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Article

***259 THE HUMAN RIGHTS DILEMMA: RETHINKING THE HUMANITARIAN PROJECT**

[Deborah M. Weissman](#) [\[FN1\]](#)

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The development of usable universal human rights values has been at the heart of international legal deliberations for much of the last fifty years. [\[FN1\]](#) The human rights project has drawn inspiration from the Charter of the United Nations and the Universal Declaration of Human Rights, and has gained new momentum in recent decades. [\[FN2\]](#) Human rights concerns have deepened as new technologies act to collapse time and space, where the circumstances of everyday life in distant places are made known instantly through telecommunication systems and media networks. The suffering of humanity in the form of genocide and ethnic cleansing, torture and mass murder, war and repression, seems to implicate the world at large and arouse the conscience of well-meaning people everywhere. [\[FN3\]](#)

***260** The human rights project offers the possibility of using the law as a means of social change based on a commitment to humanitarian values on a global scale. [\[FN4\]](#) The project addresses the plight of vast numbers of men, women, and children who fall victim to national violence or whose lives are shattered by laissez-faire global capitalism, registered most notably in widening disparities in wealth, diminution of government benefits, and increasing social injustice. [\[FN5\]](#) As people are displaced and dispersed, and as workers migrate to meet the demands of the transnational markets, the human rights movement can offer "global solidarity against national particularism and preferences." [\[FN6\]](#)

The international human rights project currently finds salience within the domestic juridical discourse. Recent U.S. Supreme Court decisions have endorsed the relevance of international human rights norms in cases dealing with such fundamental interests as the death penalty, affirmative action, and the criminalization of same-sex sexual conduct. [\[FN7\]](#) More and more plaintiffs file lawsuits in the United States seeking remedies for human rights abuses that ***261** have occurred elsewhere, intensifying debates over whether U.S. courts are proper sites for resolution of these claims. [\[FN8\]](#) International legal norms have been invoked to guide the adjudication of a number of legal issues. They have been urged as binding principles in adjudicating the validity of civil rights laws addressing gender-based violence, as catalysts for improvement of law-related policies dealing with childcare issues, and as a framework in drafting state English-only laws. [\[FN9\]](#) Increasingly, international human rights law is moving into the deliberations of domestic legal fora. These developments suggest that the legal community will inevitably be obliged to consider larger issues of international human rights concerns in the everyday domains of law.

The human rights project seems to represent an endeavor of self-evident and self-confirming virtue, but it is more complicated. It arrives in our time possessed of a past. The human rights project has served a variety of uses, often less altruistic than the humanitarian purposes with which it is now associated. Colonial powers often proclaimed humanitarian purpose as ***262** justification for conquest and territorial aggrandizement. More recently, human rights concerns have served as a rationale for U.S. military intervention. [\[FN10\]](#) Human rights norms are subject to malleable standards and have been capable of advancing U.S. strategic and economic interests through coercive means, often at the

expense of humanitarian concerns. [\[FN11\]](#)

It is, therefore, appropriate to subject the human rights project to new scrutiny, to determine if it functions under the cover of virtue to insulate and immunize national policies against criticism. What concerns should be raised for the future of the human rights project in light of the ease with which it can be appropriated to serve national interests? How can the legal community respond to issues of globalization without an awareness of the historical antecedents of the human rights project? Given the complex cultural terrain of human rights, what difficulties face U.S. courts that are asked not only to adjudicate matters involving international human rights violations, but also to consider international law perspectives in domestic matters? [\[FN12\]](#) Are there lessons to be learned that bear on the convergence of sources of law and morality and the exercise of power and coercion associated with the human rights project?

This Article provides an interpretive account of the human rights discourse at a time when the U.S. legal community is deepening its relationship with these issues. It maps the context of the human rights project over the past hundred years with a critical eye and as a cautionary tale. It reviews the historical circumstances and the ideological framework in which human rights have been appropriated as an instrument of national policy, often to the detriment of humanitarian objectives. It considers the role of law, not only as an instrument by which colonial rule was maintained, but as a system that has claimed center stage in the human rights project, often producing outcomes inimical to human rights. It demonstrates that the disparity in power between the colonizer and the colonized continues to affect the ongoing development of human rights norms and has resulted in the production of legal remedies that are often incapable of safeguarding international human rights.

***263** This Article suggests that the human rights project must be guided by an awareness of the power relationships that shape proposed remedies. Without such concerns, humanitarian enterprises may inadvertently reproduce the very wrongs they seek to correct. [\[FN13\]](#) It argues for the importance of preserving human rights as a transcendent endeavor and as a means of opposing, rather than facilitating the domination of other cultures. [\[FN14\]](#)

Gender-related human rights issues are discussed as one of several discrete concerns that inform the themes raised in this Article. [\[FN15\]](#) Legal developments and the global circumstances of women provide a particularly useful lens through which controversial issues involving human rights concerns can be examined. The condition of women was repeatedly invoked as justification for colonial intervention and readily illustrates the misuse of the human rights project. An examination of the gender formulations of humanitarian concerns in service of foreign policy objectives illuminates the particular harms women have suffered both during and after periods of colonial occupations. [\[FN16\]](#) Moreover, the multiple tensions to which women are subjected, and the exceptional position they occupy as "cultural conduits" within kinship systems and communities, serve to set in relief a broad range of human rights issues. [\[FN17\]](#)

Challenges to formulating legal strategies targeted to the harms women suffer also reflect the gender dimensions of human rights concerns. Legal norms that focus on the condition of women are often developed and applied in the real world of competing ideologies and diverse religions, of different legal ***264** systems and dissimilar cultural norms, and often respond to the interests of power. [\[FN18\]](#) An examination of the development of gender-specific human rights remedies under such circumstances thus provides a critical perspective from which to evaluate the usefulness of legal remedies. This focus on women will move the discussion away from the abstract and toward the concrete circumstances of daily life, precisely where human rights activists will confront the greatest difficulties arising from the compromise of the human rights discourse.

Part I.A begins by examining the role of human rights as a rationale of colonialism in order to demonstrate the ways that these ideals have served as the moral basis of colonial domination. It reviews the key issues in the historical accounts of misuse of the human rights discourse and the tendency of colonial powers to discredit value systems of other cultures as a means of justifying colonial intervention. Attention is given to the U.S. experience during the early period of colonial expansion in the Pacific and Caribbean, which illustrates that the colonial case for humanitarian intervention neither sought, nor accomplished, the improvement of the human condition, but rather caused more harm than good. [\[FN19\]](#) Having stated the problem, Part I.B then examines the conditions--specifically the ideological underpinnings of U.S. foreign policy--by which the disingenuous application of humanitarian concerns found acceptance and allowed colonization to become articulated as a humanitarian effort. On this point, this Article expands upon concepts developed

in other works examining the ideological determinants that have produced human rights maxims. [\[FN20\]](#) Part I.C concludes with an examination of the ways in which the law served to entrench colonial subordination and deny individuals the very rights that had justified intervention.

Part II moves from the historical and theoretical to consider the consequences of colonialism and how notions of universal human rights have entered contested realms. It examines the relationship between resistance to colonialism and the formation of human rights values. It reviews the resulting *265 formulaic legal solutions that often fail to address human rights abuses, or worse, serve to perpetuate human rights violations. Part II then resumes the focus on the United States and suggests that the development of the U.S. human rights project is often distorted by inaccurate information and a disregard for global perspectives on human rights circumstances.

Part III uses case narratives to illustrate the ways that the human rights discourse stipulates the need to rescue people of other cultures from themselves. It examines how legal narratives in media accounts and legislative debates about human rights abuses can distort other cultural realities in the guise of sympathy and support. It demonstrates that the comparative legal discourse serves to situate the United States above all other nations as arbiter of human rights abuses and agent of humanitarian relief.

Part IV suggests that current approaches to humanitarian concerns risk repetition of past errors and may inhibit progress in the field of human rights. It emphasizes concern for methodology as a means of affecting programmatic changes in the human rights project. It concludes by proposing the need for the ongoing examination of intent and purpose of intervention, always respectful of diverse normative systems and the capacity of all people to contribute to human rights solutions.

Critical examination of the human rights project does not imply a repudiation of humanitarian work. [\[FN21\]](#) This Article goes beyond theory to move human rights work out of the realm of conventional truths to the domains of critical re-examination. [\[FN22\]](#) It acknowledges that a critique of human rights is difficult and that "when confronted with suffering, all moral demands converge on the single imperative of action." [\[FN23\]](#) But it is also important to consider how "doing something" may serve the national interests of the rescuer more than the interest of the victims. [\[FN24\]](#) Human rights law functions best when it acts with cognizance of context and awareness of the cultural and national determinants *266 by which the very concept of human rights can plausibly enter the domains of commonly shared values. Most importantly, however, this Article suggests that human rights advocates must bear the burden of these cultural and national uncertainties in a way that will make their already complicated work that much more challenging. [\[FN25\]](#)

I. Values, Power, and Distortion: Colonialism and the Ideology of the Redeemer Nation

A review of the historical circumstances under which humanitarian intervention was undertaken illustrates the challenging task of ascertaining whether human suffering warrants the threat of or use of force with its attendant likelihood of disruption, suffering, and loss of life. The difficulty of agreeing on what specific practices arise to the requisite level of human rights violations to justify interference with the sovereignty of another state is exacerbated by the disparity in power implicit in the very act of formulating human rights norms. [\[FN26\]](#) That universal human rights norms are often applied by dominant powers unevenly, or deployed in pursuit of self-interests, invites caution and scrutiny of the human rights project. [\[FN27\]](#) Value systems articulated by groups who can *267 conceive of the universal-- itself a cultural construct--to be imposed upon those who dwell in the national and local often cause greater harm than good and serve to further place the usefulness of human rights norms in international law in doubt.

A. A History of Claiming and Denying Human Rights [\[FN28\]](#)

1. Human Rights as the Moral Basis for Colonialism

Claims to a higher civilization, usually represented as a superior morality and the imperative of modernity, have long served as justification for colonial expansion. [FN29] Colonialism has characteristically invoked Manichean dichotomies to justify the exercise of power over alien peoples, of civilization and enlightenment on one side, and barbarism and backwardness on the other. [FN30] Colonizers assigned themselves the task of uplifting "uncivilized" people who represented "the negation of values," and set out to transform norms of the colonized cultures to correspond to the standards of morality as conceived in the world of the colonizer. [FN31] However, the far-reaching normative disruptions resulting from the installation of colonial regimes inevitably compromised the efficacy of humanitarian projects and did little to garner respect for human rights. A central example of this phenomenon is the depiction of the "colonized *268 woman," whose condition has often been invoked as the object of civilizing. [FN32] Practices such as veiling, polygamy, child-marriages, and sati (widow immolation), among others, have served to justify the imposition of colonial rule. [FN33] The need for British rule in India was, in part, justified as a means to outlaw a number of practices relating to women and girls, including female infanticide, forced marriages, and sati. [FN34] Just as often, the defense of colonialism was based upon the general depiction of women as vulnerable sexual victims or as wayward girls in need of discipline and protection from uncivilized males. [FN35]

Advocates of U.S. expansion in the Pacific and Caribbean often invoked the condition of women to justify the need for enlightened U.S. intervention. [FN36] Congressmen used inflammatory rhetoric to describe injustices committed against Cuban women by the Spanish in order to promote military intervention in Cuba's war for independence. [FN37] Others reported of Cuban women who "were doomed to a grinding struggle for existence," and who *269 endured "evil conditions" under the Spanish while suffering from Cuban men who "have yet to be taught to value and respect the opposite sex at its true worth." [FN38]

Newspaper accounts romanticized as they sensationalized the plight of Cuban women. The Americans' "rescue" of nineteen-year-old Evangelina Cossío y Cisneros, imprisoned in Cuba because she allegedly resisted the advances of a Spanish officer, served as justification for military intervention and as metaphor for Cuba's deliverance. [FN39] Like Cossío, Cuba also needed to be rescued. The fact that the Cossío rescue episode was staged was of little importance to those clamoring for intervention. [FN40]

The three-year U.S. military campaign in the Philippines that began in 1899 was justified in part in the name of victimized Filipinas who suffered at the hands of barbaric Filipinos. [FN41] Filipinos were represented as ineffective heads of households who were unable to assume responsibility for the well-being of their families. [FN42] The moral was unambiguous--if they could not care for their households, they could hardly be entrusted to care for their country. Filipinos, as well as Puerto Ricans, were depicted as dependent children in political cartoons. [FN43] These constructs provided additional rationale for the United States to assume the role of savior, as proper "authoritative heads of household" who would bring civilization to the islands. [FN44]

*270 In Haiti, U.S. military intervention in 1915 was represented as necessary to govern unruly Haitian women whose sexual excesses contributed to Haiti's lack of social order. [FN45] Haitian women were portrayed as lacking morality, and hence, evil, dangerous, and loathsome. [FN46] These depictions, together with other paternalistic images and debasing characterizations of Haitians, created the *raison d'être* for the subsequent military occupation (1915-1934). [FN47] Similarly, U.S. colonists in Hawaii set out to improve the condition of Hawaiian women, who they claimed suffered a degraded status within a social group they described as "childlike and simple." [FN48]

Civilization in these foreign lands was fashioned on the understanding that the condition of local women was variously immoral and improper, or hopelessly subject to abuse by uncivilized men. In either case, women were in need of rescue. Thus, the logic of colonial rule has frequently been validated by the manipulation of images of women as victims of local oppression; as hapless and helpless, and in need of the protection of a superior cultural system. [FN49] Colonized people are often represented in child/female imagery, in need of protection by the colonizer nation depicted as adult/male. [FN50] The process of rendering categories of victim and savior served as more than the pretext for military intervention. It also provided the justification for efforts to substitute the cultural systems and values of the colonized for those of the colonizer. [FN51]

***271 2. Colonialism Disguised as Humanitarian Intervention: Inevitable Harmful Consequences**

The costs of discrediting cultural values are measured in the disarray of local moral systems and disruption of material conditions. [\[FN52\]](#) For all of the paternalistic claims of good intention, women have fared poorly under colonial rule. As primary caretakers of family and community, they have often borne the brunt of the social disorder produced by colonial domination and have suffered human rights abuses at the hands of colonial occupiers. [\[FN53\]](#) Colonizers imposed their patriarchal norms upon colonized women, who, in many countries, actually enjoyed greater sexual freedom and control of more economic resources than their counterparts in Europe and the United States. [\[FN54\]](#) Colonized women who previously had access to land were often reduced to unpaid family members dependent upon their husbands' wages, their status diminished and their freedom reduced. [\[FN55\]](#)

***272** Colonial domination also fashioned gender hierarchies to obtain economic advantages. [\[FN56\]](#) Colonialism sanctioned exploitation of women as low-paid workers in factories, in agriculture, and as servants. [\[FN57\]](#) Women's work-burden intensified in response to colonialism's demand for increased levels of production to meet export requirements to European and North American markets. [\[FN58\]](#) Women suffered as a result of changes in relations of production brought about under colonialism, including the devaluation of their work and loss of control of property. [\[FN59\]](#)

Colonialism often meant a loss of status and formal rights for women. [\[FN60\]](#) Cuban women had demanded, and secured, improvement in their status during the war for independence, only to have their rights ignored under U.S. occupation. [\[FN61\]](#) In Puerto Rico, the initial debates about the prospect of granting U.S. citizenship to Puerto Ricans did not include women. When citizenship was finally extended to the inhabitants of Puerto Rico, women were denied suffrage. [\[FN62\]](#) In Hawaii, as U.S. colonialists introduced the doctrine of ***273** coverture, women suffered a loss of autonomy in regard to their relationships with their husbands. [\[FN63\]](#) Women endured the general effects of community disorder as well as violence employed in particularized gender form. [\[FN64\]](#) For many women, rape and sexual harassment characterized the lived experience of colonial occupation. [\[FN65\]](#)

B. The Ideology of the Redemption: The American Paradigm

How did foreign policy decisions that were formulated on disingenuous concern for others and that resulted in grave harms to the very people whose moral uplift was the stated motive for intervention resonate as acts of beneficence? What were the theoretical matrices that facilitated the U.S. use of humanitarian principles in pursuit of national interests and as a means to fix its moral place in the world? An examination of the ideological constructs derived from a notion of national greatness provides insight into the moral sources of power, and demonstrates the ease with which the human rights discourse was appropriated. [\[FN66\]](#) It also illustrates how systems of political domination may have their origins in otherwise incontrovertible ideas.

***274 1. Themes Intersecting Human Rights and Ideology**

Historians as well as legal scholars increasingly have considered "a culturally formed notion of ideology" as a way to understand the sources of international policy, including the human rights project. [\[FN67\]](#) The ideological dimensions of human rights can be examined from a number of perspectives. Human rights are often considered in the context of religious traditions because of the theological concerns implicated in the canons of natural law. [\[FN68\]](#) Nationalism offers another approach to human rights ideology. [\[FN69\]](#) Nationalism acts to shape political dispositions in which concepts such as "friend" and "enemy," "good" and "evil," and "developed" and "developing" define points of view. [\[FN70\]](#)

2. Visions of National Greatness, Hierarchies of Race, and the Perils of Revolution

Historian Michael Hunt has engaged in a thoughtful study of the ideological context of U.S. foreign relations with particular attention to the moral imperative of U.S. policy. [\[FN71\]](#) He locates the sources of the U.S. ***275** presumption of greatness in the process of separation from Old World absolutism and monarchies. [\[FN72\]](#) The experience produced

a celebratory rhetoric affirming that, with independence, the American people had been presented an opportunity to "begin the world over again," and that destiny had chosen the United States to guide the rebirth of the world in its own image. [\[FN73\]](#) A discourse of "special responsibility" inspired territorial expansion and the search for new markets as an inalienable right to expand. [\[FN74\]](#) Expansion was further justified as a way to share the blessings of civilization with less fortunate people. [\[FN75\]](#) Liberty was conflated with constant expansion and missionary efforts to shape the world. [\[FN76\]](#)

Such ideological constructs found their way into the discourse related to the humanitarian project and provided justification for the United States to expand in the name of a higher morality. [\[FN77\]](#) The unwillingness to intervene in Cuba in 1898 was characterized as a default of the "legacy of freedom." [\[FN78\]](#) The purposes of war were in keeping with the national mission of the United States to "extend to others . . . the blessings . . . of [the American] way of life." [\[FN79\]](#) *276 Indeed, U.S. citizens were called to rejoice that "Providence" had given them "the opportunity to extend [their] influence, . . . institutions, and . . . civilizations." [\[FN80\]](#)

Those advocating the annexation of the Philippines argued that expansion was not only consistent with the ideals of the nation, but was a duty conferred on the United States by destiny. [\[FN81\]](#) Similar arguments were advanced as justification for the occupation of Haiti. [\[FN82\]](#) President Woodrow Wilson supported intervention as the discharge of historical obligations, stating:

If we have been obliged by circumstances or have considered ourselves to be obliged by circumstances, in the past, to take territory which we otherwise would not have thought of taking, I believe I am right in saying that we have considered it our duty to administer that territory, not for ourselves, but for the people living in it [\[FN83\]](#) The rationale for U.S. hegemony was thus formulated as a humanitarian gesture to aid less fortunate people.

Ideological dispositions toward intervention as a humanitarian undertaking were increasingly shaped by deepening U.S. suspicion of revolutionary change, and nowhere more than when change abroad threatened the status quo at home. [\[FN84\]](#) The United States served as the model, and revolutionary movements dissimilar to the model were suspect, especially when such movements were organized by people considered to lack capacity for self-rule. [\[FN85\]](#) Fear of revolution, for example, led to intervention in Mexico for the purposes of "helping [Mexico] adjust her unruly household." [\[FN86\]](#)

Suspicion of revolutionary change increased with the rise of socialism in the late nineteenth and early twentieth centuries and culminated in Cold War dichotomies of "good" and "bad," "barbaric" and "civilized," based on the perceived "perilous potential of revolution." [\[FN87\]](#) Communism in any place or form *277 was the sine qua non of human rights violations. Cold War policies moved from containment to interventionist strategies, including coups in Iran, Guatemala, and Chile; invasions in Cuba, Grenada, and Panama; and war in Viet Nam. [\[FN88\]](#) These acts were undertaken with the conviction that they were not only beneficial for the United States, but also that they benefited the people of the countries involved. Currently, suspicion of Islamic revolutions drives U.S. efforts to introduce Western political forms into the Middle East. [\[FN89\]](#)

Assumptions about race also drove humanitarian concerns that affected foreign policy. [\[FN90\]](#) Formulations about "savage" people in other parts of the world were congruent with depictions of American Indians and African slaves that utilized similar imagery to justify control and domination. [\[FN91\]](#) The presumed inferiority of people of color thus provided a readily available justification for colonial tutelage. Filipinos were represented as racially inferior and hence in need of uplift. [\[FN92\]](#) Occupation in Haiti was justified on the grounds that Blacks could not govern themselves. [\[FN93\]](#) Interference and control of Hawaii was debated in terms of racial superiority. [\[FN94\]](#) In sum, some people were more advanced than others, and it was the obligation of the former to uplift the latter. [\[FN95\]](#)

*278 It is within this framework that the depiction of the "colonized woman" must be understood. Gendered representations of women as victims or wayward were emblematic of the paternalistic ideology by which colonial jurisdiction was exercised. Gendered imagery obtained from notions of "natural hierarchies"--women as dependent and vulnerable--informed the purpose of U.S. foreign policy, and conferred benevolent intent on American interventionism. [\[FN96\]](#) Indeed, the gendered representations of victims suggest the power of ideology to obscure the larger purposes of U.S. interventionism.

The appropriation of human rights as an ideological rationale for American expansionism cannot be dismissed as mere political rhetoric to obscure colonial motives. As Michael Hunt notes, public rhetoric serves a crucial role in the "formulation and practical conduct of international policy." [FN97] Public rhetoric symbolizes as it shapes the national self-image. [FN98] At the same time, it provides evidence of the theoretical basis for the misappropriation of the human rights project and the transformation of the discourse of human rights to a discourse of power.

The representations of an ostensibly neutral humanitarian project are hence not without contradiction, and indeed have been characterized as "the moralized expression of a political ideology." [FN99] The exercise of power based on visions of exceptionalism, racial hierarchies, and patriarchy cannot but compromise human rights values. In the end, moral visions derived from sources of domination and subjugation are unlikely to serve as value systems that can relieve suffering and end abuses of human life.

C. The Rule of Law, Colonialism, and the Compromise of Human Rights

1. Noble Ideals in the Service of Ignoble Purposes

Colonial powers insisted that humanitarian concerns were at the heart of the rule of law, which they claimed represented a measure of civilization and a guarantee of basic freedoms. [FN100] In acquiring overseas territories, the United States assumed control over the affairs of other people, including writing of new constitutions, establishing the qualifications for citizenship and voting; organizing legislative bodies and systems of laws; and establishing judicial systems. [FN101] In almost every instance, these new legal systems were designed to be congruent with U.S. norms and compatible with U.S. interests. In the end, the project of human rights was a function of the project of empire.

This is not to suggest, of course, that hopes for human rights are misplaced. On the contrary, legal structures and procedures such as those introduced by the United States are recognized as human rights goods and are vital to the actualization of the human rights project. [FN102] The right of people to political participation, to take part in government directly or through freely chosen representatives, and the right to universal and equal suffrage form the basis of the earliest concepts of human rights and have been embedded in the law from the time of the Magna Carta of 1215. [FN103] Rather, it is necessary to emphasize that these practices and institutions have as their principal purpose the well-being of the people they serve--not the interests of a foreign power. Anything less cannot but compromise the institutional integrity of public life. The point here is that the use of law as an instrument of domination has acted to discredit the moral rationale of legal precepts emanating from former colonial power and to compromise the human rights values with which the law is associated. [FN104]

a. Constitutional Structures

The United States has often used the constitutions of other countries to further its own interests. In Cuba, for example, the United States insisted upon the inclusion of the Platt Amendment in the 1901 constitution as a condition to the end of military occupation. [FN105] By the terms of the Platt Amendment, the United States acquired the "constitutional" right to control the affairs of the island. [FN106] The Cuban constitution thus served as the instrument by which to subvert the very sovereignty it established.

The right to enact its own constitution did not exempt Puerto Rico from the need to submit the document to U.S. review in 1952. [FN107] The United States thereupon rejected portions of the constitution, particularly those sections based on social, economic, and cultural rights that reflected human rights concepts stipulated in U.N. treaties. [FN108] Once approved, the Puerto Rican constitution was--and remains--subject to U.S. law that continues to maintain authority over the island's legal transactions. [FN109]

Other cases similarly reflect the development of constitutional structures to favor U.S. interests. In 1917, during U.S. military occupation of Haiti, the United States ordered the Haitian National Assembly dissolved after it refused to pass a

U.S.-sponsored constitution and attempted to enact an "anti-American constitution." [\[FN110\]](#) The following year, the United States imposed a ***281** constitution containing provisions favorable to foreign investments and property ownership and validating all acts of the U.S. military occupation. [\[FN111\]](#) District Gendarmerie officers, [\[FN112\]](#) many of whom were U.S. Marines, threatened to arrest any opponents of the proposed constitution, a process that has since been acknowledged to have denied Haitians "even a semblance of 'self-determination.'" [\[FN113\]](#)

The Filipino constitution, enacted in 1935 and authored by U.S. authorities, was similarly a product of the U.S. colonial project. [\[FN114\]](#) Convinced that Filipinos were incapable of self-rule, the United States nonetheless directed that the Filipino constitution include a Bill of Rights similar to the U.S. Constitution. [\[FN115\]](#) However, civil rights were not explicitly extended to Filipinos and the constitution denied Filipinos the right to trial by jury. [\[FN116\]](#) The reason, Secretary of War Elihu Root indicated, was to make colonial rule palatable to the Filipino people. [\[FN117\]](#) The United States extolled the need to promote human rights through the development of constitutional legal structures, but in fact used constitutional legal projects to promote its national interests. President Franklin Roosevelt later boasted of having written Haiti's constitution as evidence of ongoing U.S. control and domination of Haiti. [\[FN118\]](#)

***282 b. Citizenship Rights and Suffrage**

The United States maintained an inconsistent policy with regard to the citizenship rights of inhabitants of foreign territories. [\[FN119\]](#) Those born in the Philippines during U.S. control (1898-1946) were treated as wards, expected to pledge allegiance to the United States, but denied citizenship. [\[FN120\]](#) Around the same time, Puerto Ricans were dispossessed of their national status and made U.S. citizens despite the objections of the populace. [\[FN121\]](#) However, Puerto Rican U.S. citizenship was not--and is not--full and complete insofar as Puerto Rican "citizens" lack full constitutional rights and protections. [\[FN122\]](#)

During the military occupation of Cuba, the United States imposed suffrage restrictions that disenfranchised vast numbers of Cubans. [\[FN123\]](#) Justifications for limiting suffrage were stated unambiguously: "[T]he proposition of annexation would be voted down by an overwhelming majority if presented . . . to the Cuban people." [\[FN124\]](#) Race and "the spectre of Haiti," which set in relief the possibility of Cuba emerging as another Black republic in the West Indies, exacerbated U.S. fears that a large Afro-Cuban population would ***283** be decisive in determining the future for an independent Cuba. [\[FN125\]](#) In Puerto Rico, U.S. officials frequently amended voting rights laws between 1899 and 1916. [\[FN126\]](#) Suffrage laws changed from more restrictive qualifications to broader suffrage rights, depending upon the need to suppress opposition to U.S. control. [\[FN127\]](#) Claiming that some publications were "calculated to alienate the affection of the people by bringing the Government into disesteem," the United States invoked anti-sedition laws--including seditious conspiracy and piracy and privateering--to regulate the content of newspaper reporting of elections. [\[FN128\]](#)

c. Laws and Legal Systems

In other instances, legal systems imposed in the name of civilization and modernization were designed to further U.S. interests. [\[FN129\]](#) During the U.S. military occupation in Cuba, legal fiat facilitated the reorganization of land tenure systems and resulted in the transfer of vast tracts of land to foreign ownership. [\[FN130\]](#) U.S. legal systems replaced Puerto Rican laws in order to "Americanize Porto Rico" [\[FN131\]](#) and supplant existing laws considered impediments to the expansion of U.S. interests. [\[FN132\]](#) New tax laws were imposed on Puerto Rican goods in order to protect the competitive costs of domestic ***284** goods produced in the United States. [\[FN133\]](#) Other sections of the law required that all trade between Puerto Rico and the United States be conducted on ships built and registered in the United States. [\[FN134\]](#) These procedures were adopted with full knowledge that the new laws burdened the people of Puerto Rico in order to benefit U.S. domestic industry. [\[FN135\]](#) The Puerto Rican legislature, although established by the United States and ostensibly endowed with law-making authority, was nonetheless required to submit all Puerto Rican legislation to review and revocation by an act of the U.S. Congress. [\[FN136\]](#)

As in Puerto Rico, Filipino law was subject to the approval of Congress, which reserved to itself the power to annul laws considered detrimental to U.S. interests. [\[FN137\]](#) U.S. laws relating to self-government allowed Filipinos to occupy

government positions, but only if they could demonstrate "an absolute and unconditional loyalty to the United States." [FN138] Organizing the Filipino judicial system around U.S. laws permitted U.S. domination of the process for choosing and installing judges. [FN139] Filipinos were denied the right to jury trials for fear that providing them with a decision-making role would result in challenges to U.S. authority. [FN140] Jury trials were deemed inappropriate for the Filipino who, it was said, "at his best has only learned half his duty to mankind. He can be tried but can't try his fellow man." [FN141] Urged as a means by which *285 Filipinos could achieve self-rule, the imposition of a Western-based legal system was the quid pro quo for achieving autonomy. In fact, these laws were designed to assure that the Philippines would remain subordinate to U.S. interests. [FN142]

In Haiti, the United States enacted tax laws to favor foreign bankers and investors. [FN143] Military and law-enforcement mechanisms were restructured around a highly centralized military police apparatus to meet U.S. needs, with long-lasting baneful consequences for Haitian civil and human rights. [FN144] Hawaiians also experienced the destruction of indigenous systems of governance. [FN145] Sally Engle Merry describes systematic legal reforms, often imposed as a result of more subtle, but no less coercive, means, that required Hawaiians to accept the supplanting of their own systems for new ones modeled on those of the United States in order to gain recognition as a "civilized," and therefore sovereign, nation. [FN146] These changes included the development of court and prison systems that resulted in the transfer of political power from Hawaiian chiefs to U.S. sugar planters and owners of railroads and shipping lines, and eventual U.S. annexation in 1898. [FN147] Hawaiians suffered economically and socially as family systems and economic livelihoods were destroyed under the new legal arrangements. [FN148]

*286 2. The Role of the Courts: The Insular Cases

The Insular Cases [FN149] provided a legal rationale that validated the administration of the U.S. empire. In these cases, the U.S. Supreme Court considered the issues raised by the status of newly acquired territories that were administered by, but not admitted to, the United States. Such issues included the degree of plenary power to be exercised by Congress and the extent to which the inhabitants of those territories enjoyed constitutional rights. [FN150] These cases are instructive, for they bear directly on larger human rights concerns. Legal theories articulated in the Insular Cases are linked to ideological constructs that depict inhabitants of U.S. territories as uncivilized and in need of uplift. [FN151] In *De Lima v. Bidwell*, the Court stated, in reference to the Philippines, "Certainly the treaty never intended to make these tropical islands, with their savage and half-civilized . . . people, a part of the United States in the constitutional sense" [FN152] The Court dismissed the denial of rights and full legal protection for inhabitants of territories acquired through military force in the belief that U.S. colonial rule was inherently benevolent: "There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." [FN153]

The Insular Cases established not only the legal justification for U.S. colonial rule, but also a humanitarian basis for annexation; U.S. law defined the *287 future relationship between the two entities as one of protector and protected. [FN154] Puerto Rico would remain not only a political subject, but a legal subject. [FN155] Indeed, once the U.S. Supreme Court legitimized the colonial relationship, Puerto Rico's struggle for sovereignty was constrained by its legal relationship to the United States, and the rights and status of its people were limited by judicial precedent. In this manner, the law's validation of colonial authority confirmed historical acts of domination in the name of humanitarian concerns and brought them fully within American normative systems.

3. Law and the Postcolonialist Order

The proposition that the rule of law is connected to the human rights project must thus be viewed within its historical context. That it is viewed in some quarters as the cornerstone of civilization and marker of modernity, as well as a means for delivering human rights protections, does not preclude it from being viewed in other quarters as the rationale for oppression and domination. [FN156] Not surprisingly, the remedies and relief that the law purports to offer formerly colonized people are often viewed with suspicion. [FN157] The hegemonic nature of the Western legal system continues to play an important part in the formation of postcolonial relationships. [FN158] Indeed, this has been the larger pattern of the post-colonial law and development movement. [FN159] The *288 imposition of Western legal regimes appears

dedicated to the establishment of "regulatory regimes and systems of private rights" to facilitate capital markets, which are often at odds with human rights. [\[FN160\]](#)

These developments are concurrent with the U.S. legal system's increasing unwillingness to consider the consequences that colonialism has wrought upon people all over the world. [\[FN161\]](#) In the last several years, U.S. courts have upheld legal distinctions between inhabitants of U.S. territories and U.S. citizens that affect rights to citizenship and immigration, as well as access to government benefits for women, children, and the disabled. [\[FN162\]](#) Thus, the unequal value accorded to residents of U.S. territories and U.S. citizens continues to have a real and material impact on citizens of those territories.

The United States persists in imposing its legal norms and standards elsewhere despite traditions of local legal cultures, and at the expense of principal values held outside of the United States. In a recent criminal case in Puerto Rico, the federal government decided to seek the death penalty despite widespread opposition on the island and the fact that the Puerto Rican Constitution of 1952 abolished capital punishment. [\[FN163\]](#) Puerto Rican constitutional framers insisted that capital punishment was contrary to the cultural, moral, and religious convictions of the people of the island and would *289 not exist under Commonwealth status. [\[FN164\]](#) Nonetheless, the U.S. government declared that federal criminal laws override "local laws," including the Puerto Rican constitution. [\[FN165\]](#) The federal district court sitting in Puerto Rico, later reversed by the First Circuit, framed the issue in compelling terms: "[I]t shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment." [\[FN166\]](#) It is not clear if the subsequent acquittal of the defendants was related to the merits of the defense or the jury's determination to obstruct the imposition of capital punishment. [\[FN167\]](#)

Sharon Hom and Eric Yamamoto demonstrate that current adjudication of human rights concerns without an understanding of the history of colonialism's misuse of the human rights project prevents the resolution of the harms that arise from systems of domination. [\[FN168\]](#) They comment on *Rice v. Cayetano*, in which the U.S. Supreme Court upheld a white American rancher's claims of racial discrimination and invalidated a regulation allowing only Native Hawaiians to vote for trustees to the state's Office of Hawaiian Affairs: [\[FN169\]](#)

How did the majority treat indigenous Hawaiian history? Nowhere did its opinion mention U.S. colonialism in 1898, in Hawai'i or contemporaneously in the Philippines and Puerto Rico. It passively described the colonization of Hawaiians as "the culture and way of life of a people . . . all but engulfed by a history beyond their control." Nor did the majority acknowledge specifically the destruction of Hawaiian culture through the banning of Hawaiian language or the current effects of homelands dispossession, including poverty, poor levels of education and health, and high *290 levels of homelessness and incarceration. Nor did the main opinion recognize that colonial powers often used race to legitimate conquest, denigrating in racial terms those colonized. [\[FN170\]](#)

American legal principles were presented as "immutable laws of justice and humanity," to be maintained for the sake of "liberty and happiness, however much they may conflict with [the] customs . . . [and] laws" in the territories where they were applied. [\[FN171\]](#) Legal systems were introduced for the stated purpose of improving indigenous systems described as ineffective and corrupt. [\[FN172\]](#) However, efforts to develop legal norms inherent in the human rights project where such systems were absent or corrupt were compromised by the purposes for which they were employed: justification of domination of foreign people. The willingness to subvert constitutional structures, the limitations on citizenship status, restrictions on suffrage, discrimination against women, and interference with indigenous legal systems fail to uphold the rule of law and the human rights values the law claims to protect. In the process, appeals to human rights norms lose currency and the system of law that these claims purport to deliver is discredited. [\[FN173\]](#)

II. The Legacy: Human Rights as the Product of Colonialism and the Ideology of the Redeemer Nation

There are, of course, lasting consequences that result from the use of humanitarian ideals to sustain colonial rule. The appropriation of the human rights discourse as a means of domination could not avoid compromising the notion of universal human rights values. This Part examines four aspects of colonialism's legacy: (1) resistance to Western-

dominated norms; (2) resulting ineffective legal norms and strategies to address human rights abuses; (3) *291 distortion of knowledge about humanitarian needs; and (4) formation of a contradictory human rights policy.

A. Contesting the Universality of Human Rights Values

Formerly subjugated people's suspicions of human rights values emanating from colonial powers must be viewed as part of the legacy of colonialism. The logic of these suspicions is easy to discern, as people denied autonomy seek to establish cultural self-determination. Misgivings about a human rights agenda originating from former colonizers is not unreasonable. [FN174] The reintroduction of humanitarian values recalls circumstances of subjugation and revives memories of a time when those who now espouse the virtues of human rights were willing to inflict unspeakable violence in the name of civilization and moral improvement. [FN175]

Norms previously used to justify colonial domination are advanced anew, disassociated from their cultural origins, characterized as universal values and markers of civilization, and celebrated as worthy normative standards to which all are enjoined to subscribe. [FN176] Individuality is exalted over collectivity and community. [FN177] Similarly, appeals are made to Western political and legal systems as signposts of modernity. [FN178] But it is also true that formerly colonized countries have developed their own value systems, shaped by historical *292 circumstances, and never more tenaciously defended as when derived in function of self-determination. [FN179] New national meanings are fixed on differences, this time as conscious efforts to replace values previously imposed either by force or by more subtle, but no less involuntary, forms of coercion. [FN180] This is not meant to suggest that an ideology of opposition is necessarily the principal force for construction of national identity. It does suggest, however, the need to appreciate the complexity of the social and cultural dimensions of oppositional modes, and furthermore, to recognize the participation of formerly colonized people in the formulation of human rights values relative to their historical circumstances.

Just as the use of human rights norms to justify colonial rule implicates the condition of women, so too the form of resistance to colonial rule creates unique impacts on women. [FN181] Opposition to colonial values has assumed various forms, including the recovery and preservation of local institutions and traditional methods of governance and decision-making. [FN182] In perhaps the most notable form of resistance, women have been summoned to assume the role of transmitter of cultural traditions deemed vital to the defense of their nation. This role typically casts women as conservators of the family and keepers of the home, the key sites of cultural formation. The private space of the household was often the most secure environment beyond the reach of colonial rule. [FN183] Resistance to outside values became intertwined with notions of women as the cultural conduit of the nation; women's honor was synonymous with the rejection of external norms, particularly those norms that threatened to modify their traditional role within the family. [FN184]

*293 Women's resistance to colonialism has often been overlooked. For example, the depiction of Afghani women as passive victims ignores their participation in the resistance to foreign occupation. [FN185] In Kenya, women's struggles against colonial rule and in support of economic and social programs have been similarly ignored, in large part because their activities do not conform to readily recognized models of Western feminism. [FN186] More attention is focused upon the sacrifices women are called to make for nationalist causes. [FN187] Women have been subjected to powerful pressures to maintain traditions and cultural conventions, even if their duties involve practices that are harmful to women, such as female circumcision and certain widowhood rituals. [FN188]

Less recognition is extended to forms of resistance that have not only shaped new values and traditions, but have also heightened women's stature and improved their circumstances within their communities. [FN189] In Cuba, for example, women's resistance to colonialism resulted in new family arrangements in which both women and men were permitted to own and control property. [FN190] In Iran, the veil, often understood as an oppressive custom, served as a sign of resistance to the Shah, whose rule was viewed as being closely *294 connected with Western colonialism. [FN191] Many Muslim women assign honor to wearing the veil, and consider it a means to affirm their cultural identity. [FN192]

Resistance and nationalism in response to colonialism have often resulted in the repression of women on the one hand, and in the improvement of their circumstances on the other. Where national interests and women's interests have

diverged, women have often struggled simultaneously against external colonialism and internal systems of gender oppression, although sometimes they have been required to choose between national interests and gender concerns. [\[FN193\]](#) While some women determine that cultural preservation and national liberation transcend gender interests, others who contest local oppression often suffer as subversive outcasts. [\[FN194\]](#) It is the latter concern to which Western human rights advocates and Western feminists frequently attend and upon which human rights efforts are often concentrated. [\[FN195\]](#) Despite its good intentions, the Western tendency to summon human rights often ignores the dynamics of resistance and is unlikely to produce the desired outcomes. At least as important, this tendency undermines the possibility of developing strategies that would allow women from both sides of the colonial divide to focus on mutual conditions of oppression. [\[FN196\]](#)

***295 B. Legal Visions from the West and the Construction of Ineffective Human Rights Strategies**

1. Western/U.S. Dominance in the Current Human Rights Discourse

The United States has dominated much of the human rights debate. In the realm of humanitarian discourse, American "mastery extends to the symbolic level." [\[FN197\]](#) The United States exercises control over the representation of human rights and possesses the means to construct and impose its notions of human rights on much of the world. [\[FN198\]](#) Thus, the notion of the universality of human rights bears few traces of non-Western origins. [\[FN199\]](#)

The development of leading international human rights organizations exemplifies the mechanisms of the West's dominance of human rights. [\[FN200\]](#) The leaders and program staff of these organizations are educated primarily in the United States. [\[FN201\]](#) Almost all have been selected on the basis of their demonstrated endorsement of the primacy of the West's human rights concerns. [\[FN202\]](#) Women's international nongovernmental organizations (INGOs) are also dominated by professionals who are either from the West or trained there. [\[FN203\]](#) Their ability to claim interpretive control in the formulation of norms ***296** and policies has tended to marginalize women from developing countries who have different perspectives. [\[FN204\]](#)

According to the prevailing models, human rights are envisioned as a set of norms that emphasize legal, political, and civil structures. [\[FN205\]](#) Economic and social issues are considered less important. [\[FN206\]](#) Individual rights are privileged over collective rights, and the proposition of human rights as a set of obligations as opposed to entitlements is ignored. [\[FN207\]](#) The human rights project often proceeds without apparent recognition that such Western modalities as the commitment to formal autonomy, legal structures, electoral politics, and ***297** political rights may lack normative authority beyond specific cultural contexts and social practices. [\[FN208\]](#)

This is not to argue for the rejection of human rights as a body of totalizing values emanating from the West. [\[FN209\]](#) Indeed, many tenets central to the body of human rights thought have obtained global endorsement. It would be unduly facile to suggest that human rights norms held dear by former colonial powers--that is, "Western" values--are presumptively suspect. [\[FN210\]](#) Ideas transcend national boundaries and are often appropriated and adapted to meet the needs of people throughout the world. This is an inevitable outcome of cultural encounters and is a dominant facet of the human experience. [\[FN211\]](#) That the Universal Declaration of Human Rights responded to massive human rights violations perpetuated in the West during World War II, [\[FN212\]](#) moreover, provides some explanation for the dominance of Western norms.

Those who have suffered abuse associated with colonialism, either as subjects or descendants of colonial projects, and who are often motivated by memories of those experiences, also develop human rights norms. [\[FN213\]](#) Indeed, fundamental human rights concepts have originated from the anti-colonial struggle itself. [\[FN214\]](#) Yet missing from much of the dominant Western human rights literature, particularly discussions advancing social norms and propounding legal strategies, is an examination of the non-Western norms that shape human ***298** rights practices. Rarely are they discussed in any way other than to affirm that they contradict Western-based universal notions. [\[FN215\]](#)

2. Exporting Remedies: Effects on Women

Legal remedies are derived principally from ideological assumptions that the United States is best positioned to raise the relevant issues and, of course, provide the relevant answers. [\[FN216\]](#) Human rights strategies framed around experiences in the United States and the West may ultimately be of little relevance to women who live in vastly different circumstances from their Western counterparts. Worse, they may cause additional injuries.

The difficulty with the universality of remedies can be examined in the context of Western feminists' focus on the dilemma of the public/private dichotomy and the demand for state intervention into the private lives of women. [\[FN217\]](#) Sources of women's oppression are frequently located in private realms within household structures and kinship systems, where male-dominated ***299** structures act to confine women to specific roles and functions. [\[FN218\]](#) New international human rights initiatives respond to these circumstances by advocating state intervention to prevent violence within the most intimate and private domains of daily life. [\[FN219\]](#) They are posited as universal solutions to be implemented everywhere.

Practices of colonial regimes are often replicated in circumstances where power is exercised arbitrarily, thereby making relief in the form of state intervention problematic. State interference in the private sphere of the household does not gain easy acquiescence from Catholic women in Northern Ireland, where the sanctity of the home has been routinely violated by the very authority from which women must seek remedy. [\[FN220\]](#) The invasion of the state into Catholic homes, together with intrusive body searches, harassment, and threats against women and children, have occurred with commonplace frequency in the name of combating terrorism. [\[FN221\]](#) Similarly, Aboriginal women in Australia decline to seek state intervention as a remedy for domestic violence for fear of exposing their communities to unsympathetic state scrutiny. [\[FN222\]](#) Palestinian women living in the occupied territories rarely appeal to Israeli authorities for relief for fear of collaborating with forces of occupation. [\[FN223\]](#) This was also true for women in Chile under the military government of General Augusto Pinochet [\[FN224\]](#) and black women in South Africa under apartheid. [\[FN225\]](#) Intervention by the state is often a threatening and potentially disruptive development. Under such circumstances, women are often forced to choose between defending their personal welfare or protecting their community's well-being. For many complex reasons, they often choose the latter.

***300** Failure to discern the varieties of local conditions and diverse historical circumstances has often resulted in the replication of "one-size-fits-all" strategies to deal with violence against women. [\[FN226\]](#) Advocacy strategies that respond to circumstances in the West are often distorted when introduced into countries where the significance of certain abuses and the methods of their resolutions are very different. For example, recent efforts to redefine rape within international human rights law as a crime of violence instead of a crime against honor [\[FN227\]](#) are praiseworthy and a progressive step forward for many rape victims--but not for all. For women who understand rape as a crime of dishonor against themselves and their families, a definition of rape that omits the concept of honor renders the act of criminalization incomplete. [\[FN228\]](#)

The use of shelter programs and the proliferation of criminal penalties have often been rejected as unsuitable for women outside the West, where fear of the criminal justice system serves as an obstacle to seeking remedies. [\[FN229\]](#) Criminal remedies may have no transference value in cultures where punishment for the purpose of deterrence or retribution is not the norm. [\[FN230\]](#) Criminal sanctions may not only fail to protect women, they can interfere with other cultural and religious systems that may otherwise provide relief. [\[FN231\]](#) ***301** Furthermore, in some countries, state intervention to remedy violence against women has actually resulted in greater restrictions on women's liberties insofar as they are treated as wards in need of guardians. [\[FN232\]](#)

The promulgation of Western-based laws often supplants local customs and undermines alternative methods of obtaining relief and risks depriving women of usable options. [\[FN233\]](#) In Fiji, a customary practice called "bulubulu," which involves apology and recompense/reconciliation, has been criticized by the U.N. oversight committee charged with monitoring compliance with the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). [\[FN234\]](#) Although many in Fiji consider bulubulu an inappropriate response to rape that undermines legal sanctions, the custom remains part of the fabric of daily life and continues to be used in many types of dispute resolution. [\[FN235\]](#) The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed concern that the practice lent legitimacy to violence when applied to rape cases and sought its eradication. [\[FN236\]](#)

Sally Engle Merry observes that a critique of bulubulu that fails to acknowledge the complexities of traditional solutions and, more importantly, neglects to consider particular political, social, and economic circumstances that may preclude the use of formal remedies altogether, is of little worth to the improvement of human rights practice. [FN237] Bulubulu is a practice rooted within villages and kinship. [FN238] As a method of community sanction, in conjunction with other interventions, bulubulu may influence the behavior of offenders. [FN239] Merry also suggests, after examining the use of formal state remedies, that *302 bulubulu may function as well as, if not better than, recourse to the police. [FN240] Nonetheless, the CEDAW Committee gave little consideration to a remedy expressed in a vocabulary that was unfamiliar in the discourse of Western legal rights. [FN241] Instead, U.N. efforts to prohibit the practice are likely to deprive Fijian society of a useful social practice without replacing it with an accessible substitute.

Human rights advocates have focused on other customary practices including female genital mutilation, sati, and dowry murders. [FN242] Of course, the need to address the problem of private violence and physical mutilation is clear, but it is also necessary to be mindful of cultural complexities that can distort understandings of these practices. It is often the single-mindedness with which these practices are vilified and human rights solutions are proffered that creates deep divisions within the human rights movement. [FN243]

3. Human Rights and Socio-Economic Harms: Effect on Women

A dominant human rights paradigm that disregards economic, cultural, and social rights risks producing remedies that are largely unresponsive to abuses that women most frequently endure in developing countries. [FN244] Human rights efforts have generally failed to consider the impact of the new structures of the international political economy and the internationalization of industries that have relied disproportionately on female workers from poorer countries to decrease labor costs. [FN245] These deficits in human rights law affect vast numbers *303 of women who are displaced as refugees, migrant workers, or victims of trafficking. [FN246]

The legal circumstances of women who have been victims of international trafficking illustrate the limitations of these legal norms. [FN247] In 2000, the U.S. Congress passed the Trafficking Victims Protection Act, framed as a human rights remedy to provide relief for modern day forms of slavery, forced labor, torture, starvation, and other human rights abuses and enacted to respond to the global trafficking of women and children. [FN248] The statute's legislative history indicates that members of Congress desired to limit relief to those who fit the stereotype of a female victim. [FN249] Women suspected of prostitution in their home countries, or women who otherwise do not easily fit the narrow image of victim, were initially excluded from relief. [FN250] The final version, although establishing meaningful new remedies for victims of *304 trafficking, including new criminal laws to sanction trafficking and the possibility of immigration relief to trafficking victims, nonetheless disregards the underlying circumstances affecting many women who might benefit from the law. [FN251] The Act limits relief to those women who can demonstrate that they complied with the statutory duty to attempt to leave the United States and requires them to demonstrate that they would suffer unusual and severe harm upon deportation. This standard precludes consideration of economic hardship, which is often the critical factor contributing to the trafficking in the first instance. [FN252] Furthermore, the Act exempted the United States from scrutiny with regard to the adequacy of U.S. laws addressing international trafficking, while requiring the U.S. State Department to evaluate the laws of all other nations. [FN253] The Act's limitations result from ideological notions of female victimhood and U.S. exceptionalism, and are likely to reduce the statute's effectiveness since the United States is one of the principal destinations for trafficked people. [FN254]

The body of human rights advocacy often ignores particular socio-economic systems as a context within which to understand abuses against women. Gender-based violence in India, for example, is complicated by generation as well as gender. [FN255] Acts of violence committed by older mothers-in-law against younger daughters-in-law are often linked to economic insecurity and responsibilities imposed upon older women for control of the family. [FN256] Inter-generational issues and economic circumstances that contribute to family violence in India receive less attention than sensationalized and often inaccurate accounts of dowry-murder and sati. [FN257] Although similar shortcomings exist with *305 regard to domestic responses to gender-based violence, the lack of familiarity with circumstances in India renders much of the human rights critique about domestic violence in India lacking in heuristic value.

Despite a lack of understanding of the complicated socio-cultural relationships with regard to land ownership, human rights advocates have often argued for an "abolitionist approach" to cultural practices in Africa that are perceived to interfere with women's property rights. [FN258] The sources of the loss of land rights for women, often occasioned by recently imposed requirements of international financial institutions, are often not addressed by the human rights discourse. [FN259] International requirements of privatizing and formalizing land titles have received much less attention than the eradication of practices that appear to promote gender inequality. Yet the focus on gender equality may not serve as the means for remedying gender discrimination in property relations in all contexts and places. [FN260]

In fact, Western legal norms that privilege gender equality regarding family and property relations without an understanding of social and economic circumstances often fail to achieve their goal. [FN261] Customary practices that *306 provided some protection for women's economic needs have been abolished in the name of progress. Effective strategies require localized understandings and solutions that recognize the efficacy of cultural practices shaped outside of the West.

C. Distorting Knowledge: A Focus on the United States

Americans have been described as knowing little about the history and culture of the rest of the world. [FN262] This lack of awareness of conditions in other countries is largely the product of a set of assumptions that act to ratify a belief that the U.S. purpose in the world is beneficent. [FN263] These assumptions do not easily admit that national interests and realpolitik often drive human rights concerns. [FN264] Instances where a humanitarian pretext can be shown to have served as cynical justification for seizure of territory or armed intervention are characterized as aberrant behavior, a "shocking break from American democratic traditions," [FN265] understood as "a series of isolated 'events,'" or "[e]xceptions not the rule . . . that could somehow be undone by a more enlightened government." [FN266]

Ignorance of conditions in other countries has contributed to ill- conceived assumptions that sustain U.S. renderings of human rights concerns. Clifford Geertz describes certain recent and hurried efforts to construct an *307 understanding of Islam as maintaining the Manichean dichotomies between good and evil. [FN267] Recent attention to the wearing of the veil in some Islamic countries has suggested that the practice, considered by many Westerners to be oppressive to women, is becoming more entrenched. However, this fails to consider that the increased awareness of the veil may be due to a rapid expansion of women moving into public life, including universities, government, and business. [FN268]

Allusion to human rights concerns as the rationale for U.S. policy works to secure public consent to foreign policy. [FN269] The rescue of oppressed people is what the United States does by virtue of being the United States. That it is the role that destiny has chosen for the United States to do so is an idea that readily obtains popular support. Once it was determined that the Iraqi threat to U.S. national security was overstated, the case for war was made on the basis of human rights violations. [FN270] Indeed, depicting a culture as repressive of its own people not only makes the argument for war more persuasive, but may also *308 induce indifference as to the accuracy of official representations. [FN271] The use of war as a humanitarian crusade appears to have had the desired results. Polls consistently indicate that a substantial percentage of Americans hold mistaken beliefs about issues related to the war in Iraq, including whether weapons of mass destruction existed, whether Iraq was involved in the events of September 11, 2001, or whether the United States waged war on humanitarian grounds. [FN272] Such widespread opinion demonstrates a national "cognitive dissonance" by which Americans have trouble relinquishing convictions in the face of conflicting facts. [FN273]

D. Policy Inconsistencies and Exceptionalism

The human rights project has yet to sufficiently disengage from historical practices that appropriated humanitarian concerns for purposes of colonial intervention. As a result, current human rights policies remain tied to a disingenuous and contradictory legacy. Common features between past and present policies are thus evident: diminished commitment to ending human rights abuses and an entrenched ideology of exceptionalism that places the United States outside the

international legal community.

1. Lack of a Coherent Human Rights Policy

U.S. human rights concerns are not always congruent with the practice of U.S. foreign policy. [\[FN274\]](#) Rather than guiding the development of foreign policy, human rights are advanced ambiguously and inconsistently. Selective use is often the mode of human rights concerns. For example, action in response to humanitarian crises in African countries is taken less frequently than in Europe. [\[FN275\]](#) Concerns for human rights violations in the former Soviet- bloc were *309 frequently expressed while the apartheid regime in South Africa was considered "too touchy" to warrant U.S. involvement. [\[FN276\]](#) The lack of significant differentials in foreign aid packages between countries with "a good human rights record" and those countries with a portfolio of human rights abuses further reveals the selective nature of U.S. human rights standards. [\[FN277\]](#)

In fact, the United States has become more consistent in tolerating exceptions to human rights norms, especially in those countries with which it has strategic relationships. [\[FN278\]](#) This disposition to overlook abuses of human rights among "allies" is variously justified by claims that the law is not applicable, that the violations no longer exist, that "quiet diplomacy" is more appropriate, and that U.S. national security requires a hands-off approach. [\[FN279\]](#) The cordial relationships between the United States and governments in Africa, Asia, and Latin America with dubious records on human rights have been well-*310 documented. [\[FN280\]](#) The United States has long supported, and indeed has installed, despots and dictators as a means to promote U.S. interests. [\[FN281\]](#)

The lack of a coherent U.S. human rights policy has been the object of criticism, but little effort has been made to align principle with practice. [\[FN282\]](#) The United States supported Saddam Hussein during the 1980s when doing so aided its efforts to contain Iran. [\[FN283\]](#) Similarly, the United States supported the Taliban in Pakistan and Afghanistan as part of Cold War efforts against the Soviet Union. [\[FN284\]](#) Little is currently heard of the need for democracy in Pakistan. [\[FN285\]](#) The *311 United States recently thwarted a plan to send U.N. peacekeepers to the Ivory Coast, objecting that it would cost too much. [\[FN286\]](#) As these examples of realpolitik suggest, universal human rights standards are malleable and have been used to promote geopolitical and economic interests. [\[FN287\]](#)

2. U.S. Exceptionalism in International Efforts

The United States has often resisted attempts to establish a coherent and binding body of international law. Certainly the United States has participated in the drafting of international human rights instruments, but concerns that multilateral agreements might infringe on U.S. sovereignty have resulted in an unwillingness to ratify a number of human rights treaties. [\[FN288\]](#) It has declined to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child; and the American Convention on Human Rights. Other agreements related to humanitarian concerns, including the Mine Ban Treaty, the Kyoto Protocol, the Comprehensive Test Ban Treaty, and the Rome Statute of the International Criminal Court (ICC) have not been signed or have been "un-signed." [\[FN289\]](#)

The justification offered for the U.S. refusal to join in multilateral human rights accords is, in large part, related to ideological notions of exceptionalism. "Americans," it is claimed, are "reluctant to embrace international human rights because they are not convinced these guarantees are *312 superior to their own." [\[FN290\]](#) U.S. objections to international human rights standards are characterized as "constitutional," as compared with other countries' departure from Western-based norms, which are described as "cultural" or "religious." [\[FN291\]](#)

U.S. opposition to the ICC illustrates its controversial posture with regard to collective efforts to protect human rights interests. Not only did the United States decline to ratify the Rome Statute that created the court, it overtly resisted the court's ability to function and threatened punitive measures against those nations that chose to become members. [\[FN292\]](#) Despite participating in the drafting of the Rome Statute and signing the document upon its completion, the United States subsequently "un-signed" the agreement. Stating that the international court provided insufficient procedural protections against the possibility of political manipulation, the United States demanded permanent immunity

from its provisions. [\[FN293\]](#) Threats to veto future U.N. peacekeeping operations were accompanied by the passage of the American Servicemembers' Protection Act of 2002, which prohibits the United States from engaging in U.N. peacekeeping missions in countries that refuse to grant immunity. [\[FN294\]](#) In July 2003, the United States made good on its threats and suspended military assistance to thirty-five countries that refused to support U.S. demands for immunity. [\[FN295\]](#)

U.S. opposition has centered on the ICC's process. [\[FN296\]](#) However, a closer examination of the court's provisions reveals that there is little deviation from procedures used in the U.S. legal system. [\[FN297\]](#) Comparisons between the *313 procedures of the ICC and those of the U.S. Constitution reveal similarities including: the presumption of innocence; the privilege against self-incrimination (broader in scope than that provided under the Miranda rule); the right to counsel, including assigned counsel for indigents; and the right to confront, challenge, and present evidence. [\[FN298\]](#) What passes for concerns about process is more likely a preoccupation with legal substance and fear that the United States may lose its ability to stand above the international community and act outside of international norms. [\[FN299\]](#)

U.S. exceptionalism on the position of the ICC has far-reaching implications for women, who stand to gain significant procedural and substantive human rights protections. The Rome Statute places sexual and gender violence among the most serious crimes under international law. [\[FN300\]](#) The Rome Statute also contains provisions relating to the structure and administration of the ICC with regard to gender concerns, including a mandate that gender balance be achieved in the selection of judges and that court staff have expertise in gender violence to accommodate witnesses appearing before the international court. [\[FN301\]](#) In the end, U.S. fear that the court could be used to challenge its national interests prevailed over concern for women's human rights.

The United States has also been characterized as a scofflaw for its refusal to abide by those international documents and U.N. resolutions related to human rights to which it has previously agreed. [\[FN302\]](#) Foreigners have been executed without being permitted to communicate with their consulates as guaranteed by the 1963 Vienna Convention, to which the U.S. is a signatory. [\[FN303\]](#) U.S. authorities have ignored decisions by the International Court of Justice *314 (ICJ) in prohibiting the execution in these cases. [\[FN304\]](#) After the ICJ determined that it had jurisdiction in a 1985 case involving Nicaragua, the United States refused to appear and then terminated its declaration accepting the Court's compulsory jurisdiction. [\[FN305\]](#) Recently, the United States has come under international criticism for taking military action in Iraq without the approval of the United Nations, [\[FN306\]](#) and for its treatment of terror "detainees" at the Guantánamo Naval Station. [\[FN307\]](#) It is this central belief in the superiority of its own human rights record that has created a moral paradox that separates the United States from the international community.

III. Case Narratives: Culture and Comparative Legal Structures, the Rescued and the Rescuer

Colonial methods of overt political and military control have been replaced by postcolonial modalities, usually as discursive formulations that focus on cultural practices. Michael Hardt and Antonio Negri note the shift in strategies of domination in an era of globalization, from "a racist theory based on biology to one based on culture. Biological differences have been replaced by sociological and cultural signifiers as the key representation of racial hatred and fear." [\[FN308\]](#) The specter of cultural difference is currently emphasized to *315 demarcate both victims and perpetrators from protectors, moral societies from those considered corrupt or deviant. [\[FN309\]](#) Indeed, non-Western culture provides the explanation for a range of crimes and offenses against women. [\[FN310\]](#)

Culture has been described as a complex process by which identity forms, not as an immutable construct, but rather as a condition that fluctuates in accordance with evolving needs and perceptions of reality. [\[FN311\]](#) While acknowledging the utility of the concept of culture as a source of coherence among people who share a generally common world view, deterministic views of culture often prevail whereby culture is associated with static traditions and fundamentalist religions. [\[FN312\]](#) The deterministic view suggests that it is the developing world that has--or suffers from--culture. [\[FN313\]](#) As Sally Engel Merry has observed, "There is a whiff of the notion of the primitive about this usage of the term

culture." [\[FN314\]](#) Although culture is more generally understood as shared patterns of conventions and conduct common to all national and subnational ***316** identities, practices perceived as "deviant" in Western societies are rarely identified as cultural problems. [\[FN315\]](#)

For example, in contrast with current Western perceptions of dowry murders in India as cultural practices, rapes, sexual assaults, and domestic violence murders in the United States are characterized as deviations from, and not representative of, Western values. [\[FN316\]](#) Female genital surgeries in Africa are often identified as backward cultural practices that cause suffering, while in the West, eating disorders, cosmetic surgeries—including sex-surgeries designed to enhance the appearance of female and male genitalia, and Botox injections—remain largely disassociated from "culture." [\[FN317\]](#) Widespread assumptions that gender-based violence is a cultural phenomenon represents a viewpoint now expressed as "death by culture," and is a way of articulating the stigma of culture outside the West. [\[FN318\]](#) The difficulty in invoking culture as an explanation for human rights violations is compounded by the distance and difference—that is, perspective—inherent in those vast cultural spaces that often do not allow the observer to comprehend the circumstances of the observed. [\[FN319\]](#) Indeed, even the act of observation implies a hierarchy of power. [\[FN320\]](#)

***317** There seems to be a far greater disposition to cast an anthropological gaze upon the outside world than to look inward. [\[FN321\]](#) Should recent disclosures of sexual abuse of children by Catholic clergy in the United States, for example, be characterized as religious practices or acts of cultural preservation? Does the charge that the abuse was widespread and tacitly sanctioned by the highest levels of Church authority require the censure of the Catholic Church? [\[FN322\]](#) Although the United States suffers from some of the highest rates of social problems in the industrialized world, including crime, homelessness, breakdown of family systems, and drug addiction, Americans do not conceive of themselves as a nation with human rights problems. [\[FN323\]](#)

The conception of culture as signifier of human rights abuses is currently articulated through a particular vocabulary that perpetuates old binaries of barbarism and victims in need of rescue on the one hand, and civilization and benefactors on the other. [\[FN324\]](#) These representations frequently assume a specific gendered form and enter into the legal discourse with a focus on cultural practices that invite invidious comparisons. [\[FN325\]](#)

This dynamic is revealed by examining the legal discourse related to two recent events. In the first instance, well-publicized media reports of a gang rape in Pakistan by members of a tribal council illustrates how the language of law and human rights is used as a political ideology that shapes perceptions and sanctions denunciation of other cultures. [\[FN326\]](#) In the second case, the legislative debates in the U.S. Congress concerning the passage of CEDAW provide an ***318** example of the necessary counterpart to the process of denigration: the United States as the paradigm of uniqueness singularly positioned to make the world safe based upon its values. [\[FN327\]](#)

A. Making the Case for Intervention: The Case of Mukhtaran Bibi

The case of Mukhtaran Bibi was reported widely. [\[FN328\]](#) In June of 2002, Bibi, a woman from the southern part of the Punjab in Pakistan, was gang-raped as punishment decreed by a tribal council ("panchayat") after allegations were made that her brother had illicit sexual relations with a woman from a different tribal family. [\[FN329\]](#) An imam who heard about the rape denounced it during religious services. [\[FN330\]](#) A local journalist reported it the next day, and the story reached the international media within a week. [\[FN331\]](#) The reaction in Pakistan both locally and nationally was shock and disbelief. [\[FN332\]](#) The Pakistani government moved swiftly and harshly against the perpetrators, and offered the victim financial compensation while going forward with the criminal prosecution. [\[FN333\]](#) Within two weeks, ten members of the tribal council were charged and tried; less than three months later, four men were found guilty of rape and two were found guilty of abetting rape. [\[FN334\]](#) All six were sentenced to death. [\[FN335\]](#)

A network television production crew traveled to the Punjab to interview Bibi. The NBC Dateline feature, titled *Tortured Justice*, was ***319** broadcast on September 15, 2002. [\[FN336\]](#) Throughout the program, the media employed code words frequently used to shape public opinion about another culture. [\[FN337\]](#) It is difficult to draw sweeping assumptions about comparative discourse based on a single television news story, but this particular broadcast is emblematic not only because of its similarity to other press accounts, but also because it exemplifies the ways that

deprecatory characterizations of other cultures enter the realm of public awareness.

Tortured Justice describes Pakistan as barbaric and frightening, the population as backward, cruel, and passive--relics "of another time." [\[FN338\]](#) Geographic descriptions are charged with value-laden descriptors that evoke a desolate and hostile land:

"To bring you [Bibi's] story, [our reporter] traveled thousands of miles to one of the world's most lawless and inaccessible lands." [\[FN339\]](#)

"Her life is of another time. It's a life so far removed from the world we know, it's surprising we ever heard of her story. But from a place without telephones or any modern communication, the story got out" [\[FN340\]](#)

"[O]n our way, it seemed that every mile we traveled forward, we went further backward in time . . . into . . . a lawless land After hours on roads where bandits lurk, and then on no roads at all, we arrived in one of Pakistan's most primitive and tradition-bound regions." [\[FN341\]](#)

"A tradition that goes back thousands of years." [\[FN342\]](#)

"In the blazing 115-degree heat, we finally met [Bibi]." [\[FN343\]](#)

"And there the case may have ended, hidden away by distance and centuries of silence." [\[FN344\]](#) *320 The narration included description of social customs and the mechanisms of legal justice in Pakistan:

"[She has] lived her life in the shadows, according to centuries-old rules and laws." [\[FN345\]](#)

"Here in the Punjab region of Pakistan, civilization is about 4,000 years old, and so are some of the social customs." [\[FN346\]](#) It also described the women in these circumstances as quiet and passive victims:

"Now, this quiet, pious victim has found her voice." [\[FN347\]](#)

"[A]nd a soft voice has now been heard around the world." [\[FN348\]](#)

"She's 30 years old, but behind her veil she seems years older, her eyes reflecting the pain of what happened to her." [\[FN349\]](#)

"We've learned that millions of women here are at once held as pillars of virtue and held as pieces of property to be traded, discarded or destroyed at will or on whim." [\[FN350\]](#)

"[W]omen are a commodity. It's like you have a flashy car, you've got a flashy house, and you've got this woman. She's a commodity." [\[FN351\]](#)

"Even in rural Pakistan where, according to human rights activists, women are routinely beaten, bartered and even sold, there was disbelief that a tribal council had authorized--sanctioned--a gang rape." [\[FN352\]](#) The gang rape itself is described as an unimaginable and unheard-of act:

*321 "[F]ew stories are as chilling as the complicated trail of cruelty and cover-up you're about to see tonight." [\[FN353\]](#)

"[Bibi] was subjected to something so inconceivable." [\[FN354\]](#)

"Medieval torture." [\[FN355\]](#)

"This is [Bibi's] stunning story." [\[FN356\]](#)

Press reports expressed similar themes: the lack of paved roads, a dusty village, a feudal society obsessed with honor. [\[FN357\]](#) The incident was framed in terms of class and power, where social traditions allowed the rape of lower caste women by men of more powerful tribes. [\[FN358\]](#) Rape was described as a common occurrence; women suffer from a

lesser status than men, and authorities look the other way when unlawful punishments are meted out. [FN359] Accounts about the rape included demands to dismantle tribal councils, which were linked to the rise of growing Islamic extremism. [FN360]

In both the Dateline feature and press accounts, the narrative served a purpose other than reporting a gang rape. Describing Pakistan with imagery of a hostile terrain and as a desolate country unfit for habitation suggests the way that the media serves as an "ideological apparatus" by which the old binaries of barbarism and civilization are reiterated. [FN361] Pakistan is represented as lawless and barbaric, and the rape serves as evidence that civilization has failed to reach this part of the world.

Rape as a form of punishment sanctioned by a council in discharge of legal or quasi-legal functions demands condemnation, of course. These circumstances, however, are not "something so inconceivable" or so unrecognized. [FN362] The use of rape as punishment is not unknown in the United *322 States, and is understood to be at the core of acts of sexual violence. [FN363] Individuals cloaked with officialdom perpetrate rape, or do not investigate or prosecute rape claims by women (and men) in the military and in prisons throughout the United States. [FN364] In at least five instances, a judge raped and sexually assaulted women while wielding the power of his office. [FN365] In one of these cases, a judge raped five women in his chambers, at least once while wearing his judicial robe. [FN366] Eventually, federal charges for rape were brought *323 in the course of an unrelated investigation, but the judge's political influence shielded him from state accountability for his crimes. [FN367] The Sixth Circuit vacated his conviction for depriving the women of their constitutional rights and privileges. [FN368] Ultimately, the appeal was dismissed because he was a fugitive who failed to turn himself in, and his victims were left without relief from the courts. [FN369]

In U.S. prisons, where sexual assault by one inmate against another has been tolerated, if not encouraged, rape is recognized as a "collateral and unofficial supplement to the publicly acknowledged repertoire of punishments that the prison metes out." [FN370] Women prisoners are particularly vulnerable and have been raped by prison guards, chaplains, deputy wardens, and other prison administrators. [FN371] Legal precedents prevent women from obtaining relief even where a rape has been proven and there has been prior notice of abusive sexual conduct by a prison employee, all of which suggest official acquiescence to such practices. [FN372] Nonetheless, what is inconceivable is that there is no institutional or official culpability for the suffering of rape victims here.

The rape of Bibi serves as a symbol of Pakistani lawlessness, revealing the country as a place where authorities turn a blind eye to sexual assaults. [FN373] The media challenged the legitimacy of tribal councils and linked them to the *324 spectre of rising fundamentalist Islamic beliefs, although there was no history of any other tribal council decreeing rape as punishment, nor was there any historical link to Islam. [FN374] Panchayats have functioned for centuries as community-based structures designed to provide a mechanism for poor people to resolve arguments between families, settle disputes over land, and mediate issues involving welfare and disagreements within the community. [FN375] As extra-judicial structures, they function similarly to alternative conflict resolution mechanisms that have developed more recently in the United States. [FN376] Nonetheless, their quasi-judicial existence outside of official courts has contributed to their denunciation. [FN377]

The point here is not that women in the United States suffer in ways similar to Mukhtaran Bibi, or that women suffer internationally. [FN378] The significance is located in the discourse employed in the Bibi case and the problem of "the ethics of comparison" that it raises. [FN379] A distorted discourse not only suggests that Pakistan is lawless, but it may prevent an accurate understanding of the conditions Bibi endured and may inhibit a meaningful identification with the harm she suffered. It is possible, moreover, that the characterization of the Bibi case serves to obscure the common condition of women and prevent the development of strategic and international bonds to *325 contest universal abuses. [FN380] This is not to argue for the universal experience of women, but rather to assert that disparaging differences conceal sites of resistance, solidarity, and the possibility for collective action. [FN381] In the end, such discourse may serve as little more than a form of moral intervention, contributing to a political socialization that foment cultural arrogance toward other countries.

B. The CEDAW Debates

Adopted in 1979 by the UN General Assembly, and often described as the international bill of rights for women, CEDAW defines discrimination against women and creates a framework of normative and legal developments for signatories to pursue in order to achieve treaty goals. [\[FN382\]](#) CEDAW broadly defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. [\[FN383\]](#) Nations that ratify the treaty bind themselves to amending their legal system to abolish all discriminatory laws and to prohibit all forms of discrimination against women. [\[FN384\]](#) Signatories are required to establish legal and public institutions toward these goals. [\[FN385\]](#)

***326** Congress has periodically debated CEDAW. [\[FN386\]](#) During these Congressional debates, both proponents and detractors of the treaty have invoked the concept of American exceptionalism to advance their positions. [\[FN387\]](#) Opponents of CEDAW have generally argued that the treaty threatens to affect women's interests adversely. [\[FN388\]](#) They have warned, for example, that the treaty provisions are incompatible with U.S. traditions of motherhood and customs of child-rearing. [\[FN389\]](#) But perhaps more telling is the fact that treaty proponents have also expressed their position in terms that may be said to conflict with human rights values. Supporters of ratification have framed their arguments in terms that denigrated other cultures and geopolitical regions while exempting the United States from the problems that women suffer worldwide. [\[FN390\]](#) At the same time, supporters have positioned the United States above all others to intercede globally on behalf of women's rights. [\[FN391\]](#)

The arguments have been consistent throughout the debates-- ratification of CEDAW is required to alleviate suffering almost everywhere except the United States. The named beneficiaries of U.S. ratification have included Afghanistan, Nigeria, Rwanda, Iran, Saudi Arabia, India, Pakistan, Nepal, Bosnia, and East Timor, as well as the Middle East, Southeast Asia, and ***327** Africa--in short, the "Third World." [\[FN392\]](#) Treaty ratification has been linked to rebuilding Afghanistan and guaranteeing Afghani women fundamental human rights. [\[FN393\]](#) Supporters have defended the treaty as a means to remedy deplorable human rights conditions for women in other parts of the world. [\[FN394\]](#) Ratification of CEDAW as a means to improve conditions in the United States has rarely been used as justification. [\[FN395\]](#)

The debates have followed the human rights policy paradigm: The United States is identified as the exemplar and champion of human rights. Proponents have insisted that ratification would not burden the United States [\[FN396\]](#) ***328** and that U.S. institutions serve as the inspiration for other nation- states. Existing federal and state statutes, it has been argued, prohibit discrimination against women and hence the United States could ratify CEDAW without any change to its domestic laws. [\[FN397\]](#) As one senator stated, "[A]ll of the things in this treaty we already do in our country." [\[FN398\]](#) Another proponent argued that "[r]atification would not require us to change a single one of our laws." [\[FN399\]](#) The United States has been characterized as a "leader of human rights" [\[FN400\]](#) and a country that does not need CEDAW to improve conditions for women. [\[FN401\]](#)

Congress has used its claims of U.S. uniqueness to justify its special responsibilities to the rest of the world. To that end, proponents CEDAW have invoked a familiar theme--the defense of universal civilization requires the rescue of women in other parts of the world. [\[FN402\]](#) The purpose of U.S. confirmation of the treaty has been expressed in terms of its "moral right to lead" [\[FN403\]](#) and its obligation to teach the rest of the world by example. [\[FN404\]](#) ***329** Ratification has been urged to allow the rest of the world to learn from the experiences of the United States. [\[FN405\]](#) Passage of the treaty has been urged to provide cover for charges of "ethnocentric [criticisms]" to enable the United States to denounce "[other] cultures that allow . . . vile customs." [\[FN406\]](#) Approval would enhance the credibility of the United States and thus enable it to pressure other governments. [\[FN407\]](#) Ratification is needed to provide "the clout" and "the portfolio" to lead the world and to intervene in other countries. [\[FN408\]](#)

There is no reason to believe that congressional proponents of CEDAW proffer their arguments for any reason other than concern for the suffering of women in other parts of the world. It is also reasonable to infer that supporters of CEDAW who minimize the need to change domestic law to comply with treaty requirements may be motivated by pragmatic considerations about promoting the treaty. However, these claims reveal the certainty with which the United

States affirms the superiority of its laws and the basis by which human rights norms are measured from a discursively constructed privileged position. [\[FN409\]](#)

Indeed, the treaty supporters divide the world into a "have and have not" dichotomy: those countries that have human rights problems and those that do not. Despite rising numbers of rape and incidents of domestic violence, lingering gaps between wages paid to women and men, and ongoing discrimination in health services, treaty supporters argue that human rights issues are not applicable to the United States. Moreover, the debate has also obscured other countries' gains toward gender equality that the United States has yet to match. [\[FN410\]](#)

*330 IV. Future Implications of a "Distinctly American Internationalism"

[\[FN411\]](#)

Criticism of the discourse of human rights risks the charge of nihilism. [\[FN412\]](#) To be sure, the horrors experienced by people in many parts of the world demand a response. As Martha Nussbaum notes, "in a time of rapid globalization, when non-moral interests are bringing us together across national boundaries, we have an especially urgent need to reflect about . . . moral norms." [\[FN413\]](#) Postmodern theories of relativism and invocation of cultural diversity may serve to impede criticisms of oppressive cultural practices. [\[FN414\]](#) To remain silent in the face of human rights abuses may be another form of ethnocentrism that insulates views from the rigors of debate and scrutiny. [\[FN415\]](#)

But critical thinking about the selective application of human rights criteria is relevant to current circumstances. The United States presently finds itself as an occupying nation in post-war Iraq while it faces deepening world-wide suspicion. [\[FN416\]](#) It once again relies on ideological dispositions that defend both the methods and the purposes of foreign policy. Human rights obtains propaganda value at multiple levels. The invocation of human rights not only serves to justify U.S. actions abroad but also acts to enlist political support at home. [\[FN417\]](#)

One must think critically about these issues to resist the compromise of humanitarian concerns by policies that ultimately may be in conflict with human rights interests. Military intervention in the former Yugoslavia in the *331 name of humanitarian interests proved to be more about politics than rescue. [\[FN418\]](#) Indeed, humanitarian needs described as a "small element of the political crisis in Kosovo" turned into a "humanitarian emergency" only after the NATO bombing campaign. [\[FN419\]](#) U.S. military intervention in Haiti in 1994 responded more to concerns about Haitian immigration to the United States than the restoration of democracy in Haiti. Selective human rights policies haunt the United States in Iraq, raising doubts about the stated purposes of the war, including its last-resort appeals to concerns for human rights. [\[FN420\]](#) Similarly, in Liberia, past deeds and inconsistent concern for humanitarian crises in Africa cloud the circumstances in which the human rights project might function. [\[FN421\]](#)

The September 2002 National Security Strategy is a recent iteration of U.S. foreign policy cloaked in concern for human rights. This document calls for pre-emptive military strikes against potential hostile states with the purpose of gaining dominance in the forum of humanitarian values. [\[FN422\]](#) The call for "a distinctly American internationalism that reflects the union of our values and our national interests" suggests that military intervention can be used to force a U.S. cultural system upon other peoples, or worse yet, that global order ought to conform to the requirements of the United States. [\[FN423\]](#) Thus, current foreign policy discourse has adopted ideological dispositions similar to those used in the early twentieth century, which set out in unusually plain language the *332 American design for world hegemony based on the definition of national interests. [\[FN424\]](#)

The President's 2002 State of the Union speech also alluded to the obligation of a great nation to extend its values. [\[FN425\]](#) U.S. foreign policy was expressed in terms of a civilizing mission against "rogue states" that lack regard for human values. [\[FN426\]](#) At the same time, U.S. policies that ignore humanitarian crises in Africa continue patterns of racialized hierarchies that have long guided international relations. [\[FN427\]](#) Suspicion of Islam appears to have replaced hostility toward Communism. [\[FN428\]](#) The value of human rights has been clearly articulated as a function of national interest and domination in a manner that seeks to disarm critics abroad while it obtains political support at home.

The historical parallels between the use of human rights to justify U.S. military occupation in the early twentieth century and U.S. military operations in the early twenty-first century are striking. The recent invocation of the plight of Afghan women as justification for intervention in Afghanistan is reminiscent of the case made for intervention in Cuba in 1898. [\[FN429\]](#) The United States seems to need images of grateful Iraqis welcoming U.S. soldiers to validate its arrival in Baghdad. But its continued presence is justified by the claim that these same Iraqis are unfit to manage their own affairs. So too with images of Haitians in the mid-1910s, who were depicted as unable to act competently in their own political affairs and thus thankful for the U.S. military occupation. [\[FN430\]](#)

*333 V. Conclusion

The human rights project may be up to the task of considering the current uses of humanitarian concerns. As Makua Wa Mutua observes, "the human rights movement needs to alter its orientation, which has been an orientation of moral, political, and legal certitude. There needs to be a realization that the movement is young and that its youth gives it an experimental status, not a final truth." [\[FN431\]](#) The increasing attention of critical legal scholarship to humanitarian issues reflects similar developments among human rights advocates in the field. Human rights organizations have recently voiced forceful objections to the inconsistent and self-serving purposes by which their work has been appropriated by U.S. policy interests. [\[FN432\]](#)

There is no programmatic blueprint for human rights work that will guarantee the use of human rights in ways that are consistent with core assumptions of human dignity, "solidarity, a fundamental sympathy for victims, and an antipathy for oppressors and exploiters." [\[FN433\]](#) Vital to this task are self-awareness and humility, a consciousness of the complexity of the cultural terrain, and a willingness to consider reparations for mistakes of the past. [\[FN434\]](#) *334 These methods may help prompt the human rights discourse to consider questions of sovereignty and cultural self-determination, and to engage in critical self-appraisal and acknowledgment of the misuse of the humanitarian project.

Human rights violations must continue to command attention; however, at the same time, addressing these conditions creates complexities that cannot be overstated. Efforts to develop "consistent, credible, and enforceable standards to guide state and intergovernmental practice" are diminished without consideration of the current and historic misuses of power. [\[FN435\]](#) Human rights activists must ask whether a lack of coherency in policy reflects the hard choices inherent in the human rights community's finite capacity to attend to global crises, or whether such inconsistency reflects geopolitical and economic interests and biases. [\[FN436\]](#) It is also worth asking whether a human rights policy steeped in inconsistency and selectivity is part of a deliberate effort on the part of some states to weaken legal constraints on intervention in order to achieve unfettered exercise of power. [\[FN437\]](#) Advocates must question whether human rights values formulated on the normative systems of dominant states, however deeply *335 held in such sites, are capable of producing meaningful criteria in less powerful states whose views and concerns routinely have been discounted, if not disregarded. [\[FN438\]](#) Without this scrutiny, human rights law may develop as an instrument wielded by powerful nations against those that are less powerful. [\[FN439\]](#)

There is danger in proceeding without caution. Laws and legal structures, if they are to have any value either domestically or internationally, cannot be developed for the self-serving gains of dominant nations. While efforts were still underway to develop a constitution in Afghanistan, the West had already begun to criticize the process of formulating the proposed constitution because it deviated from Western norms. [\[FN440\]](#) It is in the context of the current military occupation of Iraq under conditions brought about by the U.S. doctrine of preemptive war that Iraq's legal structures are being developed. While Iraqis complain about delays in the transfer of power, senior U.S. (and British) administrative officials have expressed concerns, in terms disturbingly reminiscent of U.S. manipulation of suffrage rights in Cuba in 1900, that if elections were to be held during the occupation, a Shiite Muslim cleric may be elected. [\[FN441\]](#) Power in Iraq remains centralized in the hands of a U.S. military commander and U.S. civilian occupation administrator who have denied Iraqis the opportunity to participate in the development of their country's *336 infrastructure. [\[FN442\]](#) Indeed, immediately upon the approval of an interim Iraqi Constitution which was drafted by a non-elected body appointed by U.S. administrators, a significant segment of the Iraqi population denounced the document and "dismiss[ed] it as the work of the United States and its . . . allies." [\[FN443\]](#)

The human rights project must be fixed to prevent it from becoming a system that facilitates the self-serving desires of a dominant nation. At the same time, human rights may best be considered with ideological dispositions that recognize that diverse cultures possess their own methods of resolution. [FN444] Clifford Geertz recently cautioned against efforts to conceive of other cultures "in sweeping, 'civilizational' terms." [FN445] Instead, he argued that we should use "the swirl of a particular incident, particular politics, particular voices, particular traditions, and particular arguments, a movement across the grain of difference and along the lines of dispute," however disorienting that approach may be. [FN446] His approach sets a course that would well-serve the human rights project. Encouragement for critical thinking about human rights may be justified in the knowledge that "the only real nihilism is the pious analysis of events." [FN447]

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[FN1]. See Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law* 1 (2000) (noting the increase in scope and pervasiveness of human rights law in international relations and national political and legal systems); see also Nikhil Aziz, *The Human Rights Debate in an Era of Globalization*, in *Debating Human Rights* 32, 32 (Peter Van Ness ed., 1999) (positing that human rights debates have a central position in the globalization era).

[FN2]. U.N. Charter, pmb.; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The use of the term "human rights project" throughout this Article refers to a bundle of values, as well as the legal instruments, procedures, and systems that emanate from these values. See Makau Mutua, *Savages, Victims, and Saviors*, 42 *Harv. Int'l L.J.* 201, 210 (2001) (defining the human rights movement as a "quest to create a bundle of attributes with which all societies must endow a human being").

[FN3]. See, e.g., Michael Hardt & Antonio Negri, *Empire* 115 (2000) (describing utopian tendencies that accompany forces of globalization); Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* ix (2003) (documenting the expansion of human rights work).

[FN4]. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *Harv. Hum. Rts. J.* 101, 119 (2002) (noting that the human rights movement attracts good-hearted people in a discipline that lies between public law and international law). The term "humanitarian," used in connection with values, projects, or objectives throughout this Article, refers to ideals or endeavors to ameliorate, if not end, a range of human rights abuses and grave human suffering. See Thomas G. Weiss & Don Hubert, *International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Research, Bibliography, Background* 16 (2001), <http://www.ciaonet.org/wps/wet01/wet01h.pdf>. Humanitarian intervention references nonconsensual military force by a state or states against another state in response to brutal and cruel treatment of inhabitants of that state. *Id.* at 17. The concept of humanitarian intervention precedes the post-World WarII articulation of "human rights" and was first referenced in the international legal discourse as early as 1840 as the means for achieving international stability and the protection of human rights. *Id.* at 16-17. The concept of humanitarian intervention has evolved and is now associated with more recently articulated human rights concerns. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 *I.C.J.* 14, 129, 130, 254-55 (June 27) (requiring that humanitarian intervention be linked closely to international legal norms).

[FN5]. See Robert Kuttner, *The Role of Governments in the Global Society*, in *Global Capitalism* 155 (Will Hutton & Anthony Giddens eds., 2000).

[FN6]. Luc Boltanski, *Distant Suffering: Morality, Media and Politics* xiv (Graham Burchell trans., 1999).

[FN7]. [Lawrence v. Texas](#), 123 S. Ct. 2472 (2003) (citing a European Court of Human Rights case as guidance in striking down a state law criminalizing sexual conduct between persons of the same sex); [Grutter v. Bollinger](#), 123 S. Ct. 2325 (2003) (Ginsburg, J., concurring) (citing two international human rights treaties as support for affirmative action programs); [Atkins v. Virginia](#), 536 U.S. 304 (2002) (considering the views of the international legal community in striking down the death penalty for mentally retarded defendants).

[FN8]. See Alien Tort Claims Act of 1789, [28 U.S.C. § 1350](#) (2000); Torture Victim Protection Act of 1991, [28 U.S.C. § 1350](#) (2000); [United States v. Alvarez-Machain](#), 331 F.3d 604 (9th Cir. 2003), cert. granted, [124 S. Ct. 821](#) (U.S. Dec. 1, 2003) (No. 03-485); An Important Human Rights Tool, N.Y. Times, Aug. 8, 2003, at A16 (editorializing about the need to adjudicate international human rights abuses under the Alien Tort Claims Act (ACTA)); Gina Holland, Ginsburg: Int'l Law Shaped Courts' Ruling, Associated Press, Aug. 3, 2003, http://www.kansascity.com/mld/kansascity/news/breaking_news/6445859.htm (reporting on Justice Ginsburg's speech to the American Constitution Society on the importance of international human rights norms in adjudicating domestic matters); Adam Liptak, U.S. Courts' Role in Foreign Feuds Comes Under Fire, N.Y. Times, Aug. 3, 2003, at A1 (reporting on the debate about increased litigation of international human rights in federal courts); Arlen Specter, The Court of Last Resort, N.Y. Times, Aug. 7, 2003, at A23 (supporting the use of the ATCA and the Torture Victim Protection Act (TVPA) to protect human rights around the world); see also Beth Stephens, [Individuals Enforcing International Law: The Comparative and Historical Context](#), 52 DePaul L. Rev. 433, 436 (2002) (describing the "relentless" debate over the recent resuscitation of ATCA).

[FN9]. See Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts for Petitioners, [United States v. Morrison](#), 529 U.S. 598 (2000) (No. 99-0029) (arguing that international legal norms created authority for the enactment of federal civil rights laws on gender-based violence); Martha F. Davis & Roslyn Powell, The International Convention on the Rights of the Child: A Catalyst for Innovative Childcare Policies, 25 Hum. Rts. Q. 689 (2003) (advocating that childcare issues be framed as human rights); Catherine A. MacKinnon, [Disputing Male Sovereignty: On United States v. Morrison](#), 114 Harv. L. Rev. 135, 166-68, 176-77 (2000) (urging the deployment of international legal norms as a means to expand recognition of domestic rights); A. Mark Weisburd, [American Judges and International Law](#), 36 Vand. J. Transnat'l L. 1475, 1476 (2003) (observing that ever more frequently, American courts are dealing with cases that raise issues related to public international law); Jennings Kohlberger, Note, [Using Principles of International Law to Reshape American Legislation of State Official English Laws](#), 29 J. Legis. 253 (2003).

[FN10]. See David Rieff, A Bed for the Night 66-67, 72-73, 97 (2002); Hurst Hannum, [Bellum Americanum](#), 27 Fletcher F. World Aff. 29, 29 (2003) (noting George W. Bush's invocation of human rights and the protection of mankind as cause for intervention in Iraq); Yvonne C. Lodico, The [Justification for Humanitarian Intervention: Will the Continent Matter?](#), 35 Int'l Law. 1027, 1029, 1047 (2000) (noting selective, if not discriminatory, application of standards for intervention); Stanley Hoffman, America Goes Backward, N.Y. Rev. of Books, June 12, 2003 (book review), at 74 (suggesting that the invasion of Iraq was a rationale that allowed President Bush to increase the power of the United States and his own power).

[FN11]. Lodico, *supra* note 10, at 1031.

[FN12]. See Holland, *supra* note 8 (reporting on remarks by Justice Ginsburg).

[FN13]. See, e.g., Gayatri Chakravarty Spivak, *Righting Wrongs*, in *Human Rights, Human Wrongs* 168, 169 (Nicholas Owen ed., 2003) (suggesting that human rights work has been used as an "alibi for economic, military and political intervention"); see also Rieff, *supra* note 10, at 26-27 (arguing that humanitarian groups serve political interests contrary to the needs of victims of war crimes and terror); Sally Engle Merry, *Globalization, Culture, and the Practice of Human Rights* (2002) (unpublished manuscript, on file with the Columbia Human Rights Law Review) (asking whether human rights constitutes a new form of imperialism).

[FN14]. Elizabeth M. Iglesias, [International Law, Human Rights, and LatCrit Theory](#), 28 *U. Miami Inter-Am. L. Rev.* 177, 179-80 (1997) (noting the need to add an anti-subordination perspective to international law and human rights scholarship).

[FN15]. See *infra* notes 32-35, 55, 181-85.

[FN16]. See *infra* Part I.A.

[FN17]. Uche U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 *Hum. Rts. Q.* 424, 429-30 (2002) (noting that the study of women and human rights issues illustrates tensions and contradictions in postcolonial states); see also Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* 50 (2001) (describing the ironic position of women as the keepers of cultural traditions that are oppressive to their sex).

[FN18]. See *infra* Part II.D.

[FN19]. Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* 93, 114 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (explaining that humanitarian intervention must be concerned with the respectful treatment of individuals and must cause more good than harm).

[FN20]. Ugo Mattei, [A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance](#), 10 *Ind. J. Global Legal Stud.* 383, 390-93 (2003) (describing the ideological apparatuses of the hegemonic features of U.S. law); Makau Wu Mutua, *The Ideology of Human Rights*, 36 *Va. J. Int'l L.* 589, 592 (1996) (observing that the body of human rights is derived from Western liberalism and the influence of U.S. ideology in shaping human rights policy).

[FN21]. Spivak, *supra* note 13, at 169 ("One cannot write off the righting of wrongs.").

[FN22]. Cf. Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility*, Part I, 90 *Am. Hist. Rev.* 339, 348 (1985). In a related context, Haskell examines the relationship between abolitionists' intentions and the hegemonic consequences of their actions as a function of self-deception defined as "occupying the space between intention and consequence." *Id.* A useful aspect of this construct is that it "banishes the implication of conspiracy." *Id.* Similarly, conventional truths also mask hegemonic consequences of the human rights project and should be reconsidered without "implication of conspiracy." *Id.*

[FN23]. Boltanski, *supra* note 6, at xv.

[FN24]. See Hannum, *supra* note 10, at 30 (noting the failure of U.S. human rights policies in Somalia, Rwanda, the Democratic Republic of Congo, Liberia, Sierra Leone, and East Timor).

[FN25]. Cf. Thomas C. Grey, *The Wallace Stevens Case: Law and the Practice of Poetry* 7 (1991) (referencing John Keats's invocation of "Negative Capability" described as "[t]he ability to hold conflicting generalizations in mind at the same time").

[FN26]. Charlesworth & Chinkin, *supra* note 1, at 54 (observing the difficulty of identifying common global human rights concerns for women). A considerable scholarly discourse, too voluminous to catalogue in a footnote, has addressed the question of shared values and their usefulness as the foundation for gender-based human rights norms.

[FN27]. It is perhaps useful to observe at the outset that the notion of nations as "dominant" and "subordinate," in fact, corresponds to the larger realities conveyed through such constructs as colonizer and colonized, First World and Third World, North and South, and developed and underdeveloped. These dichotomies allude to specific social circumstances in which the exercise of power determines outcomes. This understanding provides a useful perspective from which to examine current human rights models. Many authors have described difficulty with dichotomizing terminology. See, e.g., Hope Lewis, [Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas, 5 J. Gender Race & Just. 197, 205 n.28 \(2001\)](#) (expressing discomfort with such terms as "essentialist" and "demeaning"); Vasuki Nesiah, *Towards a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 Harv. Women's L.J. 189 (1993) (noting the hierarchical implications of these terms). One scholar has noted both the limits and benefits to using the term "Third World," which may signify, "not only in descriptive but in normative terms,... an intolerable situation that demands a response." Karin Mickleson, [Rhetoric and Rage: Third World Voices in International Legal Discourse, 16 Wis. Int'l L.J. 353, 360 \(1998\)](#). Use of such terminology may suggest the need for redistribution of power and resources, as well as "a fundamental rethinking of international relations." *Id.*

[FN28]. Jean-Paul Sartre described colonialism as a contradiction "[I]aying claim to and denying the human condition at the same time." Jean-Paul Sartre, *Preface to Frantz Fanon, The Wretched of the Earth* 7, 20 (Constance Farrington ed. & trans., Penguin Books 1967) (1963).

[FN29]. Edward W. Said, *Culture and Imperialism* ix (1993) (describing the European perspective on colonial expansion as "bringing civilization to primitive or barbaric people who deserved to be ruled").

[FN30]. See *id.* at 29 (noting that colonialism served as an "ideology of lies, a perfect justification for pillage [and] alibis for ... aggressions"); see also Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* 19 (2000) (noting that the colonizing process depended upon claims to be "'civilizing' a 'barbaric' or 'savage' people"); Uma Narayan, *Dislocating Cultures* 14-15, 55 (1997) (noting that the rhetoric of the superiority of Western civilization served to legitimate the colonial project); Edward W. Said, *Orientalism* 3 (1978) (arguing that "European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self"); Joel Richard Paul, [Cultural Resistance to Global Governance, 22 Mich. J. Int'l L. 1, 5-6 \(2001\)](#) (observing that European culture was represented as the evolved civilization in the nineteenth century).

[FN31]. Fanon, *supra* note 28, at 42. Fanon writes that, as indicative of "the totalitarian character of colonial exploitation the settler paints the native as a sort of quintessence of evil." *Id.*; see also Hardt & Negri, *supra* note 3, at 116 (noting colonialists' humanitarian projects were carried out for the purpose of bringing indigenous people into the realm of Christianity and European culture to achieve sameness).

[FN32]. Narayan, *supra* note 30, at 17, 54-55. Narayan describes conflicts between Western colonizers and colonized cultures as focused on the figure of the "[c]olonized woman" and the site of the struggle for culture and values. *Id.* at 17.

[FN33]. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 *Harv. Hum. Rts. J.* 1, 21 (2002) (noting that in India, British efforts to end "extreme cultural practices" pertaining to women were more pretext than purpose); see also Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 *Geo. Wash. Int'l L. Rev.* 483, 484-85 (2002) (noting that British humanitarian interests were less preoccupied with female infanticide than with the imposition of British authority exercised as a "monopoly on violence" and the idea that they "alone could determine issues of life and death"); Narayan, *supra* note 30, at 54 (noting that criticisms of sati were not registered out of concern for women but to justify colonial rule in India). Narayan also explains that colonial feminists in England saw themselves as compelled to save Indian women who "appeared to them to be the natural and logical 'white woman's burden.'" *Id.* at 18; see generally Dagmar Engels, *Wives, Widows and Workers: Women and the Law in Colonial India*, in *European Expansion and Law* 159, 159, 161-62 (W.J. Mommsen & J.A. de Moor eds., 1992) (writing about the history of Indian women under colonial law in the nineteenth and early twentieth centuries and the efforts by the British to abolish female infanticide and sati). For a critical overview of British concerns with sati, see Leti Volpp, *Feminism Versus Multiculturalism*, 101 *Colum. L. Rev.* 1181, 1206 (2001).

[FN34]. See *supra* note 33.

[FN35]. See Kristin L. Hoganson, *Fighting for American Manhood* 11, 45-56, 134-35 (1998).

[FN36]. See, e.g., *id.* at 11 (depicting Cuban women as sexual victims of the Spanish).

[FN37]. *Id.* at 46, 50 (noting that stories of painful ordeals endured by vulnerable women "struck powerful emotional chords" and were repeated by Congressmen "[a]lthough many stories... strained credulity").

[FN38]. Frederic M. Noa, *The Condition of Women in Cuba*, *The Outlook*, Mar. 11, 1905, at 643.

[FN39]. Hoganson, *supra* note 35, at 58-61; A.F. Aldridge, *Señorita Cisneros*, *N.Y. Times*, Sept. 12, 1897, at 12; see also Walter Millis, *The Martial Spirit* 82-84 (1931) (describing a gendered storyline in the news intended to "Enlist the women of America!" to take up the cause of intervention in Cuba). Headlines proclaimed "Accomplishes at a Single Stroke What the Best Efforts of Diplomacy Failed Utterly to Bring About in Many Months." *Id.* at 84 (citation omitted).

[FN40]. What had been described as a "daring rescue" was an easy venture, and the facts about Cossío's identity and her punishment were misstated and exaggerated. See Hoganson, *supra* note 35, at 60-61; Millis, *supra* note 39, at 84 (describing both the distorted story of the rescue and the U.S. public outcry and celebration of the "rescue"); Miss Cisneros's Case Exaggerated, *N.Y. Times*, Aug. 27, 1897, at 3; *Señorita Cisneros's Case*, *N.Y. Times*, Sept. 1, 1897, at 7.

[FN41]. Hoganson, *supra* note 35, at 135-37; see also Amy Rossabi, The [Colonial Roots of Criminal Procedure in the Philippines](#), 11 *Colum. J. Asian L.* 175, 196 (1997) (describing the denigration of Filipinos).

[FN42]. Hoganson, *supra* note 35, at 135, 137.

[FN43]. Michael H. Hunt, *Ideology and U.S. Foreign Policy* 86 (1987).

[FN44]. Hoganson, *supra* note 35, at 155.

[FN45]. Mary A. Renda, *Taking Haiti* 10, 16, 178 (2001).

[FN46]. *Id.* at 80.

[FN47]. *Id.* at 178 (noting that Haiti was depicted as a land of sexual excess, primitive savagery, lacking basic social order).

[FN48]. Merry, *supra* note 30, at 21; see also Calvin G.C. Pang, [Slow-baked, Flash-fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond](#), 20 *U. Haw. L. Rev.* 1, 13 n.46 (1998) (describing the missionaries' purpose as both delivering and dominating Hawaiian society, which was perceived as the "weak female needing manly protection from a dangerous world").

[FN49]. See Kennedy, *supra* note 4, at 105 (criticizing the human rights movement for portraying women as "mothers-on-pedestals or victimized care givers" because "even if the only consequence is to pry loose some resources for redistribution to women," representing women too narrowly has other negative consequences).

[FN50]. See Hoganson, *supra* note 35, at 56 (observing that political cartoons represented Cuba as a "ravished woman" awaiting the rescuing knights in the form of U.S. military troops and observing that political jingoists encouraged the United States to chivalrously intervene to stop a "brute (Spain) from "pounding a helpless woman" (Cuba)); Hunt, *supra* note 43, at 60 (describing the depiction of the Latino as "a white maiden passively awaiting salvation or seduction"); Renda, *supra* note 45, at 137 (noting that the Philippines were feminized and represented as a savage and uncivilized woman).

[FN51]. Said, *supra* note 29, at 21-22, 93-95.

[FN52]. Kennedy, *supra* note 4, at 114 (identifying alienation, loss of faith, environmental degradation, and immorality as consequences that have been attributed to emancipation projects by the West); see also Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* 5 (2001) (arguing that caste, as understood today, is the product of an historical encounter between India and Western colonial rule).

[FN53]. Hilary Charlesworth et al., [Feminist Approaches to International Law](#), 85 Am. J. Int'l L. 613, 619 (1991).

[FN54]. Ester Boserup, Economic Change and the Roles of Women, in *Persistent Inequalities: Women and World Development* 14, 23 (Irene Tinker ed., 1990) (observing that antifeminist views held strong in Europe during the colonial period); see also K. Lynn Stoner, *From the House to the Streets* 13 (1991) (noting that notwithstanding their depiction as fragile victims, Cuban women who were widely recognized for their heroism and combativeness in the Cuban war of independence found themselves restricted in family arrangements and ownership and control of property under U.S. military occupation). Sally Engle Merry, [Law, Culture and Cultural Appropriation](#), 10 Yale J.L. & Human. 575, 595-96 (1998) (noting, for example, that the doctrine of coverture was transferred from the United States to Hawaii in 1845 and that women were subsequently disenfranchised in 1850, thus eliminating once powerful and active women from political participation).

[FN55]. Boserup, *supra* note 54, at 20-23; see also Pedro A. Cabán, *Constructing a Colonial People* 136 (1999) (noting that following acquisition of Puerto Rico in 1898, the colonial state set about educating women to accept the legitimacy of family and workplace gender roles and made efforts to suppress women's labor value); Andrée Nicola McLaughlin, *The Impact of the Black Consciousness and Women's Movements on Black Women's Identity: Intercontinental Empowerment*, in *Connecting Across Cultures and Continents* 71, 81 (Achola O. Pala ed., 1995) (noting that Aryan colonialism in India replaced the Dalit matriarchal system with patriarchal Aryan-Hindu culture); Merry, *supra* note 54, at 595-96 (describing the transformation in relations between husbands and wives whereby women who had previously enjoyed autonomy in their marriages were made subordinate to their husbands).

[FN56]. Merry, *supra* note 30, at 15, 21 (explaining that the colonial project's subordination of women to their husbands related to economic concerns).

[FN57]. Charlesworth et al., *supra* note 53, at 619.

[FN58]. Boserup, *supra* note 54, at 23; see also Jane Dwasi, [Kenya: A Study in International Labor Standards and Their Effect on Working Women in Developing Countries: The Case for Integration of Enforcement Issues in the World Bank's Policies](#), 17 Wis. Int'l L.J. 347, 423 (1999) (describing how advances in modern technology reduced men's workload while increasing women's workload as more menial tasks were left to them).

[FN59]. See Charlesworth et al., *supra* note 53, at 620 (noting the restrictions and controls that colonialism imposed upon colonized women); see also Adetoun O. Ilumoka, *African Women's Economic, Social, and Cultural Rights: Toward a Relevant Theory and Practice*, in *Human Rights of Women* 307, 317-19 (Rebecca J. Cook ed., 1994) (describing the general circumstances of African women under colonialism).

[FN60]. Penelope Andrews, [Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework](#), 60 Alb. L. Rev. 917 (1997) (describing European values relegating Australian aboriginal women to second-class status within their communities and rendering them invisible). The Cuban Constitution of 1901, for example, was considered a defeat for women who protested that the constitution "left Cuba a virtual colony and made noncitizens of its women." Stoner, *supra* note 54, at 56.

[FN61]. See Jorge Ibarra, *Prologue to Revolution* 135 (1998) (noting that under U.S. occupation, Cuban women lost the status they had gained during years of fighting alongside men for Cuban independence).

[FN62]. Cabán, *supra* note 55, at 190-91 (noting that the Olmstead Bill, which included a provision related to individual naturalization and was approved by the House of Representatives, deprived Puerto Rican women of U.S. citizenship). The Senate agreed to pass the Jones Act, which granted Puerto Ricans citizenship status, only if women's suffrage was dropped. *Id.* at 205. Women in Puerto Rico who held U.S. citizenship did not obtain the right to vote until 1932 even though female citizens born in the United States received the right to vote in 1920. Manuel Del Valle, *Puerto Rico Before the Supreme Court*, 19 *Rev. Jur. U. Inter-Am. P.R.* 13, 50 n.165 (1984). For a discussion of the law's detrimental affect on human rights in the colonial project, see *supra* Part I.C.

[FN63]. Merry, *supra* note 30, at 95.

[FN64]. Christine Taylor, [Northern Ireland: The Policing of Domestic Violence in Nationalist Communities](#), 10 *Wis. Women's L.J.* 307, 342 (1995) (describing how, under the British administration in Northern Ireland, the Royal Ulster Constabulary physically attacked women and used degrading terms such as "bitch" and "whore").

[FN65]. *Id.*; see also Hoganson, *supra* 35, at 186-87 (quoting a Filipino about the war, "The people of the United States want us to kill all the men, fuck all the women, and raise up a new race in these Islands"); Renda, *supra* note 45, at 163 (noting that "marines 'prowl[ed] for liquor and women' during off-duty hours" during U.S. occupation in Haiti); Charlesworth et al., *supra* note 53, at 619 (noting that women have been subjected to sexual abuse by colonial settlers and occupation armies). Renda also notes that "[i]n one night alone, in ... Port-au-Prince, nine little girls from 8 to 12 years old died from the raping by American soldiers." Renda, *supra* note 45, at 163.

[FN66]. "Ideology" here refers to the bundling of beliefs and convictions as a set of organizing principles that function to provide order and serve as cognitive strategies by which to make sense of the world. Michael H. Hunt, *Ideology*, 77 *J. Am. Hist.* 108, 108 (1990) (describing "ideology" as "an inter-related set of convictions or assumptions that reduces the complexities of a particular slice of reality to easily comprehensible terms and suggests appropriate ways of dealing with that reality"); see also Akira Iriye, *Culture*, 77 *J. Am. Hist.* 99, 101 (1990) (describing the study of ideology as a way of examining the attitudes and actions of one nation toward another).

[FN67]. See, e.g., Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *Realizing Human Rights: Moving from Inspiration to Impact 3* (Samantha Power & Graham T. Allison eds., 2000); Michael H. Hunt, *Ideology*, in *Explaining the History of American Foreign Relations* 221, 229-35 (Michael J. Hogan & Thomas G. Paterson eds., 2d ed. 2004) (enumerating in bibliographical form an increase in studies and scholarly works that examine the role of ideology as an interpretive tool); Makau Wa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in *The Role of Law in International Politics* 149 (Michael Byers ed., 2000) (observing that the debates about human rights values and their cultural relevance conceal the fact that the human rights corpus is a political ideology); Ruth Gordon, [Racing U.S. Foreign Policy](#), 17 *Nat'l Black L.J.* 1 (2003); Michael Ignatieff, *No Exceptions?*, 2002 *J. Legal Aff.* 59; Iriye, *supra* note 66; Mutua, *supra* note 20, at 589; Carlos R. Soltero, [The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism](#), 22 *Chicano-Latino L. Rev.* 1 (2001); A.M. Weisburd, [Implications of International Relations Theory for the International Law of Human Rights](#), 38 *Colum. J. Transnat'l L.* 45 (1999); Jonathan Zasloff, [Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era](#), 78 *N.Y.U. L. Rev.* 239 (2003).

[FN68]. See generally Abdullahi A. An-Na'im, [Islam and Human Rights: Beyond the Universality Debate](#), 94 *Am. Soc'y*

[Int'l L. Proc. 95 \(2000\)](#) (transcribing address give by Professor An-Na'im and a commentary by Professor Louis Henkin). Of course, religion and human rights are linked because of the tension between them. Id.

[\[FN69\]](#). Hunt, *supra* note 67, at 229-31 nn. 20-26.

[\[FN70\]](#). Lloyd Kramer, Historical Narrative and the Meaning of Nationalism, 58 J. Hist. of Ideas 525, 526-27 (1997).

[\[FN71\]](#). Hunt, *supra* note 43.

[\[FN72\]](#). Id. at 20.

[\[FN73\]](#). Id. (describing the impact of Thomas Paine's Common Sense both in the vast readership it obtained and in its call for independence and liberty); see also David J. Bederman, [International Law Advocacy and its Discontents](#), 2 *Chi. J. Int'l L.* 475, 475 (2001) (describing Walter Mead's analysis of U.S. foreign policy ideology as one rooted in the experience of the American Revolution and the need for expansion to satisfy economic needs, thus incorporating violent cultural values of the American frontier with legalistic and elitist features); Ignatieff, *supra* note 67, at 59 (noting that the notion of U.S. exceptionality is derived from the nation's history of resistance against British colonialism); Minxin Pei, The Paradoxes of American Nationalism, Foreign Policy, May-June 2003, <http://www.foreignpolicy.com/story/story.php?storyID=13631> (arguing that disdain for "Old World" nationalism forms the basis for U.S. identity).

[\[FN74\]](#). Efrén Rivera Ramos, The Legal Construction of American Colonialism: The Insular Cases (1901-1922); see also Hunt, *supra* note 43, at 30 (explaining how territorial expansion was justified by America's special duty as guardians of freedom).

[\[FN75\]](#). Ramos, *supra* note 74, at 287-88.

[\[FN76\]](#). Hunt, *supra* note 43, at 31, 37, 41 (noting that with the need for markets and expansion of commerce, the appeal of liberty and greatness could easily overcome a more limited sense of mission).

[\[FN77\]](#). Id. at 124.

[\[FN78\]](#). Hoganson, *supra* note 35, at 63 (referring to comments made by the governor of Indiana). Hoganson also quotes Senator William V. Allen, who stated, "Are we, the sons of such an ancestry [the Revolutionary fathers], to become pusillanimous and contemptible in the eyes of the world by deserting the Cubans, our neighbors and friends, who have been inspired by our achievements, and who are now seeking the liberty we enjoy?" Id.

[\[FN79\]](#). Louis A. Pérez, Jr., The War of 1898, at 43 (1998) (quoting historian H. Wayne Morgan).

[\[FN80\]](#). Cabán, *supra* note 55, at 38 (quoting Senator O.H. Platt about the acquisitions following the War of 1898).

[FN81]. Hoganson, *supra* note 35, at 159.

[FN82]. Renda, *supra* note 45, at 17.

[FN83]. *Id.* at 92.

[FN84]. Hunt, *supra* note 43, at 921-24 (describing the fear of revolution and political change).

[FN85]. *Id.* at 100-09.

[FN86]. *Id.* at 110 (quoting President Wilson).

[FN87]. *Id.* at 105-15, 153. See also Mutua, *supra* note 20, at 649 (observing that notions of good and evil were associated prominently with human rights issues and the need to defeat Communism).

[FN88]. Hunt, *supra* note 43, at 167-70.

[FN89]. See W.M. Roger Louis, *Age of Empire, Part Two*, *Times Literary Supplement* (London), Apr. 18, 2003 (book review), at 9 (describing American Orientalism as distrust for Arabs and Muslims largely based on fear of the Egyptian revolution in 1952, the Iraqi revolution in 1958, and subsequent political developments which have threatened U.S. strategic interests).

[FN90]. Hunt, *supra* note 43, at 46-52; see also Gordon, *supra* note 67, at 20-21 (describing the racial dimension of U.S. foreign policy); Ramos, *supra* note 74, at 285 (describing the white-supremacist beliefs underpinning U.S. imperialism).

[FN91]. See Hoganson, *supra* note 35, at 134 (finding that racist descriptions of Filipinos paralleled those of Blacks and American Indians in the United States); see also Gordon, *supra* note 67, at 12 (noting that the rationale for unequal treatment of Blacks and Native Americans was similar to that used to justify later inequitable treatment of Mexicans and Chinese).

[FN92]. Gordon, *supra* note 67, at 14-15.

[FN93]. Renda, *supra* note 45, at 29 (describing Haiti as "the nation that was a nightmare to slavery's defenders").

[FN94]. Gordon, *supra* note 67, at 14.

[FN95]. *Id.* at 13-14, 16 (noting that racial hierarchy and the inability of racially inferior people to govern a territory

justified U.S. expansion west of the Mississippi River, into Mexico, Hawaii, the Caribbean, Central America, and the South Pacific); see also Ramos, *supra* note 74, at 287 (explaining that the Manifest Destiny ideology was predicated on notions of racial supremacy and the "right," "duty," and "mission" of the superior race to disseminate its ways in the world); Soltero, *supra* note 67, at 7 (noting that racial considerations were a key part in U.S. expansionism).

[FN96]. Hunt, *supra* note 67, at 223-35 nn.32-35; Hoganson, *supra* note 35, at 13; Emily S. Rosenberg, Gender, 7 J. Am. Hist. 116, 116-18 (1990).

[FN97]. Hunt, *supra* note 43, at 16.

[FN98]. *Id.*

[FN99]. Mutua, *supra* note 20, at 592 (referencing liberal democracy's use of human rights).

[FN100]. See Richard H. Fallon, Jr., "The [Rule of Law](#)" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 23 (1997) (noting that the rule of law has been equated with the rule of reason); Frank Michelman, [Law's Republic](#), 97 Yale L.J. 1493, 1500-01 (1988) (arguing that the concept of freedom has rested on the notion of a government of laws, not people).

[FN101]. See *infra* Part I.C.1.a-c.

[FN102]. They have been codified more recently in human rights documents. See UDHR, *supra* note 2; International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[FN103]. See, e.g., Philip C. Aka & Gloria J. Browne, [Education, Human Rights, and the Post-Cold War Era](#), 15 N.Y.L. Sch. J. Hum. Rts. 421, 424 n.10 (1999) (noting that documents including the Magna Carta and the U.S. Constitution formed the basis of modern human rights law); Anthony Anghie, [Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of The League of Nations](#), 34 N.Y.U. J. Int'l L. & Pol. 513, 538 (2002) ("[A] State can adopt any constitution it likes, arrange its administration in a way it thinks fit, [and] enact such laws as it pleases.") (quoting 1 Oppenheim, International Law § 124 (Sir Arnold D. McNair ed., 4th ed. 1928)); Linda Bosniak, [Universal Citizenship and the Problem of Alienage](#), 94 Nw. U. L. Rev. 963, 974-75 (2000); Dr. P.K. Menon, [The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine](#), 1 J. Transnat'l L. & Pol'y 151, 168 (1992); The Right Honorable Lord Gordon Slynn of Hadley, [Constitutional Change in the United Kingdom](#), 54 Mercer L. Rev. 1199, 1207-08 (2003).

[FN104]. See Anghie, *supra* note 103, at 518 (noting that subordinating and exploitive practices are fundamental to colonialism and continue to affect international law).

[FN105]. See David Healy, Drive to Hegemony 53 (1988); Louis A. Pérez, Jr., Cuba Under the Platt Amendment, 1902-1934, at 42-47 (1986); Zasloff, *supra* note 67, at 288-91. For historical treatment of the Platt Amendment by legal scholars, see, for example, Pedro Capó-Rodríguez, The Platt Amendment, 17 Am. J. Int'l L. 761 (1923); James B. Scott, The Origin and Purpose of the Platt Amendment, 8 Am. J. Int'l L. 585 (1914).

[FN106]. Scott, *supra* note 105, at 588-91.

[FN107]. Puerto Rican Federal Relations Act of 1950, [48 U.S.C. § 731\(b\) \(2000\)](#); see also 98 Cong. Rec. 5119-28, 6184-86, 8715 (1952) (Congressional review of proposed constitution).

[FN108]. See Lisa Napoli, The [Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status](#), 4 *Cardozo J. Int'l & Comp. L.* 131, 141 (1996).

[FN109]. *Id.* at 142.

[FN110]. Hans Schmidt, The United States Occupation of Haiti, 1915-1934, at 98 (1971) (describing U.S. threats to dissolve the legislature by force if Haiti's client-President did not issue the decree himself). The legislature was actually dissolved by an order read by a U.S. marine. *Id.* at 97.

[FN111]. *Id.* at 99; Renda, *supra* note 45, at 10, 32.

[FN112]. Schmidt, *supra* note 110, at 86 (describing the Gendarmerie d'Haiti as a branch of the client-government in Haiti that included U.S. marines who held official commissions from the Haitian government while simultaneously retaining their rank in the Marine Corps).

[FN113]. *Id.* at 99 (quoting former Secretary of the Navy Josephus Daniels in a letter to President Franklin D. Roosevelt).

[FN114]. Anghie, *supra* note 103, at 556; Ariane M. Schreiber, [States That Kill: Discretion and the Death Penalty--A Worldwide Perspective](#), 29 *Cornell Int'l L.J.* 263, 318 (1996).

[FN115]. Anghie, *supra* note 103, at 556 n.148; Rossabi, *supra* note 41, at 199-200.

[FN116]. Rossabi, *supra* note 41, at 199-200; see *infra* notes 140-142 and accompanying text.

[FN117]. See Anghie, *supra* note 103, at 555-58 (describing the U.S. strategy with regard to the Philippines as one designed to justify the continued control of foreign people).

[FN118]. Henry J. Richardson III, The [Gulf Crisis and African-American Interests Under International Law](#), 87 *Am. J. Int'l L.* 42, 68 (1993) ("Quite a proud boast for a citizen of a strong nation which likes to be looked upon as a protector of the weak, to make over a small people who had the right to call themselves a republic.") (quoting Pittsburgh Courier, July 12, 1924, at 2); Sarah Ramage, The [Return of Article 42: Enemy of the Good for Collective Security](#), 5 *Pace Int'l L. Rev.* 211, 258-59 n.171 (1993).

[FN119]. See R. Volney Riser, [The Burdens of Being White: Empire and Disfranchisement](#), 53 Ala. L. Rev. 243, 262 (2002).

[FN120]. See [Valmonte v. INS](#), 136 F.3d 914, 918 (2d Cir. 1998); see also [Rabang v. INS](#), 35 F.3d 1449 (9th Cir. 1994) (holding that birth in the Philippines during the territorial period does not give rise to U.S. citizenship).

[FN121]. Foraker Act, ch. 191, 31 Stat. 77 (1900) (current version at [48 U.S.C. § § 733, 736, 738-740, 744, 866 \(2000\)](#)); see also Napoli, *supra* note 108, at 152 n.97 (noting Puerto Rican opposition to U.S. citizenship).

[FN122]. Puerto Rican citizens cannot vote in elections for President, are not entitled to representation in Congress, can be treated differently than U.S. citizens born in the United States with regard to government benefits, are subject to special custom and tax treatment, and may have their citizenship revoked. See Pedro A. Malavet, [Puerto Rico: Cultural Nation, American Colony](#), 6 Mich. J. Race & L. 1, 27-28 (2000); Sylvia R. Lazos Vargas, [History, Legal Scholarship, and Latcrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900](#), 78 Denv. U. L. Rev. 921, 933-36 (2001).

[FN123]. Louis A. Pérez Jr., *Cuba Between Empires* 309-11 (1983) (describing voting restrictions limiting suffrage to Cuban-born males, sons of Cuban parents born while in temporary residence abroad, or Spaniards who renounced their citizenship, with the additional requirement that they possess one of the following characteristics: the ability to read or write, ownership of real or personal property worth at least \$250, or honorable service in the Liberation Army prior to July 18, 1898). The result of these requirements was the disenfranchisement of two-thirds of Cuban males who were disproportionately Afro-Cubans. *Id.*

[FN124]. *Id.* at 305 (quoting the military governor of Havana, quoted in William Ludlow, *The Transition in Havana*, *The Independent*, Apr. 12, 1900, at 868).

[FN125]. *Id.* at 307 (noting that the ascendancy of Blacks in Cuba was a cause of uneasiness for the United States). U.S. officials worried that unrestricted suffrage and self-government "would lead to the 'establishment of another Haitian Republic in the West Indies'--and that 'would be a serious mistake.'" *Id.* at 307-08 (quoting N.Y. Times, June 24, 1899, at 1).

[FN126]. Cabán, *supra* note at 55, 177-82.

[FN127]. *Id.* at 177 (noting frequent amendments to laws regulating the rights of Cubans to vote). In 1900, the United States revoked universal male suffrage because of concerns articulated by Puerto Rico's military governor that, unless voting was restricted to the elite, the election process would threaten colonial rule. *Id.* at 66.

[FN128]. *Id.* at 66 (quoting U.S. military governor General George W. Davis); see also Annual Reports of the War Department for 1899, Report of Brig. Gen. Geo. W. Davis on Civil Affairs in Puerto Rico 603 (1900) (establishing applicability of sedition laws).

[FN129]. William Alford, [Exporting the Pursuit of Happiness](#), 113 Harv. L. Rev. 1677, 1678-79 (2000) (noting that the

United States has claimed as its mission the "civilization" of others through the export of the rule of law).

[FN130]. Louis A. Pérez, Jr., *Insurrection, Intervention, and the Transformation of Land Tenure Systems in Cuba, 1895-1902*, 65 *Hisp. Am. Hist. Rev.* 229, 240 (1985).

[FN131]. See Edward J. Berbusse, SJ, *The United States in Puerto Rico 1898- 1900*, at 124 (1966) (quoting from the Insular Commission's 1899 report on Puerto Rican laws).

[FN132]. Cabán, *supra* note 55, at 153-54; see also Berbusse, *supra* note 131, at 101 (recounting the translation of Spanish statutes in force in Puerto Rico to English, and the addition of U.S. laws and U.S. military orders to the First Organic Act of Puerto Rico).

[FN133]. Foraker Act, ch. 191, 31 Stat. 77 (1900) (current version at [48 U.S.C. § § 733, 736, 738-740, 744, 866 \(2000\)](#)); Cabán, *supra* note 55, at 101.

[FN134]. Cabán, *supra* note 55, at 101. Indeed, the military Governor declared to investors: "Capitalists can be assured of protection to their property and investments, guaranteed in the form of government, in the tax laws, and in the reorganization of the courts, and capital is pretty sure to take care of itself." *Id.* at 154 (quoting Governor Allen) (citation omitted).

[FN135]. See Cabán, *supra* note 55, at 101-02 (discussing the comments of Representative Richardson, who opposed the tariff laws on the basis that they oppressed Puerto Ricans for the benefit of enriching some U.S. citizens).

[FN136]. Del Valle, *supra* note 62, at 50 n.165 (describing the formation of a civilian government appointed by the U.S. President with the advice and consent of the U.S. Senate). Del Valle notes that "insular norms are ultimately subordinate to countervailing federal norms." *Id.* at 17.

[FN137]. See [Gromer v. Standard Dredging Co., 224 U.S. 362, 370 \(1912\)](#) (referring to Philippine Act's requirement that all laws passed by the Philippine government be reported to Congress, which had the power to annul them).

[FN138]. Anghie, *supra* note 103, at 557 (quoting W. Cameron Forbes, *The Philippine Islands* 440 (1928)).

[FN139]. Rossabi, *supra* note 41, at 200-01.

[FN140]. *Id.* at 201-02; see also [Dorr v. United States, 195 U.S. 138 \(1904\)](#) (denying Filipinos a right to jury trial absent a Congressional grant of such right).

[FN141]. Rossabi, *supra* note 41, at 195 (quoting William Howard Taft) (citation omitted).

[FN142]. See *id.*; Zasloff, *supra* note 67, at 292.

[FN143]. See Georges Anglade, [Rules, Risks, and Rifts in the Transition to Democracy in Haiti](#), 20 *Fordham Int'l L.J.* 1176, 1184 (1997).

[FN144]. *Id.* at 1176.

[FN145]. Merry, *supra* note 54, at 575, 596-97.

[FN146]. Merry, *supra* note 30, at 4; see also Mattei, *supra* note 20, at 388 (observing a more subtle means of coercing Western legal models "as imposition by bargaining ... part of a subtle blackmail" to obtain economic viability). "History offers examples of this model in China, Japan, and Egypt early in the last century, and today, this is the most important way in which the World Bank, International Monetary Fund, World Trade Organization, and European Union operate through the developing and former socialist world." *Id.*

[FN147]. Merry, *supra* note 54, at 589.

[FN148]. Merry, *supra* note 30, at 86 (noting that following a few years of legal reforms, foreigners controlled most of the private property in Hawaii and had begun to displace Hawaiians by importing substantial numbers of foreign workers). Merry also notes that the legal changes "established the power of private landowners over tenants, [and] husbands over wives." Sally Engle Merry, [From Law and Colonialism to Law and Globalization](#), 28 *Law & Soc. Inquiry* 569, 586 (2003).

[FN149]. The Insular Cases were a series of U.S. Supreme Court decisions between 1901 and 1922 that originally consisted of nine cases: Fourteen [Diamond Rings v. United States](#), 183 U.S. 176 (1901); [Dooley v. United States](#), 183 U.S. 151 (1901); [Huus v. New York & Porto Rico Steamship Co.](#), 182 U.S. 392 (1901); [Downes v. Bidwell](#), 182 U.S. 244 (1901); [Armstrong v. United States](#), 182 U.S. 243 (1901); [Dooley v. United States](#), 182 U.S. 222 (1901); Grossman v. [United States](#), 182 U.S. 221 (1901); [Goetze v. United States](#), 182 U.S. 221 (1901); [De Lima v. Bidwell](#), 182 U.S. 1 (1901). As Efrén Rivera Ramos notes, other cases that dealt with similar issues and were decided during that period of time have also been included as a part of the Insular Cases. See Ramos, *supra* note 74, at 240. The cases relate to actions in Puerto Rico, the Philippines, Hawaii, and Alaska. *Id.*

[FN150]. *Supra* note 149. The Court resolved a later case that dealt with Alaska differently, in part because, at the time it was decided, there was evidence of intent, not merely to acquire Alaska, but to incorporate it within the United States. [Rasmussen v. United States](#), 197 U.S. 516, 528-31 (1905).

[FN151]. Natsu Taylor Saito, The [Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty](#), 51 *Cath. U. L. Rev.* 1115, 1140-41 (2002).

[FN152]. [De Lima](#), 182 U.S. at 138. Similarly, Puerto Ricans were labeled "alien and hostile" in [Downes](#), 182 U.S. at 308.

[FN153]. [Downes, 182 U.S. at 268.](#)

[FN154]. Ramos, *supra* note 74, at 228.

[FN155]. *Id.*

[FN156]. See, e.g., Merry, *supra* note 30, at 19 (describing a view of law as "a creature of colonialism, ... grounded in relations of imperialism, distinctions of race, and the opposition of savage and civilized"); Andrews, *supra* note 60, at 926 (noting that Aboriginal people were distrustful of the Australian legal system because of its colonial origins and legacy of brutality).

[FN157]. Radhika Coomaraswamy, To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights, in *Human Rights of Women* 39, 43 (Rebecca J. Cook ed., 1994); Orin Starn, "I Dreamed of Foxes and Hawks": Reflections on Peasant Protest, New Social Movements, and the Rondas Campesinas of Northern Peru, in *The Making of Social Movements in Latin America* 89, 97 (Arturo Escobar & Sonia E. Alvarez eds., 1992) (noting the historical roots of poor farmers' distrust of legal reforms that were associated with the abuses of the Spanish colonial regime); see *infra* Part III.D.

[FN158]. See Anghie, *supra* note 103, at 519 (observing that the concept of perfecting international legal doctrines in the West and transferring them to other parts of the world affects the construction of human rights, democracy, and development issues); Vargas, *supra* note 122.

[FN159]. See Hardt & Negri, *supra* note 3, at 3 (suggesting that the new world order is expressed in juridical formation); see also Steven D. Jamar, [A Lawyering Approach to Law and Development](#), 27 *N.C. J. Int'l L. & Com. Reg.* 31, 36 (2001) (suggesting a more holistic approach to law and development); David Kennedy, [When Renewal Repeats: Thinking Against the Box](#), 32 *N.Y.U. J. Int'l L. & Pol.* 335, 359 (2000) (noting that the acceptance of Western-dominated international law is the price of participation); see generally Amy L. Chua, [Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development](#), 108 *Yale L.J.* 1 (1998) (reviewing application of current paradigm and suggesting ways to rethink it).

[FN160]. Chua, *supra* note 159, at 12 n.39 (observing that the law and development movement focused on developing capital markets and overhauling the legal system, including legal education, to foster this end).

[FN161]. See Sharon K. Hom & Eric K. Yamamoto, [Collective Memory, History, and Social Justice](#), 47 *UCLA L. Rev.* 1747, 1772 (2000) (discussing [Rice v. Cayetano](#), 528 U.S. 495 (2000), in which the Supreme Court upheld claims of race discrimination asserted by a white non-native Hawaiian denied the right to vote for the Office of Hawaiian Affairs under Hawaiian law).

[FN162]. See [Valmonte v. INS](#), 136 F.3d 914, 918 (2d Cir. 1998) (denying citizenship to a person born in the Philippines while it was a U.S. territory, citing the Insular Cases as "authoritative guidance on the territorial scope of the term 'in the United States' in the Fourteenth Amendment"); [Rabang v. INS](#), 35 F.3d 1449 (9th Cir. 1994) (same); see also [Harris v. Rosario](#), 446 U.S. 651 (1980) (upholding regulations providing for lower levels of AFDC benefits to Puerto Rican families); [Califano v. Torres](#), 435 U.S. 1 (1978) (denying rights to Supplemental Security Income to Puerto Rican U.S. citizens in Puerto Rico).

[FN163]. See P.R. Const. art. II, § 7 ("The death penalty shall not exist."); Adam Liptak, Puerto Ricans Angry That U.S. Overrode Death Penalty Ban, N.Y. Times, July 17, 2003, at A1.

[FN164]. United States v. Acosta Martinez, 106 F. Supp. 2d 311, 320 (D.P.R. 2000), rev'd, 252 F.3d 13 (1st Cir. 2001).

[FN165]. Liptak, *supra* note 163.

[FN166]. Acosta Martinez, 106 F. Supp. 2d at 327. Initially, decisions from the U.S. District Court for the District of Puerto Rico and the Supreme Court of Puerto Rico were appealed directly to the U.S. Supreme Court. However, the Foraker Act and later the Jones Act established that the Court of Appeals for the First Circuit should hear such appeals. Jones Act, ch. 145, § 43, 39 Stat. 966 (1917); Foraker Act, ch. 191, § 35, 31 Stat. 77 (1900).

[FN167]. Abby Goodnough, Acquittal in Puerto Rico Averts Fight Over Government's Right to Seek Death Penalty, N.Y. Times, Aug. 1, 2003, at A14 (noting that the verdict elated many Puerto Ricans who accused the U.S. government of violating the Puerto Rican constitution).

[FN168]. Hom & Yamamoto, *supra* note 161.

[FN169]. 528 U.S. 495 (2000).

[FN170]. Hom & Yamamoto, *supra* note 161.

[FN171]. Zasloff, *supra* note 67, at 293, 294 n.220 (quoting Elihu Root) (citation omitted)

[FN172]. See Berbusse, *supra* note 131, at 83, 125 (noting that colonial authorities described conditions of lawlessness in Puerto Rico and further denigrated laws, courts, and prison systems). Berbusse notes that following an investigation into allegations about the Puerto Rican legal system, the U.S. Secretary of Justice, considered to be very knowledgeable about Puerto Rican courts, found that the U.S. report was based on "false and calumnious imputations." *Id.* at 125-26.

[FN173]. Hardt & Negri, *supra* note 3, at 118-19. See also Randall Peerenboom, Beyond Universalism and Relativism: The Evolving Debates About "Values in Asia," 14 Ind. Int'l & Comp. L. Rev. (forthcoming 2004) (manuscript at 56, on file with the Columbia Human Rights Law Review) (noting that the history of colonial exploitation may result in resistance to the norms of former colonialists).

[FN174]. Sonia Harris-Short, International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child, 25 Hum. Rts. Q. 130, 174-75 (2003) (noting that experiences of colonialism give rise to suspicions about international human rights); see also Pei, *supra* note 73 (identifying the alienating consequences of U.S. foreign policies, which can create allegiances to the very regimes the U.S. targets).

[FN175]. Raquel Aldana-Pindell, In [Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes](#), 35 *Vand. J. Transnat'l L.* 1399, 1488-89 (2002) (describing Guatemalans' fear and distrust of current efforts to establish legal protections by those same entities that committed human rights abuses); Jonathan L. Hafetz, [Pretrial Detention, Human Rights, and Judicial Reform in Latin America](#), 26 *Fordham Int'l L.J.* 1754, 1773 (2003) (observing that Salvadorans were distrustful of U.S. assistance in bringing about legal reforms given U.S. involvement in human rights abuses in El Salvador during the civil war of the 1980s); Juan E. Mendez, [Human Rights Policy in the Age of Terrorism](#), 46 *St. Louis U. L.J.* 377, 400 (2002) (noting worldwide distrust of U.S. efforts to promote human rights because of its history of supporting repressive regimes).

[FN176]. Fanon, *supra* note 28, at 43 (observing that during the period of decolonization, the native person is exhorted to retain the values of the colonizer).

[FN177]. Cf. *id.* at 47 (noting that, for the formerly colonized, the value of "individuality is the first to go").

[FN178]. See Chua, *supra* note 159, at 12.

[FN179]. Hardt & Negri, *supra* note 3, at 106 (noting that anti-colonial struggles seek to expel the occupying force and reject its values in order to reclaim the colonized people's dignity).

[FN180]. Peerenboom, *supra* note 173 (manuscript at 56-57) (noting that the origins of norms are important for psychological, political, and practical reasons, and contribute to a sense of needing to resist former repressors); see also Narayan, *supra* note 30, at 5 (demonstrating that understandings of "western culture" and the "indigenous national culture" diverged during the struggle between colonialism and nationalist movements).

[FN181]. Charlesworth et al., *supra* note 53, at 619.

[FN182]. Reem Bahdi, Truth and Method in the Domestic Application of International Law, 15 *Can. J.L. & Juris.* 255, 263 (2002).

[FN183]. Coomaraswamy, *supra* note 33, at 487 (describing the family as providing a haven from the colonial world and the role of women as custodians of the cultural ways of the group).

[FN184]. Fadia Faqir, Intrafamily Femicide in Defence of Honour: The Case of Jordan, 22 *Third World Q.* 65, 76-77 (2001) (noting that protecting women's honor assumed heightened importance as a shield and means of resistance against Western influence during British occupation of Palestine and Jordan).

[FN185]. Miriam Cooke, [Islamic Feminism Before and After September 11th](#), 9 *Duke J. Gender L. & Pol'y* 227, 228-29 (2002) (describing Afghan women's resistance to the Soviets as well as to the Mujahideen and the Taliban).

[FN186]. See Dwasi, *supra* note 58, at 421 (noting that Kenyan women's organizations have been difficult to conceptualize along the lines of feminist organizations).

[FN187]. Merry, *supra* note 30, at 16 (describing nationalism as relying on "invisible, incorporated women who supported the national identity through their sacrifices and labor for husband and family").

[FN188]. See Katha Pollitt, *Whose Culture?*, in *Is Multiculturalism Bad for Women?* 27, 29 (Joshua Cohen et al. eds., 1999) (noting that clitoridectomy was a declining practice in Kenya when nationalists revived it as a rejection of British colonialism); see also Ewelukwa, *supra* note 17, at 442 (noting that widows in African societies have assumed prominent roles in ensuring strict observance to customary widowhood rituals detrimental to women, in part because of their attachment to the cultural and social significance of these practices); Andra Nahal Behrouz, Note, [Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative](#), 103 *Colum. L. Rev.* 1136, 1157-58 (2003) (noting that Sudanese Muslims tenaciously held onto the custom of female circumcision as a symbol of resistance).

[FN189]. Ibarra, *supra* note 61, at 136.

[FN190]. Stoner, *supra* note 54, at 22.

[FN191]. Ratna Kapur, [Un-Veiling Women's Rights in the "War on Terrorism,"](#) 9 *Duke J. Gender L. & Pol'y* 211, 218 (2002).

[FN192]. *Id.*; see also Nicholas D. Kristof, *Saudis in Bikinis*, N.Y. Times, Oct. 25, 2002, at A35 (noting that some Saudi women feel that wearing abayas, or black cloaks, helps free them from sexual harassment and the use of their bodies as commodities).

[FN193]. Dwasi, *supra* note 58, at 423 (noting that during the colonial era, women in Kenya fought on two fronts--against colonial domination and against a patriarchal structure that harmed women, particularly economically); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchy: Sharing the Pieces of Jurisdictional Authorities*, 35 *Harv. C.R.-C.L. L. Rev.* 385, 401 (2000).

[FN194]. Coomaraswamy, *supra* note 33, at 484 (noting that women who resist certain cultural practices are branded as traitors).

[FN195]. See Charlesworth & Chinkin, *supra*note 1, at 155-57; Charlesworth et al., *supra* note 53, at 620; Dwasi, *supra* note 58, at 423 (describing a group of white settlers whose efforts on behalf of Kenyan women were based on Western norms, which functioned to dampen Kenyan women's anti-colonialist militancy).

[FN196]. Chandra Talpade Mohanty, "Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles, 28 *Signs* 499, 522 (2003) (urging that feminist solidarity requires an "understanding [of] the historical and experiential... differences of women's lives"); Behrouz, *supra* note 188, at 1162 (suggesting that Muslims are best equipped to reform Islamic practices that subordinate women).

[FN197]. Talal Asad, *What Do Human Rights Do? An Anthropological Enquiry*, 4 *Theory & Event* 4, P 46 (2000), http://muse.jhu.edu/journals/theory_and_event/v004/4.4asad.html.

[FN198]. *Id.* (noting how the United States uses research centers and experts, as well as sophisticated telecommunication and "culture industries," to dominate the discourse of human rights).

[FN199]. Mutua, *supra* note 20, at 629 (challenging the exaltation of the universality of human rights, as exemplified in the Universal Declaration of Human Rights, without identifying any non-Western political or moral support). According to Mutua, the Third World has been excluded from participating in the development of international law and human rights norms. See Mutua, *supra* note 2, at 216; see also Weisburd, *supra* note 67, at 107 (observing that values of non-Western states have not been significantly considered in the formulation of human rights norms which make a consensus on the universality of values more difficult to obtain).

[FN200]. Mutua, *supra* note 20, at 608-13 (reviewing organizations such as the International League for Human Rights, Human Rights Watch, International Human Rights Law Group (now Global Rights), International Commission of Jurists, and Amnesty International).

[FN201]. *Id.* at 615-16 (describing a vetting approach for the purpose of selecting boards and staff members who align themselves with dominant Western views, such as the primacy of political and civil rights over social and economic rights).

[FN202]. *Id.*

[FN203]. Jean Franco, *The Long March of Feminism*, North Am. Cong. for Latin Am. Report on the Americas 10 (1998); Merry, *supra* note 13.

[FN204]. Franco, *supra* note 203, at 14-15 (noting, for example, the impact on women's organizations in Latin America, many of which now receive significant funding from European and North American governments and foundations that support a neoliberal agenda, focusing on individual empowerment and self-esteem issues, and raising questions about who is defining the agendas and strategies for women's struggles for rights).

[FN205]. Human rights law has often been described in categorical terms with certain rights sorted into tiers or "generations," connoting both a hierarchy of values and a dominant model. See Charlesworth & Chinkin, *supra* note 1, at 203-05. First generation rights are conceived of as "[c]ivil and political rights [which] may be described as 'negative' in that they require abstention by the state from particular acts The core of [these] rights is the preservation of the autonomy of the individual." *Id.* at 203. Second generation rights include socio-economic and cultural rights, while third generation rights include collective rights to self-determination, development, and peace. The latter two categories require active efforts on the part of governments and are contentious, particularly in the realm of government responsibilities and implementation. *Id.* at 203-04. The first generation, which is premised on individual rights, is understood as forming the basis for the classic theory of human rights. Christin J. Albertie, Note, [The Act on Hungarians Living Abroad: A Misguided Approach to Minority Protection](#), 24 *Mich. J. Int'l L.* 961, 970 (2003); see also [Recent Publications](#), 25 *Yale J. Int'l L.* 533, 540 (2000) (describing civil and political rights as "classic human rights").

[FN206]. Mutua, *supra* note 20, at 605 (noting widespread agreement that Western culture and political norms have dominated the development of human rights norms). Mutua also notes that prominent human rights organizations have

only narrowly acknowledged the importance of economic and social rights. [Id. at 619-20](#); see also Alford, *supra* note 129, at 1699 (describing the ways that different models of democracy give rise to varying institutions); Eduardo Cáceres, *Building a Culture of Rights*, 34 *North Am. Cong. for Latin Am. Report on the Americas* 19, 24 (2000) (noting that, despite a Latin American view as to the importance of communitarian over individualist traditions and social over political citizenship, human rights strategies developed elsewhere respond to less-relevant themes such as liberalism and individualism); Kennedy, *supra* note 4, at 112 (describing human rights values as focusing on discrete individual rights at the expense of overlapping identities).

[FN207]. See Aziz, *supra* note 1; Mutua, *supra* note 20, at 605; see also Mutua, *supra* note 67, at 167 (describing varying African conceptions of men and women as group-centered, valuing rights along with duties, in contrast with the overindulgence of the individual in the West).

[FN208]. Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 *Transnat'l L. & Contemp. Probs.* 333, 334 (1997); see also Barbara Stark, *After/word(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 *Yale J. Int'l L.* 315, 325 n.66 (2002) ("[w]hat [is] good for [America] is good for the world") (quoting Abe Fortas) (citation omitted).

[FN209]. See Martha C. Nussbaum, In *Defense of Universal Values*, 36 *Idaho L. Rev.* 379, 384 (2000) (criticizing those who equate the leaders of formerly colonized nations as nothing more than "dupes of colonial powers" for introducing "alien" human rights norms); see also Mohanty, *supra* note 196, at 509 (warning against the dangers of falling into cultural relativist platitudes when considering values and social norms).

[FN210]. Martha C. Nussbaum, *Women and Human Development* 38 (2000) (noting that accusations of "Westernizing" may be suspect as efforts to discredit those who seek change); Narayan, *supra* note 30, at 92-93.

[FN211]. Nussbaum, *supra* note 210, at 48.

[FN212]. William M. Carter, Jr., *The Note in Thy Brother's Eye*, 20 *Berkeley J. Int'l L.* 496, 501-02 (2002) (reviewing Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001)).

[FN213]. See Spivak, *supra* note 13, at 171 (noting that in the global South, human rights workers are often the descendants of the colonial subject).

[FN214]. See Nussbaum, *supra* note 209, at 409 (noting the Gandhian roots of the struggle for women's autonomy and freedom in India).

[FN215]. Mutua, *supra* note 67, at 149, 166.

[FN216]. See, e.g., Sonja K. Hardenbrook, Comment, *The Good, Bad, and Unintended: American Lessons for Cambodia's Effort Against Domestic Violence*, 12 *Pac. Rim L. & Pol'y J.* 721, 735, 737-40 (2003) (arguing that despite vast differences between Cambodia and the United States, Cambodia should model its response to domestic violence after U.S. policies, including tough criminal laws and mandatory prosecution). The author argues that "American successes" and "failures" in combating domestic violence justify the U.S. model in Southeast Asian countries. [Id. at 737](#),

[745](#). See supra notes 203, 208 and accompanying text.

[FN217]. See Charlesworth & Chinkin, supra note 1, at 31 (noting challenges to the public/private distinction within the scope of international human rights law by which public and state-sanctioned violence is targeted and violence within the realm of private domains is not). However, the erosion of the public/private dichotomy is not universally demanded within the United States. Many studies demonstrate that women of color, Latinas, and immigrants prefer not to involve the state because of hostile treatment or unwanted consequences that arise from doing so; they fear the police and the prosecutorial arm of the state because of injustices they have suffered as members of minority communities. See, e.g., Linda L. Ammons, [Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African- American Woman and the Battered Woman Syndrome](#), 1995 Wis. L. Rev. 1003, 1017- 30; Donna Coker, [Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking](#), 47 UCLA L. Rev. 1, 16-32 (1999); Kimberlé Crenshaw, [Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color](#), 43 Stan. L. Rev. 1241, 1257 (1991); Angela Mae Kupenda, [Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women](#), 42 How. L.J. 1, 6- 7, 14-19 (1998); Jenny Rivera, [Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials](#), 14 B.C. Third World L.J. 231, 245-49 (1994).

[FN218]. Charlesworth et al., supra note 53, at 620 (noting that women are subordinated within their family role and compelled to conform to male-defined values).

[FN219]. See, e.g., Katherine M. Culliton, [Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas](#), 34 Harv. Int'l L.J. 507, 514-15 (1993) (advocating the use of international human rights litigation to obtain state protection from domestic violence).

[FN220]. Taylor, supra note 64, at 340.

[FN221]. Id. at 335, 340.

[FN222]. Andrews, supra note 60, at 918.

[FN223]. Nadera Shalhoub-Kevorkian, Law, Politics, and Violence Against Women: A Case Study of Palestinians in Israel, 21 Law & Pol'y 189, 201-04 (1999).

[FN224]. See, e.g., Gonzalo Bacigalupe, Family Violence in Chile: Political and Legal Dimensions in a Period of Democratic Transition, 6 Violence Against Women 427 (2000).

[FN225]. See, e.g., Paula C. Johnson, [Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa](#), 1 J. Gender Race & Just. 471 (1998).

[FN226]. Kennedy, supra note 4, at 111 (criticizing the dominant human rights approach as a "one-size-fits-all emancipatory practice" that neglects differences and the need for variation in strategies); see also Elizabeth M. Iglesias, [Out of The Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory](#), 40 B.C. L. Rev. 349, 378 (1998) (criticizing the "unilateral extraterritorial projection and

enforcement of domestic criminal laws by dominant states").

[FN227]. Rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization are now included as crimes that constitute crimes against humanity and grave breaches of the Geneva Conventions. Rome Statute of the International Criminal Court, opened for signature July 17, 1998, art. 7(l)(g), [37 I.L.M. 999, 1004 \(entered into force July 1, 2002\)](#).

[FN228]. Richard B. Bilder & José E. Alvarez, The [Boundaries of International Law: A Feminist Analysis](#), 95 *Am. J. Int'l L.* 459, 462 (2001) (observing that rape and the definitions by which it is criminalized may be experienced differently in different cultures).

[FN229]. Merry, *supra* note 13, at 35 (describing a tendency to create "cookie-cutter" solutions); Shalhoub-Kevorkian, *supra* note 223, at 191 (noting reluctance of women worldwide to use certain legal remedies with regard to domestic violence in part because of fear of the criminal justice system).

[FN230]. See Thomas Kelley, Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law, 34 *N.Y.U. J. Int'l L. & Pol.* 635, 671-72 (2002) (describing legal norms and legal reform in Niger).

[FN231]. *Id.* at 697 (explaining that, according to the Zarma's view of justice, a focus on punishing a thief was not only useless, but potentially harmful because it prevents the community from restoring and healing itself).

[FN232]. Kapur, *supra* note 33, at 67 (describing, for example, the result of domestic reforms influenced by universal norms that focus on the criminal law and result in further state restrictions on women's rights). Kapur describes Nepal's anti-trafficking campaign, which has resulted in the prohibition of women under thirty from traveling outside of the country without the permission of a husband or male guardian. *Id.*

[FN233]. Ewelukwa, *supra* note 17, at 440, 459-60 (noting obstacles and costs for attempting to use formal legal remedies, including social ostracism and financial hardship). In Israel, state laws regarding domestic violence were passed with minimal consideration of the impact on informal systems that previously provided some relief for women, but which were weakened as they were displaced by formal mechanisms; Palestinian women who could not, or would not, turn to the state apparatuses were without any remedy. Shalhoub-Kevorkian, *supra* note 223, at 197.

[FN234]. Merry, *supra* note 13, at 37-40.

[FN235]. *Id.* at 42-43.

[FN236]. *Id.* at 37-40.

[FN237]. *Id.* at 44.

[\[FN238\]](#). Id. at 48.

[\[FN239\]](#). Id.

[\[FN240\]](#). Id. at 50.

[\[FN241\]](#). Id. at 43.

[\[FN242\]](#). Charlesworth & Chinkin, *supra* note 1, at 226-28 (noting the preoccupation with female genital mutilation); Narayan, *supra* note 30, at 43- 44 (noting that "[a]historical and apolitical Western feminist understandings of 'Third-World traditions' continue to appear ... on issues such as sati and dowry-murder, and in discussions relating to human rights-based interventions into 'cultural practices' affecting Third-World women") (citation omitted).

[\[FN243\]](#). Charlesworth & Chinkin, *supra* note 1, at 228.

[\[FN244\]](#). See Bilder & Alvarez, *supra* note 228, at 463 (questioning Western feminist renditions of human rights developments that fail to adequately address the role of economic globalization as a source of human rights abuses for women).

[\[FN245\]](#). See Charlesworth & Chinkin, *supra* note 1, at 327 (noting the failures of various U.N. working groups and the office of the Special Rapporteur on the Human Rights of Migrants to address the economic exploitation of women workers); Saskia Sassen, [Toward a Feminist Analytics of the Global Economy](#), 4 *Ind. J. Global Legal Stud.* 7, 12 (1996).

[\[FN246\]](#). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the principal human rights treaty for women, has no provisions to protect women working outside their home countries. See Donna Maeda, [Agencies of Filipina Migrants in Globalized Economies: Transforming International Human Rights Legal Discourse](#), 13 *La Raza L.J.* 317, 327 (2002) (describing the findings of a U.N. Report on Human Rights for Migrants on the lack of protections for women migrants in human rights jurisprudence).

[\[FN247\]](#). Trafficking has been described as the movement or transport of women for the purpose of placing the victim "in an unfamiliar milieu where she is culturally, linguistically, or physically isolated and denied legal identity or access to justice." Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Submitted by Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, U.N. ESCOR, U.N. Comm'n on Hum. Rts., 56th Sess., P 1, U.N. Doc. E/CN.4/2000/68/Add.4 (2000).

[\[FN248\]](#). Victims of Trafficking and Violence Protection Act of 2000, [Pub. L. No. 106-386](#), 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.). Section 102 of the Act identified the various targeted human rights violations that are inherent in trafficking, while generally acknowledging that trafficking per se involves grave violations of human rights. [Pub. L. No. 106-386, § 102\(b\)\(3\), \(6\), \(13\), \(23\). Section 104](#) of the Act requires annual country reports on human rights practices to include assessment of countries' efforts to bring about an end to trafficking practices. Further, U.S. diplomatic mission personnel must consult with human rights organizations

in order to undertake monitoring and remediation efforts. [Pub. L. No. 106-386, § 104.](#)

[FN249]. See Suzanne H. Jackson, To [Honor and Obey: Trafficking in "Mail- Order Brides," 70 Geo. Wash. L. Rev. 475, 532 \(2002\)](#) (describing the legislative debates and the statutory language limiting relief to those "crime victim[s]" who "appear blameless and helpless").

[FN250]. Id. (noting that trafficking victims who are former prostitutes or women who project an appearance of control are unlikely to fit the image required for legal relief). Similarly, traffickers have been profiled in legislative debates according to racialized hierarchies that suggest they are immigrants and non-whites. Id. at 535-36.

[FN251]. [22 U.S.C. § 7105\(b\)\(C\), \(E\)\(i\) \(2000\)](#). The Act also defines trafficking victims in broader terms than those used by the Supreme Court. Compare [United States v. Kozminski, 487 U.S. 931, 949-52 \(1988\)](#) (requiring proof of psychological and physical or legal coercion to find trafficking), with Victims of Trafficking and Violence Protection Act of [2000, Pub. L. No. 106-386, § 102\(b\)\(13\) \(2000\)](#).

[FN252]. [8 C.F.R. § 214.11\(g\), \(i\) \(2003\)](#).

[FN253]. Victims of Trafficking and Violence Protection Act of [2000, Pub. L. No. 106-386 § 108\(b\) \(2000\)](#).

[FN254]. Trafficking of Women and Children in the International Sex Trade: Hearings Before the Subcomm. on International Operations and Human Rights, 106th Cong. 106-66, at 37 (1999) (statement of Dr. Laura J. Lederer); see also Jackson, *supra* note 249, at 541 (describing the exemption for the United States in the Act's annual report requirements).

[FN255]. Marilyn Fernandez, Domestic Violence by Extended Family Members in India: Interplay of Gender and Generations, 12 J. Interpersonal Violence 433, 440-42 (1997).

[FN256]. Id. at 448.

[FN257]. Id. at 450; see also Narayan, *supra* note 30, at 46-54 (describing historical inaccuracies in the literature about the prevalence, causes, and reaction to sati in India); Engels, *supra* note 33, at 161-62 (noting that although sati was not common in India in the 1800s, and had virtually disappeared altogether, it remained a symbol of India's degeneracy and was used as a means to justify British interference in indigenous legal relationships); Volpp, *supra* note 33, at 1206 (noting that, despite attempts to find a religious basis for sati, the practice was related to concerns for future subsistence and economic and social well-being).

[FN258]. Celestine Nyamu, [How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?, 41 Harv. Int'l L.J. 381, 408 \(2000\)](#) (noting that although land may be officially titled to men, under customs and practices women are not precluded from having vested rights and control); see also Kelley, *supra* note 230, at 702 (noting that although women have few land rights in Niger, Western-style law now imposes Western definitions of property ownership on Zarma landholding, which negatively affects the social structure of rural villages).

[FN259]. Nyamu, *supra* note 258, at 396-97.

[FN260]. *Id.* at 399-400.

[FN261]. Many countries face formidable obstacles to using formal legal remedies. There is little access to courts, less access to attorneys, and no community support for the use of formal legal remedies. See, e.g., Ewelukwa, *supra* note 17, at 459 (describing Nigerian women's lack of knowledge about formal legal remedies); Kelley, *supra* note 230, at 659 (noting that in Niger, rural people are unable to access state law). Ewelukwa also notes that recent common law and statutory developments have worsened conditions for widows in Nigeria. Ewelukwa, *supra* note 17, at 427-28; see also Amy Conger Lind, Power, Gender, and Development: Popular Women's Organizations and the Politics of Needs in Ecuador, in *The Making of Social Movements in Latin America* 134, 147 (Arturo Escobar & Sonia E. Alvarez eds., 1992) (noting that grassroots organizations do not emphasize law reform given the inaccessibility and lack of knowledge about the law, particularly in poor communities); cf. Chua, *supra* note 159, at 12 (criticizing the law and development movement for its deliberate efforts to replace "Third World 'localism'" with the "'universality' of the modern Western state") (citation omitted).

[FN262]. Geoffrey Wheatcroft, *After the Great Game*, N.Y. Times Rev. of Books, May 11, 2003, at 28 (reviewing Karl E. Meyer, *The Dust of Empire* (2003)) (writing that "Americans can travel the world knowing little about the history, culture and language of the countries they visit. Non-Americans do not have that option with respect to the United States."); see also Teemu Ruskola, [Legal Orientalism](#), 101 Mich. L. Rev. 179 (2002) (suggesting that the hegemonic power of Western culture provides an excuse to avoid taking the rest of civilization seriously); Clifford Geertz, *Which Way to Mecca?*, N.Y. Rev. of Books, June 12, 2003 (book review), at 27 (suggesting that Americans are unfamiliar with Islam because, unlike Marxism and Communism, Islam was not derived from Western philosophy).

[FN263]. See *supra* Part I.B.2; Hunt, *supra* note 43, at 174 (noting Americans' perceptions that the United States acts with benevolent intentions, seeking only to protect, even as it engages in acts of hostility designed to establish spheres of influence).

[FN264]. Mutua, *supra* note 20, at 591 (observing that, because human rights is understood as a neutral and universal belief system, it does not lend itself to being described as an ideology).

[FN265]. Hoganson, *supra* note 35, at 156 (describing the reaction in the United States to the taking of the Philippines).

[FN266]. Louis A. Pérez, Jr., *Dependency*, in *Explaining the History of American Foreign Relations* 99, 100 (Michael J. Hogan & Thomas G. Paterson eds., 1991).

[FN267]. Geertz, *supra* note 262. Geertz, in his review of over a dozen books on Islam, raises concerns about the "conception of 'Islam' being so desperately built up before our eyes by professors, politicians, journalists, polemicists, and others professionally concerned with making up our minds." Clifford Geertz, *Which Way to Mecca?* Part II, N.Y. Rev. of Books, July 3, 2003, at 36; see also Francis Robinson, *Thoroughly Modern Muslims*, Times Literary Supp. (London), Apr. 11, 2003 (book review), at 26 (raising similar concerns that, despite different historical development and traditions, all Middle Eastern countries are considered to be the same); see generally Said, *supra* note 30, at 14 (describing "Orientalism" as the embodiment of discursive practices by which the West disparages the Orient as an object that exists only in relation to the West).

[FN268]. Robinson, *supra* note 267 (noting that, in many Islamic countries, universities enroll more women than men and increasing numbers of women are joining the workforce).

[FN269]. See, e.g., Hunt, *supra* note 43, at 180-82 (noting the importance of mobilizing popular consent to Cold War policies). U.S. officials admit that recent efforts to magnify the threat posed by Saddam Hussein were made to gain support for its war in Iraq. Paul Krugman, *Matters of Emphasis*, N.Y. Times, Apr. 29, 2003, at A29. Krugman reports that a Bush administration official told ABC News that, while the government did not lie, "it was just a matter of emphasis," referring to the administration's "hyp[ing] the threat that Saddam Hussein posed to the United States." *Id.*; see also Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. Times, July 6, 2003, § 4, at 9 (exposing the deliberate deceptive release of information relative to Iraq's alleged efforts to buy uranium from Niger).

[FN270]. See Hoffman, *supra* note 10, at 74 (stating that justification for the war was re-stated in terms of intervention on behalf of human rights and democracy once it became evident that Iraq's ability to threaten the United States had been exaggerated); see also Michael Ignatieff, *Why Are We In Iraq? (And Liberia? And Afghanistan?)*, N.Y. Times, Sept. 7, 2003, § 6 (Magazine), at 38 (opining that the United States did not invade Iraq for human rights purposes).

[FN271]. Tom Teepen, *Bush's Backup Rationale for War Comes a Little Late*, Raleigh News & Observer, Sept. 24, 2003, at 21A (linking the poll results that consistently showed that 70 percent of Americans thought mistakenly that Saddam Hussein's Iraq was responsible for the acts of terror on September 11, 2001, in part, to the U.S. government's argument that Hussein violated Iraqis' human rights).

[FN272]. Frank Davies, *Poll: Public Gets Iraq Facts Wrong*, Raleigh News & Observer, June 15, 2003, at 11A.

[FN273]. *Id.*

[FN274]. See Rieff, *supra* note 10, at 215 (noting inconsistent decisions to engage in humanitarian military interventions).

[FN275]. See, e.g., Howard French, *Two Decades of Decline: When Liberians Looked to America in Vain*, N.Y. Times, July 13, 2003, § 4, at 4 (noting that experts on West Africa have stated that the United States has had "frequent, clear opportunities to make a dramatic difference [in Liberia] for the better at very little cost, and time and again has failed to do so," and referring to Liberia as the "destitute orphan" of the United States); Gordon, *supra* note 67, at 19-21; Lodico, *supra* note 10, at 1028-30 (comparing the lack of willingness on the part of the United States and other Western nations to intervene in humanitarian crises in Sierra Leone, Rwanda, and other African countries with the decisions to take action in the former Yugoslavia).

[FN276]. Hunt, *supra* note 43, at 165 (describing the Truman, Eisenhower, and Kennedy administrations' reluctance to challenge apartheid, and quoting President Eisenhower following the Sharpeville massacre as referring to apartheid as a "touchy thing") (citation omitted).

[FN277]. Eric Neumayer, *Is Respect for Human Rights Rewarded? An Analysis of Total Bilateral and Multilateral Aid Flows*, 25 Hum. Rts. Q. 510, 527 (2003) (reporting data indicating that human rights records play a negligible role in the

amount of foreign aid a country receives).

[FN278]. See Mutua, *supra* note 20, at 650; Nicholas D. Kristof, *Revolving-Door Monsters*, N.Y. Times, Oct. 11, 2002, at A33 (labeling the contradictions in U.S. policy toward Iraq as a theory of "revolving door monsters"); see also James Dao, *Argentine Junta Felt Safe From the U.S.*, N.Y. Times, Aug. 22, 2002, at A3 (noting communication between the U.S. government and leaders of the military dictatorship that took control in Argentina in 1976 indicating that the United States would not penalize military or paramilitary killings, tortures, or kidnappings); Diana Jean Schemo, *Latin Death Squads and U.S.: A New Disclosure*, N.Y. Times, Oct. 23, 2002, at A6 (noting that, in 1976, U.S. government officials backed off of demands that South American dictators end their use of death squads); Brian Urquhart, *The Rights Stuff*, N.Y. Rev. of Books, May 15, 2003, at 39 (noting the close relationships that the United States currently has with Uzbekistan, Pakistan, Saudi Arabia, and Egypt, all nations with "notoriously indifferent" human rights records).

[FN279]. Louis Henkin, *Does the Law of Human Rights Guide--or Rationalize--U.S. Foreign Policy?*, 79 Am. Soc'y Int'l L. Proc. 18, 22 (1985).

[FN280]. See *supra* note 275 and accompanying text; see also Jon H. Sylvester, *Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization*, 27 Loy. L.A. L. Rev. 1299, 1312-13 nn.43-44 (1994) (noting that strategic considerations trumped concerns for human rights, as evidenced by U.S. support for Kenyan dictator Daniel arap Moi during the 1980s and the repressive regime of Somalia's Mohamed Siad Barre); Ellen Johnson Sirleaf, *What the U.S. Owes Liberia*, N.Y. Times, Aug. 15, 2003, at A15 (criticizing the United States for supporting the fraudulent 1985 election of Samuel Doe in Liberia, which discredited the nation's democratic process and led to brutal power struggles).

[FN281]. Hunt, *supra* note 43, at 139 (noting U.S. support for Mussolini in Italy, Chiang Kai-shek in China, Somoza in Nicaragua, Batista in Cuba, Franco in Spain, and Metaxas in Greece). Similarly, the United States often attempted to preempt threats to American interests by taking the position that Latin American countries were better served by authoritarian regimes. *Id.* at 166-67; see also Mark Windsor, *L'Ot Boa, Haiti Through American Eyes*, 1 U.C. Davis J. Int'l L. & Pol'y 187, 191 (1995) (noting that, despite the brutality imposed by Francois "Papa Doc" Duvalier, he was installed as Haiti's president as a result of U.S. interference, and he continued to receive American aid because he had the "supreme virtue of not being a Communist"); Zbigniew Brzezinski, *Confronting Anti-American Grievances*, N.Y. Times, Sept. 1, 2002, at A9 (criticizing the United States for its failure to include in the public debate the political antecedents of terrorism and the political conflicts that sustain it and, instead, perpetuating a "one-dimensional" and "disembodied" definition of terrorist threats); *Dancing With Dictators*, N.Y. Times, Sept. 1, 2002, at A8 (describing the U.S. habit of endorsing foreign dictators who serve American interests); *Oily Diplomacy*, N.Y. Times, Aug. 19, 2002, at A14 (noting that the government lacked credibility when it invoked the war against terrorism and other national interests to thwart action against human rights abuses committed in Indonesia, Papua New Guinea, and Myanmar); Rachel L. Swarns, *Criticized by the West, Mugabe is a Hero to Many*, N.Y. Times, Sept. 6, 2002, at A3 (noting that the United States has condemned the forceful and sometimes violent remaking of maps through the redistribution of land by Mugabe's postcolonial government in Africa, but ignored claims that the legacy of colonialism "left millions of blacks stranded on rocky, arid soil and a tiny white minority in control of half of Zimbabwe's fertile land").

[FN282]. See Henkin, *supra* note 279, at 20 (identifying as the principle problem the failure to consistently incorporate human rights into foreign policy and pointing out the contradictions this has created in areas such as U.S. policy towards the "Third World" and the "Communist World").

[FN283]. Robinson, *supra* note 267; see *infra* note 420.

[FN284]. Robinson, *supra* note 267.

[FN285]. See Volpp, *supra* note 33, at 1207 (observing that the United States gave aid to Pakistan's General Zia, whose government was notorious for human rights abuses against women).

[FN286]. Paul Krugman, *Matters of Emphasis*, N.Y. Times, Apr. 29, 2003, at A29.

[FN287]. Lodico, *supra* note 10, at 1029-31.

[FN288]. Mutua, *supra* note 20, at 647 n.226 (noting that although the United States is often the key nation-state drafting international human rights treaties, it has only ratified the Convention on the Prevention and Punishment of Genocide of December 9, 1948 (Genocide Convention), and the International Covenant on Civil and Political Rights (ICCPR)).

[FN289]. President Bush's declaration in May, 2003 that, despite the United States's status as a signatory to the treaty, it would neither ratify the treaty nor be bound by its terms, has given rise to the notion that the United States has "unsigned" the treaty. See Jamie Mayerfeld, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 Hum. Rts. Q. 93, 95 (2003); Ignatieff, *supra* note 67, at 59; see also Pei, *supra* note 73 (noting that U.S. actions undermining treaty agreements have a detrimental affect on U.S. credibility); see *infra* note 292 and accompanying text.

[FN290]. Ignatieff, *supra* note 67, at 60.

[FN291]. See Said, *supra* note 29, at 25-26.

[FN292]. For an overview of the Rome Statute and the provisions of the International Court, see *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Roy S. Lee ed., 2001); *The International Criminal Court: The Making of the Rome Statute* (Roy S. Lee ed., 1999).

[FN293]. See *supra* note 289.

[FN294]. American Servicemembers' Protection Act of [2002, Pub. L. No. 107-206, § § 2001-2008 \(2002\)](#).

[FN295]. Elizabeth Becker, *U.S. Suspends Aid to 35 Countries Over New International Court*, N.Y. Times, July 2, 2003, at A12. Some countries were exempted from the aid cutoff. *Id.*

[FN296]. For an analysis of the process arguments, see Mariano-Florentino Cuellar, *The International Criminal Court and the Political Economy of Anti- Treaty Discourse*, 55 *Stan. L. Rev.* 1597 (2003).

[FN297]. Id. at 1608-12 (noting that, although there are some differences, defendants before the ICC are granted roughly the same protections as defendants in U.S. courts, and even more protections than defendants before U.S. military tribunals).

[FN298]. Id. at 1608-09; see also Johan D. van der Vyver, American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness, 50 Emory L.J. 775, 809-11 (2001) (arguing that the Rome Statute fully protects universal norms of due process, including those recognized in the U.S. Constitution).

[FN299]. Cuellar, *supra* note 296, at 1618-19 (noting U.S. fear of losing its "flexibility to execute an unconstrained national security policy").

[FN300]. Cate Steains, Gender Issues, in *The International Criminal Court: The Making of the Rome Statute* 357 (Roy S. Lee ed., 1999).

[FN301]. Id. at 376-83; see also Women's Initiative for Gender Justice, <http://www.iccwomen.org/news/actionalertupdate.htm> (last visited Feb. 2, 2004) (describing the lack of women in high positions in international law).

[FN302]. Paul Krugman, America the Scofflaw, *N.Y. Times*, May 24, 2002, at A25 (discussing U.S. violations of international trade agreements).

[FN303]. See, e.g., Marlise Simons, World Court Tells U.S. to Delay Executing 3, *N.Y. Times*, Feb. 6, 2003, at A13; Tim Weiner, Mexico: Challenge on U.S. Death Penalty, *N.Y. Times*, Jan. 17, 2003, at A3.

[FN304]. Harold Hongju Koh, On American Exceptionalism, 55 Stan. L. Rev. 1479, 1486 n.26 (2003) (discussing the case of Karl LaGrand, who was executed by the United States in defiance of provisional orders issued by the ICJ halting the execution); see also Abram Chayes, Nicaragua, the United States, and the World Court, 85 Colum. L. Rev. 1445 (1985) (noting the U.S. refusal to continue participating in the ICJ following the court's decision to hear a case brought against the U.S. by Nicaragua); Delissa A. Ridgway & Mariya A. Talib, Globalization and Development - Free Trade, Foreign Aid, Investment and the Rule of Law, 33 Cal. W. Int'l L.J. 325, 342 n.87 (2003) (highlighting other death penalty cases involving Paraguayans and Germans executed by the United States in violation of orders of the ICJ).

[FN305]. Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341, 345 (1995) (referencing the ICJ case, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)).

[FN306]. Hoffman, *supra* note 10 (stating that the U.N. Charter required Security Council approval for the military actions in Iraq).

[FN307]. Jonathan Turley, Rights on the Rack: Alleged Torture in Terror War Imperils U.S. Standards of Humanity, *L.A. Times*, Mar. 6, 2003, at B19. U.S. forces have been directly involved in inhumane treatment, including homicide. See, e.g., Don Van Natta, Jr., Questioning Terror Suspects in a Dark and Surreal World, *N.Y. Times*, Mar. 9, 2003, at A1 (describing a U.S. military coroner's report that two Afghans were most likely tortured by U.S. officials, and

containing evidence that the United States may be operating a torture facility).

[FN308]. See Hardt & Negri, *supra* note 3, at 191; see also [Leti Volpp, Gazing Back, 14 Berkeley Women's L.J. 149, 152 \(1999\)](#) (reviewing Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (1998)) (noting that "[v]iolence in nonwhite communities is now understood as a kind of cultural practice particular to a specific community").

[FN309]. Amede Obiora, [Feminism, Globalization, and Culture: After Beijing, 4 Ind. J. Global Legal Stud. 355, 370 \(1997\)](#).

[FN310]. See Kapur, *supra* note 33, at 13.

[FN311]. See, e.g., Louis A. Pérez, Jr., *On Becoming Cuban* 8 (1999); Merry, *supra* note 13, at 6 (defining culture as "a set of contested values and practices changing over historical time as its members encounter new ideas and have new experiences either at home or as they travel"); Volpp, *supra* note 308, at 152 (observing the constant transformation of cultural identities); cf. Frank B. Cross, [Law and Economic Growth, 80 Tex. L. Rev. 1737, 1757 \(2002\)](#) (describing the deterministic view which "treats culture as if it were an immutable and exogenous genetic fact of certain populations").

[FN312]. Pérez, *supra* note 311, at 8 (noting that culture "set[s] into place standards by which to assess the capacity of social structures to meet commonly-held expectations and aspirations" and forms coherence among those who more or less share points of view); see also Pollitt, *supra* note 188 (noting that cultures imagined as stable or timeless are so conceived out of ignorance and do not exist); Oscar G. Chase, [American "Exceptionalism" and Comparative Procedure, 50 Am. J. Comp. L. 277, 278-79 \(2002\)](#) (noting the benefit of the concept of culture as a means to acknowledge commonalities in practice, values, and beliefs).

[FN313]. Merry, *supra* note 13, at 3 (noting that human rights activists and others "locate culture 'out there' in villages and rural areas rather than 'in here' in their offices and conference rooms").

[FN314]. *Id.*

[FN315]. An exception to this is the blaming of culture for problems within communities of color in the United States and the West. See, e.g., Narayan, *supra* note 30, at 87-88; Merry, *supra* note 13, at 6 (suggesting that those who control the dominant discourse about human rights are as engaged in cultural practices in their U.N. meetings as are tribal and village peoples in the developing world). For a thorough examination of the disparaging uses of culture against women from non-Western regions, see Volpp, *supra* note 33, at 1185-95.

[FN316]. Narayan, *supra* note 30, at 89.

[FN317]. See generally Susan Bordo, *Unbearable Weight* 251 (1993) (noting that in the United States, cosmetics and body transformations are rejected as political questions); Volpp, *supra* note 308, at 159 n.53 (citing Carrie Havranek, *The New Sex Surgeries*, *Cosmopolitan*, Nov. 1998, at 146 (describing sex surgeries that include vaginal-tightening procedures, trimming of labia, and pubic-mound liposuction to increase access to the clitoris)); Rand Richards Cooper, *Botox Parties*, *N.Y. Times*, Dec. 15, 2002, § 6 (Magazine), at 66 (describing 2002 as "the year of the Botox party--that

sui generis clinical setting where your hostess serves smoked salmon to a few choice guests in need of wrinkle zapping and your doctor brings the syringes, giving new meaning to doing shots at happy hour"); Adam Liptak, Opponents of Circumcision Use the Legal System and Legislatures to Combat It, N.Y. Times, Jan. 23, 2003, at A14 (noting controversy about the widespread practice of male circumcision in the United States, a practice uncommon elsewhere in the world and considered by many to be violative of bodily integrity and without medical or other valid purpose).

[FN318]. See Narayan, *supra* note 30, at 82; Kapur, *supra* note 33, at 13; Volpp, *supra* note 33, at 1185-88.

[FN319]. Boltanski, *supra* note 6, at 3.

[FN320]. Edward W. Said, In the Shadow of the West, in *Power, Politics, and Culture: Interviews with Edward W. Said* 39, 40 (Gauri Viswanathan ed., 2001) (original interview by Jonathan Crary & Phil Mariani published in *Wedge*, 1985) (explaining that "the act of representing (and hence reducing) others almost always involves violence" (emphasis in original)).

[FN321]. See Brenda Cossman, [Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project](#), 1997 *Utah L. Rev.* 525, 526 (describing the dangers of the ethnocentric gaze).

[FN322]. See, e.g., Paul Elie, A Church in Search of Followers, N.Y. Times, June 23, 2003, at A21 (noting the lack of progress in obtaining accountability a full year following disclosures); Daniel J. Wakin, Victims Say Report on L.I. Priest Abuse Breaks New Ground, N.Y. Times, Feb. 12, 2003, at B1.

[FN323]. See *Debating Human Rights*, *supra* note 1, at 6; see also Mutua, *supra* note 20, at 609 (noting that American popular culture portrays human rights problems as applying to "exotic" people, unlike themselves).

[FN324]. See Kennedy, *supra* note 4, at 111 (describing the human rights vocabulary as constructing evil as a social machine with passive and innocent victims, deviant abusers, and heroic human rights professionals).

[FN325]. Inderpal Grewal & Caren Kaplan, Warrior Marks: Global Womanism's Neo-Colonial Discourse in a Multicultural Context, 39 *Camera Obscura* 5, 79 (1996); Kapur, *supra* note 33, at 37 (discussing the Third World victim subject).

[FN326]. See *infra* notes 328-360 and accompanying text.

[FN327]. See *infra* notes 387-401 and accompanying text.

[FN328]. See, e.g., 6 Pakistanis Sentenced to Hang for Gang-Rape, N.Y. Times, Sept. 1, 2002, § 1, at 12; Ian Fisher, Account of Punjab Rape Tells of a Brutal Society, N.Y. Times, July 17, 2002, at A3; Pakistani Woman Recalls Jury-Ordered Rape, N.Y. Times, July 6, 2002, at A6; Beena Sarwar, Brutality Cloaked as Tradition, N.Y. Times, Aug. 6, 2002, at A15; Asim Tanveer, Death Sentences for Gang Rape, *Independent* (London), Sept. 2, 2002, at 9; Press Release, Amnesty International, Pakistan: Tribal Councils Must Stop Taking Law into their Own Hands (July 5, 2002), available

at [http:// web.amnesty.org/library/Index/engasa330182002](http://web.amnesty.org/library/Index/engasa330182002) [hereinafter Amnesty Press Release]. An internet search using the terms "Punjab," "Rape," "Tribal," and "Council" produced 1,601 "hits," all of which appear to relate to this case.

[FN329]. It was learned that the allegations were a cover for acts of sodomy and assault committed against Ms. Bibi's brother. See Fisher, *supra* note 328.

[FN330]. Sarwar, *supra* note 328.

[FN331]. See *supra* note 328.

[FN332]. *Id.*

[FN333]. Pakistani Woman Recalls Jury-Ordered Rape, *supra* note 328.

[FN334]. 6 Pakistanis Sentenced to Hang for Gang-Rape, *supra* note 328.

[FN335]. *Id.*

[FN336]. Dateline NBC: Tortured Justice (NBC television broadcast, Sept. 15, 2002) (transcript on file with the Columbia Human Rights Law Review) [hereinafter Tortured Justice].

[FN337]. See Hunt, *supra* note 43, at 16 (describing foreign policy rhetoric that often uses code words to obtain a particular response).

[FN338]. Tortured Justice, *supra* note 336, at 2.

[FN339]. *Id.*

[FN340]. *Id.*

[FN341]. *Id.* at 3.

[FN342]. *Id.*

[FN343]. *Id.*

[\[FN344\]](#). Id. at 5.

[\[FN345\]](#). Id. at 2.

[\[FN346\]](#). Id.

[\[FN347\]](#). Id. at 7.

[\[FN348\]](#). Id. at 2.

[\[FN349\]](#). Id.

[\[FN350\]](#). Id.

[\[FN351\]](#). Id. at 4.

[\[FN352\]](#). Id. at 5.

[\[FN353\]](#). Id. at 2.

[\[FN354\]](#). Id.

[\[FN355\]](#). Id. at 4.

[\[FN356\]](#). Id. at 2.

[\[FN357\]](#). See, e.g., Fisher, *supra* note 328; Sarwar, *supra* note 328.

[\[FN358\]](#). See, e.g., Fisher, *supra* note 328; Sarwar, *supra* note 328; Amnesty Press Release, *supra* note 328.

[\[FN359\]](#). Ash-har Quraishi, Gang Rape Forces Pakistan Tribal Justice Rethink (Aug. 4, 2002), <http://www.cnn.com/2002/WORLD/asiapcf/south/08/04/pakistan.justice>.

[\[FN360\]](#). See, e.g., Fisher, *supra* note 328; Sarwar, *supra* note 328; Amnesty Press Release, *supra* note 328.

[FN361]. Mattei, *supra* note 20, at 387, 436.

[FN362]. Tortured Justice, *supra* note 336, at 2.

[FN363]. See Katharine K. Baker, [Once a Rapist? Motivational Evidence and Relevancy in Rape Law](#), 110 *Harv. L. Rev.* 563, 617-18 (1997); Katherine Chen, [Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives](#), 3 *Wm. & Mary J. Women & L.* 277, 311 (1997) (noting that, between spouses, rape is a form of punishment, used to "get even" and keep women "in their place"). Just one month after the Pakistani "tribal rape" was reported, a one-paragraph, three-sentence story in the New York Times reported that a top-selling musician was charged with participating in a gang rape that was meant to punish a woman accused of embezzlement. Louisiana: Rape Charges Against Rapper, *N.Y. Times*, July 20, 2002, at A10. The court delayed going forward with the charges in order to allow the parties to "settle the issue." Corey Moss, *Mystikal Rape Case To Be Settled Soon, Lawyer Predicts* (Jan. 23, 2003), at <http://www.mtv.com/news/articles/1459659/20030123/mystikal.jhtml?headlines=true>.

[FN364]. See, e.g., Katherine C. Parker, [Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia](#), 10 *Am. U. J. Gender Soc. Pol'y & L.* 443 (2002) (discussing the failure of the District of Columbia Department of Corrections and the judicial system to protect female inmates from sexual abuse by prison guards or redress past abuse); Delisa Springfield, [Sisters in Misery: Utilizing International Law to Protect United States Female Prisoners from Sexual Abuse](#), 10 *Ind. Int'l & Comp. L. Rev.* 457, 463 (2000) (analyzing the pervasive sexual abuse of female inmates in U.S. prisons under the standards of international human rights law); Ronald J. Pappalardo, *Sentenced to Prison Abuse*, *Raleigh News & Observer*, June 16, 2003, at 9A (citing a Human Rights Watch report indicating that, in the United States, there is no accountability for rape in prison, and noting that prison employees take a hands-off approach to rape); Eric Schmitt, *Top Air Force General Backs Independent Inquiry in Rapes*, *N.Y. Times*, Feb. 27, 2003, at A1 (noting that, in the elite echelons of U.S. military institutions, officials continue to intimidate and retaliate against those who complain about rape and sexual abuse of female cadets and officers, despite previous scandals such as the Tailhook sexual harassment incident); Eric Schmitt & Michael Moss, *Air Force Academy Investigated 54 Sexual Assaults in 10 Years*, *N.Y. Times*, Mar. 7 2003, at A1 (discussing the increased number of sexual assault investigations by the Air Force Academy and the approaches officials are taking to address the issue); Press Release, Legal Aid Society of New York, *Sixteen Women Currently or Formerly Incarcerated in N.Y. State Prisons File Federal Lawsuit Charging N.Y. with Failing to Protect Them from Sexual Assault by Prison Employees* (Jan. 28, 2003) (describing plaintiffs' allegations that female prisoners are subjected to "ongoing and recurring" sexual misconduct and "impregnated by male staff in [New York State] prisons with regularity"), at http://www.brennancenter.org/programs/lse/pages/view_elerts.php?category_id=8.

[FN365]. See [United States v. Lanier](#), 520 U.S. 259 (1997).

[FN366]. *Id.* In the series of Lanier rapes, one of the judge's victims was forced into his chambers after the judge threatened to remove custody of her child. See *id.* at 261; Johanna R. Shargel, [United States v. Lanier: Securing the Freedom to Choose](#), 39 *Ariz. L. Rev.* 1115, 1115-16 (1997).

[FN367]. Shargel, *supra* note 366, at 1116 (pointing out that the judge was protected by his wealth and his politically powerful family).

[FN368]. [United States v. Lanier](#), 73 F.3d 1380 (6th Cir. 1996) (en banc).

[FN369]. [United States v. Lanier](#), 123 F.3d 945 (6th Cir. 1997).

[FN370]. J.C. Oleson, The [Punitive Coma](#), 90 Cal. L. Rev. 829, 856 n.144 (quoting James Gilligan) (citation omitted).

[FN371]. Springfield, *supra* note 364, at 463.

[FN372]. See [Wilson v. Seiter](#), 501 U.S. 294 (1991) (affirming that an Eighth Amendment violation requires proving that prison officials were "deliberately indifferent" to cruel and unusual conditions); see also Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § § 801-810, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 28 and 42 U.S.C.) (establishing additional obstacles for inmates seeking relief from prison rape); Parker, *supra* note 364, at 455-63 (discussing Supreme Court case law and the physical injury requirement under the Prison Litigation Reform Act of 1995 as all but eliminating a woman's opportunity to seek protection from rape and sexual abuse at the hands of prison officials). The articulation of the deliberate indifference standard has made it difficult for inmates to prevail in such cases without proof of an official's subjective state of mind. See David M. Siegal, Note, [Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter](#), 44 Stan. L. Rev. 1541, 1542 (1992).

[FN373]. Fisher, *supra* note 328; Sarwar, *supra* note 328.

[FN374]. Cheri M. Ganeles, [Cybermediation: A New Twist on an Old Concept](#), 12 Alb. L.J. Sci. & Tech. 715, 722 (2002) (noting that councils may be linked with Hindu traditions); Fisher, *supra* note 328; Sarwar, *supra* note 328. It should also be noted that the United States is home to tribunals that function as formal extensions of religious orders and that resolve, albeit in a most unsatisfactory way, issues of rape and sexual abuse. See Laurie Goodstein, Bishops Pass Plan to Form Tribunals in Sex Abuse Cases, N.Y. Times, Nov. 14, 2002, at A1 (describing criticisms of a new policy whereby priests accused of sexual abuse by church tribunals are judged by bishops who serve as the "jury, judge and executioner").

[FN375]. See Ganeles, *supra* note 374, at 722; Kimberly A. Klock, [Resolution of Domestic Disputes Through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, the Panchayat, and the Mahalla](#), 15 Temp. Int'l & Comp. L.J. 275, 285-86, 291 (2001) (describing the structure and workings of panchayats in India); François Tanguay-Renaud, [Post-Colonial Pluralism, Human Rights & the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan](#), 6 Sing. J. Int'l & Comp. L. 541, 543 n.13 (2002) (providing descriptions of these community structures as customary practice in regions of India where they are sanctioned).

[FN376]. Klock, *supra* note 375, at 278.

[FN377]. Amnesty Press Release, *supra* note 328 (criticizing the existence of these tribal councils that "have no legal standing").

[FN378]. Peerenboom, *supra* note 173, (manuscript at 24-25) (suggesting that if anything is universal, it is the disregard of rights when there are threats to social order).

[FN379]. Ruskola, *supra* note 262, at 181.

[FN380]. Terry Eagleton, Sweet Violence: The Idea of the Tragic 279 (2002) ("To pity the pharmakos [scapegoat] ... is to identify with it, and so to feel horror not of it but of the social order whose failure it signifies.").

[FN381]. Johanna E. Bond, [International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations](#), 52 Emory L.J. 71, 109 (2003) (arguing for the need for and possibility of a shared identity, where "subjectivities intersect in multiple systems of oppression that collectively affect peoples' lives").

[FN382]. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, art. 1, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. For an overview of the provisions of CEDAW, see Charlesworth & Chinkin, *supra* note 1, 216-18; United Nations, Division for the Advancement of Women, at <http://www.un.org/womenwatch/daw/cedaw/> (last visited Feb. 22, 2004).

[FN383]. CEDAW, *supra* note 382, art. 1, 1249 U.N.T.S. at 16.

[FN384]. *Id.* art. 2.

[FN385]. *Id.*

[FN386]. The United States signed CEDAW on July 17, 1980, and it was submitted to the U.S. Senate for advice and consent later that year. See 1 Multilateral Treaties Deposited with the Secretary General: Status as of 31 December 2000, at 228-29 (2000); see also *infra* notes 388-401, 403-408 (discussing the congressional debate surrounding the ratification of CEDAW.).

[FN387]. Charles Bright & Michael Geyer, Where in the World Is America?, in *Rethinking American History in a Global Age* 63, 64 (Thomas Bender ed., 2002) (defining exceptionalism as "that bundle of self-satisfied and exclusionary conceits that... stress[es] American uniqueness").

[FN388]. See, e.g., 146 Cong. Rec. S3925 (daily ed. May 11, 2000) (statement of Sen. Helms); 146 Cong. Rec. S1276 (daily ed. Mar. 8, 2000) (statement of Sen. Helms); see also [Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the Senate Comm. on Foreign Relations, 107th Cong. \(2002\) \(statement of Kathryn O. Balmforth, Esq.\), 2002 WL 1303056 \(F.D.C.H.\)](#) (arguing that ratification of CEDAW threatens to overrun certain fundamental rights by requiring governments to intrude in all areas of life, no matter how private, consensual, or sacred such as motherhood and religion).

[FN389]. See *supra* note 388; see also James Dao, Senate Panel Approves Treaty Banning Bias Against Women, N.Y. Times, July 31, 2002, at A3 (describing conservatives' fear that CEDAW will force a feminist agenda on issues from abortion rights to employment quotas); Katha Pollitt, Ashcroft Loves Iran, Nation, July 8, 2002, at 10 (discussing Attorney General John Ashcroft's opposition to CEDAW).

[FN390]. See *infra* notes 392-401 and accompanying text.

[FN391]. See *infra* notes 401-408 and accompanying text.

[FN392]. See 148 Cong. Rec. S1778 (daily ed. Mar. 12, 2002) (statement of Sen. Feinstein); 146 Cong. Rec. H268586 (daily ed. May 4, 2000) (statement of Rep. Woolsey); 146 Cong. Rec. E644 (daily ed. May 4, 2000) (statement of Rep. Woolsey); 144 Cong. Rec. E365 (daily ed. Mar. 12, 1998) (statement of Rep. Morella); 137 Cong. Rec. H8113 (daily ed. Oct. 21, 1991) (statement of Rep. Meyers); Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Comm. on Foreign Relations, 107th Cong. (2002) ([statement of Rep. Morella](#)), 2002 WL 1303055 (F.D.C.H.); Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the House International Relations Comm., 105th Cong. (2000) ([statement of Rep. Maloney](#)), 2000 WL 553545 (F.D.C.H.).

[FN393]. See, e.g., S. Res. 603, 107th Cong. (2002) (linking CEDAW with the need to reconstruct Afghanistan); 148 Cong. Rec. S1779 (daily ed. Mar. 12, 2002) (statement of Sen. Feinstein); 148 Cong. Rec. E312 (daily ed. Mar. 11, 2002) (statement of Rep. Lee); 147 Cong. Rec. H10950 (daily ed. Dec. 20, 2001) (statement of Rep. Woolsey); Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the Senate Comm. on Foreign Relations, 107th Cong. (2002) ([statement of Rep. Maloney](#)), 2002 WL 1303048 (F.D.C.H.); Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the House International Relations Comm., 107th Cong. (2002) ([statement of Rep. Woosley](#)), 2002 WL 1303060 (F.D.C.H.).

[FN394]. 137 Cong. Rec. H8113 (daily ed. Oct. 21, 1991) (statement of Rep. Broomfield); 137 Cong. Rec. H8113 (daily ed. Oct. 21, 1991) (statement of Rep. Yatron).

[FN395]. But cf. H.R. 116, 102d Cong. (1997) (acknowledging that no nation in the world has eliminated the gap in the status between men and women, and noting the growing feminization of poverty in the United States); 147 Cong. Rec. S2064 (daily ed. Mar. 8, 2001) (statement of Sen. Feingold) (noting women's under-representation in government, gender-wage gaps, and lack of affordable day care); 137 Cong. Rec. H8115 (daily ed. Oct. 21, 1991) (statement of Rep. Mink) (acknowledging gender wage gaps and women's poverty).

[FN396]. 146 Cong. Rec. S1306 (daily ed. Mar. 8, 2000) (statement of Sen. Kerry) (noting that the Convention contains no provisions in conflict with American law); 146 Cong. Rec. S1305 (daily ed. Mar. 8, 2000) (statement of Rep. Feinstein) (provisions consistent with American law); 145 Cong. Rec. H1138 (daily ed. Mar. 10, 1999) (statement of Rep. Woolsey). In the few instances where Congress discussed examples of requirements in CEDAW that may conflict with current laws affecting women's status in the United States, treaty proponents have advocated passage of the treaty with reservations to ensure that U.S. laws will remain unaffected. See [Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the Senate Comm. on Foreign Relations, 103d Cong. \(1994\) \(statement of Jamison S. Borek, Deputy Legal Advisor, U.S. Dep't of State\)](#), 1994 WL 522865 (F.D.C.H.). Thus, by treaty reservations or interpretation, private discrimination against women could remain unregulated, and the CEDAW Committee's broad interpretation of equal pay for women, and requirements for paid maternity and parental leave would require no legal revisions to domestic laws. *Id.*

[FN397]. See 145 Cong. Rec. H1138 (daily ed. Mar. 10, 1999) (statement of Rep. Woolsey).

[FN398]. 146 Cong. Rec. S1293 (daily ed. Mar. 8, 2000) (statement of Sen. Boxer); see also Statement of Rep.

Maloney, *supra* note 393 (stating that "CEDAW contains no provisions in conflict with American laws"); Statement of Jamison S. Borek, *supra* note 396 (claiming that "[t]he substantive provisions of CEDAW embody, with relatively few exceptions, principles already reflected in the Constitution and laws of the United States").

[FN399]. Statement of Rep. Maloney, *supra* note 393.

[FN400]. 146 Cong. Rec. S1291 (daily ed. Mar. 8, 2000) (statement of Sen. Boxer).

[FN401]. *Id.*; Statement of Rep. Woosley, before the House International Relations Committee (May 3, 2000), available at [2000 WL 553548 \(F.D.C.H.\)](#).

[FN402]. See Cooke, *supra* note 185, at 227 (noting the invocation of a similar theme in regard to intervention in Afghanistan).

[FN403]. 147 Cong. Rec. S2065 (daily ed. Mar. 8, 2001) (statement of Sen. Feinstein); see also 148 Cong. Rec. S1778 (daily ed. Mar. 12, 2002) (statement of Sen. Feinstein) (referring to the United States as "the lone superpower and champion of democracy and human rights"); 145 Cong. Rec. S14944 (daily ed. Nov. 19, 1999) (statement of Sen. Boxer) (urging Congress that "[t]he United States needs to show that it is the world leader on promoting human rights and that includes the rights of women throughout the world"); Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Comm. on Foreign Relations, 107th Cong. (2002) ([statement of Rep. Morella](#)), [2002 WL 1303055 \(F.D.C.H.\)](#) (encouraging the U.S. Senate to ratify CEDAW).

[FN404]. See, e.g., 146 Cong. Rec. H1081 (Mar. 16, 2000) (statement of Rep. Woolsey); 146 Cong. Rec. S1306 (Mar. 8, 2000) (statement of Sen. Feinstein) (stating that the United States should ratify CEDAW and "send a strong message to the international community").

[FN405]. 146 Cong. Rec. S1293 (Mar. 8, 2000) (statement of Sen. Boxer).

[FN406]. 137 Cong. Rec. H 8113 (Oct. 21, 1991) (statement of Rep. Meyers) (referencing female circumcision in the Middle East and Africa, and dowry murders in India).

[FN407]. 144 Cong. Rec. E365 (Mar. 12, 1998) (statement of Rep. Morella); Statement of Rep. Maloney, *supra* note 393.

[FN408]. 146 Cong. Rec. S1291 (Mar. 8, 2000) (statement of Sen. Boxer).

[FN409]. See Nicholas D. Kristof, *Bush vs. Women*, N.Y. Times, Aug. 16, 2002, at A17 (stating that CEDAW "would make no difference in America but would be one more tool to help women in countries where discrimination means death"); Nicholas D. Kristof, *Women's Rights: Why Not?*, N.Y. Times, June 18, 2002, at A23 (arguing that CEDAW would not affect U.S. women who already have full rights, and that the treaty should be supported to help women in other parts of the world). These editorials may be examples of the hegemonic discourse of human rights skewing

understandings of human rights problems by addressing inequalities in a system that advantages the West. See Aziz, *supra* note 1, at 39.

[FN410]. Nussbaum, *supra* note 210, at 39 (noting the absurdity of Americans taking the credit for the concept of sex equality in light of the United States's failure to pass an equal rights amendment, as India did in 1951).

[FN411]. This is the term used by the current Bush Administration to describe the goal of its new national security strategy. See The National Security Strategy of the United States, Sept. 17, 2002, <http://www.whitehouse.gov/nsc/nssall.html> [hereinafter National Security Strategy].

[FN412]. Rieff, *supra* note 10, at 89.

[FN413]. Nussbaum, *supra* note 210, at 32.

[FN414]. Bordo, *supra* note 317, at 225 (expressing concern about the paralyzing anxiety over falling into ethnocentrism or "essentialism" that prevents locating common values); Hardt & Negri, *supra* note 3, at 138, 152 (describing global marketing strategies that benefit from postmodern politics of difference).

[FN415]. See Narayan, *supra* note 30, at 150.

[FN416]. Christopher Marquis, World's View of U.S. Sours After Iraq, Poll Finds, N.Y. Times, June 4, 2003, at A19; see also Pei, *supra* note 73, at 31 (noting that since the events of September 11, 2001, international sentiment toward the United States has moved "from sympathy to undisguised antipathy").

[FN417]. David E. Sanger, Threats and Responses: Security, N.Y. Times, Sept. 20, 2002, at A1 (reporting that President Bush directed his staff to write the new national security document in plain English because "the boys in Lubbock ought to be able to read it").

[FN418]. See, e.g., Rieff, *supra* note 10, at 201 (quoting Eric Dachy, the operations director of Médecins San Frontières-Belgium, "[w]e witnessed ... the creation of a militaro-humanitarian space whose strategic priorities reflected more the interests of the great powers than of the populations being helped").

[FN419]. *Id.* at 202-03.

[FN420]. As Paul Krugman of the New York Times notes, "It is no answer to say that Saddam was a murderous tyrant [M]any ... who fomented this war were nonchalant, or worse, about mass murders by Central American death squads in the 1980's." Paul Krugman, Standard Operating Procedures, N.Y. Times, June 3, 2003, at A31; see also Hoffman, *supra* note 10, at 74 (noting the shift to human rights and democracy as the justification for the war in Iraq when weapons of mass destruction proved difficult to find).

[FN421]. See, e.g., Sirleaf, *supra* note 280; see also Somini Sengupta, Oh, if Only the G.I.'s Would Come Marching In,

N.Y. Times, July 30, 2003, at A4 (observing that Liberia functioned as a plantation society and as a client government to the United States, serving its economic and political needs). "It baffles Liberians that American soldiers would interfere where they are not wanted, and stay away from where they are." *Id.*

[FN422]. National Security Strategy, *supra* note 411; see also David E. Sanger, Bush to Outline Doctrine of Striking Foes First, N.Y. Times, Sept. 20, 2002, at A1 (noting that the doctrine focuses on strategies that "can be used to win what it describes as a battle of competing values and ideas including 'a battle for the future of the Muslim world'").

[FN423]. National Security Strategy, *supra* note 411; see also Hannum, *supra* note 10, at 29 (observing that *Pax Americana* has become *bellum americanum*).

[FN424]. See *supra* note 417 and accompanying text; see also Lars Schoultz, *Beneath the United States* vi-xvii (1998) (observing that U.S. depictions of Latin America have shifted over the last 200 years from accusations of backwardness to human rights violators to hotbeds of radicalism, all for the purpose of protecting U.S. interests).

[FN425]. George W. Bush, State of the Union Address (Jan. 29, 2002) (declaring that "We want to be a nation that serves goals larger than self [W]e have a great opportunity ... to lead the world toward the values that will bring lasting peace"), [http:// www.whitehouse.gov/news/releases/2002/01/20020129-11.html](http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html). The President announced that the United States has been called to play "a unique role in human events." *Id.*

[FN426]. See *supra* note 411.

[FN427]. See Gordon, *supra* note 67, at 22.

[FN428]. In part, this fear is related to the specter of Islamic revolutions. See Louis, *supra* note 89, at 9 (suggesting that American distrust for Arabs and Muslims is based largely on fears associated with the Egyptian revolution in 1952, the Iraqi revolution in 1958, and subsequent political developments that threatened U.S. interests).

[FN429]. See *supra* notes 37-40 and accompanying text.

[FN430]. See Renda, *supra* note 45, at 191. One might consider other comparisons. Has Jessica Lynch become a 21st century Evangelina Cossío y Cisneros, a young woman, barely 19 years old, whose dramatic but staged rescue is played to audiences around the world, but especially to lift the morale of the U.S. electorate on behalf of the war in Iraq? See *supra* notes 39-40 and accompanying text.

[FN431]. Mutua, *supra* note 20, at 655.

[FN432]. Bill Keller, The Selective Conscience, N.Y. Times, Dec. 14, 2002, at A29 (noting that Amnesty International declared the appropriation of human rights issues as part of the Bush Administration's call for war against Iraq a "cold and calculated manipulation"). Even those human rights workers who do not oppose military intervention in Iraq in the name of human rights relief express deep suspicion that concern for human rights abuses serve as the motivation for military intervention. See *id.* (noting that members of Human Rights Watch are not convinced that U.S. actions in Iraq

are designed to end human rights abuses there).

[FN433]. Rieff, *supra* note 10, at 334 (describing values associated with humanitarianism).

[FN434]. Some scholars and advocates have begun to consider the use of reparations to address the legacy of colonialism. In May 2002, the Seventh Annual Latina and Latino Critical Race Theory ("LatCrit") Conference at the University of Oregon included a panel focusing on reparations for the inhabitants of U.S. colonial territories, titled "Reparations, Redress, and Remedies: Undoing the Legacy of Colonialism and Imperialism." See Substantive Program for LatCrit VII, <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/latcrit007substantiveprogram.htm> (last visited Feb. 22, 2004); see also Pedro A. Malavet, [Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts](#), 13 *Berkeley La Raza L.J.* 387 (2002) (identifying the cultural and political advantages of using reparations theory to inform a transition to postcolonial Puerto Rico). The legal concept of reparations grows largely out of the critical analyses of African American scholars and advocates in response to the legacy of slavery systems in the Americas. See Adjoa A. Aiyetoro, [Formulating Reparations Litigation Through the Eyes of the Movement](#), 58 *N.Y.U. Ann. Surv. Am. L.* 457 (2003); Max du Plessis, Historical Injustices and International Law: An Exploratory Discussion of Reparations for Slavery, 25 *Hum. Rts. Q.* 624 (2003); Anthony Gifford, The Legal Basis of the Claim for Slavery Reparations, 27-*SPG Hum. Rts.* 16(2000) (conceptualizing the legal framework for reparations within international law); F. Michael Higginbotham, [A Dream Revived: The Rise of the Black Reparations Movement](#), 58 *N.Y.U. Ann. Surv. Am. L.* 447 (2003). These issues include whether the demand for reparations is a workable claim; whether this particular iteration will dilute reparations claims made on behalf of descendants of African slaves; whether reparations counteracts other forms of struggle against colonialism's legacy; and whether, as a legal issue, reparations may both fail and further harm plaintiffs. See Ediberto Roman, [Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits](#), 13 *Berkeley La Raza L.J.* 369 (2002); Robert Westley, [Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?](#), 40 *B.C. L. Rev.* 429 (1998); Eric K. Yamamoto, [Racial Reparations: Japanese American Redress and African American Claims](#), 40 *B.C. L. Rev.* 477 (1998).

[FN435]. International Commission on Intervention and State Sovereignty, Responsibility to Protect 11 (2001) [hereinafter Responsibility to Protect]; see also Michael Byers & Simon Chesterman, Changing the Rules About Rules?, in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* 177, 190-91 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (observing that in many states that have endured past humanitarian intervention, the intermingling of humanitarian purposes with other non-humanitarian goals has created debate over the value of the human rights project).

[FN436]. See Responsibility to Protect, *supra* note 435, at 24 (raising the issues in contemporary human rights debates).

[FN437]. Byers & Chesterman, *supra* note 435, at 192-94 (suggesting that the United States has been seeking to loosen constraints on intervention in order to obtain dominance in international order and to pursue its desired course of action outside the norms of humanitarian intervention).

[FN438]. See Responsibility to Protect, *supra* note 435, at 23 (noting that the conflict between differing views of the humanitarian projects is exacerbated because Third World countries are "relegated to the role of norm-takers, while developed countries act as norm enforcers").

[FN439]. See Byers & Chesterman, *supra* note 435, at 203.

[FN440]. See Sanjoy Majumder, *Afghan Claims Rejected*, BBC News (June 18, 2003) (noting criticism from a Brussels-based International Crisis Group, whose calls for elections instead of the *loya jirga*, failed to account for the material conditions in Afghanistan, the historical purposes of the *loya jirga*, and the absence of a structure to regulate election polls), http://news.bbc.co.uk/1/hi/world/south_asia/2999700.stm (last visited Oct. 1, 2003). The substance of the constitution has also been criticized for deviating from Western norms. See Preeta D. Bansal & Felice D. Gaer, *Editorial, Silenced Again in Kabul*, N.Y. Times, Oct. 1, 2003, at A23 (protesting that "American efforts to build a democratic, tolerant Afghanistan are facing a serious challenge" and that the proposed Afghan Constitution would create a fundamentalist Islamic state). These criticisms were lodged while the constitutional debates were still underway, and at a time when Afghan women submitted for consideration a Bill of Rights for women that privileged socio-economic rights over civil and political rights. See *Afghan Women's Rights*, N.Y. Times, Sept. 24, 2003, at A26. It is also noteworthy that human rights concerns in Afghanistan, particularly those related to gender issues, no longer receive attention from U.S. government officials. *Id.*

[FN441]. Patrick E. Tyler, *Iraq Leaders Seek Greater Role Now in Running Nation*, N.Y. Times, Sept. 27, 2003, at A1.

[FN442]. *Id.* (noting that, despite promises that Iraqis would have a major role in finance, security, policy matters, and foreign affairs, Americans have denied the Iraqi Governing Council access to critical information and have excluded them from such matters).

[FN443]. Hamza Hendawi, *More Shiite Leaders Criticize New Iraqi Constitution*, The Associated Press, Mar. 9, 2004, available at LEXIS, News Library, AP File.

[FN444]. See Ewelukwa, *supra* note 17, at 474 (noting the need for strong local women's voices to eliminate oppressive practices); see also Hunt, *supra* note 43, at 3 (suggesting that we "learn to enjoy our own institutions and values without feeling the need for others to duplicate them").

[FN445]. Geertz, *supra* note 262.

[FN446]. *Id.*

[FN447]. Rieff, *supra* note 10, at 89 (quoting French social theorist Jean Baudrillard) (citation omitted).

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