The Human Rights Dilemma: Rethinking the Humanitarian Project

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By Deborah M. Weissman*

INTRODUCTION

The development of usable universal human rights values has been at the heart of international legal deliberations for much of the last fifty years.¹ 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.² 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 instantly known 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.³

The human rights project offers the possibility of using the law as a means of social

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change based on a commitment to humanitarian values on a global scale. 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 the widening disparities in wealth, the diminution of government benefits, and increasing social injustice. As people are displaced and disperse, as workers migrate to meet the demands of the transnational markets, the human rights movement can offer “global solidarity against national particularism and preferences.”

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. More and more
lawsuits are filed in the United States seeking remedies for human rights abuses that have occurred elsewhere, intensifying debates over whether U.S. courts are proper sites for resolution of these claims. International legal norms have been invoked to guide 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 a catalyst for improvement of law-related policies dealing with childcare issues, and as a framework in drafting state English-only laws. 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 the 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 treaties as support of affirmative action programs).


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 justification for conquest and territorial aggrandizement. More recently, human rights concerns have served as a rationale for U.S. military intervention. 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.

It is, hence, 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? 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

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11 Lodico, *supra* note 10, at 1031.

context of the human rights project over the past one 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 colonizer and 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.

This Article suggests that commitment to human rights must be guided by an awareness of the power relationships out of which proposed remedies originate. It contends that without such concerns, humanitarian enterprises may inadvertently reproduce the very wrongs they seek to correct.  

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.

Attention is given to gender-related human rights issues as one of several discrete concerns that inform the themes raised in this Article. Legal developments and the global circumstances of women provide a particularly useful lens through which controversial issues

13 Gayatri Spivak, Righting Wrongs, in Human Rights and Human Wrongs, (Nicholas Owen, Ed. forthcoming) (suggesting that human rights work has been used as an alibi for economic, military, and political intervention). See Merry, Globalization, Culture, and the Practice of Human Rights, (unpublished manuscript on file with author), (asking whether human rights constitutes a new form of imperialism). Rieff, supra note 10, at 27 (2002) (arguing that humanitarian groups serve political interests contrary to the needs of victims of war crimes and terror).


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. 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.

The gender dimensions of human rights concerns are also reflected in the challenges to formulating legal strategies targeted to the harms women suffer. 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 systems and dissimilar cultural norms, and often respond to the interests of power. 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 toward 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

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16 See infra Part I.A.


18 See infra Part II.D.
domination.\textsuperscript{19} It reviews the key issues in the historical accounts of the 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.\textsuperscript{20} 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 that have examined the ideological determinants that have produced human rights maxims.\textsuperscript{21} Part I.C concludes with an examination of the ways that 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 formulaic legal solutions that often fail to address human rights

\textsuperscript{19} Frantz Fanon, \textit{Wretched of the Earth}, 41–42, 210–211(1963)

\textsuperscript{20} Fernando Tesón, \textit{The Liberal Case for Humanitarian Intervention}, 114 (in \textit{Humanitarian Intervention: Ethical, Legal, and Political Dilemmas} J.L. Holzgrefe and Robert O. Keohane ed., 2003) (explaining that humanitarian intervention must be concerned with the respectful treatment of individuals and must cause more good than harm).

abuses, or worse, serve to perpetuate human rights violations. Part II then resumes focusing 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.\footnote{Spivak, supra note 13 (“[O]ne cannot write off the righting of wrongs.”).} This Article goes beyond theory to move human rights work out of the realm of conventional truths to the domains of critical re-examination.\footnote{Cf. Thomas I. Haskell, \textit{Capitalism and the Origins of the Humanitarian Sensibility}, Part I 90 AHR 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.” \textit{Id.} A useful aspect of this construct is that it “banishes the implication of conspiracy.” \textit{Id.} Similarly, conventional truths also act to mask hegemonic consequences of the human rights project, and it to should be reconsidered without “implication of conspiracy.”} 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.” 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. Human rights law functions best when it acts with cognizance of context and awareness of the cultural and national determinants 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.

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 the interference with the sovereignty of another state is exacerbated by the disparity in power implicit in the very act of formulating human rights norms. That universal

24 Bolstanski, supra note 6, at xvi.


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

27 Charlesworth & Chinkins, supra note 1, at 54 (observing the difficulty in 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.
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. Value systems articulated by groups who can 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.

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. 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. Colonizers assigned to themselves the task of uplifting “uncivilized” people who

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28 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 determined 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); Karin Mickelson, Rhetoric and Rage: Third World Voices in International Legal Discourse, 16 Wis. Int’l L.J. 353, 360 (1998) (noting both limits and benefits to the use of the term, “Third World,” which may signify, “not only in descriptive but in normative terms, … an intolerable situation that demands a response.”) Use of such terminology may suggest the need for redistribution of power and resources as well as “a fundamental rethinking of international relations.” Id. at 360.

29 Jean-Paul Sartre described colonialism as a contradiction “laying claim to and denying the human condition at the same time.” Sartre, Preface to Wretched of the Earth, supra note 19, at 20.

30 Edward W. Said, Culture and Imperialism ix (1993) (describing the European perspective on colonial expansion as “bringing civilization to primitive or barbaric people who desired to be ruled”).

31 See id., at 29 (noting that colonialism served as an “ideology of lies, a perfect justification for pillage; . . . alibis for . . . aggressions.” See also Edward W. Said, Orientalism 3 (1978); Uma Narayan,
represent “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.  

In fact, however, the far-reaching normative disruptions resulting from the installation of colonial regimes inevitably compromised the efficacy of humanitarian projects and did little to obtain respect for human rights. Central to this undertaking is the depiction of the “colonized woman,” whose condition has often been invoked as the object of civilizing. Practices such as veiling, polygamy, child-marriages, and sati (widow immolation), among others, have served to justify the imposition of colonial rule. The need for British rule in India was, in part, justified as a

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Dislocating Cultures, 14–15, 55 (1997) (noting that the rhetoric of the superiority of Western civilization served to legitimize the colonial project). See Sally Engle Merry, Colonizing Hawai‘i: The Cultural Power of Law, 19 (2000) at 19 (noting that the colonizing process depended upon claims to be “‘civilizing’ a ‘barbaric’ or ‘savage’ people”). See 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 19th century).

32 Fanon, supra note 19, at 41 Fanon writes that as indicative of “... the totalitarian character of colonial exploitation, the settler paints the native as some sort of quintessence of evil”). Id. Hardt & Negri, supra note 3, at 116 (noting that the humanitarian projects of colonialists were carried out for the purpose of bringing indigenous people into the realm of the colonizers’ religion and culture to achieve sameness).

33 Narayan, supra note 31, at 17, 54–55. Narayan describes conflicts between Western colonizers and colonized cultures as focused on the figure of the “Colonized woman” and the site of the struggle for culture and values. Id. at 17.

34 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” such as female infanticide was 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, 484–485 (2002) (noting that British humanitarian interests had less to do with concern for infants than preoccupation with imposition of British authority exercised as a “monopoly on violence,” and the claim that they “alone could determine issues of life and death”). See Narayan, supra note 31, at 54 (noting that criticisms of sati were not registered out of concern for women but to justify colonial rule in India). Narayan notes 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. Dagmar Engels, Women and the Law in Colonial India, in European Expansion and Law, 159 (W.J. Mommsen and A. De Moor eds.1991) (writing about the history of Indian women under colonial law in 19th and early 20th century and 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 (2001).
means to outlaw a number of practices relating to women and girls: female infanticide, forced marriages, and the treatment of widows.\textsuperscript{35} 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.\textsuperscript{36}

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.\textsuperscript{37} 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.\textsuperscript{38} Others reported of Cuban women who “deserved to be lifted from the hands of oppression,” who 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.”\textsuperscript{39}

Newspaper accounts romanticized as they sensationalized the plight of Cuban women. The case of Evangelina Cossio, a nineteen year-old woman who was “rescued” by Americans after being imprisoned in Cuba, allegedly because she resisted the advances of a Spanish officer, served as justification for military intervention and as metaphor for Cuba’s deliverance.\textsuperscript{40} Like

\textsuperscript{35} Id.


\textsuperscript{37} Id. at 11 (e.g., depicting Cuban women as sexual victims of the Spanish).

\textsuperscript{38} Id. at 46, 50 (noting that stories of painful ordeals endured by vulnerable women “struck powerful emotional chords” and were repeated by Congressmen “despite the strain on credulity”).

\textsuperscript{39} Frederic M. Noa, \textit{The Condition of Women in Cuba}, The Outlook 642, Mar 11, 1905.

\textsuperscript{40} A.F. Aldridge, \textit{Señorita Cisneros}, N.Y. Times, Sept. 12, 1897, at 12; Hoganson, supra note 36, at 58–61; Walter Millis, \textit{The Martial Spirit} (1931) 82–84, (describing a gendered storyline in the news so as to “Enlist the women of America!” to take up the cause of intervention in Cuba. Id. at 83. Headlines proclaimed “Accomplishes at a Single Stroke What the Best Efforts of Diplomacy Failed Utterly to Bring About in Many Months.” Id. at 84.
Cossío, Cuba also needed to be rescued. That the Cossío rescue episode was staged was of little importance to those clamoring for intervention.\textsuperscript{41}

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 hand of barbaric Filipinos.\textsuperscript{42} Filipinos were represented as ineffective heads of households, unable to assume responsibility for the well-being of their families.\textsuperscript{43} The moral was unambiguous: if they could not care for their households, they could hardly be entrusted to care for their country. Puerto Ricans were portrayed as dependent children.\textsuperscript{44} 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.”\textsuperscript{45}

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.\textsuperscript{46} Haitian women were portrayed as lacking morality, and hence evil, dangerous, and loathsome.\textsuperscript{47} These depictions, together with other paternalistic images and debasing characterizations of Haitians,

\textsuperscript{41} 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. \textit{Id.} Hoganson, \textit{supra} note 36, at 60, 61. \textit{Señorita Cisneros’s Case}, New York Times, Sept. 1, 1897, at 7; \textit{Miss Cisneros’s Case Exaggerated}, New York Times, Aug. 27, 1897, p. 3. \textit{See also} Millis, \textit{supra} note 47, at 84 (describing both the distorted story of the rescue and the U.S. public outcry and celebration at the “rescue”).


\textsuperscript{43} Hoganson, supra note 36, at 135, 137.

\textsuperscript{44} Michael H. Hunt, \textit{Ideology and U.S. Foreign Policy} 86.

\textsuperscript{45} Hoganson, \textit{supra} note 36, at 155.

\textsuperscript{46} Mary A. Renda, \textit{Taking Haiti} 10, 16, 178 (2001).

\textsuperscript{47} \textit{Id.} at 80, 175.
created the raison d’etre for the subsequent military occupation (1915-1934). Similarly, U.S. colonists in Hawai’i 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.”

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 of uncivilized men. In either case, women were in need of rescue. The logic of colonial rule thus has frequently obtained validation through the manipulation of images of women as victims of local oppression, as hapless and helpless in need of protection of a superior cultural system.

Colonized people are often represented in child/female imagery, in need of protection by colonizer nation depicted as adult/male. 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.

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48 Id., at 178 (noting that Haiti was depicted as a land of sexual excess, primitive savagery, lacking basic social order).
49 Merry, supra note 31, 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 purpose of the missionaries intervention as both delivering and dominating Hawaiian society perceived as the “weak female needing manly protection from a dangerous world”).
50 See Kennedy, supra note 4, at105 (criticizing the human rights movement for portraying women as “mothers-on-pedestals or victimized care givers” because of the negative consequences of representing women too narrowly, and “even if the only consequence is to pry loose some resources for redistribution to women”).
51 See Renda, supra note 46, at 137 (noting that the Philippines were feminized and represented as a savage and uncivilized woman). See Hoganson, supra note 36, at 56 (observing that political cartoons represented Cuba as a “ravished woman” awaiting the rescuing knights in the form of U.S. military troops). See Hunt, supra note 44 at 61 (describing the depicting of the Latino as “a white maiden passively awaiting salvation of seduction”).
52 Said, supra note 30, at 21–22, 93–95.
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. For all 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. 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. 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.

53 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 Nicholas B. Dirks, *Caste 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).


55 Ester Boserup, *Economic Change and the Roles of Women in Persistent Inequalities*, 23 (Irene Tinker, ed. 1990) (observing that antifeminist views held strong in Europe during the colonial period). 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, 595–596 (1998) (noting, for example, the imposition of the doctrine of coverture, transferred from the United States to Hawai’i in 1845 and the subsequent disenfranchisement of women in 1850 which eliminated once powerful and active women from political participation).

Colonial domination also fashioned gender hierarchies to obtain economic advantages. Colonialism sanctioned exploitation of women as low-paid workers in factories, in agriculture, and as servants. 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. 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.

Colonialism often meant a loss of status and formal rights for women. 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. In Puerto Rico, the initial debates about the following acquisition of Puerto Rico in 1898, the colonial state set about educating women to accept the legitimacy of gender roles within family and the workplace and made efforts to suppress women’s labor value. Merry, supra note 55, at 595–596 (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).

Merry, supra note 31, at 15, 21 (explaining that the subordination of women to their husbands by the colonial project related to economic concerns).

Charlesworth, et al., supra note 54, at 619.


See also Charlesworth et al., supra note 54 at 620 (noting that colonialism imposed upon colonized women those restrictions and controls that women within colonizing countries suffered). Adetoun O. Ilumoka, African Women’s Economic, Social, and Cultural Rights, in Human Rights for Women (Rebecca J. Cook, ed. 1994) (describing the circumstances of African women under colonialism generally).

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 relegateing Australian aboriginal women to second class status within their communities and rendering them invisible). The Cuban Constitution of 1901, for example, was particularly considered a defeat for women who protested that the constitution “left Cuba a virtual colony and made noncitizens of its women.” Stoner, supra note 55, at 56.

See Jorge Ibarra, Prologue to Revolution, 135 (1998) (noting that under U.S. occupation, Cuban women suffered a loss of status that they had gained during years of fighting side by side with men for
prospect of granting of U.S. citizenship to Puerto Ricans did not include women, and when citizenship was finally extended to the inhabitants of Puerto Rico, women were denied suffrage. 63 In Hawai’i, as U.S. colonialists introduced the doctrine of coverture, women suffered a loss of autonomy in regard to their relationships with their husbands. 64 Women endured the general effects of community disorder as well as violence employed in particularized gender form. 65 For many women, rape and sexual harassment characterized the lived experience of colonial occupation. 66

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 uplift was the stated motive for intervention resonate as acts of beneficence? What are the theoretical matrices that facilitated the

63 Cabán, supra note 56 at 190 (noting that the Olmstead Bill which included a provision related to individual naturalization and which was approved by the House, deprived Puerto Rican women of US 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 1936. Compare Puerto Rican women who were U.S. citizens with women citizens born in the United States who received the right to vote in 1920. See Manuel Del Valle, Puerto Rico Before the Supreme Court, 19 Rev. Jur. U.I.P.R. 13, 51 n.165 (1984). See supra Part I.C for a discussion of the detrimental affect of role of law in the colonial project on human rights.

64 Merry, supra note 31, at 95.

65 Christine Taylor, Northern Ireland: the Policing of Domestic Violence in Nationalist Communities, 10 Wis. Women’s L. J. 307, 3442 (1995) (describing the Royal Ulster Constabulary’s physical attacks under the British administration in Northern Ireland and on women together with the pervasive use of degrading terms such as “bitch” and “whore”).

66 Id. See also Charlesworth, et al., supra note 54, at 619 (noting that women have been subject to sexual abuse by colonial settlers and occupation armies). Hoganson, supra at 36, at 186–187 (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 46, at 163 (noting that “marines ’prowl[ed] for liquor and women’ during off-duty hours during U.S. occupation in Haiti). Renda 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.’” Id.
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.\textsuperscript{67} It illustrates that systems of political
domination may have their origins in otherwise incontrovertible ideas.

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.\textsuperscript{68} The ideological dimensions of human rights can be examined from a
number of perspectives. Human rights is often considered in the context of religious traditions
because of the theological concerns implicated in the canons of natural law.\textsuperscript{69} Nationalism offers

\textsuperscript{67} Ideology here refers to the bundling of beliefs and convictions as a set of organizing principles
that functions to provide order and serves as cognitive strategies by which to make sense of the world.
convictions or assumptions that reduces the complexities of a particular slice of reality to easily
comprehensive terms and suggests appropriate ways of dealing with that reality.” \textit{See also} Akira Iriye,
\textit{Culture}, 77 J. Amer. Hist. 99, 101(1990) (describing the study of ideology as a way of examining the
attitudes and actions of one nation toward another).

\textsuperscript{68} Michael H. Hunt, \textit{An Update: Ideas in Vogue,, Explaining the History of U.S. Foreign
Relations}, (Hogan and Patterson, eds., 2003) (forthcoming) (enumerating in bibliographical form an
increase in studies and scholarly works that examine the role of ideology as an interpretive tool); Iriye,
\textit{supra} note 67; A. M. Weisburd \textit{Implications of International Relations Theory for the International Law
of Human Rights}, 38 Colum. J. Transnat’l L. 45 (1999); Makau Wa Mutua, \textit{Politics and Human Rights:
An Essential Symbiosis}, 149 in \textit{The Role of Law In International Politics}, (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). Mutua, \textit{supra} note 21, at 589; Jonathan Zasloff, \textit{Law and the
Shaping of American Foreign Policy: From the Gilded Age to the New Era}, 78 N.Y. U. L. Rev. 239
(2003); Louis Henkin, \textit{Human Rights: Ideology and Aspiration, Reality and Prospect, in Realizing
Human Rights: Moving from Inspiration to Impact} 3 (Power & Allison eds., 2000); Ruth Gordon, \textit{Racing
U.S. Foreign Policy} 17 Nat’l Black L.J. 1(2003); Carlos R. Soltero, \textit{The Supreme Court Should Overrule
the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism},

\textsuperscript{69} \textit{See generally}, Abdullahi A. An-Na’im, \textit{Islam and Human Rights: Beyond the Universality
Debate}, 94 Am. Soc’y Int’l L. Proc. 95(2000) (transcripts of a debate between Professors An-Na’im and
Louis Henkin). Of course, religion and human rights are linked because of the tension between them. \textit{Id.}
another approach to human rights ideology. 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.

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. He locates the sources of the U.S. presumption of greatness in the process of separation from Old World absolutism and monarchies. The experience produced a celebratory rhetoric affirming that with independence the American people had been presented with the 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. A discourse of “special responsibility” inspired territorial expansion and the search for new markets as an inalienable right to expand. Expansion was further

70 Hunt, supra note 68, at nn.6–10.


72 Hunt, supra note 44.

73 Id. at 20.

74 Id. (describing the impact of Thomas Paine’s Common Sense both in the vast readership it obtained and its call for independence and liberty). See also Ignatieff, supra note 68, at 59 (noting that the notion of U.S. exceptionality is derived from its history in resisting British colonialism); David J. Bederman, International Law Advocacy and its Discontents 2 Chi. J. Int’l L. 475 (2001) (describing Walter Mead’s analysis of U.S. foreign policy ideology as one based on experiences of the American revolution, the need for expansion for economic needs, incorporating violent cultural values of the American frontier with legalistic and elitist features); Minxin Pei. The Paradoxes of American Nationalism (noting that disdain for “Old World” values forms the basis for U.S. identity). http://www.foreignpolicy.com/story/story.php?storyID=13631.

justified as a way to share the blessings of civilization with less fortunate people.\textsuperscript{76} Liberty was conflated with constant expansion and missionary efforts to shape the world.\textsuperscript{77}

Such ideological constructs found their way into the discourse related to the humanitarian project and have provided justification for the United States to expand in the name of a higher morality.\textsuperscript{78} The unwillingness to intervene in Cuba in 1898 was characterized as a default of the “legacy of freedom.”\textsuperscript{79} 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.”\textsuperscript{80} Indeed, U.S. citizens were called to rejoice that “Providence” had given them “the opportunity to extend [their] influence, . . . institutions, and . . . civilizations.”\textsuperscript{81}

Those advocating the annexation of the Philippines argued that expansion was not only consistent with the ideals of the nation, but a duty conferred on the United States by destiny.\textsuperscript{82} Similar arguments were advanced as justification for the occupation of Haiti.\textsuperscript{83} President Woodrow Wilson supported intervention as discharge of historical obligations, stating:

\begin{thebibliography}{99}
\bibitem{76}Ramos, \textit{supra} note 75, at 287–288.
\bibitem{77}Hunt, \textit{supra} note 44, 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).
\bibitem{78}Hunt, \textit{supra} note 44, at 124.
\bibitem{79}Hoganson, \textit{supra} note 36, at 63 (quoting the Governor of Indiana). Hoganson also quotes Sen. 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?” \textit{Id}.
\bibitem{81}Cabán, \textit{supra} note 56, at 38, (quoting Senator O. H. Platt about the acquisitions following the War of 1898).
\bibitem{82}Hoganson, \textit{supra} note 36, at157.
\bibitem{83}Renda, \textit{supra} note 46, at 17.
\end{thebibliography}
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. . . .

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.85 The United States served as a 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.86 Fear of revolution, for example, led to intervention in Mexico for the purposes of “helping [Mexico] adjust her unruly household.”87

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.”88 Communism in any place or form was the sine qua non of human rights violations. Cold War policies moved from containment to interventionist strategies, including coups in Iran,

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84 Id. at 92.
85 Hunt, supra note 44, at 92–124 (describing the fear of revolution and political change).
86 Id., at 100–109.
87 Id., at 110 (quoting President Wilson).
88 Id. at 105–115, 153. See also Mutua supra note 21, at 649 (observing that notions of good and evil were prominently associated in human rights issues associated with the need to defeat Communism).
Guatemala, and Chile, invasions in Cuba, Grenada, and Panama, and war in Viet Nam. These acts were undertaken with the conviction that it was not only beneficial for the United States but also that the acts benefitted the people of the countries involved. Currently, suspicion of Islamic revolutions drives U.S. efforts to introduce Western political forms into the Middle East.

Assumptions about race also drove humanitarian concerns that affected foreign policy. 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. 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. Occupation in Haiti was justified on the grounds that Blacks could not govern themselves. Interference and control of Hawai’i was debated in terms of racial superiority. In sum, some people were more advanced than others, and it was the obligation of the former to

89 Hunt supra note 44, at 154, 167–170 (quoting George Kennan who stated that Americans had “the responsibilities of moral and political leadership” in opposing the Soviet Union in behalf of the rest of the world). U.S. leaders promoted development policies as a wedge against communism noting that “brown people of the East” required trustees. Id. at 162.

90 See Wm Roger Louis, Age of Empire, Part Two, Times Literary Supplement, April 18, 2003 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).

91 Hunt supra note 44, at 46–52. See also Ruth Gordon, supra note 68, at 12; Ramos supra note 75, at 285.

92 See Hoganson, supra note 36, at 134 ((describing racists descriptions of Filipinos that paralleled those of Blacks and American Indians in the United States). See also Gordon supra note 68, at 12, (noting that the rationale for unequal treatment of Blacks and Native Americans was similar to that used to justify subsequent inequitable treatment of Mexicans and Chinese).


94 Renda, supra note 46, at 29 (describing Haiti as “the nation that was a nightmare to slavery’s defenders”).

95 Gordon, supra note 68, at 14.
uplift the latter.\textsuperscript{96} 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—and informed the purpose of U.S. foreign policy and conferred benevolent intent on American interventionism.\textsuperscript{97} Indeed, the gendered representations of victims suggests 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 “formulations and practical conduct of international policy.”\textsuperscript{98} Public rhetoric symbolizes as it shapes the national self-image.\textsuperscript{99} 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 is hence not without contradiction and indeed has been characterized as “the moralized expression of a political

\textsuperscript{96} Id. at 13–14, 16 (noting that racial hierarchy justified the ever-expanding United States past the Mississippi, into Mexico, Hawai‘i, the Caribbean, Central America, and the South Pacific, warranted by the inability of racially inferior people to populate or govern a territory). See Ramos, supra note 75, at 287 (describing the ideology of Manifest Destiny as predicated on notions of racial supremacy and the “right,” “duty,” and “mission” of the superior race to disseminate its ways in the world). See Soltero, supra note 68, at 7 (noting that racial considerations were a key part in U.S. expansionism).

\textsuperscript{97} Hoganson, supra note 36, at 13; Emily S. Rosenberg, Gender 7 J. Am. Hist. 116, 116–118 (1990); Hunt, supra note 68, at 7–9 nn.16–19.

\textsuperscript{98} Hunt, supra note 44, at 16.

\textsuperscript{99} Id.
ideology." 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 to human life.

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

1. Noble ideals in the service of ignoble purposes.

Humanitarian concerns were at the heart of the proposition of the rule of law, a measure of civilization, colonial powers insisted, and a guarantee of basic freedoms. In acquiring overseas territories, the United States assumed control over the affairs of other people, including the writing of new constitutions, establishing the qualifications for citizenship and voting, organizing legislative bodies and systems of laws, and establishing judicial systems. 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 the types introduced by the United States are recognized as human rights goods and are vital to the actualization of the human rights project.

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100 Mutua, supra note 21, at 592 (referencing liberal democracy’s use of human rights).

101 See Richard H. Fallon, Jr., “The Rule of Law” as a Conception Constitutional Discourse, 97 Colum. L. Rev. 1, 2–3 (1997) (noting that the Rule of Law has been equated with the rule of reason and central to national identity); 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).

102 See infra Part I.C.1.a–c.

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. Rather, it is necessary to emphasize, 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.

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. By the

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105 See Anghie, supra note 104, at 518 (noting that the subordinating and exploitive practices are fundamental to colonialism, and continue to affect international law).

terms of the Platt Amendment, the United States acquired the “constitutional” right to control the affairs of the island. 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. 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 UN documents. 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.

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.” The following year, the United States imposed a constitution containing provisions favorable to foreign investments and property ownership and validating all acts of the U.S. military occupation. District Gendarmerie officers comprised

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107 Id.


110 Id. at 142.

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

112 Id. at 99; Renda, supra note 46, at 10, 32.
largely of 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.’”

The Filipino constitution enacted in 1935 and authored by U.S. authorities was similarly a product of the U.S. colonial project. 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. However, civil rights were not explicitly extended to Filipinos and the constitution denied Filipinos the right to trial by jury. The U.S. purpose, Secretary of War Elihu Root indicated, was to make colonial rule palatable to the Filipino people. 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.

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113 Schmidt, supra note 111, at 86 (describing the Gendarmerie d’Haiti as a branch of the client-government in Haiti also comprised of U.S. marines who held official commissions from the Haitian government while simultaneously retaining their rank in the Marine Corps).

114 Schmidt, supra note 111, at 99 (quoting former Secretary of the Navy Josephus Daniels in a letter to then President Franklin D. Roosevelt, who had been Daniels’ former Assistant Secretary).


116 Anghie, supra note 104, at 556 n. 148; Rossabi, supra note 42, at 199–200.

117 Id. See infra notes 141–143 and accompanying text.

118 Id. at 294; Anghie, supra note 104, at 555, 558 (describing U.S. strategy with regard to the Philippines as one designed to justify the continued control of foreign people).

119 Sarah Rumage, The Return of Article 42: Enemy of the Good for Collective Security, 5 Pace Int’l. L. Rev. 211, 258 n. 171 (1993); Henry J. Richardson III, Gulf Crisis and African-American Interests under International Law, 87 Am. J. Int’l L. 42, 68 (1993) (quoting a news report at the time: “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.”).
b. Citizenship Rights and Suffrage

The United States maintained an inconsistent policy with regard to the citizenship rights of inhabitants of foreign territories. Those born in the Philippines during U.S. control (1898-1946) were treated as wards, considered to owe their allegiance to the United States but denied citizenship. At the same time, Puerto Ricans were dispossessed of their national status and made U.S. citizens, over the objections of the populace. However, Puerto Rican U.S. citizenship was not—and is not—full and complete and Puerto Rican “citizens” lack full constitutional rights and protections.

During the military occupation of Cuba, the United States imposed suffrage restrictions that disenfranchised vast numbers of Cubans. Justifications for limiting suffrage were stated unambiguously: “[t]he proposition of annexation would be voted down by an overwhelming

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121 See Valmonte v. INS, 136 F.3d 914, 918 (2d Cir. 1998). See also Rabang v. INS, 35 F.3d 1449 (9th Cir. 1994).


124 Louis A. Pérez, Jr., *Cuba Between Empires*, 309–311 (1983) (describing voting restriction limiting suffrage to only Cuban-born males or sons of Cuban parents born while in temporary residence abroad or Spaniards who renounced citizenship, be able to read or write, owned real or personal property worth $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.
majority if presented . . . to the Cuban people." 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 be decisive in determining the future for an independent Cuba. In Puerto Rico, U.S. officials frequently amended voting rights laws between 1899 and 1916. Suffrage laws changed from more restrictive qualifications to broader suffrage rights, depending upon the need to suppress opposition to U.S. control. Claiming that some publications were “calculated to alienate the affection of the people by bringing the Government into disesteem,” U.S. anti-sedition laws, including seditious conspiracy and piracy and privateering, were invoked to regulate the content of newspaper reporting of elections.

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. 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

125 Id. at 305 (quoting the military governor of Havana).

126 Id. at 307 (noting that the ascendancy of Blacks in Cuba was a cause of uneasiness to 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 307–308.

127 Cabán, supra note at 56, 177–182.

128 Id. at 177 (noting frequent amendments to laws regulating the rights of Cubans to vote). In 1900, the U.S. revoked universal male suffrage of his concerns articulated by Puerto Rico’s military governor that unless voting was restricted to the elite, the election process would prove to be a threat to colonial rule). Id. at 66.


130 William Alford, Exporting the Pursuit of Happiness. 113 Harv. L. Rev. 1677, 1678–1679 (2000) (noting that the United States has claimed as its mission the “civilization” of others through the export of the rule of law).
land to foreign ownership.\textsuperscript{131} U.S. legal systems replaced Puerto Rican laws in order to “Americanize Porto Rico”\textsuperscript{132} and to supplant existing laws considered impediments to the expansion of U.S. interests.\textsuperscript{133} New tax laws were imposed on Puerto Rican goods in order to protect the competitive costs of domestic goods produced in the United States.\textsuperscript{134} Other sections of the law required that all trade between Puerto Rico and the United States be conducted on U.S.-built and registered ships.\textsuperscript{135} 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.\textsuperscript{136} The Puerto Rican legislature, which was 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.\textsuperscript{137} Like 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.\textsuperscript{138} U.S. laws relating to

\begin{footnotes}
\item[133] Cabán, supra note 56, at 153–154. See also Berbusse, supra note 132, at 101 (1966).
\item[134] Foraker Act, see Cabán, supra note 56, at 101.
\item[135] Id. 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 it take care of itself.” Cabán, supra note 56, at 154 (quoting Governor Allen).
\item[136] Cabán, supra note 56, at 101–102 (quoting Rep. Richardson who opposed the Tarriffs laws on the basis that it oppressed Puerto Ricans for the benefit of enriching some U.S. citizens).
\item[137] Del Valle, supra note 63, at 51 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 subordinate to countervailing federal norms. Id. at 17. Ramos, supra note 75, at 234.
\item[138] See Gromer v. Standard Dredging Co., 224 U.S. 362, 370 (1912)(referring to terms of the Philippine Act which required that all laws passed by the Philippine government be reported to Congress
\end{footnotes}
self-government allowed Filipinos to occupy government positions, but only if they could
demonstrate “an absolute and unconditional loyalty to the United States.”139 Organizing the
Filipino judicial system around U.S. laws permitted U.S. domination of the process for choosing
and installing judges.140 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.141 Jury trials were
deemed inappropriate for the Filipino who, it was said “at his best has only learned half his duty
to mankind . . . [who] can be tried but . . . can’t try his fellow man.”142 Urged as a means by
which 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.143

In Haiti, the United States enacted tax laws to favor foreign bankers and investors.144
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.145 Hawaiians too experienced the destruction of indigenous systems of

which had the power to annul the same).

139 Anghie, supra note 104, at 556.
140 Rossabi, supra note 42, at 200–201.
141 Id. at 201–202. 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).
142 Rossabi, supra note 42, 195 (quoting William Howard Taft).
143 Id.; Zasloff, supra note 67, at 292.
144 See Georges Anglade, Rules, Risks, and Rifts in the Transition to Democracy in Haiti, 20
145 Id. at 1176.
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 those of the United States in order to gain acceptance as a “civilized” nation. These changes included the development of courts and prison systems that resulted in 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. Hawaiians suffered economically and socially as family systems and economic livelihoods were destroyed under the new legal arrangements.

2. The Role of the Courts: The Insular Cases

The Insular Cases provided a legal rationale by which the administration of empire was validated. In these cases, the U.S. Supreme Court considered the issues raised by the status

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146 Merry, supra note 55, at 575, 596–597.

147 Merry, supra note 31, at 4. See also Mattei, supra note 21, at 388 (observing a more subtle means of coercing Western legal models “as imposition by bargaining,” “part of a subtle blackmail” in order to obtain economically 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.

148 Merry, supra note 55, at 586.

149 Merry, supra note 31, at 86 (noting that with a few years of legal reforms, foreigners controlled most of the private property in Hawaii and had begun to import substantial numbers of foreign workers which displaced Hawaiians). Merry notes that legal changes “established the power of private landowners over tenants, husbands over wives.” Sally Engle Merry, From Law and Colonialism to Law and Globalization, 28 Law and Soc. Inquiry 569, 586 (2003).

150 The Insular Cases were a series of U.S. Supreme Court decisions rendered from 1901 to 1922. They were originally conceived of as 9 cases: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Grossman v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York and Porto Rico Steamship Company, 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); and Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901). As Efrén Rivera Ramos notes, other decisions during that time frame that deal with the same issues have also been included as a part of the Insular cases. Ramos, supra note 75, at 240. The cases relate to actions in Puerto Rico, the Philippines, Hawai‘i, and Alaska.
of newly acquired territories to be administered by but not admitted to the United States union, including the degree of plenary power to be exercised by Congress and the degree to which the inhabitants of those territories enjoyed constitutional rights.\textsuperscript{151} These cases are instructive for they bear directly on larger human rights concerns. Legal theories articulated in the \textit{Insular Cases} are linked to those ideological constructs depicting inhabitants of U.S. territories as uncivilized and in need of uplift.\textsuperscript{152} In \textit{De Lima v. Bidwell} with respect to the Philippines, the Court stated:

\begin{quote}
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. . . .\textsuperscript{153}
\end{quote}

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:

\begin{quote}
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 secure dependencies against legislation manifestly hostile to their real interests.\textsuperscript{154}
\end{quote}

The \textit{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 future relationship between the two countries as one of protector and protected.\textsuperscript{155} Puerto Rico would remain not only a political

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\textsuperscript{151} \textit{Id}. A later case that dealt with Alaska was resolved differently, in part because at the time it was decided, there was evidence of intent to not merely acquire Alaska but incorporate it within the United States. \textit{Rasmussen v. United States}, 197 U.S., 516, 528–31 (1905).


\textsuperscript{153} \textit{De Lima}, 182 U.S. at 138. Similarly, Puerto Ricans were labeled “alien and hostile in \textit{Downes}, 182 U.S. at 308.

\textsuperscript{154} \textit{Downes v. Bidwell}, 182 U.S. 244, 268 (1901).

\textsuperscript{155} Ramos, \textit{supra} note 75, at 228.
subject, but a legal subject. Indeed, once the U.S. Supreme Court legitimized the colonial relationship, Puerto Rico’s struggle for sovereignty was constrained within the confines of its legal relationship to the United States, the rights and status of its people 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 as possessing a proper history. 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. Not surprisingly, the remedies and relief that the law purports to offer formerly colonized people are often viewed with suspicion. The hegemonic nature of the Western legal system continues to play an important part in the formation of postcolonial relationships.

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156 Id.

157 Andrews, supra note 61, at 926 (noting that Aboriginal people were distrustful of the Australian legal system because of its colonial origins and its legacy of brutality); Merry, supra note 31, (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”).


159 See Anglie, supra note 104, at 519 (observing that the concept of perfecting international legal doctrines in the West and transferring them to the non-west affects the construction of human rights, democracy, and development issues). See Vargas, supra note 121.

The imposition of Western legal regimes appears dedicated to the establishment of “regulatory regimes and systems of private rights” to facilitate capital markets, often at odds with human rights.\footnote{Chua, supra note 160, at 12 n.39 (observing that the law and development movement focused on the development of capital markets an overhaul of the legal system, including legal education, to foster this end).}

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.\footnote{See Sharon K. Hom & Erick 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 U.S. Supreme Court upheld claims of race discrimination on behalf of a white non-native Hawaiian denied the right to vote for the Office of Hawaiian Affairs).} 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 to government benefits for women, children, and the disabled.\footnote{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 based on the Insular Cases as “authoritative guidance on the territorial scope of the term ‘in the United States’ in the Fourteenth Amendment”). See also Rabang v. INS, 35 F.3d 1449 (9th Cir. 1994). See Califano v. Torres, 435 U.S. 1 (1978) (denying rights to Supplement Security Income for the disabled to Puerto Rican U.S. citizens in Puerto Rico); Harris v. Rosario, 446 U.S. 651 (1980) (upholding regulations providing for lower levels of AFDC benefits to Puerto Rican families).}

Thus, the unequal value accorded to residents of U.S. territories and U.S. citizens continues to wreak havoc.

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 outside of the United

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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 capital punishment was abolished in the Puerto Rican Constitution of 1952.\textsuperscript{164} 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 not exist under Commonwealth status.\textsuperscript{165} Nonetheless, the U.S. government declared that federal criminal laws override “local laws,” including the Puerto Rican Constitution.\textsuperscript{166} The lower federal 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.”\textsuperscript{167} 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.\textsuperscript{168}

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.\textsuperscript{169} They


\textsuperscript{166} Liptak, \textit{supra} note 164.

\textsuperscript{167} \textit{United States v. Acosta Martinez}, 106 F. Supp. 2d at 327. Initially, decisions from the U.S. District Court of Puerto Rico and from the Puerto Rican Supreme Court were appealed directly to the U.S. Supreme Court, however the Foraker Act, and later the Jones Act provided that such appeals are heard in the First Circuit Court of Appeals. \textit{Jones Act}, 35 Stat. 951 (1917).

\textsuperscript{168} Abby Goodnough, \textit{Acquittal in Puerto Rico Averts Fight Over Government’s Right to Seek Death Penalty}, N.Y. Times, August 1, 2003, at A14 (noting that the verdict elated many Puerto Ricans who accused the federal government of violating the Puerto Rican constitution).

\textsuperscript{169} Hom & Yamamoto, \textit{supra} note 162.
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.\footnote{Rice v. Cayetano, 528 U.S. 495 (2000).}

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 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.\footnote{Id.}

American legal principles were presented as “immutable laws of justice and humanity,” to be maintained for the sake of “liberty and happiness, irrespective of the ways they may conflict with the customs or laws” in the territories where they were applied.\footnote{Zasloff, supra note 67, at 293 (quoting Elihu Root).} Legal systems were introduced for the stated purpose of improving indigenous systems described as ineffective and corrupt.\footnote{See Berbusse, supra note 132 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 Secretary of Justice, considered to be the most knowledgeable about Puerto Rican courts found the U.S. to be “false and calumnious accusations.” Id. at 125–126.}

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, 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 are discredited.174

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 but have compromised the notion of universal human rights values. This Part examines colonialism’s legacy in four respects: (1) resulting ineffective legal norms and strategies to address human rights abuses; (2) resistance to Western-dominated norms; (3) the distortion of knowledge about humanitarian needs; and (4) the 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.175 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 uplift.176

174 Hardt & Negri, supra note 3, at 18; see also Peerenboom, supra note 1.


176 Jonathan L. Hafetz Pretrial Detention, Human Rights, And Judicial Reform in Latin America,
Norms previously used to justify colonial domination are advanced anew, disassociated
from their cultural origins, and characterized as universal values and markers of civilization,
celebrated as worthy normative standards to which all are enjoined to subscribe.\textsuperscript{177} Individuality
is exalted over collectivity and community during periods of decolonization.\textsuperscript{178} Similarly,
appeals are made to Western political and legal systems as the signpost of modernity.\textsuperscript{179} But it is
also true that formerly colonized countries have developed their own value systems, shaped by
historical circumstances, and never more tenaciously defended as when derived in function of
self-determination.\textsuperscript{180} New national meanings are fixed on differences, this time as conscious
efforts to replace values previously imposed either by force or more subtle but no less
involuntary forms of coercion.\textsuperscript{181} 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,

\textsuperscript{177} Fanon, \textit{supra} note 19, at 43 (observing that during the period of decolonization, the native
person is appealed to and exhorted to retain the values of the colonizer).

\textsuperscript{178} \textit{Id.} at 47.

\textsuperscript{179} See Chua, \textit{supra} note 160, at 12.

\textsuperscript{180} Hardt & Negri, \textit{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 dignity of its people).

\textsuperscript{181} Peerenboom, \textit{supra} note 1 (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). \textit{See also}
Narayan, \textit{supra} note 31, at 5 (demonstrating that the diverging understandings of “western culture” and
the “indigenous national culture” emerged in the struggle between colonialism and nationalist
movements).
and more: 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 has particular relevance to the condition of women, so too does the form of resistance to colonial rule bear on the circumstances of women. Opposing colonial values assumed various forms, including the recovery and preservation of local institutions and traditional methods of governance and decision-making. In perhaps the most notable form of resistance, women were summoned to assume the role of transmitter of cultural traditions deemed vital to the defense of nation. This role typically casts women as conservator of the family and keeper 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. Resistance to outside values became intertwined with notions of women as the cultural conduit of 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.

Women’s resistance to colonialism has often been overlooked. The depiction of Afghani women as passive victims ignores their participation in the resistance to foreign occupation.

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182 Charlesworth, et al., supra note 54, at 619.


184 Coomaraswamy, supra note 34, 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).


186 Miriam Cooke, Islamic Feminism Before and After September 11th , 9 Duke J. Gender L. & Pol’y 227, 228–229 (2002) (describing Afghan women’s resistance to the Soviets as well as the
Kenya, women’s struggles against colonial rule and in support of economic and social programs have been ignored, in large part because their activities do not conform to readily recognized models of Western feminism. It is more likely that attention is given to resistance in the form of rising nationalism when the focus is upon the sacrifices women are called to make. Women have been subjected to powerful pressures to maintain traditions and cultural conventions, even if it involved practices harmful to them, such as female circumcision and certain widowhood rituals.

Less recognition is extended to forms of resistance that not only shaped new values and traditions but heightened women’s stature and improved their circumstances within their communities. In Cuba, for example, women’s resistance to colonialism resulted in new family arrangements in which women and men each owned and controlled property. In Iran, the veil, often understood as oppressive custom, served as a sign of resistance to the Shah whose rule was seen closely connected with Western colonialism. Many Muslim women assign honor to its Mujahideen, the Taliban, and most recently, against the United States).

See Dwasi, supra note 59, at 421 (noting that Kenya’s women’s organizations have been difficult to conceptualize along the lines of feminist organizations).

Merry, supra note 31, at 16 (describing nationalism as relying on “invisible, incorporated women who supported the national identity through their sacrifices and labor for husband and family”).

See Katha Pollitt, Whose Culture? 29, in Is Multiculturalism Bad for Women? (Susan Moller Okin, ed. 1999) (noting that clitoridectomy was a declining practice in Kenya when nationalists revived it in rejecting British colonialism). See also Andra Nahal Behrouz, Note, Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative, 103 Colum. L. Rev. 1136, 1157–1158 (2003) (noting that Sudanese Muslims tenaciously held onto the custom of female circumcision as a symbol of resistance). See 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).

Ibarra, supra note 62, at 136.

Stoner, supra note 55, at 22.

Ratna Kapur, Un-Veiling Women’s Rights in the ‘War on Terrorism’, 9 Duke J. Gender L. &
usage, which has become a means to affirm their own cultural identity.\textsuperscript{193}

Resistance and nationalism in response to colonialism have often resulted both in the repression of women, on the one hand, and an occasion for the improvement of their circumstances, on the other. Where they have diverged, women have often endeavored to struggle simultaneously against external colonialism and internal systems of gender oppression, although at times they have been required to choose between national interests and gender concerns.\textsuperscript{194} While some women determine that cultural preservation and national liberation transcend gender interests, others who contest local oppression often suffer as subversive outcasts.\textsuperscript{195} It is to the latter concern that Western human rights advocates and Western feminists frequently attend, and upon which human rights efforts are often concentrated.\textsuperscript{196} The summoning of human rights, however well-intentioned, often fails to recognize the dynamics of resistance and is unlikely to produce useful outcomes. At least as important, it serves to undermine the possibility of developing strategies to allow women from both sides of the

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Pol’y 211, 218 (2002).
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\textsuperscript{193} Id. at 218. See also Nicholas D. Kristof, \textit{Saudis in Bikinis}, N.Y. Times, Oct. 25, 2002, at A35 (noting that some Saudi women note that wearing abayas, or black cloaks contributes to freedom from sexual harassment and from their bodies being used as commodities).

\textsuperscript{194} Ayelet Shachar, \textit{The Puzzle of Interlocking Power Hierarchy: Sharing the Pieces of Jurisdictional Authorities} 35 Harv. C.R.-C.L. L. Rev. 385, 401(2000); Dwasi, \textit{supra} note 59, at 423 (noting that during the colonial era, women in Kenya fought on two fronts: against colonial domination and against patriarchal structures that harmed women, particularly economically).

\textsuperscript{195} Coomaraswamy, \textit{supra} note 34, at 485 (noting that women who resist certain cultural practices are branded as traitors).

\textsuperscript{196} See Dwasi, \textit{supra} note 59, at 423 (describing a group on white settlers whose efforts on behalf of Kenyan women were based on Western norms and who functioned to dampen Kenyan women’s anti-colonialist militancy). Charlesworth, \textit{et. al.}, \textit{supra} note 54, at 620, Charlesworth & Chinkin, \textit{supra} note 1, at 155–157.
colonial divide to focus on mutual conditions of oppression.\textsuperscript{197}

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


The United States has dominated much of the human rights debate. In the realm of the humanitarian discourse, U.S. “mastery extends to the symbolic level.”\textsuperscript{198} It has exercised control over the representation of human rights and possesses the means by which it constructs and imposes its notions of human rights on much of the world.\textsuperscript{199} Thus, the notion of the universality of human rights bears few traces of non-Western origins.\textsuperscript{200}

The development of leading international human rights organizations reveals the mechanisms of Western dominance in human rights.\textsuperscript{201} The organizational leaders and program

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\textsuperscript{197} Chandra Talpade Mohanty, “Under Western Eyes” Revisited: Feminist Solidarity Through Anticapitalist Struggles, 499, 522 Signs (Winter 2003) (urging that feminist solidarity requires an understanding of the historical and experiential differences in people’s lives). Behrouz, supra, note190, at 1162 (suggesting that Muslims are best equipped to reform practices that subordinate women within local settings without external conditions forced upon them).


\textsuperscript{199} Id. Asad notes the use of sophisticated telecommunication and “culture industries,” by which the United States dominates the discourse of human rights, and the use of the research centers and experts for the purpose of dominating the discourse of human rights. Id.

\textsuperscript{200} Mutua, supra note 21, at 629 (challenging the exalting the universality of human rights as exemplified in the Universal Declaration of Human Rights without identifying any non-Western political or moral support for them). The Third World, says Mutua, has been excluded from participating in the development of international law and human rights norms. See Mutua, supra note 2, at 216. Weisburd, supra note 68, at 107 (observing the fact that values of non-Western states have not been significantly considered in the formulation of human rights norms will make notions of universality of values more difficult to obtain).

\textsuperscript{201} Id. 608–613 (reviewing organizations such as the International League for Human Rights, Human Rights Watch, International Human Rights Law Group, International Commission of Jurists, and Amnesty International).
staff are educated primarily in the United States.\textsuperscript{202} Almost all have been selected based on their demonstrated endorsement of the primacy of the West’s human rights concerns.\textsuperscript{203} Women’s international nongovernmental organizations (INGOs) are also dominated by professionals from or trained in the West and have considerable influence in the drafting of human rights documents.\textsuperscript{204} Their ability to claim interpretive control in the formulation of norms and policies has tended to marginalize the participation of women who have perspectives from developing countries.\textsuperscript{205}

According to the prevailing models, human rights is envisioned as a set of norms that emphasize legal, political, and civil structures.\textsuperscript{206} Economic and social issues are considered less

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\item \textsuperscript{202} Id. at 615–616 (describing a vetting approach for the purposes of selecting boards and staff who align themselves with the dominant Western view, for example, the primacy of political and civil rights over social and economic rights).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Jean Franco, \textit{The Long March of Feminism}, 31 NACLA Rep. on the Am. 10 (1998); Merry, supra note 13.
\item \textsuperscript{205} Id. at 14–15 (noting, for example, the impact on women’s organizations in Latin America, many of which are now heavily funded by European and North American governments and foundations which support a neoliberal agenda, individual empowerment and self-esteem issues and raising questions about who is defining agendas and strategies focusing on women’s struggles for rights).
\item \textsuperscript{206} Human rights law has often been described in categorical terms by which certain rights are designated within tiers or “generations” connoting both a hierarchy of values, and a dominant model. See Charlesworth & Chinkin \textit{supra} note 1, at 203–205. First generation rights are conceived as civil and political rights, at the core of which is the preservation of the autonomy of the individual, and which are often described as negative rights that require forbearance or abstention by the state from particular acts. \textit{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 as rights particularly in the realm of government responsibilities and implementation. \textit{Id.} at 203–204. It is the first generation premised on individual rights that is understood as the classic theory of human rights. Christin J. Albertie, \textit{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”).
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Individual rights are privileged over collective rights and the proposition of human rights as a set of obligations as opposed to entitlements is ignored. The human rights project often proceeds without apparent recognition that such Western modalities as the commitment to formal autonomy, legal structures, electoral politics, and political rights may lack normative authority beyond specific cultural contexts and social practices.

This is not to argue for the rejection of human rights as a body of totalizing values emanating from the West. 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. Ideas transcend national boundaries and are often appropriated and adapted to meet the needs of

207 Mutua, supra note 21, at 605 (noting agreement that the development of human rights norms has been dominated by Western cultural and political norms). Mutua also notes the narrow and limited acknowledgment prominent human rights organizations have given to economic and social rights. Id. at 619–620. Alford, supra note 130, at 1699 (describing models of democracy and its related values). See also Kennedy supra note 4, at 112 (describing human rights values as focusing on discrete individual rights at the expense of overlapping identities). See Eduardo Cáceres, Building a Culture of Rights, 34 NACLA Rep. on the Am. 22, 24 (2000) (noting that despite a Latin American view as to the importance of communitarian over individualist traditions, social over political citizenship, human rights strategies developed elsewhere respond to themes less relevant such as liberalism and individualism).

208 Id. See also Mutua, supra note 68, at 167 (describing varying African conceptions of men and women as group-centered who value rights along with duties in contrast with the overindulgence of the individual in the West). See also Aziz, supra note 1.


people throughout the world. It is an inevitable outcome of cultural encounters and is a dominant facet of the human experience. That the Universal Declaration of Human Rights responded to massive human rights violations perpetuated in the West during World War II, moreover, provides some explanation for the dominance of Western norms.213

But 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.214 Indeed, fundamental human rights concepts have originated from the anti-colonial struggle itself.215 Yet missing from much of the dominant Western human rights literature, particularly those discussions that advance social norms and propound legal strategies, is an examination of non-Western norms of human rights practices. Rarely are they discussed in any way other than to affirm that they contradict Western-based universal notions.216

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.217 Human rights strategies framed around experiences in the United States and the West

212 Nussbaum supra note 211, at 48.


214 Spivak, supra note 13 (noting that in the global South, human rights workers are often the descendants of the colonial subject).

215 See Nussbaum, supra note 210, at 409 (noting the Gandhian roots of support for women’s struggles for autonomy and freedom).

216 Mutua, supra note 68, at 149, 166.

may ultimately be of little relevance to women who live their lives in vastly different circumstances from Western counterparts. And 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. Sources of women’s oppression are frequently located in private realms within household structures and kinship systems, where male-dominated structures act to confine women to specific roles and functions. New international human rights initiatives respond to these circumstances by advocating state intervention to prevent violence at the hands of those most intimate and private domains of daily life. They are posed as universal solutions to be implemented everywhere.

Practices of colonial regimes are often replicated in those 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 (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 204 & 209 and accompanying text.

218 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 rather violence within the realm of private domains).

219 Charlesworth, et al., supra note 54, at 620 (noting that women are subordinated within their role in family, and are compelled to conform to male-defined values).

by the very authority from which women are enjoined to seek remedy. 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. Similarly, Aboriginal women in Australia decline to seek state intervention as a remedy for domestic violence for fear of further harassment by state agencies. Palestinian women living in the occupied territories rarely appeal to Israeli authorities for relief for fear of collaborating with forces of occupation. This was also true for women in Chile during the military government of General Augusto Pinochet and black women in South Africa under apartheid. 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.

221 Taylor, supra note 65, at 340.

222 Id. at 335, 340

223 Andrews, supra note 61, at 918. The erosion of the public/private dichotomy is not always a universally held value within the U.S. 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 Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991); 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. 371 (1968); Linda Ammons, Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypers: The African-American Woman and the Battered Woman Syndrome, 1995 Wis. L. Rev. 1003 (1995); 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 Howard L.J. 1 (1998); Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. Rev. 1 (1999).


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. 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 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.

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. Criminal remedies may have no transference value in cultures where punishment for the purpose of deterrence or retribution is not the norm.

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226 Kennedy, supra note 4, at 111 (criticizing the dominant human rights approach as a “one-size-fits-all emancipatory practice” which 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).

227 Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization are now included as constituting crimes against humanity and grave breaches of the Geneva Conventions. Rome Statute, Article 7(l)(g).

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

229 Merry, supra note 13, (describing a tendency to create “cookie-cutter” solutions). Shaloub-Kevorkian, supra note 224, 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 itself). See infra note 313 and accompanying text.

230 See Thomas Kelley, Squeezing Parakeets into Pigeon Holes: The Effects of Globalization And
Criminal sanctions may not only fail to protect women, they can interfere with other cultural and religious systems that may otherwise provide relief. Furthermore, in some countries, state intervention to remedy violence against women has actually resulted in greater restrictions on women’s liberties as women are treated as wards in need of guardians.

The promulgation of Western-based laws often supplants local customs and undermines alternative methods of obtaining relief and risks depriving women of usable options. 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). 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. The CEDAW committee expressed concern that the


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 by preventing the community from restoring and healing itself).

Kapur, supra note 34, at 6–7 (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.

Ewelukwa, supra note 17, at 440, 459–460 (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 little consideration given to 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. Shaloub-Kevorkian, supra note 224, at 197.

Merry, supra note 13, 37–40.

Id. at 42–43.
practice lent legitimacy to violence when applied to rape cases and sought its eradication.\textsuperscript{236}

Sally Engle Merry observes that a critique of \textit{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.\textsuperscript{237} \textit{Bulubulu} is a practice rooted within villages and kinship.\textsuperscript{238} As a method of community sanction, in conjunction with other interventions, \textit{bulubulu} may influence the behavior of offenders.\textsuperscript{239} Merry also suggests, after examining the use of formal state remedies, that \textit{bulubulu} may function as well if not better than recourse to the police.\textsuperscript{240} Nonetheless, the CEDAW monitoring committee gave little consideration to a remedy expressed in a vocabulary that was unfamiliar in the discourse of Western legal rights. 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 practices of custom, including female genital mutilation, sati, and dowry murders.\textsuperscript{241} The need to address the problem of private violence and physical mutilation is clear, of course. But it is also necessary to be mindful of cultural complexities that can distort understandings of these practices. And it is often the single-

\textsuperscript{236} \textit{Id.} at 37–40

\textsuperscript{237} \textit{Id.} at 43.

\textsuperscript{238} \textit{Id.} at, 48.

\textsuperscript{239} \textit{Id.}

\textsuperscript{240} \textit{Id.} at 50.

\textsuperscript{241} Charlesworth & Chinkin, \textit{supra} note 1, at 228 (noting the preoccupation with female genital mutilation). Narayan, \textit{supra} note 31 (concerns with sati and dowry murder).
mindedness with which these practices are vilified and human rights solutions are proffered that creates deep divisions within the human rights movement.242

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.243 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 lower labor costs.244 These deficits in human rights law affect vast numbers of women who are displaced as refugees, migrant workers, or victims of trafficking.245

The legal circumstances of women who have been victims of international trafficking illustrate the limitations of these legal norms.246 In 2000, the U.S. Congress passed the

242 Id. 228.

243 See Bilder & Alvarez, supra note 228, at 463 (questioning Western feminist renditions of human rights developments that fail to adequately address the role of global economic as a source of human rights abuses for women).


246 Trafficking has been described as the movement or transport for the purposes of placing the victim “in an unfamiliar milieu where she is culturally, linguistically, or physically isolated and denied legal identity or access to justice.” Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, U.N. Commission on Human Rights, Economic and Social Council, U.N. Doc. E/CN. 4/2000/68, 9 (2000).
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.\textsuperscript{247} The statute’s legislative history indicates that members of Congress desired to limit relief to those who fit the stereotype of a female victim.\textsuperscript{248} Women suspected of prostitution in their home countries, or women who otherwise do not easily fit the narrow image of victim, were initially to be excluded from relief.\textsuperscript{249} The final version, although establishing meaningful new remedies for victims of 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.\textsuperscript{250} 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, a

\begin{footnotes}
\item[247] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 2000 U.S.C.C.A.N. (114 Stat. 1464) (codified 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. \textit{Id.}, Section 102 (b) (3)(6)(13)(23). Section 104 of the Act requires annual country reports on human rights practices to include monitoring and assessments of countries’ efforts to bring about an end to trafficking practices, and further, that U.S. diplomatic mission personnel consult with human rights organizations in order to undertake monitoring and remediation efforts. \textit{Id.} Section 104.


\item[249] \textit{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 in profiled in legislative debates according to racialized hierarchies that suggest that they are immigrants and non-whites. \textit{Id.} at 535–536.

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standard that precludes consideration of economic hardship, which is often the critical factor contributing to the trafficking in the first instance.\textsuperscript{251} Furthermore, the Act exempted the United States from scrutiny with regard to the adequacy of U.S. laws addressing international trafficking while requiring the State Department to evaluate the laws of all other nations.\textsuperscript{252} 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.\textsuperscript{253}

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.\textsuperscript{254} 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.\textsuperscript{255} 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.\textsuperscript{256} Although similar

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\textsuperscript{251} 8 CFR §§ 214.11 (g)(i). & \\
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\textsuperscript{252} Victims of Trafficking and Violence Protection Act of 2000 § 108(b). & \\
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\textsuperscript{254} Marilyn Fernandez, Domestic Violence by Extended Family Members in India: Interplay of Gender and Generations, 12 J. of Interpersonal Violence 433 (1997). & \\
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\textsuperscript{255} Id. & \\
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\textsuperscript{256} Id. Narayan, supra note 31 (describing historical inaccuracies in the literature about the prevalence, causes, and reaction to sati and dowry murders in India). See also Engels, supra note 34, at 161–162 (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
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shortcomings exist with 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 without 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. 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. 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.

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. Customary practices that provided some protection for women’s economic needs

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257 See 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, 393, 408 (2000), noting that while land may be officially titled to men, under customs and practices women are not precluded from having vested rights and control; See Kelley, supra note 230, at 702 (noting that although women have few land rights in Niger, Western style law now impose Western definitions of property ownership on Zarma landholding with negative affects on the social structure of rural villages).

258 Nyamu, supra note 257, at 396–397.

259 Id. at 399–400.

260 The obstacles to using formal legal remedies in many countries are formidable. There is little access to the courts, less access to attorneys, and no community support for the use of formal legal
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. 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.

These assumptions do not easily admit that national interests and realpolitik often drive human rights concerns. Instances where humanitarian pretext can be shown to have served as cynical justification for seizure of territory or armed intervention are characterized as aberrant behavior,

remedies. Kelley, supra note 230, at 659 (noting that in Niger, rural people cannot access state law); Ewelukwa, supra note 17, at 121 (describing Nigerian women’s lack of knowledge about formal legal remedies). Ewelukwa notes that recent received common law and statutory developments have worsened conditions for widows in Nigeria. Id., at 427, 471. See also Amy Conger Lind, Power, Gender, and Development: Popular Women’s Organizations and the Politics of Needs in Ecuador, 134, 147 in The Making of Social Movements in Latin America, supra note 158 (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 160, at 12 (criticizing the law and development movement for its deliberate efforts to replace “Third World ‘localism’” with the “universality of the Western state”).

261 Geoffrey Wheatcroft, After the Great Game, N.Y. Times Review of Books, May 11, 2003, at 23 ((reviewing Karl E. Meyer, The Dust of Empire and writes that “Americans can travel the world knowing little about this history, culture and language of the countries they visit. Non-Americans do not have that option with respect to the United States.”). See Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev. 179 (2002) (suggesting that the hegemonic power of Western culture provides the excuse to avoid taking the rest of civilization seriously). See Clifford Geertz, Which Way to Mecca, New York Review of Books, June 12, 2003, at 27–29 (noting that Americans are trained to look at other countries only from the point of view of what surrounds such countries and their relations with the West, as opposed to its core character).

262 See supra Part I.B.2. See Hunt, supra note 44, at 174 (noting the perceptions of Americans that the U.S. acts with benevolent intentions, seeking only to protect, even as it engages in acts of hostility designed to establish spheres of influence).

263 Mutua, supra note 21, 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).
a “shocking break from American democratic traditions,” understood as “a series of isolated ‘events,’” as “[e]xceptions not the rule . . . that could somehow be undone by a more enlightened government.”

Ignorance of conditions in other countries has contributed to ill-conceived assumptions that sustain U.S. renderings of human rights concerns. Clifford Geertz describes the recent and hurried efforts to construct an understanding of Islam as maintaining the Manichean dichotomies between good and evil. 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 increase in awareness of the veil may be due to a rapid expansion of women moving into public life, including universities, government, and business.

Allusion to human rights concerns as rationale for U.S. policy works to secure public consent to foreign policy. The rescue of oppressed people is what the United States does by

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264 Hoganson, supra note 36, at 156 (describing the reaction in the United States to the taking of the Philippines).


266 Geertz, supra note 261 (suggesting that we divide our attention to Islam between the good and the bad, the tolerant from the terrorist). 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.” See also Clifford Geertz, Which Way to Mecca? Part II, N.Y. Review of Books July 3, 2003, 36, 39. Francis Robinson, Thoroughly Modern Muslims, Times Literary Supplement, Apr. 11, 2003 at 26 (raising similar concerns that despite different historical development and traditions, all Middle Eastern countries are considered as the same). See Said, supra note 31, 1–4 (describing “Orientalism” as the discursive practices by which the West disparages the Orient as an object that exists only in relation to the West).

267 Robinson, supra note 266 (noting that in many Islamic countries, there are now more women than men in universities and the movement of women into the workplace).

268 Hunt, supra note 44, at 4 (noting the importance of mobilizing popular consent to Cold War policies). Clifford Geertz suggests that distorted information is currently used to justify armed action in
virtue of being the United States. That is the role that destiny has chosen for the United States and one 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.\textsuperscript{269} Indeed, depicting a culture as repressive of its own people not only makes the argument for war more persuasive, but may also induce indifference as to the accuracy of official representations.\textsuperscript{270} 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 events of September 11, 2001, or whether the United States waged war on humanitarian grounds, thus demonstrating a national “cognitive dissonance” by which Americans have trouble relinquishing convictions in the face of conflicting facts.\textsuperscript{271}

\textsuperscript{269} See Hoffman, supra note 10, at 74 (stating that when it was evident that Iraq’s ability to threaten the United States has been exaggerated, justification for the war was re-stated in terms of intervention in behalf of human rights and democracy). See Michael Ignatieff, \textit{Why Are We In Iraq? (And Liberia? And Afghanistan?)}, NY Times Magazine 38, Sept. 7, 2003 (explaining that the U.S. did not invade Iraq for human rights purposes).

\textsuperscript{270} Tom Teepen, \textit{Bush’s Backup Rationale for War Comes A Little Late}, Raleigh News & Observer, Sept. 24, 2003, at 21A (linking the poll results that consistently show that 70% of Americans continue to mistakenly think that Saddam Hussein’s Iraq was responsible for the acts of terror on Sept. 11, 2001 in part to the government’s argument that Hussein was a tormentor and human rights abuser of his own people). See Ignatieff, supra note 270 (describing the manipulation of popular consent for the invasion of Iraq).

\textsuperscript{271} Frank Davies, \textit{Poll: Public gets Iraq Facts Wrong}, Raleigh News & Observer, June 15, 2003,
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 are thus evident: diminished commitment to ending human rights abuses, and an entrenched ideology of exceptionalism by which the United States stands outside of the international legal community.

1. Lack of Coherent Human Rights Policy

U.S. human rights concerns are not always congruent with the practice of U.S. foreign policy. Rather than guide 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. Concerns for human rights violations in the former Soviet-bloc were expressed often while the apartheid regime in South Africa was considered “too touchy” to warrant U.S. involvement. The lack of significant differentials in foreign aid packages between countries

at 11A. See supra note 215.

272 See Rieff, supra note 10, at 215 (noting the inconsistency of decisions to engage in humanitarian military intervention a function of going against weaker nation such as Serbia or Afghanistan while ignoring violations committed by stronger nation such as Russia or China).

273 Lodico, supra note 10, at1028–1030 (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 go forward in the former Yugoslavia). See Gordon, supra note 68 at 19–21. See also Howard French, Two Decades of Decline: When Liberians Looked to America in Vain N.Y. Times, July 13, 2003, at Sec.4, p.4 (noting that experts on West Africa have stated that the United States has had “frequent, clear opportunities to make a dramatic difference 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).

274 Hunt, supra note 44, at 165 (quoting President Eisenhower following the Sharpeville massacre as referring to apartheid as a “touchy thing”).

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with “a good human rights record” compared with those countries with a portfolio of human rights abuses further reveals the selective nature of U.S. human rights standards.\textsuperscript{275}

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.\textsuperscript{276} 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.\textsuperscript{277} The cordial relationships between the United States and governments in Africa, Asia, and Latin America with dubious records on human rights have been well-documented.\textsuperscript{278} The United States has long


supported and indeed has installed despots and dictators as a means to promote U.S. interests.\textsuperscript{279} 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.\textsuperscript{280} The United States supported Saddam Hussein during the 1980s when convenient to its efforts to contain Iran.\textsuperscript{281} Similarly, the United States supported the Taliban in Pakistan and Afghanistan in Cold War efforts against the Soviet Union.\textsuperscript{282} Little is currently heard of the need for democracy in Pakistan.\textsuperscript{283} The United States recently thwarted a plan to send U.N. peacekeepers to Ivory Coast, objecting that it would cost too much.\textsuperscript{284} As these examples of real politick suggest, universal human rights standards are

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\item Hunt, \textit{supra} note 44, at 139 (noting the United States’ support for Mussolini in Italy, Chiang Kai-shek in China, Somoza in Nicaragua, Batista in Cuba, Franco in Spain, and Metaxas in Athens). Similarly, the United States often took the position that countries in Latin America were better served by authoritarian regimes to head off threats to American interests. \textit{Id.} at 166–167. \textit{See} Mark Windsor, \textit{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 he imposed, Francois “Papa Doc” Duvalier was installed as Haiti’s president as a result of U.S. interference and continued to receive American aid because he had the “supreme virtue of not being a Communist”). \textit{See Oily Diplomacy}, N.Y. Times, Aug. 19, 2002, at A14 (noting that the government’s invocation of the war against terrorism and other national interests to thwart action against human rights abuses committed in Indonesia, Papua New Guinea, and Myanmar lacked credibility). \textit{See also} Dancing With Dictators, N.Y. Times, Sept. 1, 2002, at A8 (describing the United States’ habit of endorsing foreign dictators who serve American interests). \textit{See} Zbigniew Brzezinski, \textit{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 conflict from which terrorism originates and by which it is sustained, and the resulting one-dimensional and disembodied definition of terrorist threats). \textit{See} Rachel L. Swarns, \textit{Criticized by the West, Mugabe Is a Hero to Many}, N.Y. Times, Sept. 6, 2002, at A3 (noting that the West has condemned the forceful and sometimes violent remaking of maps through the redistribution of land by Mugabe’s postcolonial government in Africa but remains inattentive to the colonization “left millions of blacks stranded on rocky, arid soil and a tiny white minority in control of half of [the] fertile land.”

\item \textit{See supra} note 277, at 20 (remarks by Louis Henkin identifying as the principle problem the lack of a consistent international human rights policy and pointing out the contradictions when comparing U.S. policy toward the “Third World” and the “Communist world”).

\item Robinson, \textit{supra} note 266, at 26. \textit{See infra} note 403.

\item \textit{Id.}

\item \textit{See} Volpp, \textit{supra} note 34, at 1207 (observing that the United States gave aid to General Zia of Pakistan whose government was notorious for human rights abuses against women).

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malleable and have been used to promote geopolitical and economic interests.\footnote{Lodico, supra note 10, at 1029–1031.}

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 documents, but concern that multilateral agreements might infringe on U.S. sovereignty has resulted in an unwillingness to ratify a number of human rights treaties.\footnote{Mutua, supra note 21, at 647 n.10 (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 and the International Covenant on Civil and Political Rights).} 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 International Criminal Court (ICC) have not been signed or have been “un-signed.”\footnote{President Bush’s declaration in May, 2003 that despite the U.S.’ status as a signatory to the treaty, it would neither ratify nor be bound by the terms of the statute 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 68, at 59. See also Pei, supra note 74 (noting that the actions of the United States in undermining treaty agreements have a detrimental affect on U.S. credibility). See infra note 290 and accompanying text.}

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 superior to their own.” 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.”

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. Although 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. 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 UN peacekeeping missions in those countries that refuse to concede a grant of immunity. In July 2003, the United States made good on its threats and suspended military assistance to 35 countries that refused to support U.S. demands for immunity.

288 Ignatieff, supra note 68, at 60.


291 See supra note 287.


293 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.
U.S. opposition has centered on the ICC’s process. However, a closer examination of the court’s provisions reveals that there is little deviation from procedures used in the U.S. legal system. Comparisons between procedures offered by the ICC and those provided under 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. 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.

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. 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


295 Id. at 1608–1612 (noting that although there are some differences, defendants before the ICC are granted basically the same protections as they are in domestic courts in the United States, and even more so when compared with U.S. military tribunals).


297 Id. at 1618–1619 (noting U.S. fear of losing its “flexibility to execute an unconstrained national security policy”).

298 Cate Steains, Gender Issues in The International Criminal Court, supra note 290, at 357.
witnesses appearing before the international court.\textsuperscript{299} 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.\textsuperscript{300} 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.\textsuperscript{301} U.S. authorities have ignored decisions by the International Court of Justice (ICJ) in prohibiting the execution in these cases.\textsuperscript{302} 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.\textsuperscript{303} Recently, the United States has come under international criticism for military actions in Iraq, undertaken without the approval of the United Nations, and for its treatment of terror “detainees” at the Guantanamo Naval

\textsuperscript{299} \textit{Id.} at 357. See also Women’s Caucus for Gender Justice, http://www.iccwomen.org/caucus/about.htm.

\textsuperscript{300} Paul Krugman, \textit{America the Scofflaw}, N.Y. Times, May 24, 2002 at A25 (describing U.S. violations of international agreements related to trade).


\textsuperscript{302} Harold Hongju Koh, \textit{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 the provisional orders issued by ICJ halting the execution). See also The Honorable Delissa A. Ridgway, Mariya A. Talib, \textit{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 Mexicans executed by the United States in violation of orders of the the ICJ). See also Abram Chayes, \textit{Nicaragua,The United States, and The World Court}, 85 Colum. L. Rev. 1445 (1985) (noting the U..S refusal to continue to participate in the ICJ following the court’s determination to hear a case brought against it by Nicaragua); Ignatieff, \textit{supra} note 68, at 59.

It is this central belief in the superiority of its own human rights record that has created a moral paradox that separates the U.S. 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.”305 The spectre of cultural difference is currently emphasized to demark victims as well as perpetrators from protectors, moral societies from those considered corrupt or deviant.306 Indeed, non-Western culture provides the explanation for a range of crimes and offenses against women.307

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

304 Hoffmann, supra note 10, at 74–75 (stating that the U.N. Charter required Security Council approval for the military actions in Iraq). Jonathan Turley, Rights on the Rack: Alleged Torture in Terror War Imperils U.S. Standards of Humanity, L.A. Times, Mar. 6, 2003. U.S. forces have been directly implicated in inhumane treatment, including homicide by U.S. officials 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 killed and tortured, most likely by U.S. officials, and describing evidence that the United States may be operating torture facility).

305 See Hardt & Negri, supra note 3, at 191, See also, Leti Volpp, Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms, 14 Berkeley Women’s L. J. 149, 152 (1999) (noting that “violence in nonwhite communities is now understood as a kind of cultural practice particular to a specific community”).


307 See Kapur, supra, note 34, at 13.
and perceptions of reality. 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. The deterministic view suggests that it is the developing world that has—or suffers from—culture. As Sally Engel Merry has observed, “There is a whiff of the notion of the primitive about this usage of the term culture.” Although culture is more generally understood as shared patterns of conventions and conduct common to all national and subnational identities, practices perceived as “deviant” in Western societies are rarely identified as cultural problems.

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

308 Louis A. Pérez, Jr., *On Becoming Cuban*, 8 (1999). Merry, *supra* note 13, (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 305, at 152 (observing the constant transformation of cultural identities). Frank Cross, *Law And Economic Growth*, 80 Tex. L Rev. 1737, 1757 (2002) (“the deterministic view treats culture as if it were an immutable and exogenous genetic fact of certain populations”).

309 Pérez. *supra* note 308, at 8, (noting that culture “set[s] into place standards by which to take measure of the capacity of social structures to meet widely-shared and commonly-held expectations and aspirations” and forms coherence among those who more or less share points of view). See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 Am. J. Comp. L. 277, 278–279 (2002) (noting the benefit of the concept of culture as a means to acknowledge commonalities in practice, values, and beliefs). Pollitt, *supra* note 189, at 9 (noting that cultures imagined as stable or timeless are so conceived out of ignorance and do not exist).

310 Merry, *supra* note 13, (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”).

311 *Id.*

312 An exception to this is the blaming of culture for problems within communities of color in the United States and the West. See Narayan, *supra* note 31, at 87–88. See Merry, *supra* note 13, (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 34.
characterized as deviations from and not representative of Western values. 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 genitalia, and botox injections, remain largely disassociated from “culture.” Widespread assumptions that gender-based violence is a cultural phenomenon represents a viewpoint now expressed as “death by culture” as a way of articulating the stigma of culture outside the West. The difficulty in invoking culture as an explanation for human rights violations is compounded in 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. Indeed, even the act of observation implies a hierarchy of power.

There seems to be a far greater disposition to cast an anthropological gaze upon the outside world than to look inward. Should recent disclosures of sexual abuse of children by

313 Narayan supra note 31, at 89–89.
314 Volpp, supra note 305, 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 enhance appearance). See Rand Richards Cooper, Botox Parties, N.Y. Times Magazine, Dec. 15, 2002, at 66 (describing the year 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.”) See also Adam Liptak, Circumcision Opponents Use the Legal System and Legislatures, N.Y. Times, Jan. 23, 2003, at A14 (noting controversy about the prevalent practice of male circumcision in the United States, a practice uncommon elsewhere in the world, considered by many to be violative of bodily integrity and without medical or other valid purpose). See Susan Bordo, Unbearable Weight 251 (1993) (noting that in the United States, cosmetics and body transformations are rejected as political questions).
315 See Narayan, supra note 31, at 82; Kapur, supra note 34, at 13; Volpp, supra note 34, 1185–1188.
316 Boltanski supra note 6, at 3.
318 See Brenda Cossman, Turning the Gaze Back on Itself: Comparative Law, Feminist Legal
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?\footnote{Daniel J. Wakin, Victims React to Report on L.I. Priest Sexual Abuse, N.Y. Times, Feb. 12, 2003, at B1. 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).}

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.\footnote{Van Ness, supra note 1, at 6, see also Mutua, supra note 21, at 609 (noting that in American popular culture, human rights problems are conceived as applying to “exotic” people, unlike themselves).}

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.\footnote{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).} These representations frequently assume a specific gendered form and enter into the legal discourse with a focus on cultural practices that invite invidious comparisons.\footnote{Grewal Inderpal & Caren Kaplan, Warrior Marks: Global Womanism’s Neo-Colonial Discourse in a Multicultural Context, 39 Camera Obscura 5, 31 (September 1996). Kapur, supra note 34 3–7 (discussing the Third World victim subject).}

An examination of the legal discourse in two recent events reveal this dynamic. 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.\footnote{See infra notes 325–342 and accompanying text.} In the second case, the legislative debates in the U.S. Congress concerning the passage of CEDAW provide an 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.\footnote{See infra notes 371–384 and accompanying text.}

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

The case of Mukhtaran Bibi was reported widely.\footnote{See infra notes 325–342 and accompanying text.} In June, 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.\footnote{Ian Fisher, \textit{Account of Punjab Rape Tells of a Brutal Society}, N.Y. Times, July 17, 2002, at A3; Pakistan Pushes for Gang-Rape Trial, N.Y. Times, July 18, 2002, (A.P); News Release Issued by the International Secretariat of Amnesty International, (hereinafter Amnesty News Release) July 5, 2002, http://web.amnesty.org/ai.nsf/recent/asa330082002; Beena Sarwar, \textit{Brutality Cloaked as Tradition}, N. Y. Times, Aug. 6, 2002, at A15; 6 Pakistanis Sentenced to Hang for Gang-Rape, Sept. 1, 2002 (A.P.); Pakistani Woman Recalls Jury-Ordered Rape, By REUTERS; Homaira Usman, ‘Jury’ Ordered Rape of Pakistani Teenager, http://news.independent.co.uk/world/asia_china/story.jsp?story=311397. An internet search using the terms “Punjab,” “Rape,” and “Tribal” and “Council” produced 1,601 “hits” all of which appear to relate to this case.} An imam who heard about the rape denounced it during religious services.\footnote{See supra note 325.} A local journalist reported it the next day and, within a week, the story reached the international media.\footnote{Sarwar, \textit{supra} note 325.} The reaction in Pakistan both locally and nationally was shock and disbelief.\footnote{See supra note 325.} The Pakistani government moved swiftly and harshly against the perpetrators and offered the victim financial compensation while going forward with the criminal
prosecution.\textsuperscript{330} 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.\textsuperscript{331} All six were sentenced to death.\textsuperscript{332}

An NBC Dateline production crew traveled to the Punjab to interview Bibi. The Dateline feature, titled “\textit{Tortured Justice},” was broadcast on September 15, 2002. Throughout the program, the media employed code words frequently used to shape opinion about another culture.\textsuperscript{333} 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 of the ways that deprecatory characterizations of other cultures enter the realm of public awareness.

\textit{Tortured Justice} describes Pakistan as barbaric and frightening, the population as backward, cruel, and passive—relics “of another time.”\textsuperscript{334} Geographic descriptions are charged with value-laden descriptors that evoke a desolate and hostile land.\textsuperscript{335}

\begin{quote}
“\textit{To bring you [Bibi’s] story, [our reporter] traveled thousands of miles to one of the world’s most lawless and inaccessible lands.}”
\end{quote}

\begin{quote}
“\textit{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. . . .}”
\end{quote}

\begin{quote}
“\textit{[O]n our way, it seemed that every mile we traveled forward, we went further backward}\textsuperscript{330}\textsuperscript{331}\textsuperscript{332}\textsuperscript{333}\textsuperscript{334}\textsuperscript{335}
\end{quote}

\begin{itemize}
\item \textsuperscript{330} Pakistani Woman Recalls Jury-Ordered Rape, REUTERS, \textit{supra} note 325.
\item \textsuperscript{331} \textit{6 Pakistanis Sentenced to Hang for Gang-Rape, supra} note 325.
\item \textsuperscript{332} \textit{Id}.
\item \textsuperscript{333} \textit{See} Hunt, \textit{supra} note 44, at 16 (describing foreign policy rhetoric that is often employed through the use of code words to obtain a particular response).
\item \textsuperscript{334} \textit{Tortured Justice}, Dateline NBC News, September 15, 2002 (transcript on file with author).
\item \textsuperscript{335} \textit{Id}.
\end{itemize}
in time . . . into . . . a lawless land. . . . After hours on the roads where bandits lurk, and then on no roads at all, we arrived in one of Pakistan’s most primitive and tradition-bound regions.”

“Traditions date back thousands of years.”

“In the blazing 115-degree heat, we finally met [Bibi].”

“And there the case may have ended, hidden away by distance and centuries of silence.”

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.”

“Here in the Punjab region of Pakistan, civilization is about 4,000 years old, and so are some of the social custom.”

It also described women and their circumstances—quiet, passive, and victims:

“Now, this quiet, pious victim has found her voice.”

“. . . and a soft voice has now been heard around the world.”

“She’s 30 years old, but behind her veil she seems years older, her eyes reflecting the pain of what happened to her.”

“We’ve learned that some 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.”

“[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.”

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336 Id.
“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.”

The gang rape itself is described as an unimaginable and unheard of act:

“Few stories are as chilling and complicated as the trail of cruelty you are about to see tonight.”

“[Bibi] was subjected to something so inconceivable.”

“Medieval torture.”

“This is [Bibi’s] stunning story.”

Press reports expressed similar themes: the lack of paved roads, a dusty village, a feudal society obsessed with honor. 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. 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. Accounts about the rape included demands to dismantle tribal councils, which were linked to the rise of growing Islamic extremism.

In both the Dateline feature and press accounts, the narrative served a purpose other than reporting a gang rape. Describing Pakistan with imagery of hostile terrain and a desolate country

337 Id.

338 Id.

339 Fisher, supra note 325; Sarwar, supra note 325.

340 Sarwar, supra note 325; Fisher, supra note 325; Amnesty News Release, supra note 325.


342 Fisher, supra note 325; Amnesty News Release, supra note 325; Sarwar, supra note 325.
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. 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. The use of rape as punishment is not unknown in the United States and is understood to be at the core of acts of sexual violence. Individuals cloaked with officialdom perpetrate rape against women (and men) in the military and in prisons throughout the United States. In at least five instances, a judge raped and sexually assaulted women while wielding the power of his office.

343 Mattei, supra note 21, at 387, 436.
344 Tortured Justice, supra note 311.
347 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); Delisa Springfield, Sisters in
women in his chambers and at least once while wearing his judicial robe.\textsuperscript{348} Eventually, federal charges for rape were brought in the course of an unrelated investigation, but the judge was shielded from state accountability for his crimes as a result of his political influence.\textsuperscript{349} The Sixth Circuit vacated his conviction for depriving the women of their rights and privileges secured by the Constitution and laws of the United States.\textsuperscript{350} 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.\textsuperscript{351}

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 criminal justice system metes out.”\textsuperscript{352}

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    \item \textsuperscript{348} \textit{Lanier}, 520 U.S. 259. In the series of Lanier rapes, one of his victims was forced into his chambers after the judge threatened to remove custody of her child. \textit{Id.} at 261. See Johanna R. Shargel, \textit{United States v. Lanier: Securing the Freedom to Choose}, 39 Ariz. L. Rev. 1115, 1115–1116 (1997).
    \item \textsuperscript{349} Shargel, \textit{supra} note 348, at 1113, 1116 (pointing out that the judge was protected by his wealth and his politically powerful family).
    \item \textsuperscript{350} Lanier was prosecuted under 18 U.S.C. § 242 (1994) providing for prosecution for those who, under color of any law, statute, ordinance, regulation, or custom, willful subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. \textit{Lanier}, 33 F.3d 639 (6th Cir. 1994), vacated, 43 F.3d 1033 (6th Cir. 1995), \textit{reh’g en banc} 73 F. 3d. 1380 (6th Cir. 1996). The Supreme Court vacated the Sixth Circuit’s \textit{en banc} opinion but failed to address whether sexual assault can be prosecuted as constitutional violation. \textit{Lanier}, 520 U.S. 259. See Shargel, note 348, at 1117.
    \item \textsuperscript{351} \textit{United States v. Lanier}, 123 F.3d 945 (6th Cir. 1997).
    \item \textsuperscript{352} J.C. Oleson, \textit{The Punitive Coma}, 90 Cal. L. Rev. 829, 855 n.144.
\end{itemize}
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prisoners are particularly vulnerable and have been raped by prison guards, chaplains, deputy wardens, and other prison administrators. 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. Nonetheless, what is “inconceivable” is that there is institutional or official culpability for the suffering of rape victims here.

The rape of Bibi serves as symbol of Pakistani lawlessness, a place where authorities turn a blind eye to sexual assaults. The media challenged the legitimacy of tribal councils and linked them to the spectre of rising fundamentalist Islamic beliefs, although there was no history of any other tribal council decreeing rape as punishment and a lack of historical links to Islam. 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

353 Springfield, supra note 347, at 463.


355 Fisher, supra note 325; Sarwar, supra note 325.

356 Amnesty News Release, supra note 325; Fisher, supra note 325; Sarwar. supra note 325; 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). It might also be noted that the United States has examples of 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 of judging priests accused of sexual abuse by church tribunals, where a bishop would be “jury, judge and executioner”).
to mediate issues involving welfare and disagreements within the community. As extra-judicial structures, they function similarly to alternative conflict resolution mechanisms that have developed more recently in the United States. Nonetheless, their quasi- or extra-judicial existence outside of official courts has contributed to their denunciation.

The point here is not that women in the United States suffer in ways similar to Mukhtaran Bibi, or that women suffer internationally. The significance is located in the discourse employed in the Bibi case and the problem of “the ethics of comparison” that it raises. A distorted discourse not only suggests that Pakistan is lawless, but may prevent an accurate understanding of the conditions Bibi endured and an identification with the harm she suffered. It is, moreover, possible that the characterization of the circumstances of the Bibi case serves to obscure the common condition of women and prevents the development of strategic and international bonds to contest universal abuses. This is not to argue for the universal experience of women, but rather to assert that disparaging differences conceal sites of resistance,

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358 Klock, supra note 357, at 278.

359 Amnesty News Release, supra note 325, (attacking Pakistan for the existence of these Tribal councils that “have no legal standing”).

360 Peerenboom, supra note 1, (suggesting that if there is anything universal, it is the disregard of rights when there are threats to social order).

361 Ruskola, supra note 261, at 181.

362 Terry Eagleton, Sweet Violence: the Idea of the Tragic, 279(2003) (“to pity the pharmakos [scapegoat] is to identify with it, and so feel horror not of it but of the social order whose failure it signifies”).
solidarity, and the possibility for collective action.\textsuperscript{363} In the end, such discourse may serve as a little more than a form of moral intervention, contributing to a political socialization that foments cultural arrogance toward other countries.\textsuperscript{364}

B. The CEDAW Debates\textsuperscript{365}

Adopted in 1979 by the UN General Assembly, and often described as the international bill of rights for women, the Convention for the Elimination of All Forms of Discrimination Against 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.\textsuperscript{366}

The CEDAW treaty broadly defines discrimination against women as

\[ \ldots \text{any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.} \textsuperscript{367} \]

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.\textsuperscript{368} Signatories are

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\textsuperscript{364} See Paul Krugman, \textit{Behind the Great Divide}, N.Y. Times, Feb.18, 2003, at A23 (describing skewed depictions of events in the Middle East and Iraq by U.S. news networks who view it their job to prepare the Americans for war in Iraq).


\textsuperscript{366} \textit{Id.}


\textsuperscript{368} \textit{Id.}
\end{flushright}
required to establish legal and public institutions toward these goals.  

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

369 Id.

370 The United States signed CEDAW on July 17, 1980, and was submitted to the U.S. Senate for advice and consent later that year. See CEDAW, in 1 Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2000, at 228–29. See also infra notes 372–384, 386–391.


374 See infra notes 376–384 and accompanying text.
The arguments were consistent throughout the debates: ratification of CEDAW was required in order to alleviate suffering almost everywhere except the United States. The beneficiaries of U.S. ratification were identified as Afghanistan, Nigeria, Iran, India, Nepal, Bosnia, Rwanda, East Timor, Saudi Arabia, Pakistan, and the Middle East, Southeast Asia, Africa—in short, the “Third World.” Treaty ratification was encouraged to rebuild Afghanistan and guarantee Afghani women fundamental human rights. Supporters defended the treaty as a means to remedy deplorable human rights conditions for women in other parts of the world. Ratification of CEDAW as a means to improve conditions in the United States was rarely used as justification.

The debates followed the human rights policy paradigm: the United States was identified

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375 See infra notes 384–391 and accompanying text.


as the exemplar and champion of human rights. Proponents insisted that ratification created no
burden on the United States, which was understood as a model of gender equality. Proponents insisted that ratification created no
burden on the United States, which was understood as a model of gender equality. U.S.
380 institutions serve as the inspiration for other nation-states. Existing federal and state statutes, it
was argued, prohibited discrimination against women and hence the United States could ratify
CEDAW without any change to its domestic laws. "All of the things in this treaty we already
do in our country," pronounced one Senator. Another proponent argued that “[r]atification
would not require us to change a single one of our laws.” The United States was proclaimed as
a “leader of human rights,” which does not need CEDAW to improve conditions for women.

Congress used its claims of U.S. uniqueness to justify its special responsibilities for the
rest of the world. To that end, CEDAW proponents invoked a familiar theme: the defense of
universal civilization required the rescue of women in other parts of the world. The purpose of

1305 (Statement of Rep. Feinstein) (provisions consistent with American law); 145 Cong. Rec. S. 1306
(Statement of Sen. Kerry) (the Convention contains no provisions in conflict with American law). In the
few instances where CEDAW’s requirements are identified that may conflict with current laws affecting
women’s status in the United States, treaty proponents advocate passage of the treaty with reservations to
ensure that U.S. laws will remain unaffected. See Sept. 27, 1994 (Statement of Jamison S. Borek, 1994
WL 522865 (F.D.C.H.). Thus, by treaty reservations or interpretation, private discrimination against
women would remain unregulated, and CEDAW’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.


(Statement of Rep. Maloney) (2002 WL 1303048) (F.D.C.H); (Statement of Jamison S. Borek, Deputy


384 146 Cong. Rec. S. 1291 (Mar. 8, 2000) (Statement of Sen. Murray); May 3, 2000 (Statement

385 See Cooke, supra note 186, at 227 (noting the invocation of a similar theme in regard to
intervention in Afghanistan).
U.S. confirmation of the treaty was expressed in terms of its “moral right to lead”\textsuperscript{386} and its obligation to teach the rest of the world by example.\textsuperscript{387} Ratification was urged to allow the rest of the world to learn from the experiences of the United States.\textsuperscript{388} Passage of the treaty was to have provided cover for charges of “ethnocentric [criticisms]” to enable the United States to denounce “[other] cultures that allow . . . vile customs.”\textsuperscript{389} Approval would have enhanced the credibility of the United States and thus have enabled it to pressure other governments.\textsuperscript{390} Ratification was needed to provide “the clout” and “the portfolio” to lead the world and to intervene in other countries.\textsuperscript{391}

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 CEDAW supporters who minimized the need to change domestic law to comply with treaty requirements may have been 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.\textsuperscript{392}

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 the soaring incidents in the United States of rape and domestic violence in private homes and in public institutions, of disparate wages, and of discrimination in health services, human rights issues are not applicable here. Moreover, the debate also obscures other countries’ gains toward gender equality that the United States has yet to match.\textsuperscript{393}

IV. FUTURE IMPLICATIONS OF “A DISTINCTLY AMERICAN INTERNATIONALISM”\textsuperscript{394}

Criticism of the discourse of human rights risks the charge of nihilism.\textsuperscript{395} 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 the moral norms.”\textsuperscript{396} Postmodern theories of relativism and invocation of cultural diversity may serve to

\textsuperscript{392} See Nicholas D. Kristof, \textit{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, \textit{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 instead support for the treaty was warranted on behalf of women in other parts of the world). These editorials might be an example of how the hegemonic discourse of human rights skews understandings by addressing inequalities in a system that advantages the West. \textit{See Aziz, supra note 1, at 39.}

\textsuperscript{393} Nussbaum, \textit{supra} note 211, at 39 (noting the absurdity of Americans as taking the credit for the concept of sex equality in light of the fact that the United States has been unsuccessful in passing an equal rights amendment as did India in 1951).

\textsuperscript{394} This is the term used by the current Bush Administration to describe the goal of its new national security strategy. \textit{The National Security Strategy of the United States}, Sept. 17, 2002, at http://www.whitehouse.gov/nsc/nssall.html.

\textsuperscript{395} Rieff, \textit{supra} note 10, at 89.

\textsuperscript{396} Nussbaum, \textit{supra} note 211, at 31.
impede criticisms of oppressive cultural practices.\textsuperscript{397} To remain silent in the face of human rights abuses may be another form of ethnocentrism that insulates all views from the rigors of debate and scrutiny.\textsuperscript{398}

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.\textsuperscript{399} 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 its actions abroad, but also acts to enlist political support at home.\textsuperscript{400}

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 name of humanitarian interests proved to be more about politics than rescue.\textsuperscript{401} Indeed, humanitarian needs described as a “small element of the political crisis in Kosovo” turned into a “humanitarian emergency” only after the NATO

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\item Bordo, \textit{supra} note 314, at 225 (expressing concern about the paralyzing anxiety over falling into ethnocentrism or “essentialism” that prevents locating common values). Hardt \& Negri, \textit{supra} note 3, at 138, 152 (describing global marketing strategies that benefit from postmodern politics of difference).
\item See Narayan, \textit{supra} note 31, at 150.
\item Christopher Marquis, \textit{World’s View of U.S. Sours After Iraq, Poll Finds}, N.Y. Times, June 4, 2003 at A19. See also Pei, \textit{supra} note 74 (noting that the since the events of September 11, 2000, international sentiment toward the United States has moved from sympathy to undisguised antipathy).
\item David E. Sanger, \textit{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”).
\item See Rieff, \textit{supra} note 10, at 201 (quoting Eric Dachy, the operations director of Médicins San Frontières- Belgium, “[w]e witnessed a war . . . whose strategic priorities reflected more the interests of the great powers than of the populations being helped”).
\end{enumerate}
\end{footnotesize}
bomiting campaign. 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 the last resort appeals to concerns for human rights. Similarly, in Liberia, past deeds and inconsistent concern for humanitarian crises in Africa cloud the circumstances in which the human rights project might function.

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. 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. Thus, current foreign policy discourse has adopted

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402 Id. at 202–203.

403 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.

404 Ellen Johnson Sirleaf, What the U.S. Owes Liberia, N.Y. Times, Aug. 11, 2003 (observing that the U.S. betrayed Liberia in 1985 when it recognized discredited election results so as to establish relations with a government that would). Somini Sengupta, Oh, if Only the G.I.’s Would Come Marching In, N.Y. Times, July 30, 2003 (observing that Liberia functioned as a plantation society and as a client government to the U.S., serving its economic and political needs in the world) “It baffles Liberians that American soldiers would interfere where they are not wanted, and stay away from where they are.” Id.

405 The National Security Strategy of the United States, Sept. 17, 2002 http://www.whitehouse.gov/nsc/nssall.html. See also, David E. Sanger, Bush to Outline Doctrine of Striking Foes First, N.Y. Times, Sept. 20, 2002, at A1 (noting that the document focuses on various 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’”).

406 The National Security Strategy of the United States, supra note 405. See Hannum, supra note
ideological dispositions similar to those used in the early twentieth century, which set out in unusually plain language the American design for world hegemony based on the definition of national interests.  

The President’s 2002 State of the Union speech also alluded to the obligation of a great nation to extend its values. U.S. foreign policy was expressed in terms of a civilizing mission against “rogue states” that lack regard for human values. At the same time, U.S. policies that ignore humanitarian crises in Africa continue patterns of racialized hierarchies that have long guided international relations. Suspicion of Islam appears to have replaced hostility toward Communism. 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

10, at 29 (observing that Pax Americana has become bellum americanum).

See supra note 400 and accompanying text. See Lars Schoulz, Beneath the United States, (1998) (observing that the U.S. justification for depicting Latin America has shifted over the last 200 years from notions of backwardness to human rights violators to hotbeds of radicalism, all for the purpose of protecting U.S. interests).

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

See supra note 391.

See Gordon, supra note 68, at 22.

In part, this fear is related to the specter of Islamic revolutions. See Wm Roger Louis, Age of Empire, Part Two, Times Literary Supplement, April 18, 2003 at 9 (describing American distrust for Arabs and Muslims largely based on fear of the Egyptian revolution in 1952, the Iraqi revolution in 1958, and subsequent political developments that threatened U.S. interests).
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.\footnote{See supra notes 38–41, and accompanying text.} The United States seems to need images of grateful Iraqis welcoming U.S. soldiers to validate its arrival in Baghad. 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.\footnote{See \textit{Renda}, supra note 46, at 191. One might consider other comparisons: has Jessica Lynch become a twenty-first century Evangelina Cossío, a young woman, barely nineteen, whose dramatic, but staged rescue is played to audiences around the world, but especially to lift the morale of the U.S. electorate in behalf of war in Iraq? See \textit{supra} notes 40–41 and accompanying text.}

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.”\footnote{Mutua, \textit{supra} note 21, at 655.} 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.\footnote{Bill Keller, \textit{The Selective Conscience}, N.Y. Times, Dec. 14, 2002, at A29 (noting that Amnesty International declared the appropriation of human rights issues as a strategy that calls 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. \textit{Id.} (noting that members of Human Rights Watch have deep mistrust of the plan to invade Iraq as having as its purpose the ending of human
There is no programmatic blueprint for human rights work that will guarantee the use of human rights in ways that are consistent with the its core assumptions of human dignity and “solidarity, a fundamental sympathy for victims, and an antipathy for oppressors and exploiters.”\textsuperscript{416} 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.\textsuperscript{417} 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, but at the same time, addressing these conditions creates complexities that cannot be overstated. Efforts to develop

\textsuperscript{416} Rieff, \textit{supra} note 10, at 334 (describing values associated with humanitarianism).

“consistent, credible, and enforceable standards to guide state and intergovernmental practice” are diminished without consideration of the current and historic misuses of power.\textsuperscript{418} Human rights activists must ask whether a lack of coherency in policy reflects the hard choices inherent in humanitarian intervention determinations that result from a finite capacity to attend to global crises or whether such inconsistency reflects geopolitical and economic interests and biases.\textsuperscript{419} It is worth interrogating, too, whether a human rights policy steeped in inconsistency and selectivity is part of a deliberate effort to weaken legal constraints on intervention in order to achieve unfettered exercise of power.\textsuperscript{420} Advocates must question whether human rights values formulated on the normative systems of dominant states, however deeply 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.\textsuperscript{421} Without this scrutiny, human rights law may develop as an instrument wielded by a powerful nation against those less powerful.\textsuperscript{422}

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

\textsuperscript{418} The Responsibility to Protect 11 (2001). Michael Byers & Simon Chesterman, Changing the Rules About Changing the Rules? In Humanitarian Intervention, supra note 20, at 190–191 (observing that for the many states that have endured past humanitarian intervention that sought to achieve other purposes, the human rights project remains controversial at best, and may for example in Africa, lead to emphasis on state sovereignty in the debate about the development of humanitarian intervention norms).

\textsuperscript{419} The Responsibility to Protect, supra note 418, at 24 (raising the issues in contemporary human rights debates).

\textsuperscript{420} Byers & Chesterman, supra note 418, at 192–194 (suggesting that the United States has been seeking to loosen constraints on intervention in order to obtain dominance in international order and to able to act outside the norms of humanitarian intervention).

\textsuperscript{421} See Responsibility to Protect, supra note 418, at 23 (noting that differing views about the humanitarian projects is exacerbated as a result of Third World countries being “relegated to the role of norm-takers, while developed countries act as norm enforcers”)

\textsuperscript{422} See Byers and Chesterman, supra note 418, at 203.
gains of dominant nations. While efforts are underway to develop a constitution in Afghanistan, the West has already criticized the process of formulating the proposed constitution because it deviates from Western norms.\textsuperscript{423} 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 will be 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 held, a Shiite Muslim cleric might well be elected on the strength of popular vote.\textsuperscript{424} Power 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 infrastructure.\textsuperscript{425}

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

\textsuperscript{423} See Sanjoy Majumder, \textit{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 as the governing body in the constitutional process, failed to take into account the material conditions in Afghanistan, the historical purposes of the loya jirga, and the absence of structure to regulate election polls). \url{http://news.bbc.co.uk/1/hi/world/south_asia/2999700.stm}, last visited, Oct. 1, 2003. Criticisms have also been made of the substance of the constitution as deviating from Western norms. See Preeta D. Bansal and Felice D. Gaer, \textit{Silenced Again in Kabul}, NY Times, Oct. 1, 2003 (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 underway, and at a time where Afghan women have submitted for consideration a Bill of Rights for women which privileges socio-economic rights over civil and political rights. See \textit{Afghan Women’s Rights}, NY Times, Sept. 24, 2003, 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. \textit{Id.}


\textsuperscript{425} \textit{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).
be considered with ideological dispositions that recognize that diverse cultures possess their own methods of resolution.426 Clifford Geertz recently cautioned against efforts to conceive of other cultures “in sweeping, ‘civilizational’ terms.”427 He argued instead that “[w]e should use the swirl of a particular incident, particular politics, particular voices, particular traditions, and particular arguments, however disorienting, a movement across the grain of difference and along the lines of dispute.”428 His approach sets a course that would well-serve the human 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.”429

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426 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 44, at 3 (suggesting that we “learn to enjoy our own institutions and values without feeling the need for others to duplicate them”).

427 Geertz, supra note 261, at 30.

428 Id.

429 Rieff, supra note 10, at 89 (quoting French social theorist Jean Baudrilliard).