⁵⁹ In this regard, she asks why forms of body modification

52. See generally *id.* at 361-76.

53. See *id.* at 361-62.

54. See *id.* at 365-67 (urging clinicalization for all future circumcisions).

55. See *id.* at 357-58.

56. See Obiora, *supra* note 1, at 357-60 (questioning the effectiveness of laws in the face of cost of enforcement and lack of voluntary compliance).

57. See *id.* at 357-58 (urging clinicalization).

58. See *id.* at 292-98 (discussing the history and cultural significance of circumcision to those who practice it); see also *id.* at 303-05 (arguing that the Western view of African women as subjugated to men is inaccurate and that African women possess initiative and self-reliance).

59. See *id.* at 305-06.

practiced in the West do not implicate universalist human rights norms, whereas similar practices in traditional African cultures are "fetishized" and subjected to broad-based condemnation and calls for legislative prohibition.⁶⁰

Professor Obiora is no doubt correct to posit that the revulsion expressed by Western critics of female circumcision is a product of their socialization and culture.⁶¹ This state of affairs is not particularly surprising; like legal norms, moral norms do not exist in a cultural vacuum. Even in the United States, culture shapes and defines the moral sense of both lawmakers and judges. In turn, the moral sensibilities of legislators and judges affect the community's legal order.⁶²

A. *The Free Exercise Clause: Culture Shaping Law*

The Free Exercise clause of the First Amendment⁶³ provides an excellent example of the impact of cultural sensibilities and biases on the legal order. Historically, the Supreme Court has refused to interpret the Free Exercise clause to protect the religious practices of unpopular religious minorities. Thus, in *Reynolds v. United States*,⁶⁴ the Court squarely rejected a free exercise challenge brought by Mormons against a federal prohibition on bigamy.⁶⁵ The court stated,

[L]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . .

. . . .

60. See *id.* at 318-22.

61. See Obiora, *supra* note 1, at 314-16 (discussing the effect of a culture on the views held by its members).

62. For example, Associate Justice Antonin Scalia appears to believe that federal judges should bring their personal moral and religious sense to bear when executing their official duties. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring). See also *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part); Chandler, *supra* note 7 (discussing whether Scalia's defense of Christianity, delivered at a Baptist prayer breakfast, demonstrates an inability to remain impartial).

63. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

64. 98 U.S. 145 (1878).

65. See *id.* at 166-67; see also *Davis v. Beason*, 133 U.S. 333 (1890) (upholding Idaho voting law that required that the voter did not belong to any group advocating bigamy or polygamy).

Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.⁶⁶

The Supreme Court recently reaffirmed this view of the Free Exercise clause in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁶⁷ The court in *Smith* affirmed the denial of unemployment compensation benefits to Native Americans who were fired from their drug counselling positions because they regularly ingested peyote—a practice consistent with their religious beliefs but illegal under state law. Writing for the majority, Justice Scalia opined that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on the measuring effects of a governmental action on a religious objector’s spiritual development.’”⁶⁸

Congress has taken a somewhat broader view of the religious prerogatives of the citizenry, enacting the Religious Freedom Restoration Act of 1993 (the “RFRA”)⁶⁹ to overturn legislatively the rule announced in *Smith*.⁷⁰ Under the RFRA, a legislative enactment that burdens a religious practice must serve a compelling state interest to be valid as applied against the religious practice.⁷¹ It essentially creates a presumption that religious minorities may engage in otherwise prohibited conduct in order to satisfy their religious obligations.⁷²

66. *Reynolds*, 98 U.S. at 166-67.

67. 494 U.S. 872 (1990).

68. *Id.* at 885 (quoting *Lying v. Northwest Indian Cemetary Protective Assn.*, 485 U.S. 439, 451 (1988)).

69. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §2000bb (1993)).

70. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 895 (1994).

71. See 42 U.S.C. § 2000bb(b); see also *Lawson v. Dugger*, 844 F. Supp. 1538, 1541 (S.D. Fla. 1994) (applying compelling interest test as required by RFRA to prison policy of literature censorship), *rev'd sub nom. on other grounds*, *Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996) (finding that new prison policy did not violate compelling interest test and trial court erred by refusing to consider new policy); *Allah v. Menei*, 844 F. Supp. 1056, 1062 (E.D. Pa. 1994) (holding that compelling interest test now applies to all state statutes that burden religious practice).

72. The federal courts have not yet spoken to the possible application of the RFRA to female circumcision. It would seem, however, that persons from cultures practicing female

If *Smith* and *Reynolds* reflected a consistent line of jurisprudence, one might credibly argue that the meaning of the Free Exercise clause is not culturally contingent. However, these cases do not reflect an unbroken and consistent jurisprudence. In *Wisconsin v. Yoder*,⁷³ the Supreme Court held that Amish children could not be compelled to attend high school.⁷⁴ Although Wisconsin's compulsory attendance law constituted a "neutral" law of general applicability (i.e., the obligation to attend secondary school applied to all minors within the state and the Wisconsin legislature did not pass the law in order to burden any particular religious minority⁷⁵), the Supreme Court nevertheless exempted Amish children from its application.

Chief Justice Burger's opinion in *Yoder* clearly reflects unbribed admiration for the Amish people's yeoman-farmer lifestyle:

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. . . . Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their

circumcision could attempt to use the RFRA as a shield to possible prosecutions arising from circumcising their daughters. (Editor's Note: This comment was written before Congress criminalized female circumcision in the United States. See generally James T. Dixon, *Introduction*, 47 CASE W. RES. L.REV. 263, 266 n.14 (1997) (describing the prohibited acts under the new law).) Whether this will remain the case after the Supreme Court issues its decision in *Flores v. City of Boerne* remains to be seen. See 73 F.3d 1352 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3292 (U.S. Oct. 15, 1996) (No. 95-2074) (reversing trial court's holding that RFRA is unconstitutional and finding that Congress had power to enact RFRA without violating separation of powers doctrine or First and Tenth Amendments); see also Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 439-45 (1994) (arguing that the RFRA should be deemed unconstitutional for at least three reasons, notably including the RFRA's implicit assumption that Congress may legislatively override the Supreme Court's interpretation of the Free Exercise Clause).

73. 406 U.S. 205 (1972).

74. *Id.* at 234.

75. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-47 (1993) (overturning city ordinance prohibiting ritual slaughter of animals on grounds that ordinance's lack of neutrality impermissibly infringed on religious rights).

idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.⁷⁶

Would a majority of the justices have been as solicitous of the free exercise claims of a group of Rastafarians who wished to establish a commune in violation of a local zoning ordinance? I suspect that they would not.⁷⁷ The decision in *Yoder* reflects and incorporates cultural assumptions about the moral worth of the Old Order Amish: A majority of the Supreme Court viewed the Amish way of life as consistent with dominant community paradigms—notably including the Protestant work ethic. Accordingly, the Supreme Court interpreted the Free Exercise clause to protect this religious minority from the unintended consequences of the Wisconsin compulsory attendance laws.

The First Amendment right to the free exercise of religion permits some deviance from community norms; the degree and kind of deviance permitted under *Yoder* (and now the RFRA) will be a function of the cultural sensibilities of individual federal judges. Thus, the substantive meaning of the “right to free exercise” is (at least in part) culturally determined. Moreover, this observation is not intended to be a criticism of *Yoder*, the RFRA, or any individual jurist. The substantive content of many rights is culturally dependent; one’s sense of justice is necessarily something of a function of one’s cultural norms.⁷⁸

76. *Yoder*, 406 U.S. at 222, 225-26; cf. *id.* at 246-47, 247 n.5 (Douglas, J., dissenting) (criticizing the majority’s reliance on the “law and order” record of the Amish people and asking rhetorically “how the Catholics, Episcopalians, the Baptists, Jehovah’s Witnesses, the Unitarians, and [his] own Presbyterians would make out if subjected to such a test”).

77. See, e.g., *Employment Div., Dep’t of Resources v. Smith*, 494 U.S. 872, 879-85, 890 (1990) (discussing cases in which religious motivations did not automatically merit exemption from neutral laws of general application).

78. For example, the Japanese Supreme Court has tolerated higher levels of government regulation of indecent and obscene materials than has the Supreme Court of the United States. See *Ishii v. Japan* (the de Sade Case), 23 Keishu 10 at 1239 (High Ct. 1969), reprinted in HIROSHI ITOH & LAWRENCE W. BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70* 183 (1978); Judgment Upon Case of Translation and Publication of *Lady Chatterley’s Lover* and Article 175 of the Penal Code (1957), reprinted in SAIKO SAIBANSHO, 2 *SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY*; see also LAWRENCE W. BEER, *FREEDOM OF EXPRESSION IN JAPAN* 335-61 (1984) (discussing the Japanese Supreme Court’s treatment of obscenity cases). This does not mean that the Japanese Constitution’s guarantee of free speech is meaningless, but rather means that the Japanese conception of the “freedom of speech” happens to differ from that of the Supreme Court of the United States.

B. Tradition, Culture, and the Right of Privacy

The Supreme Court's approach to the right to privacy also illustrates the close relationship between culture and law. In a series of cases beginning with *Griswold v. Connecticut*,⁷⁹ the Supreme Court has recognized a sphere of personal autonomy that includes the right to substantial personal discretion in matters pertaining to intimate associations and procreation, up to and including the right to terminate an unwanted pregnancy.⁸⁰

Notwithstanding its earlier precedents endorsing the view that the constitutional right of privacy conferred substantial discretion on individual citizens in ordering their intimate associations, in *Bowers v. Hardwick*⁸¹ the Supreme Court held that Georgia could constitutionally criminalize sex between persons of the same sex.⁸² Writing for the five-justice majority, Justice White emphasized the long history of the legislative proscriptions against homosexual sodomy and placed strong reliance on these proscriptions to justify excluding this behavior from the right of privacy.⁸³

Going back even further in time, Chief Justice Burger, concurring separately, cited "Judeo-Christian moral and ethical" prohibitions on homosexual conduct as evidence supporting the majority's decision.⁸⁴ In the Chief Justice's view, because the prohibition against same-sex intimate associations had "ancient roots" reaching back to the time of the Roman Empire, the right of privacy could not plausibly be interpreted to protect such conduct.⁸⁵

It is certainly possible to distinguish heterosexual and homosexual intimate associations, and to afford constitutional protection to the former but not to the later. The distinction, however, does not rest on any *legal* grounds, but rather reflects and incorporates deeply held cultural values about human sexual behavior.

79. 381 U.S. 479 (1965).

80. See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (briefly examining the Court's previous privacy rulings).

81. 478 U.S. 186 (1986).

82. See *id.* at 196.

83. See *id.* at 192 n.5-6, 194 (listing state laws prohibiting sodomy in effect when the Constitution, Bill of Rights, and Fourteenth Amendment were enacted and concluding that these laws indicate that a right to sodomy is not "deeply rooted in this Nation's history and tradition").

84. *Id.* at 196-97 (Burger, C.J., concurring).

85. *Id.*

Although the Supreme Court had recognized a generalized right of privacy, which may encompass the right to engage in extramarital intercourse,⁸⁶ the cultural norm against homosexual conduct justified an exception from the general rule that government cannot regulate intimate associations.⁸⁷ Like *Reynolds, Bowers* is an example of a majority of the Supreme Court enforcing its conception of contemporary community mores. The content of the legal rule, in this case the right of privacy, reflected and incorporated certain cultural values and assumptions.

C. On Culture, Difference, and Human Rights

The foregoing discussion of the Supreme Court's implementation of the Free Exercise clause and the right of privacy demonstrates the close relationship between law and culture; legal norms do not exist free and clear of cultural expectations. Accordingly, it seems to me that Professor Obiora is correct to challenge us to consider the cultural context in which female circumcision is practiced and to recognize that this context is quite different from that of the United States in the late twentieth century.⁸⁸ Even if non-Western governments agree to protect "human rights," this does not necessarily mean that the content of those rights will be identical to those protected in the West. Moreover, this state of affairs does not necessarily imply a moral or legal inferiority on the part of the non-Western governments or cultures. Some care should be taken before applying Western concepts of personal rights and autonomy to traditional African societies.⁸⁹

Of course, even permitting traditional African societies an ample margin of appreciation⁹⁰ to account for the wide disparities

86. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the denial of contraceptives to unmarried persons violates the equal protection clause since it infringes a privacy right).

87. See *Bowers*, 478 U.S. at 190-91.

88. See Obiora, *supra* note 1, at 295-98 (discussing several cultures in which circumcision is practiced).

89. In this regard, one of the more salient distinctions that Professor Obiora identifies is the organic concept of culture that evidently exists in traditional African societies. See *id.* at 292-93, 295. Western rights discourse is firmly grounded on Lockean social contract theory of the state; the notion of the community as an organic whole is largely foreign to this worldview.

90. The phrase "margin of appreciation" has a rich history in the case law of the European Court of Human Rights and is a helpful way of conceptualizing Professor Obiora's admonition to consider the cultural sensibilities of African women and men. The European Court uses the term to describe the deference that it permits signatories to the

that exist in cultural sensibilities, one nevertheless could conclude that the practice of female circumcision violates fundamental human rights and must therefore be abolished. One can agree with Professor Obiora's position that culture must be taken into account before applying normative standards of conduct to particular cultures without ultimately abandoning opposition to the practice of female circumcision.

Professor Obiora is calling the West to task for judging traditional African societies without first giving adequate consideration to the importance of local customs and practices and the role that they play in structuring both individuals and whole communities. She posits that the West (and Western feminists in particular) suffer from the same malady that afflicted Lewis Carroll's Queen of Hearts in *Alice in Wonderland*: a predisposition to judge without first having and weighing all of the relevant facts.⁹¹ The consequences of this state of affairs are terribly high, for by condemning without first understanding, the West has failed to make a credible case for abolition to those most directly affected by the practice of female circumcision.

European Convention on Human Rights and Fundamental Freedoms by balancing local cultural traditions against the need to recognize and enforce minimum human rights. *See* Dudgeon v. United Kingdom, 4 EUR. H.R. REP. 149, 164-67 (1981) (describing the court's use of "margin of appreciation" in balancing North Ireland's interest in prohibiting homosexual relations against general human rights); Sunday Times v. United Kingdom, 2 EUR. H.R. REP. 245, 276 (1979) (stating that "margin of appreciation" is not absolute and court retains power to review); Tyrer v. United Kingdom, 2 EUR. H.R. REP. 1, 10-11 (1978) (balancing local interests in favor of corporal punishment against general interest in avoiding "degrading" punishment); *see also* MIRIELE DELMAS-MARTY, THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS 330-34 (1992); J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 144-49 (1988). Notwithstanding a general consensus among the signatory states that a particular practice, such as corporal punishment, violates the rights and liberties safeguarded by the convention, a member state may argue that its local customs and traditions justify a derogation from the European community's norm. *See id.* at 133; P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 421-49 (1984). The margin of appreciation does not guarantee that the state claiming its benefit will escape liability under the convention; it merely ensures that the European Court will give some consideration to local sensibilities before enforcing community-wide standards on a signatory state. *See* DELMAS-MARTY, *supra*, at 333; MERRILLS, *supra*, at 132. *But cf.* VAN DIJK & VAN HOOFF, *supra*, at 604-06 (arguing that the margin of appreciation has been taken so far that no principals are now fully protected).

91. As the Queen of Hearts so eloquently puts it, "Sentence first—verdict afterwards!" LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 116 (Henry Holt and Co. 1985); *cf.* Obiora, *supra* note 1, at 292-95, 298-99.

Only by recognizing that our instinctive reaction to the practice of female circumcision reflects and incorporates its utter foreignness can the West hope to make a credible case for reform. By recognizing that the content of our own rights discourse is culturally defined, we can begin to attempt to understand the role that female circumcision plays in traditional African cultures. In this regard, the free exercise and privacy cases demonstrate how culture shapes (and sometimes controls) legal and moral understandings and expectations.

In short, Professor Obiora challenges the West to step back and reconsider its attempts to apply its moral and legal reasoning in a linear fashion to African women living in pre-industrial agrarian societies. Her point is a good one and demands a serious response by those most opposed to the practice of female circumcision.

III. CONCLUSION

Professor Obiora has challenged the West to rethink its campaign against female circumcision, on the grounds that current efforts to eradicate the practice are both ineffective and culturally myopic. Both of these criticisms seem to be well-founded. At the same time, I find myself in complete agreement with Western feminists' and the international human rights community's demand that the adverse health effects associated with female circumcision must be addressed expeditiously. It seems to me, however, that one can acknowledge the validity of Professor Obiora's observations without uncritically embracing the practice of female circumcision. Indeed, one could (and perhaps should) interpret Professor Obiora's overall project not as a general defense of female circumcision, but rather as a plea for greater cultural sensitivity on the part of the West. Such sensitivity will be crucial to building the necessary consensus for reform within the affected communities—a step that I believe is an absolute prerequisite to effective legislative reforms. In sum, the Western human rights community must recognize the limits of law as an agent of social change; in so doing, it can urge a platform of reform that successfully utilizes law as an important (but not self-sufficient) element of comprehensive social and cultural change.