

# Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States

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## I. INTRODUCTION

¶1 Scholars, social activists, and policy makers often regard the United States' foreign policy as it relates to human rights and its domestic policy with respect to race as distinct areas, separated by the nation's border. Although this border exists geographically, through the assertion of jurisdiction, and in the recognition of citizenship, is there really a border between our foreign and domestic policy in these matters? The U.S. government is often criticized for failing to comply with international human rights law and for perpetuating economic and racial inequality in its foreign policy. Racism within the United States is recognized as pervasive and virulent, but generally considered unrelated to U.S. foreign policy. For the most part, scholars and activists concentrate on either the international *or* the domestic realm, reflecting a widely accepted assumption that the problems confronted in each are distinct. There is, however, evidence that this border between the two is much more permeable than contemporary legal analyses or social attitudes suggest.

¶2 In fact, because perceptions of and attitudes toward those who are regarded as racial or ethnic minorities flow quite readily across this border, racism towards those outside the United States makes discrimination within this country seem more acceptable; the ill-treatment of racial and ethnic minorities within our borders, in turn, makes it easier to disregard

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the rights and humanity of those outside the border. This attitude manifests itself in many ways, one of which is the United States' willingness to disregard international law, particularly human rights law.

¶3 It is a mistake to think that we can remedy discrimination against Americans while allowing our government to treat people who live in other countries or carry different passports as not deserving of full, or even basic, human rights. Taking such a position allows the basis of the discrimination to be constantly re-created at the same time that we deplore its consequences. It is like cutting off the head of a weed while fertilizing its roots. This cycle is especially problematic in the United States because our population has cultural and historic ties with so many parts of the world. We cannot expect a formal legal distinction between "citizens" and "non-citizens," or "Americans" and "foreigners" to protect the rights of racial or ethnic minorities simply because we live inside the U.S. border,<sup>1</sup> particularly when prejudice and disregard move so easily across its territorial boundaries.

¶4 We have been conditioned to define ourselves in terms of citizenship, and to think of ourselves in relation to the border.<sup>2</sup> With respect to human rights, we uncritically accept the distinction between "Americans" and "foreigners," and frame the struggle for justice and human decency in terms of "civil rights" for those at home and "human rights" for those overseas. This is reinforced by the belief that the U.S. Constitution provides significantly more protection than is afforded by international law, and that we can only take advantage of this higher level of protection by maintaining the power of the border.

¶5 Because these concepts are so deeply rooted in our thinking, it is easier to see the connections between foreign and domestic policy if we leave aside, for the moment, the concepts of race and citizenship, and think in terms of the identification of the "other." The distinction between "us"

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1. On the relationship between citizenship and the perception of foreignness, see generally Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT* 1087 (Hyung-chan Kim ed., 1992); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997) (examining the legal, social, and political importance of the term, "alien"); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. (1997) (noting the complexities of racial hierarchy); Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 506 (1998) (examining "how the United States government prevents many Latino-American citizens from 'belonging' to the United States collective by stigmatizing aspects of Latino-American identity"); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995) (explaining how "American culture, history, and laws make 'invisible people' out of American Latinos . . ."); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (explaining the role of "foreignness" in the racialized identification of Asian Americans); and Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71 (1997) (arguing that the depiction of Asian Americans as a model minority masks the discrimination suffered by them).

2. See generally Robert S. Chang, *A Meditation on Borders*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 244-245 (Juan F. Perea ed., 1997).

and "them" is, of course, one that affects all social interaction, creating complex layers of overlapping identities. Here, however, I am limiting the term to the kind of "otherness" that is ascribed on the basis of what we commonly call racial or ethnic characteristics. It thus encompasses people of color, people who speak languages other than English, and people from significantly different cultural traditions. What makes this concept of "otherness" more confusing—and correspondingly, more useful—is that, unlike distinctions based on fixed characteristics such as "race"<sup>3</sup> or nationality, "otherness" mutates in response to social and political change. Thus, for much of our history, African Americans have been defined as "other," based on the strict racial classifications that emerged in the seventeenth and eighteenth centuries to help create and maintain the institution of slavery. Nonetheless, we see current attempts to enlist African Americans, as U.S. citizens, in campaigns to restrict the rights of recent immigrants.<sup>4</sup> While Cuban Americans have sometimes been identified as "other" or "foreign" based on their national origin, we have recently seen distinctions made on the basis of race, class, and political affiliation between the Cuban Americans who came to the United States in the 1960s, now portrayed as "insiders," and more recent Cuban immigrants, generally poorer and darker-skinned, who are portrayed as "others."

¶6 Although who is "other" can change over time, once people have been identified as outsiders, public perceptions of them often do not keep pace with advances in their legal status. This is illustrated by the legacy of slavery. The portrayal of Africans as less than human—and therefore not deserving of human rights—as a rationale for slavery created a basis for ongoing oppression of African Americans that did not end with the

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3. "Race" is increasingly being recognized as a social construct, rather than an immutable biological characteristic. Justice White, writing for the majority in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), said, "[i]t has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological in nature." *Id.* at 610 n.4. See generally Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING AND DIFFERENCE 21, 22 (Henry Louis Gates, Jr. ed., 1986) (discussing how Du Bois came to "gradually, though never completely, assimilate the unbiological nature of races."); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994) (discussing paradigms of race based on concepts of class, ethnicity, and nationality); Ian Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (critiquing existing theories of race and advancing a new one based on historical social relationships).

This recognition has, in turn, led to the use of "race" as a verb meaning that racial identity is being ascribed. See, e.g., Lani Guinier, *(E)Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994) (using play-on-words in the title to criticize the refusal of the judiciary to take race into account when interpreting the Voting Rights Act); Barbara Phillips Sullivan, *The Song That Never Ends: New Verses About Affirmative Action*, 23 S.U. L. REV. 157, 161 (1996) (stating that "de-racing" is "routinely done by whites and usually noticed by African-Americans").

4. See Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993) (discussing the history and social context of relations between African American and Korean American communities).

granting of citizenship or formal legal equality.<sup>5</sup> As the *Dred Scott* decision<sup>6</sup> made painfully clear, until the passage of the Fourteenth Amendment,<sup>7</sup> persons of African descent were not considered citizens, or even "persons," under the law.<sup>8</sup> From Jim Crow laws<sup>9</sup> to the Kerner Commission<sup>10</sup> to contemporary reports of racial violence and discrimination,<sup>11</sup> we see the lingering effects of the viewpoints that once rationalized slavery.<sup>12</sup> One result of this history is that we cannot understand racism today without reference to the continuing, often unconscious, portrayal of whiteness as the norm and African Americans as "other."

¶7 This article explores some of the ways in which U. S. foreign policy affects the treatment of those peoples within the United States who are identified as "other" based on socially constructed notions of race, ethnicity, or national origin and how, in turn, the treatment of such groups within the United States influences our foreign policy. In Section II, I consider how the portrayal of peoples outside the U.S. border as "other" can both stem from and perpetuate the ill-treatment of racial and ethnic minorities within the United States. I describe some contemporary situations in

5. See generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978) (discussing the history of slavery in the U.S.); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1974) (discussing the history of laws that promoted racial segregation).

6. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 454 (1857) (holding that the Court did not have jurisdiction to hear Scott's challenge to his enslavement because, being of African descent, he could not be a citizen of Missouri). See generally DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (discussing *Scott*).

7. U.S. CONST. amend. XIV.

8. Justice Taney, writing for the majority found, not only that slaves were not citizens, but that all African Americans, even free blacks were not meant to be full-fledged citizens under the U.S. Constitution. See *Scott*, 60 U.S. at 403-4.

9. On laws mandating racial segregation, see PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1951) (describing segregation laws in each state of the U.S.); WOODWARD, *supra* note 5.

10. REPORT OF THE NAT'L ADVISORY COMM. ON CIVIL DISORDERS (1968). Appointed by President Johnson in 1967 following massive civil uprisings, the Kerner Commission reported frankly that "[s]egregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans." *Id.* at 2.

11. See, e.g., ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (assessing the impact of racial discrimination on employment, education, criminal justice, and politics); Charles Sumner Stone, Jr., *Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. REV. 1711 (1993) (measuring black-white progress by assessing the fairness of media coverage).

12. Martin Luther King, Jr. observed in 1964 the relationship between the continuing influence of slavery and involvement in international politics:

For those who ask the question, "Aren't you a Civil Rights leader?" and thereby mean to exclude me from the movement for peace, I have this further answer. In 1957 when a group of us formed the Southern Christian Leadership Conference, we chose as our motto: "To save the soul of America." We were convinced that we could not limit our vision to certain rights for black people, but instead affirmed the conviction that America would never be free or saved from itself unless the descendants of its slaves were loosed completely from the shackles they still wear.

Martin Luther King, Jr., *A Time to Break Silence*, Speech Before New York's Riverside Church (Apr. 4, 1967) [hereinafter *A Time to Break Silence*], reprinted in THE EYES ON THE PRIZE CIVIL RIGHTS READER 389-390 (Clayborne Carson et al. eds., 1991) [hereinafter EYES ON THE PRIZE READER].

which the U.S. government has exhibited a flagrant disregard for human rights and international law in our foreign policy, and the adverse effect this disregard has on racial and ethnic minorities at home. In Section III, I present a case study, the currently pending legal action regarding the United States' kidnapping, holding hostage, and incarceration of Japanese Peruvians during World War II, and relate this policy to discrimination against Japanese Americans, discrimination which extended to the point of threatening large-scale deportations of U.S. citizens. Section IV focuses on the important role international law can play in developing governmental policies that promote human rights for racial and ethnic minority groups both at home and in other countries. I conclude in Section V that an integral part of the struggle for racial justice at home is the insistence that our government comply with international law and treat those who are identified as "foreign" or "other" with respect.

## II. FOREIGN POLICY AND DOMESTIC DISCRIMINATION: THE "OTHER" INSIDE AND OUTSIDE THE BORDER

¶8 The identification of some peoples as "other," the distinguishing of "them" from "us," is often used as an explanation of why some people control more resources, are regarded with more favor, or wield more power. In the 1980s and 1990s the distinction between "Americans" and "foreigners" seems to have taken on added significance, strengthening the notion that those who are foreign need not be treated as well as those who are American.<sup>13</sup> Sometimes this is seen in American<sup>14</sup> attitudes towards other nations and their peoples. Because it affects *them* and not *us*, it has apparently been acceptable to most Americans to disregard slaughter in the Balkans,<sup>15</sup> to buy products made by child labor in Pakistan<sup>16</sup> or prison labor in China, and to allow our government to mine Nicaraguan waters and use drug money to fund the Contras.<sup>17</sup> There has been little public

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13. See generally PETER BRIMELOW, *ALIEN NATION: A COMMON SENSE APPROACH TO AMERICA'S IMMIGRATION DISASTER* (1995) (discussing immigration and its consequences). But see Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1939-1946 (1996) (reviewing Peter Brimelow, *Alien Nation: A Common Sense Approach to America's Immigration Disaster* (1995)).

14. I use the term "American" because we do not have another adjective meaning "of the United States," but note many Mexicans, Canadians, and Central and South Americans consider it chauvinistic to use the term "American" to refer only to people from the United States.

15. See Kelly A. Childers, Comment, *United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World*, 8 TEMP. INT'L & COMP. L.J. 117, 123-129 (1994). See generally John M. Scheib, Comment, *Threshold of Lasting Peace: The Bosnian Property Commission, Multi-Ethnic Bosnia and Foreign Policy*, 24 SYRACUSE J. INT'L L. & COM. 119 (1997) (discussing the work of the Property Commission, the need to attain a multi-ethnic Bosnia, and the implications for U.S. foreign policy).

16. See Mark Shapiro & Trudle Styler, *Children of a Lesser God: Child Labor in Pakistan*, HARPER'S BAZAAR, Apr. 1996, at 204; see also Claudia R. Brewster, *Restoring Childhood: Saving the World's Children from Toiling in Textile Sweatshops*, 16 J.L. & COM. 191, 197-98 (1997).

17. See *Military and Paramilitary Activities (Nicar. v. United States)*, 1984 I.C.J. 392, 442 (finding that the International Court of Justice had jurisdiction and that the application by

outcry over the government's kidnapping Mexican citizens in blatant disregard of international law,<sup>18</sup> or its refusal to ratify international conventions<sup>19</sup> or pay monies owed the United Nations.<sup>20</sup>

¶9 Sometimes the distinction between *them* and *us* focuses on citizenship, blaming the cost of social programs on immigration, and cutting back the constitutional protections and social benefits available to those who, while they may be legal residents, are not U.S. citizens.<sup>21</sup> What

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Nicaragua was admissible). The United States refused to participate in the proceedings and announced its intent to terminate its acceptance of the Court's compulsory jurisdiction. *See id.* at 395. In 1986, the ICJ held that the United States had violated customary international law and its Friendship, Commerce, and Navigation (FCN) treaty with Nicaragua by mining Nicaraguan territorial waters, attacking ports and other facilities, and financing and training the contra forces. *See Military and Paramilitary Activities (Nicar. v. United States) 1986 I.C.J. 14, 538-42.*

18. *See United States v. Alvarez-Machain*, 504 U.S. 655, 659-70 (1992) (allowing a criminal defendant to be tried in federal court despite his transborder abduction); William J. Aceves, *The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain*, 3 Sw. J.L. & TRADE AM. 101, 102 (1996). Despite the holding in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), that courts were required to divest themselves of jurisdiction when a defendant had been abducted in violation of international treaties, federal courts have routinely found jurisdiction in cases of abduction by U.S. agents. *See, e.g., United States v. Reed*, 639 F.2d 896 (2d Cir. 1981) (holding that defendant's alleged abduction did not constitute a violation of due process); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) (same); *United States v. Chapa-Garza*, 62 F.3d 118 (5th Cir. 1995) (same); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974) (holding that a defendant could be tried in federal court despite the alleged failure of the United States to follow orderly processes of extradition).

19. The United States has signed but not ratified a number of significant treaties, including the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448; the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13; the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 144 U.N.T.S. 123; and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3. The United States has neither signed nor ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, U.N. Doc. A/44/49 (1989); the Inter-American Convention to Prevent and Punish Torture, *entered into force* Feb. 28, 1987, 25 I.L.M. 519; the Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302; Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 27 U.S.T. 3301, *entered into force* Apr. 22, 1949. Louis Henkin notes that the package of reservations, understandings and declarations the United States has attached to treaty ratification has evoked much criticism. *See Louis Henkin, U.S. Ratification of the Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

20. The United States owes more than \$1 billion in United Nations dues. *See Emilio J. Cardenas, Financing the United Nations' Activities: A Matter of Commitment*, 1995 U. ILL. L. REV. 147, 151-52 (1995) (examining the current financial plight of the United Nations); John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 878-80 (1997) (arguing that it is wrong for the United States to fail to pay the dues it owes to the United Nations); *The United States As Deadbeat: Debt to U.N. Should Be Paid In Full; The Nation's Honor is at State*, L.A. TIMES, June 17, 1997, at B6 (asserting that the United States owes the United Nations \$300-400 million more than what Congress says it is prepared to pay).

21. *See generally* Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (providing a theoretical framework for current debates over immigration); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994) (suggesting an Equal Protection model to explain limits on state

started as a movement to cut back on social services provided to those who entered this country without the government's approval has quickly expanded to cutbacks in the rights and privileges of those who are legal permanent residents, but who are also portrayed as "other." Even constitutional protections, such as the Fourth Amendment's prohibition of unlawful searches and seizures, which have long been held to apply to all "persons," are being restricted on the basis of immigration status.<sup>22</sup>

¶10 There is a spillover effect whereby these attitudes affect even those who, while they may *be* citizens of the United States, are still identified as "foreign" or "other." Thus, civil rights groups have documented increased violence toward and discrimination against Mexican Americans in the wake of California's Proposition 187 and the recent changes in federal immigration and welfare laws.<sup>23</sup> To the extent that our government treats people poorly because they are not "us" we must recognize that one day it will probably treat some of "us" with the same disregard. The devaluing of human life overseas contributes to racism and nativism at home and, in turn, racism at home is exported in foreign policy that harms people, particularly people of color, in other countries.

¶11 Numerous examples demonstrate the negative impact U.S. foreign policy has on racial and ethnic minorities in the United States today, regardless of the fact that the individuals affected live on this side of the border and may, in fact, be U.S. citizens. The United States' disregard for international law and human rights in Southeast Asia during the Vietnam War era is well documented.<sup>24</sup> One small but telling example of this has recently come to light in connection with the murder of hundreds of women, children and old men at My Lai in 1968. Six months before this massacre, the Pentagon had received a report entitled "Alleged Atrocities by U.S. Military Forces in South Vietnam," which showed that all but six of the 179 Marine second lieutenants interviewed would mistreat a prisoner to obtain desired information, most would kill a prisoner in the case of a

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activity in immigration and alienage matters); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (arguing that the Supreme Court should make explicit that its federal alienage jurisprudence rests on the process of communal formation, not on inherent governmental power).

22. See *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1994) (questioning the applicability of the Fourth Amendment to non-citizens); Bill Wallace, *Court Rejects Illegal Immigrant's Plea on Searches; Ruling Says Suspect Had No Standing to Question Practices*, S.F. CHRON., Oct. 21, 1997, at A20 (describing a U.S. district court's finding that an undocumented resident of twelve years, married to a permanent resident and father of a U.S. citizen, was not protected against unconstitutional searches and seizures). See generally Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999 (1992) (analyzing the possibility of Fourth Amendment violations in the INS enforcement of drug laws).

23. See Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 10-20 (1995) (reporting cases of discrimination against citizens and legal immigrants).

24. See generally ROBERT S. MCNAMARA & BRIAN VANDEMARK, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM (1995) (presenting a litany of mistakes made by the United States in Vietnam).

firefight, and most lacked a "clear understanding of their responsibility in regard to the Geneva Convention."<sup>25</sup> Faced with this information, the U.S. military did not take it upon itself to teach its soldiers about their responsibilities under international law. Instead, the report was ordered rewritten and subsequently placed in "review status," effectively killing it.<sup>26</sup> The atrocities at My Lai and numerous other villages were a predictable result of the government's disregard for human rights law. Our policies also resulted in the bombing of civilians, the widescale use of land mines, and the use of defoliants and other chemical weapons by the United States during the Vietnam War.<sup>27</sup> After the war, hundreds of thousands of Southeast Asian refugees came to the United States, many of them forced to leave their homelands because of their collaboration with the U.S. military. Despite the fact that the Southeast Asians who have come to the United States have been those who were on "our" side, they have encountered widespread discrimination and violence.<sup>28</sup> Furthermore, because Southeast Asians in the United States are racially identified with those of Korean, Chinese, and Japanese descent, the discrimination has a compounding effect making, for example, Chinese Americans the targets of violence related to both the war in Vietnam and resentment of Japanese auto makers.<sup>29</sup> In working to ensure that Asian Americans are treated with respect, we cannot ignore the legacy of U.S. violations of human rights during the war in Vietnam, Laos and Cambodia, and the portrayal during that period of Southeast Asians as "gooks."

¶12 The same is true for Haitian Americans. The recent history of what

25. Seymour M. Hersh, *My Lai, and Its Omens*, N.Y. TIMES, Mar. 16, 1998, at A25.

26. *Id.*

27. See, e.g., Noam Chomsky, *After "Pinkville"*, in THE CHOMSKY READER, *supra*, at 259 (describing the massacre of Vietnamese civilians by U.S. troops at Song My); Noam Chomsky, *Cambodia*, in THE CHOMSKY READER, *supra*, at 289 (relating the genocide committed by the Khmer Rouge to earlier United States actions in Cambodia); Noam Chomsky, *Laos*, in THE CHOMSKY READER, *supra*, at 265 (describing United States bombardment of Laos); Noam Chomsky, *The Mentality of the Backroom Boys*, in THE CHOMSKY READER, *supra*, at 269 (describing the "pacification" program, including saturation bombing and the use of torture); Noam Chomsky, *Vietnam and United States Global Strategy*, in THE CHOMSKY READER 227 (James Peck, ed. 1987) (presenting an overview of U.S. policies in Indochina).

28. See generally NATIONAL ASIAN PACIFIC AM. LEGAL CONSORTIUM, *AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS: THE VIOLENT IMPACT ON A GROWING COMMUNITY* (1996) (4th Ann. Rpt.); *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993) (describing racialized violence against those perceived as former enemies).

29. In 1982 Vincent Chin, a young Chinese American, was beaten to death by two laid-off auto workers in Detroit who blamed him for their loss of employment. See *United States v. Ebers*, 800 F.2d 1422 (6th Cir. 1986); *Racial Violence Against Asian Americans*, *supra* note 28, at 1928; see also Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347 (1996) (analyzing the Chin case in the context of U.S. racial history). In 1989 Jim Loo, also Chinese American, was killed by assailants who called him "gook" and "chink" and blamed him for the death of American soldiers in Vietnam. See U.S. COMM'N ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S*, at 26-31 (1992). See also Chris Helm, *One Tough Lama*, HARPER'S MAG., Aug. 1996, at 11 (interviewing 13 year-old Tibetan Lama Pema Jones, who says "[t]hey call me names like 'nip' and 'gook'. . . . Some skinhead doesn't care whether I'm Tibetan or Chinese. He just wants to stomp my head").

has been called "the world's first black republic"<sup>30</sup> is one of massive violations of international human rights law. The United States occupied Haiti from 1915 to 1934, a period which was followed by two decades of political chaos and three decades of rule by the brutally repressive Duvaliers.<sup>31</sup> In 1990, a Catholic priest and human rights activist, Jean-Bertrand Aristide, was the overwhelming winner of the country's first democratically held presidential elections. His government was ousted in a 1991 military coup, and thousands of Haitians took to the sea to escape a military regime that engaged in arbitrary detentions and disappearances, torture, and summary executions. Despite the fact that these human rights violations were widely known and many of the refugees would have qualified for political asylum in the United States, over 40,000 Haitian "boat people" were stopped and turned back by the U.S. Coast Guard on the high seas, outside of U.S. jurisdiction.<sup>32</sup> The United States contended that such interdiction was allowed by a 1981 agreement between the Reagan administration and the regime of Jean-Claude ("Baby Doc") Duvalier in 1981, which provided that the Haitians interdicted on the high seas were to be interviewed, and those found to have a credible fear of political persecution were not to be returned to Haiti.<sup>33</sup> Questionable as this agreement was, at least it recognized the principle of nonrefoulement, a well-established tenet of international law that prohibits persons from being returned to a country in which they are likely to be subjected to persecution.<sup>34</sup> In 1992, however, President Bush issued an executive order which allowed the Coast Guard to interdict Haitians on the high seas and return them to Haiti without any screening of their claims for political refugee status.<sup>35</sup> Despite the clear violations of international law and the human rights of the Haitians involved, this practice was upheld by the U.S. Supreme Court in *Sale v. Haitian Centers Council*,<sup>36</sup> a case Thomas Jones has called the "Dred Scott Case of Immigration Law."<sup>37</sup> As noted by Judge

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30. Thomas David Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77, 83 (1993) (noting that Haiti won its independence from France in 1804 after a successful slave insurrection); William G. O'Neill, *The Roots of Human Rights Violations in Haiti*, 7 GEO. IMMIGR. L.J. 87, 87 (1993).

31. See Jones, *supra* note 30, at 83-84; O'Neill, *supra* note 30, at 90-94.

32. See Jones, *supra* note 30, at 85-86; see also AMNESTY INT'L, HAITI: THE HUMAN RIGHTS TRAGEDY 37-39 (1992) (reporting on the situation of Haitian asylum-seekers); LAWYERS' COMM. FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI (1990) (describing human rights abuses in Haiti and the failure of U.S. policy to address the problem); ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION IN HAITI, OEA/Ser. L/V/II. 83, Doc. 18, at 41-45 (Mar. 9, 1993).

33. See Jones, *supra* note 30, at 93.

34. See United Nations General Assembly Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), U.N. GAOR, 22nd Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1968); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 6 I.L.M. 78 (1967); Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137, 176.

35. See Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (the "Kennebunkport Order"); see Jones, *supra* note 30, at 94.

36. 509 U.S. 125, 188 (1993).

37. Jones, *supra* note 30, at 102. Jones notes that by "restricting the access to the high seas and interfering with the movement of refugees on the high seas, arguably, both Haiti and the United States are in violation of conventional and customary international law." *Id.* at 111.

Hatchett, dissenting from the Eleventh Circuit's decision to uphold the interdictions, "Under existing law, any refugee may reach the shores of the United States . . . except Haitian refugees. . . . The primary purpose of the program was . . . to keep Haitians out of the United States."<sup>38</sup>

¶13 Harold Koh summarizes the situation:

[W]hen refugees started to arrive, we began to view the refugees, not the restoration of democracy, as the problem. We abandoned the safe-haven principle . . . . We undercut international legal standards at home. We defended illegal violations of international treaties before our courts and violated the principle of non-neutrality. . . . The United States acted as a broker, not as an advocate of democracy, cutting a deal between the legitimately elected government and the coup leaders. . . . The United States insisted on amnesty for gross human rights abuses, effectively eliminating any incentive for the military officials to discontinue these abuses. . . . We ignored human rights abuses while the . . . negotiations continued. Then deaths occurred. . . . Supporters of the democratic government were shot in the street. . . . [F]inally, as the deadline for returning the Aristide government approached, we sent two hundred American soldiers with sidearms to Haiti . . . . When Haitians protested at the dock, we turned our boat around and departed.<sup>39</sup>

It was the official policy of the U.S. government to countenance such human rights abuses. Widely disseminated newspaper and television accounts portrayed the turning back of boatloads of Haitians on the high seas, and the slaughter of civilians by members of the Haitian military whom we had trained and paid.<sup>40</sup> Such actions cannot be portrayed as

38. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1111-12 (11th Cir. 1991) (Hatchett, J., dissenting).

39. Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189, 198-199 (1994); accord Creola Johnson, *Quarantining H.I.V. Infected Haitians: United States' Violations of International Law at Guantanamo Bay*, 37 HOW. L.J. 305 (1994) (arguing that detaining Haitians who were either HIV-positive or suspected of being HIV-positive violated international law); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2435 (1994) (explaining the Haitian policy and judicial response as exemplifying "the possibilities and limits of transnational public law litigation"; Louis N. Schulze, Jr., Note, *The United States' Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 641, 642 (1997) ("focus[ing] upon the international circumstances and repercussions of our nation's refugee detention policy").

40. See Kathleen Marie Whitney, *SIN, FRAPH, and the CIA: U.S. Covert Action in Haiti*, 3 SW. J. L. & TRADE AM. 303, 304, 315-30 (1996) (documenting U.S. Central Intelligence Agency (CIA) involvement with leaders of the Haitian government, military, and police, and indicating that "the CIA has provided training, funds, and equipment to the corrupt Haitian military). Whitney states that the activities of the CIA "violate international laws that protect the rights of sovereignty and self-determination and prohibit intervention into the domestic affairs of other states." *Id.* at 304.

acceptable U.S. foreign policy without also conveying the notion that Haitian lives are worth less than American lives. While such policies were carried out by different branches of the federal government, extensive media coverage disseminated the message of the policies to the public. Consequently, it is not surprising to find that police officers and other government agents brutalize Haitian immigrants. The recent police torture in Brooklyn of a Haitian security guard gave rise to well-justified public outrage and political organizing within Haitian American communities.<sup>41</sup> Effective prevention of such abuses, however, will require not only a focus on discrimination at home, but also on U.S. foreign policy. Just as discrimination against African Americans did not end when they were granted citizenship, we cannot expect discrimination to stop the moment a person crosses over the border.

¶14 One can find examples of the transborder effects of discrimination with respect to almost any racial or ethnic minority group in the United States. Our government has been roundly criticized by the world community (as well as many Americans, including former attorney general Ramsey Clark) for the enormous numbers of civilian deaths resulting from the bombing of Iraq during the Gulf War.<sup>42</sup> It does not seem reasonable that we could deem the lives of Iraqis and citizens of other Middle Eastern countries to be worthless (at least in comparison to our desire for oil)<sup>43</sup> and constantly identify Arabs as "terrorists,"<sup>44</sup> and yet expect that Arab-Americans will be treated with respect in this country. The "war on drugs" also provides many examples of the conflation of the domestic and the

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41. See Timothy Williams, *Point of View: In Wake of Attack; Haitian Immigrants Say Political Power Needed*, L.A. SENTINEL, Sept. 3, 1997, at A7; see also James Ridgeway & Jean Jean-Pierre, *Louima Time: An Alienated and Angered Haitian American Community Fights Back*, VILLAGE VOICE, Sept. 2, 1997 (noting that in a fact-finding mission to Haiti in 1982, the Mayor of New York, Rudolf Giuliani, reported that there was no political repression but that people emigrated for economic reasons); Ron Daniels, *Vantage Point: Racism, Anti-Immigrant Fever Fuel Police Brutality*, L.A. SENTINEL, Oct. 15, 1997, at A7 (arguing that the crisis surrounding the assault on Abner Louima is "much deeper than just police brutality, it goes to the heart of the issue of social and economic injustice").

42. See RAMSEY CLARK, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* 83 (1992) (noting that approximately 150,000 civilians died as a result of the US attack); see also Michael Held, *The Fire This Time: U.S. War Crimes in the Gulf*, 26 N.Y.U. J. INT'L L. & POL. 157 (1993) (reviewing Clark's book). For a critique of Clark's view, see Keith Barber, *No Fire This Time: False Accusations of American War Crimes in the Persian Gulf*, 146 MIL. L. REV. 235 (1994) (reviewing Clark's book).

43. See DAVID CAMPBELL, *POLITICS WITHOUT PRINCIPLE: SOVEREIGNTY, ETHICS AND THE NARRATIVES OF THE GULF WAR* (1993); see also Jean Manas, *Beyond Right and Wrong?: Thoughts Engendered by a Post-Modernist Critique of the Gulf War*, 36 HARV. INT'L L.J. 245 (1995) (book review).

44. See generally ARAB-AMERICAN ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES: POLITICAL AND HATE VIOLENCE AGAINST ARAB-AMERICANS (1992) (documenting political and hate violence against Arab-Americans, particularly showing the increase in such violence following the Gulf War); Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, 83 A.B.A. J. 48, 50 (1997) (quoting Sam Hussein, media director of the American-Arab Anti-Discrimination Committee Director, who states that "Arab-Americans get targeted more or less depending on world events. . . . The Gulf War, World Trade Center bombing and Oklahoma City bombing all led to more reports of disparate treatment").

international.<sup>45</sup> Swept up by rhetoric against drugs, we allowed our government to invade Panama and destroy entire neighborhoods in an effort to kidnap President Noriega, a former employee of the Central Intelligence Agency.<sup>46</sup> There is footage of entire city blocks being bombed and swallowed up by fires, reportedly set deliberately by the U.S. military.<sup>47</sup> It is difficult to see how such a policy could be acceptable without also condoning the Philadelphia city government's decision to "fight crime," in the form of the MOVE organization, by bombing and burning the entire block of the neighborhood in which they lived.<sup>48</sup>

¶15 Although the previous cases focus on ways in which disregard for human rights in our foreign policy comes home to roost, domestic racism also infects our international policies. Beginning with early attempts to justify slavery in the United States, African peoples have often been portrayed as savage or uncivilized. This view can still be seen in news coverage which portrays African nations in a constant state of "tribal" warfare, with governments run by corrupt strongmen who stand by as their people die of malnutrition and infectious diseases. The racism in this perspective allowed the United States to support white supremacist governments in southern Africa for years. It has allowed the United States to wait for many months before responding to widespread famine in

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45. See generally Mark Andrew Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661 (1991) (describing how the United States' international drug policy often involves coercion, impeding its effectiveness); Peter S. McCarthy, Comment, *United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 NEW ENG. L. REV. 1067 (1993) (examining the issue of government-sponsored kidnapping in light of the Verdugo-Urquidez decision).

46. In December, 1989, approximately 24,000 U.S. troops invaded Panama, inflicting significant casualties, both civilian and military, and destroying much property. General Manuel Noriega, head of the Panamanian state (and formerly on the CIA payroll), was arrested by U.S. forces, brought to the United States, and put on trial for criminal conspiracy to violate U.S. law. See *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988); see also Mark Andrew Sherman, *An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 395 (1989) ("*Noriega* represents the ultimate intersection of United States domestic law and foreign policy, and its precedential value should not be understated."). Louis Henkin says,

With regret, I conclude that the invasion of Panama by the United States was a clear violation of international law as embodied in the principal norm of the U.N. Charter on which the world, under the leadership of the United States, built the new international order after World War II. The United States did not even have a color of justification for this invasion.

Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 312-13 (1991). For a justification of the invasion, see Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

47. This can be seen in the documentary film PANAMA DECEPTION (Empowerment Project 1992).

48. In May 1985, the Philadelphia police dropped a bomb on a residential neighborhood, destroying an entire city block and killing eleven people, in an attempt to arrest members of MOVE, a radical African American political organization. See *In re City of Philadelphia Litigation: Ramona Africa v. City of Philadelphia*, 49 F.3d 945 (3d Cir. 1995); Matthew Siegel, Note, *Africa v. City of Philadelphia: The Third Circuit Drops a Bomb on Fourth Amendment Protections*, 7 TEMP. POL. & CIV. RTS. L. REV. 167 (1997).

Somalia<sup>49</sup> or to the genocide in Rwanda.<sup>50</sup> More devastating in the long run may be the discounting of African lives that can be seen today in our lack of action concerning AIDS in Africa.<sup>51</sup> It is my belief that these policies, which have been fueled by racism at home, come back to influence domestic policy toward African American teenagers in the inner cities and toward poor people who have AIDS.<sup>52</sup> Finally, as the border between governmental and corporate power becomes less fixed and the ability of national governments to regulate business declines, we need to consider not only the government's stated policy, but also its influence, and ours, on the actions of multinational corporations with large U.S. operations.<sup>53</sup> We see the same de-valuing of human life in the actions of Shell Oil in Ogoniland in Nigeria,<sup>54</sup> in the reaction to the Bhopal disaster,<sup>55</sup> and in U.S.

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49. See Robert M. Cassidy, *Sovereignty Versus the Chimera of Armed Humanitarian Intervention*, 21 FLETCHER F. WORLD AFF., Fall, at 47, 59 (1997) ("The United States was very reluctant to commit forces in Somalia until it was impelled to do so by domestic political factors.").

50. See Dorinda Lea Peacock, *"It Happened and It Can Happen Again": The International Response to Genocide in Rwanda*, 22 N.C. J. INT'L L. & COM. REG. 899, 900-01 (1997) (noting that the United States and the international community "maintained a careful distance" for over two years of refugee crises, civil war, and genocide); see also Weekend Edition-Saturday, Mar. 28, 1998, available in 1998 WL 6284798 (discussing President Clinton's apology to genocide survivors in Rwanda for the slow response of the United States, and noting one estimate that the commitment of 2,000 troops could have prevented the slaughter of 500,000 people).

51. See UN: *'We cannot afford to fail' in AIDS fight, says Secretary-General*, M2 Presswire, Dec. 9, 1997, available in 1997 WL 16294870 (noting the World Health Organization's new estimate that over 20 million people in sub-Saharan Africa are infected with HIV or AIDS, two-thirds of the total number in the world); see also *African Epidemic Reaches Unprecedented Levels*, AIDS ALERT SS4, Feb. 1, 1998. See generally GLOBAL AIDS POLICY (Douglas A. Feldman, ed. 1994) (including essays examining the harm done by political agendas and biases against the poor and racial minorities to the development of effective remedies).

52. CBS News reported that "President Clinton is under fire . . . from his own advisory panel on AIDS. . . . for not getting AIDS drugs to HIV patients on Medicaid and for not funding needle-exchange programs." *CBS Evening News* (CBS television broadcast, Dec. 7, 1997), available in 1997 WL 16409290. In addition, the United States and three European countries have recently been accused of "conducting unethical medical experiments on thousands of HIV-infected pregnant women in Africa, Asia and the Caribbean." Martin Kettle, *American AIDS Trials Run Into Ethics Fury*, THE GUARDIAN, Sept. 19, 1997. In these experiments, only half of the HIV-positive women were treated with AZT. As the *Guardian* reports, "[t]he issue carries particular force . . . because it raises the spectre of the notorious Tuskegee research on untreated syphilis among poor blacks in Alabama, in which unknowing sufferers were denied penicillin during a 40-year study." See *id.*; accord Sheila Dennie, *Against All Odds: Survivors of Tuskegee Syphilis Study (TSS) Receive Apology from President Clinton*, TENN. TRIB., June 19, 1997, at 4 (noting that the "TSS's lasting effect is especially evident" in African Americans' attitudes toward HIV/AIDS policies); Muriel Dobbin, *Clinton Warns Against Prejudice in Science*, SACRAMENTO BEE, May 19, 1997, at A6.

53. See generally Mark Gibney & R. David Emerich, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996) (exploring the extraterritorial application of U.S. law on multinational corporations).

54. See generally Charles Marecic, Note, *How Many Wrongs Does It Take To Make a Human Right?*, 22 VT. L. REV. 201 (1997) (discussing the conflict between Shell Oil and the Ogoni in Nigeria).

55. See generally Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994) (arguing for a more comprehensive international regime in light of Bhopal);

attitudes toward tobacco companies that have targeted Asian markets.<sup>56</sup>

### III. THE JAPANESE PERUVIAN INTERNMENT: A CASE STUDY

¶16 In the previous part, I illustrate my proposition that our foreign and domestic policies with respect to the treatment of those identified as "other" are not demarcated by a distinct border but are, instead, interdependent phenomena. The attitudes and actions I have described go far beyond, and are much more complicated than, what is identified as unlawful under either domestic or international legal systems. Nonetheless, if we wish to reduce the impact of racism on our foreign policy, and the impact of our foreign policy on our treatment of domestic minorities, compliance with international law is a good place to begin.

¶17 Respect for international law is important for at least two reasons. First, there is a large body of international law, both conventional and customary, that addresses human rights in a way that is far more complex and encompassing than our domestic law, which is generally limited to the civil and political rights of individuals.<sup>57</sup> Second, this is a body of law that has been constructed by the representatives of many nations. Simply acknowledging its legitimacy is the beginning of a policy of respect for those who are, by definition, "other." This Part considers in some detail the World War II internment of Japanese Peruvians, a case in which the United States government disregarded international law and the human rights of the individuals involved.

¶18 Representing the African captives in the *Amistad* case,<sup>58</sup> John Quincy Adams argued to the Supreme Court that the United States could not concede to Spain's demand that the President "first turn man-robber . . . next turn jailer . . . and lastly turn catchpoll and convey [the African defendants to] slave-traders despoiled of their prey and thirsting for blood."<sup>59</sup> A case currently pending in the federal courts illustrates what can happen when the U.S. government is allowed to violate international law with impunity. It is a case in which the United States turned "man-robber" and "jailer" of thousands of Japanese Latin-Americans during World War II

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Ratna Kapur, *From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations*, 10 B.C. THIRD WORLD L.J. 1 (1990) (arguing that in light of disasters such as Bhopal, multinational corporations must be included in the human rights discourse).

56. See Jonathan Wike, Note, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT'L L. 329 (1996) (discussing human rights issues raised by aggressive promotion of U.S. tobacco products in Asia).

57. See generally Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990) (discussing the skeptical attitude of the United States toward economic, social, and cultural rights); Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1996-97) (proposing the incorporation of international human rights law into the discourse about rights of minorities in the United States); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79 (1992) (exploring the reasons for U.S. refusal to ratify the International Covenant on Economic, Social and Cultural Rights).

58. See text accompanying notes 22-26 *infra*.

59. Donald Dale Jackson, *Mutiny on the Amistad*, SMITHSONIAN MAG., Dec. 1997, at 124.

and it illustrates the connection between foreign policy and domestic policy—specifically, that disregard for human rights in our foreign policy both reflects and perpetuates discrimination inside the United States.

¶19 The evacuation and imprisonment of approximately 120,000 Japanese Americans<sup>60</sup> from the West Coast during World War II is a now-familiar story of racism against a domestic minority.<sup>61</sup> But until 1996 when *Mochizuki v. United States*,<sup>62</sup> a class action requesting redress for the incarceration of Japanese Latin Americans, was filed in federal district court, few people knew that the U.S. government, in collaboration with various Latin American governments, also kidnapped, transported, incarcerated, and held hostage over 2,000 Japanese Latin Americans. Because the bulk of these people were Japanese Peruvians, this section focuses on their story.<sup>63</sup>

60. Two thirds of this number were second generation Japanese Americans who were American citizens by birth. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 15 (1989). Because the racial restrictions imposed by the Naturalization Act of 1790 (limiting naturalization to "free white persons" and, after passage of the Fourteenth Amendment, adding persons of African descent) were not fully removed until the Naturalization Act of 1952, the first generation Japanese immigrants were not eligible to become U.S. citizens. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (1996). Nonetheless, they were in the United States as permanent residents, committed to staying here and raising their children as Americans. Therefore, I use the term "Japanese American" to encompass this entire community, regardless of citizenship.

61. See *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction vacated* 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 320 U.S. 81 (1943), *conviction vacated* 828 F.2d 591 (9th Cir. 1987). For a description of U.S. treatment of Japanese Americans, see generally COMMISSION ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982); PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983) [hereinafter *JUSTICE AT WAR*]; *JAPANESE AMERICANS: FROM RELOCATION TO REDRESS* (Roger Daniels et al. eds., 1991); *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES* (Peter Irons ed., 1989) [hereinafter *JUSTICE DELAYED*]; MICHIE NISHIURA WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* (1996); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983)); Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 55 Yale L. J. 489 (1945); and Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

62. *Mochizuki v. United States*, No. 96-5986 (C.D. Cal., filed Aug. 27, 1996). On July 12, 1998, the U.S. Justice Department announced that it had reached a settlement with the plaintiffs. The settlement consists of a brief letter of regret from President Clinton and an agreement to pay each surviving Japanese Latin American internee \$5,000 out of funds allocated under the 1988 Civil Liberties Act after all Japanese American claimants have been paid. Not only is this amount significantly less than the \$20,000 paid to each Japanese American internee, but the claims of Japanese Latin American internees are expected to exceed the available funds. A hearing to finalize the settlement is scheduled for November, 1998. See Aurelio Rojas, *U.S. Offers Internees Apology*, S.F. CHRON., June 13, 1998, at A1; Lena H. Sun, *U.S. Apologizes for Internment*, WASH. POST, June 13, 1998, at A04.

63. See generally JOHN EMMERSON, *THE JAPANESE THREAD* 125-49 (1978) (describing the treatment of Japanese Peruvians); C. HARVEY GARDINER, *PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE AND THE UNITED STATES* (1981) (same); WEGLYN, *supra* note 61, at 54-66 (describing treatment of Japanese Latin-Americans).

There were Japanese Latin Americans taken from numerous other countries as well, but by far the largest number came from Peru. See WEGLYN, *supra* note 61, at 60 (eighty percent of the Latin-American Japanese deportees were from Peru); see also GARDINER, *supra* note 63, at 134,

¶20 Japanese began emigrating to Peru in 1899 for the same reasons they came to the United States—land, jobs, and the opportunity to make a better life for their children.<sup>64</sup> By the 1930s, many were economically successful and, like Japanese Americans on the West Coast, had become targets of local hostility and racism.<sup>65</sup> Nonetheless, by 1940, there were at least 25,000 Peruvians of Japanese descent, some of whom were Peruvian citizens.<sup>66</sup>

¶21 Although Peru was a non-belligerent during World War II, it entered into an agreement to promote hemispheric unity<sup>67</sup> and in 1942, acceded to U.S. pressure to break diplomatic ties with the Axis powers.<sup>68</sup> Peru accepted a U.S. proposal that all Axis officials be repatriated through the United States, and then asked the United States to take non-officials as well.<sup>69</sup> These were civilian men, women, and children, both Japanese and Peruvian citizens.<sup>70</sup> Some "volunteered" for repatriation, and many of the women and children left in order to be reunited with their husbands and fathers. Large numbers were simply kidnapped by the Peruvian police, however, and turned over to U.S. officials.<sup>71</sup> Very few of these individuals had been classified as "dangerous" to either Peruvian or U.S. security.<sup>72</sup>

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tbl. 9 (showing that only 18 Bolivians and 495 Peruvians of Japanese descent remained in U.S. custody as of Jan. 31, 1946.)

64. See generally EMMERSON, *supra* note 63, at 130-33 (describing Japanese migration to Peru); GARDINER, *supra* note 63, at 3-11 (same).

65. See EMMERSON, *supra* note 63, at 132 ("[t]he patent success of the Japanese won them enmity"); GARDINER, *supra* note 63, at 8; WEGLYN, *supra* note 61, at 60.

66. The Peruvian census of 1940 reported 17,598 Japanese citizens and 8,790 second generation Peruvians of Japanese descent, for a total "Japanese" population of 25,888. See EMMERSON, *supra* note 63, at 131; see also Memorandum (no. 7288) from R. Henry Norweb to Secretary of State, encl. No. 1 (July 7, 1943) (on file with author). The State Department files also contain a translation of an article entitled "Japanese in Peru," which states that in 1940 there were 50,000 Peruvians of Japanese descent. See Letter (May 27, 1943) (summarizing *Japanese in Peru*) (on file with author).

67. See WEGLYN, *supra* note 61, at 58-59; see also GARDINER, *supra* note 63, at 16-17.

68. See GARDINER, *supra* note 63, at 18-19.

69. See GARDINER, *supra* note 63, at 19, 23 tbl. 4.

70. Emmerson says, "From April 4, 1942 until July 9, 1943, during the period I was in Lima, the embassy participated actively in the expulsion from the country and transportation to the United States of 1,024 Japanese, of whom 399 were women and children." EMMERSON, *supra* note 63, at 139; accord GARDINER, *supra* note 63, at 41 (noting American authorities' insistence that "citizenship should not stand in the way of their efforts to deport individuals from Peru.").

A Department of State, Special War Problems Division [hereinafter "SWP"] report, dated July 6, 1944, states: "Following Peru's severance of diplomatic relations in April 1942 with the Axis nations, 569 Germans and 1,737 Japanese nationals have been removed from Peru for internment in the United States." See U.S. Department of State, SWP, Report No. 6467 (July 6, 1944) (on file with author.)

71. See GARDINER, *supra* note 63, at 24, 27-29, 67-69; WEGLYN, *supra* note 61, at 61. The SWP memorandum on the "Control of Japanese in Peru," *supra* note 70, states that "through political influence and bribery," a number of "dangerous Japanese leaders" have avoided deportation. Letter No. 7314, dated July 10, 1943, from the embassy in Lima to the Secretary of State, states that a Mrs. Chieko Nishino had been arrested and sent to join her husband in a U.S. internment camp despite her insistence that she would kill herself if deported. See Letter (No. 7314) from George M. Butler, First Secretary of U.S. Embassy, to U.S. Secretary of State (July 10, 1943) (on file with author).

72. Emmerson says:

American consuls in Peru were instructed not to issue visas to Japanese Peruvians, and passports and other documents were illegally seized from those who had them.<sup>73</sup> One group of men was sent via Panama, where they spent several weeks at forced labor, clearing jungle in the Canal Zone.<sup>74</sup> Others were shipped directly to San Francisco or New Orleans. Upon arrival, all were turned over to I.N.S. officials who then declared them to be in the country illegally.<sup>75</sup> The Department of Justice, through the Immigration and Naturalization Service, held the Japanese Peruvians and other Japanese Latin Americans in concentration camps<sup>76</sup> in Texas for the duration of the war.<sup>77</sup>

¶22 The United States' motivation for going to all of this trouble and expense, most of which violated both U.S. and international law,<sup>78</sup> appears

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Lacking incriminating evidence, we established the criteria of leadership and influence in the community to determine those Japanese to be expelled. We prepared lists, which we presented to the Peruvian authorities. These authorities, committed at least personally if not officially, to the expulsion of *all* Japanese, treated our proposed lists rather lightly.

EMMERSON, *supra* note 63, at 143; *accord* GARDINER, *supra* note 63, at 16-17, 27-28, 39-40, 44 tbl. 5, 67-68; WEGLYN, *supra* note 61, at 63.

State Department Memorandum No. 6239 from Ambassador Norweb to the Secretary of State, dated March 3, 1943, indicates that of the 119 Japanese Peruvians who were evacuated on the S/S Frederick C. Johnson on February 24, 1943, 15 were recommended for expulsion by the Embassy. Memorandum from R. Henry Norweb to U.S. Secretary of State (Mar. 3, 1943) (on file with author). Another State Department letter entitled *War Problems*, dated August 24, 1944, notes that the new Peruvian ambassador had been "sent to the United States to get rid of the Japanese in Peru and to buy matches and that he was not interested in any other matters . . ." Letter from A.E.C. to Keeley (Aug. 24, 1944) (on file with author).

73. See GARDINER, *supra* note 63, at 29, 41.

74. *Cf. id.* at 69 (describing their living conditions in Panama).

75. *Cf. id.* at 46, 70 (describing claims of their illegal entry); WEGLYN, *supra* note 61, at 64 (same).

76. While some consider this term too harsh, Harold Ickes, Secretary of the Interior, called them "fancy-named concentration camps." WEGLYN, *supra* note 61, at 18; *accord* ROGER DANIELS, *CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II* (1972). While these camps were far from the death camps run by the Nazis, the parallel was not lost on the world. Michi Weglyn reports: "In his article, 'The Man Behind a Famous Court Case,' (*Pacific Citizen*, February 13, 1970), Ray Okamura wrote: 'Gordon [Hirabayashi] had a grim and thought-provoking footnote: "The Nazi defendants at the Nuremberg Tribunal cited the *Hirabayashi* and *Korematsu* decisions as a defense.'"" WEGLYN, *supra* note 61, at 291 n.14.

77. These camps were located in the Texas towns of Kenedy, Seagoville and Crystal City. See GARDINER, *supra* note 63, at 29-31, 36-37, 58-61. [Weglyn: at this time, no evid. of mistreatment of Americans held by Japanese].

78. The Alien Enemies Act, 50 U.S.C. § 21-23 (1988), only allowed the executive to intern or deport enemy aliens. See *id.* § 21. The United States was a party to hemispheric security arrangements, but they only allowed for the restraint or removal of "certain dangerous alien enemies." Proclamation No. 2685, 60 Stat. 1342 (1946) (citing *adopted* May 21, 1943, Emergency Advisory Committee for Political Defense Res. XX; *adopted* Jan. 28, 1942, Conference of Foreign Ministers Res. XVII); *accord* EMMERSON, *supra* note 63, at 126. Weglyn states: By early 1943, the Justice Department . . . had become greatly alarmed at the number of internees being sent up. Worse, it had come to its attention that many being held under the Alien Enemies Act were not enemy Japanese but Peruvian nationals, thus aliens of a friendly nation; and that little or no evidence supported the Peruvian Government's contention that their deportees were dangerous.

WEGLYN, *supra* note 61, at 63.

to have been a desire for hostages to be exchanged for Americans held in the Japanese-occupied territories.<sup>79</sup> Thus, even though concern about hemispheric security had diminished by October 1942, Secretary of State Hull, noting that there were 3300 American citizens still in China, 3000 in the Philippines, and 700 in Japan proper, recommended that there be no let-up in the hemispheric removals of "all the *dangerous* Germans and Italians" and "all the Japanese . . . for internment in the United States."<sup>80</sup> This was not a new idea. In 1936, George Patton, then Chief of Military Intelligence, suggested a plan "[t]o arrest and intern certain persons of the Orange race [Japanese] who are considered most inimical to American interests, or those whom, due to their position and influence in the Orange community, it is desirable to retain as hostages."<sup>81</sup> In January 1942, Major Karl Bendetson, the architect of the Japanese American internment, noted that "the 'hostage idea' has not been sufficiently explored . . ."<sup>82</sup>

¶23 Over 500 Japanese Peruvians were in fact included in the two exchanges that took place in 1942 and 1943.<sup>83</sup> Evidence suggests that attempts to arrange a third exchange fell through at least in part because of the Japanese government's reaction to the hostage taking and to the harsh treatment of Japanese Americans held in the Tule Lake camp.<sup>84</sup> This left

79. WEGLYN, *supra* note 61, at 54-56; *see also* State Department officer A.E. Clattenberg, Outline of Negotiations for Exchange of American Civilians in Japanese Hands (Oct. 12, 1943) (on file with author); Memorandum (June 15, 1942) (on file with author) (summarizing "American-Japanese exchange agreement") (on file with author); Letter from Francis Biddle, Attorney General to Secretary of State (June 28, 1943) (agreeing to withdraw the Justice Department's objections to the repatriation of 12 Japanese nationals to avoid endangering "the entire Japanese repatriation negotiations," in light of "the primary objective of obtaining the return of American nationals.") (on file with author).

80. WEGLYN, *supra* note 61, at 62-63 (emphasis added); *accord supra* note 78 (regarding the legal implications of imprisoning persons not found to be "dangerous").

81. WEGLYN, *supra* note 61, app. 7, at 182.

82. *Id.* In August 1941, months before the attack on Pearl Harbor, Congressman John Dingell of Michigan suggested to the President that:

we remind Nippon that unless [Japan allows the departure of one hundred U.S. citizens reportedly detained in Japan] within forty-eight hours, the Government of the United States will cause the forceful detention or imprisonment in a concentration camp of ten thousand alien Japanese in Hawaii; the ratio of Japanese hostages held by America being one hundred for every American detained by the Mikado's Government. It would be well to further remind Japan that there are perhaps one hundred fifty thousand additional alien Japanese in the United States who will be held in a reprisal reserve . . .

*Id.* at 55.

83. *See* GARDINER, *supra* note 63, at 48, 84-85.

84. In June 1944, Secretary of State Hull wrote President Roosevelt that "the detention of [the Japanese Americans] and incidents that have occurred in our detention centers have resulted in protests from the Japanese Government and have supplied that Government with pretexts for refusing to negotiate for further repatriation of our nationals in Japanese custody or for their relief." WEGLYN, *supra* note 61, at 222. The Clattenberg "Outline," points out the "tremendous resentment" and "a lessening of Japanese interest in the exchange of nationals" due, in part, to reports from Japanese repatriated from the U.S. *See* Clattenberg, *supra* note 79 (manuscript at 3, on file with author). On the determination of "loyalty" and the segregation at Tule Lake, *see* WEGLYN, *supra* note 61, at 146-173; *cf. Tokyo Makes Most of Tule Lake Riots*, CHI. SUN, Nov. 15, 1943, *reprinted in id.* at 15 (describing reactions to the riots there). Referring to the forced deportation of Chieko Nishino from Peru, *see supra* note 71, a State

over 1300 Japanese Peruvians imprisoned in the United States.<sup>85</sup> At the end of the war, Peru refused to allow these people to return.<sup>86</sup> Pressured by the United States, it eventually agreed to the return of those who were either Peruvian citizens or married to citizens.<sup>87</sup>

¶24 In March 1946, a full seven months after Japan's surrender, Acting Secretary of State Dean Acheson asked Attorney General (later Supreme Court Justice) Tom Clark to inform the Japanese Peruvians that, because there was no "clear evidence" that they posed a threat to "the security and welfare of the Americas," they were "no longer subject to restraint."<sup>88</sup> Although the U.S. Justice Department recognized that it was illegal to forcibly repatriate the Japanese Peruvians to Japan,<sup>89</sup> it refused them permission to stay in the United States.<sup>90</sup> Ironically, the arrest warrant of

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Department memorandum voices concern that the related "unfavorable propaganda" could effect "our exchange negotiations with Japan" should Mrs. Nishino commit suicide. Memorandum from J.K.W. to the Ambassador (July 9, 1943) (on file with author); *see also* Brief Review of Impressions Obtained at Immigration Detention Stations at Kenedy, Crystal City and Seagoville, Texas (July 9, 1943) (noting that the physical conditions in the camps were so poor as to "most likely produce on the part of the enemy retaliation against our Americans") (on file with author); Memorandum from Spanish Embassy (June 5, 1944), *reprinted in* WEGLYN, *supra* note 61, at 185 (transmitting Japanese government's protest over the internment of Japanese residents of Peru and Bolivia).

85. *See* GARDINER, *supra* note 63, at 116 tbl. 8.

86. A State Department memorandum of Nov. 2, 1945 states that "the Peruvian government has indicated on a number of occasions that it does not look with favor on the return to Peru of the Japanese . . . now interned in the United States." Memorandum (Nov. 2, 1945) (on file with author).

87. *See* GARDINER, *supra* note 63, at 169-171; WEGLYN, *supra* note 61, at 64. According to Gardiner, "[f]ewer than 5 percent of the deported Peruvian Japanese—considerably fewer than one hundred persons—were allowed to return to South America." GARDINER, *supra* note 63, at 174.

88. GARDINER, *supra* note 63, at 136.

89. A "War Problems" memorandum dated September 1, 1944 noted that the author "was informed by Mr. Ennis [Department of Justice, Director of the Alien Enemy Control Unit] that the law precludes Justice [referring to the Department of Justice] from holding non-alien enemies in an interned status beyond a period of three months." Memorandum (Sept. 1, 1944) (entitled "War Problems") (on file with author). According to Gardiner, the Justice Department "insisted that it could justify the detention of the Latin American Japanese only if some satisfactory means were instituted to determine whether the enemy aliens were dangerous." GARDINER, *supra* note 63, at 64; *accord id.* at 73-74.

On July 14, 1945 and April 10, 1946, Presidential Proclamations entitled "Removal of Enemy Aliens" were issued, specifically allowing the deportation of interned Latin Americans pursuant to the Alien Enemy Act. *See* Proclamation No. 2685, 60 Stat. 1342 (1946); Proclamation No. 2655, 59 Stat. 370 (1945).

90. *See* EMMERSON, *supra* note 63, at 148-149. A U.S. State Department Notice to the Internees from Latin America, dated Jan. 4, 1946, explained that the internees were being held pursuant to the Alien Enemy Act, and that they could not remain in the U.S. after release from custody because their "entry into the United States was not made under the immigration laws." U.S. Dept. of State, Notice to the Internees from Latin America (Jan. 4, 1946) (manuscript at 3, on file with author); *accord Truman Acts on Axis Nationals*, BALTIMORE SUN, Sept. 9, 1945 (from U.S. Dept. of State Alien Enemy Control Section file), noting that the President by proclamation gave the State Department "the authority to get rid of 1,300 Japanese and 900 German aliens who were arrested in Latin America during the war and brought to this country for internment." According to the article, the internees included "spies, saboteurs, provocateurs and propagandists." *Id.* *See also* State Department Memorandum of Meeting dated Aug. 31, 1944 on the subject of the "Postwar disposition of interned alien

one Iwamori Sakasegawa stated that he was to be deported because "he was an immigrant not in possession of a valid immigration visa[,] . . . did not present an unexpired passport[, was] an alien ineligible to citizenship and was not entitled to enter the United States."<sup>91</sup> Some "700 men and their dependents" had no choice but to allow themselves to be deported to Japan.<sup>92</sup> The plight of the remaining 365 Japanese Peruvians came to the attention of Wayne Collins, a remarkable attorney who was carrying on a one-man battle against the forced "repatriation" of Japanese Americans.<sup>93</sup> Collins eventually got the remaining deportations halted and found employment for many of them at Seabrook Farms in New Jersey, a frozen food processing plant (now Birdseye) that had used German POW labor during the war.<sup>94</sup> Some in this final group were later able to legalize their immigration status and become U.S. citizens.<sup>95</sup> None of the abducted Japanese Peruvians, even those who became U.S. citizens, received the redress eventually provided to Japanese Americans under the Civil Liberties Act of 1988 because that Act limits redress to persons who, at the time of internment, were American citizens or permanent residents.<sup>96</sup> The class action brought in *Mochizuki v. United States* is challenging that limitation.<sup>97</sup>

¶25 There is no doubt that the kidnapping, deportation, incarceration, holding hostage, and forced repatriation of the Japanese Peruvians violated international law.<sup>98</sup> Forcibly transporting civilians from a non-belligerent

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enemies received from the other American republics," anticipating "difficulties in disposing" of them but determining that none of the internees should be allowed to remain in the U.S., despite the fact that "some individuals sent here for internment were undoubtedly relatively harmless." Memorandum of Meeting (Aug. 31, 1944).

91. GARDINER, *supra* note 63, at 138.

92. See WEGLYN, *supra* note 61, at 64. A letter from the Officer in Charge of the Santa Fe, New Mexico Department of Justice Internment Camp to the State Department, dated April 3, 1946, lists the 81 Japanese Peruvians held in the camp and notes that of that number, only 4 were willing to accept voluntary repatriation to Japan. See Letter from Ivan Williams, Officer in Charge, U.S. Dep't of Justice/I.N.S. Internment Camp, Santa Fe, New Mexico, to Dep't of State, Alien Control Section (Apr. 3, 1946) (on file with author).

93. Collins, who had represented Korematsu and Endo in their challenges to the internment, also represented hundreds of Japanese Americans whom the U.S. government was trying to deport. See GARDINER, *supra* note 63, at 141-42; WEGLYN, *supra* note 61, at 253-65. Because the majority of the incarcerated Japanese Americans were U.S. citizens, the term "repatriation" is inaccurate. Nevertheless, it is frequently used in this context, furthering the perception that these Americans were "foreign."

94. See GARDINER, *supra* note 63, at 142; WEGLYN, *supra* note 61, at 64-65; see also Letter from Albert Clattenburg, State Department, to the Peruvian Embassy (Aug. 26, 1946) (identifying eight Japanese Peruvians employed at Seabrook Farms and noting that 355 Japanese from Peru remained in custody) (on file with author).

95. See WEGLYN, *supra* note 61, at 66; cf. GARDINER, *supra* note 63, at 175 (discussing Japanese Peruvians who became U.S. citizens).

96. See The Civil Liberties Act of 1988, 50 U.S.C. § 1989b-7(2) (1990). Furthermore, the Act excludes persons who "relocated" to a country between Dec. 7, 1941 and Sept. 2, 1945 while the United States was at war with that country. See *id.*

97. *Mochizuki v. United States*, No. 96-5986 (C.D. Cal., filed Aug. 27, 1996) (on file with author); see First Amended Civil Rights Complaint, *Mochizuki*, (filed Feb. 3, 1997) (on file with author).

98. According to a March 1998 submission of International Educational Development to the 54th Session of the United Nations Commission on Human Rights:

to a belligerent country and holding them as hostages for exchange was prohibited at that time by the laws and customs of war.<sup>99</sup> In fact, the drafters of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War noted that they were compelled by the events of World War II to articulate prohibitions on deportations that had previously been considered unnecessary because it was assumed that civilized nations no longer resorted to such practices.<sup>100</sup> John Emmerson, the State Department official who supervised the deportations for the U.S. Embassy in Lima, later acknowledged that the program "was clearly a violation of human rights and was not justified by any plausible threat to the security of the Western Hemisphere."<sup>101</sup> Interdepartmental

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At the time this program was in operation, international humanitarian law clearly forbade war-time abduction, incarceration, and deportation of civilians from friendly countries. Exchange of civilians from a friendly country to an enemy third party was viewed as especially serious and in this case, met the criteria of hostage-taking. . . . International law also forbade slavery and forced labour (the conditions of the Latin Americans held in the Panama camps clearly met the then-existing prohibition against slavery and forced labour) whether in peacetime or in war. The Charter of the International Military Tribunal (Nuremberg Charter), the Charter of the Military Tribunal for the Far East (Tokyo Charter) and the earlier Control Council Law 10 set out these acts as war crimes and crimes against humanity at the time of World War II.

Arbitrary Detention of Latin Americans of Japanese Ancestry (Mar., 1998) (manuscript at 2, on file with author). See generally LARAE LARKIN, *THE LEGITIMACY IN INTERNATIONAL LAW OF THE DETENTION AND INTERNMENT OF ALIENS AND MINORITIES IN THE INTEREST OF NATIONAL SECURITY* (1996) (discussing detention and internment of aliens and minorities in authoritarian and democratic states); Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207 (1975) (exploring the difference between legal and illegal transfers of populations); Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469 (1993) (arguing that states should be prohibited from deporting civilians during time of war).

99. This was recognized by the United States government as early as 1863, when it was stated in General Order No. 100 of the U.S. Army ("Lieber's Code") that "private citizens are no longer murdered, enslaved, or carried off to distant parts. . . ." RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 49 (1983). According to Georg Schwarzenberger, at the Hague Peace Conferences of 1899 and 1907, "[t]o raise the issue of the illegality of the deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted." GEORG SCHWARZENBERGER, 2 *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 227 (1968). In 1924, the Belgo-German Mixed Arbitral Tribunal stated in *Moriaux v. Germany* that deportation of civilians was a "most flagrant and atrocious breach of international law." See SCHWARZENBERGER, *supra*, at 228-29. Beginning in 1921, the International Red Cross began articulating prohibitions on the mass deportation of civilians and the taking of hostages, but these were not finalized before the outbreak of World War II. See DONALD A. WELLS, *WAR CRIMES AND LAWS OF WAR* 50-51 (2d. ed. 1991).

100. "The 1907 Hague Regulations do not provide an explicit prohibition of deportations. The Commentary to Geneva IV explains that this was probably so 'because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance.'" Henckaerts, *supra* note 98, at 480; accord de Zayas, *supra* note 98, at 210-211 (noting that the 1907 Hague Regulations were silent on the issue of deportations because deportations were no longer practiced in "so-called civilized warfare."). It is also interesting to note that one of the defenses raised at the Nuremberg trials was the United States' treatment of Japanese Americans. See WEGLYN, *supra* note 61, at 75.

101. EMMERSON, *supra* note 63, at 149.

correspondence makes it clear that the U.S. State Department was largely unconcerned about the legality of interning Japanese Peruvians, while the Justice Department, although aware that only the internment of individual Axis nationals who were identified as "dangerous to hemispheric security" was even arguably legal, did little to enforce compliance with international law.<sup>102</sup>

¶26 The U.S. government's disregard for international law was facilitated by the racism of American officials, both civilian and military, toward those identified as Japanese, regardless of their citizenship.<sup>103</sup> This attitude is reflected in a December 1943 memorandum to Secretary of State Hull from Assistant Secretary Long.<sup>104</sup> After noting that the U.S. had "quite of number of these Japanese (of American nationality) serving in our Army whom we could not in justice kick out of the United States after they had fought with us," Long said:

The Department has a responsibility . . . in connection with the internment camps, relocation centers and prisoners of war camps in this country where Japanese citizens and American citizens of Japanese race are confined. I have appeared before two committees of the Senate where the subject has been discussed and . . . a large-scale operation to get them out of the United States seems to be the hope of the members of those committees.

The problem has been complicated by our laws relating to citizenship and by the constitutional provision regarding the native born character of the citizenship of those born here. *The Attorney General is reported to have said recently . . . that he had a formula under one of our statutes by which a native-born Japanese or one naturalized could be divested of his American citizenship — thus making him eligible for deportation. . . .* I think the far larger part of official sentiment is to do something so we can get rid of these people when the war is over . . . But sentiment is liable to wane if the authorization measures are not adopted before the war ends. We have 110,000 of them in confinement here now - and that is a lot of

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102. See *supra* note 78; see also Memorandum (1943) (Enclosure No. 1 to despatch No. 6239 (Mar. 3, 1943) from the U.S. Embassy in Lima) (on file with author) (describing the deportation of Axis nationals, and outlining the review of State Department procedures by Raymond Ickes of the Alien Enemy Control Unit of the Department of Justice in which Ickes insisted that only "dangerous" enemy aliens could be arrested, and that there was inadequate evidence for some of the proposed deportations).

103. The most famous of these are probably General DeWitt, head of the Western Defense Command, who said "'A Jap's a Jap. It makes no difference whether he is an American citizen or not,'" WEGLYN, *supra* note 61, at 201, and then-Governor of California Earl Warren, who had to be warned by the Army in December 1944 that people of Japanese ancestry had to be allowed safe return to the West Coast. See *id.* at 192-93 (reprinting of letter to Earl Warren from Robert Lewis).

104. See WEGLYN, *supra* note 61, at 190-91.

Japs to contend with in postwar days . . . .<sup>105</sup>

¶27 This statement, which comes from within the State Department, illustrates how Japanese Americans were regarded as "other" despite their citizenship and the close ties between their rights and U.S. foreign policy. Even President Roosevelt referred to the *nisei*, second generation Japanese Americans who were U.S. citizens by birth, as "Japanese people from Japan who are citizens."<sup>106</sup> As Justice Murphy, dissenting in the *Korematsu* case said, "[t]his exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity . . . goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."<sup>107</sup>

¶28 Racism against those of Japanese descent allowed the U.S. government to imprison Japanese Americans during World War II and to contemplate expatriation or deportation plans such as that described by Long. The treatment of U.S. citizens and permanent residents in this manner is consistent with policies that endorse abducting Japanese Latin Americans, bringing them to the United States, and holding them in prison camps. In turn, the ease with which the Japanese Latin Americans could be kidnapped and held hostage made it easier for government officials to justify the internment of Japanese Americans in violation of both international and domestic law, and even to consider stripping them of all rights and deporting them after the war was over.

¶29 It is interesting to contemplate how differently both Japanese Latin Americans and Japanese Americans would have been treated had the U.S. government adhered to international law. Although the main body of what is now identified as international human rights law was not explicitly articulated until after World War II, there were many provisions of humanitarian law that prohibited such treatment of civilians, even in times of war. Legal challenges to the Japanese American internment were framed in the context of domestic law, and U.S. courts, up to and including the Supreme Court, upheld the constitutionality of the internment.<sup>108</sup> In the 1980s, after discovering evidence that the War Department had deliberately misled the Court about the existence of a military threat posed by Japanese Americans, *coram nobis* petitions were brought by Gordon Hirabayashi and Fred Korematsu, challenging their convictions in the earlier cases. Even though their convictions were vacated, the precedent set by the earlier decisions was not overturned.<sup>109</sup>

¶30 As a practical matter it is highly unlikely that a federal court during World War II would have stopped either internment just because it

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105. *Id.* (emphasis added).

106. *Id.* at 217.

107. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

108. Various aspects of the internment were upheld in *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Yasui v. United States*, 320 U.S. 115 (1943); and *Hirabayashi v. United States*, 320 U.S. 81 (1943).

109. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

violated international law. Nonetheless, had there been forces within the government, the courts, or the public which prevented the United States from interning all but those Japanese Latin Americans who had been individually identified as dangerous, it would have been much more difficult to justify interning *all* persons of Japanese ancestry from the West Coast. The fact that the United States could have complied with international law in both of these cases is illustrated by the procedures implemented in Hawaii. Although the Japanese had attacked Hawaii, only those persons of Japanese descent who were individually considered dangerous were interned on the urging of the Military Governor. There were no security problems as a result of this policy and, in fact, a high proportion of Japanese Hawaiians volunteered for military service.<sup>110</sup>

#### IV. INTERNATIONAL HUMAN RIGHTS LAW AND RACIAL JUSTICE

¶31 Some of the greatest thinkers on the subject of racism in the United States have concluded that the struggle must be viewed in an international context. W.E.B. Du Bois spent much of his life opposing colonialism and participating in Pan-African movements.<sup>111</sup> As Henry Richardson says, Du Bois:

repeatedly pointed out regarding black America that "the problem of the color line, is international and no matter how desperately and firmly we may be interested in the settlement of the race problem in Boston, in Kansas and in the United States, it cannot ultimately be settled without consultation and cooperation with the whole civilized world."<sup>112</sup>

Malcolm X argued that African Americans should see themselves as part of the worldwide majority of peoples of color, forming the Organization of African American Unity (OAAU) with the express purpose of bringing the struggle of African Americans "from the level of civil rights to the level of human rights."<sup>113</sup> Martin Luther King, Jr. came to believe that speaking out against the war in Vietnam was a necessary part of the

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110. See WEGLYN, *supra* note 61, at 144.

111. See W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 239-40* (1sted. 2d prtg. 1969) ("The most important work of the decade as I now look back upon it was my travel. . . . [It] gave me a depth of knowledge and a breadth of view which was of incalculable value for realizing and judging . . . the problem of race in America.")

112. Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 62 (1993) (quoting W.E.B. Du Bois, *Peace and Foreign Relations*, in *CRISIS*, Nov. 1923, at 9).

113. CLAYBORNE CARSON, *MALCOLM X: THE FBI FILES* 289 (1991) (citing FBI Report of July 2, 1964, which quotes an article from June 30, 1964, in the *Omaha World-Herald* newspaper). After Malcolm X's first trip to Africa in 1964, he established the OAAU to unite African Americans "around a non-religious and non-sectarian constructive program for Human Rights." *Id.* at 38.

struggle for justice at home.<sup>114</sup>

¶32 These leaders recognized that, in many respects, international law provides more protection for racial and ethnic minorities than does domestic law, particularly regarding economic, social and cultural rights<sup>115</sup> and the rights of "peoples" to self-determination.<sup>116</sup> Thus, Malcolm X proposed to have the General Assembly of the United Nations declare that the United States' treatment of African Americans violated the Universal Declaration of Human Rights,<sup>117</sup> and a major political objective of the Black Panther Party was "a United Nations-supervised plebiscite . . . for the purpose of determining the will of Black people as to their national destiny."<sup>118</sup>

¶33 Du Bois, Malcolm X, and King, among others, understood that painting people who reside outside the borders of the United States as "other" and the willful indifference to their ill-treatment on that basis, reinforces the oppression of those identified as "other" within the United States.<sup>119</sup> One means of combating this form of racism is to insist on

114. A Time to Break Silence, *reprinted in* EYES ON THE PRIZE READER, *supra* note 12, at 387.

115. These are sometimes referred to as "second generation" human rights, in contrast to civil and political rights, which are identified as "first generation" rights. They are also considered "positive" rights (e.g., the right to food, shelter, medical treatment or education) in contrast to "negative" rights which protect people from interference by the government (e.g., the right to freedom of speech, the right to be free from arbitrary arrest and detention, or the right not to be discriminated against on the basis of race or gender). Both first and second generation rights are generally considered to be the rights of individuals. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982). These rights are articulated in many international agreements, including the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR]; the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 600 U.N.T.S. 195 [hereinafter ICERD]; and the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

116. The rights of groups or of peoples, sometimes referred to as "third generation" human rights, are mentioned in the ICCPR, *supra* note 115, and the ICESCR, *supra* note 115, and more specifically articulated in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/185, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992), and the African Charter on Human and Peoples' Rights [Banjul Charter], *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 9 I.L.M. 58 (asserting that all peoples have the inalienable right to self-determination). See also BASIC DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS (Hurst Hannum ed., 1993) (containing a number of international and domestic human rights documents); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (rev. ed. 1996) (analyzing group rights and providing nine case studies of potential solutions); THE RIGHTS OF PEOPLES (James Crawford ed., 1988) (including essays that discuss "third generation" human rights); Saito, *supra* note 57 (discussing "third generation" international human rights law in the United States).

117. See CARSON, *supra* note 113, at 40 (citing December 14, 1964 report by John Lewis & Donald Harris, *The Trip*). Lewis and Harris were Student Nonviolent Coordinating Committee (SNCC) activists who met with Malcolm X (now El-Hajj Malik El-Shabazz) in Nairobi during his second trip to Africa. See *id.* at 39.

118. October 1966 Black Panther Party Platform and Program, *reprinted in* EYES ON THE PRIZE READER, *supra* note 12, at 346-347 (Point No. 10).

119. According to Lewis and Harris, Malcolm "felt that the presence of SNCC in Africa

compliance with international law, particularly the emerging international law of human rights.<sup>120</sup> Although international law is sometimes unclear and always difficult to enforce, it represents an emerging global consensus regarding the nature of human rights. In addition, because international law is premised on the notion of political equality among sovereigns and is negotiated between various nations, respect for and compliance with international law puts the principle of respect for those who are "other" into practice.<sup>121</sup>

¶34 The case of the *Amistad*<sup>122</sup> provides a good example of how compliance with international law can contribute to the fight against racism within the United States. Recently popularized by a spate of books and movies,<sup>123</sup> this case involved a mutiny by Africans aboard a Spanish ship, the *Amistad*. The Africans took control of the ship, killed the captain and tried to return to Africa. Tricked by the crew into sailing north, the ship was seized by the U.S. Navy off the coast of Long Island. The Africans remained imprisoned for two years while the courts tried to resolve the claims brought on behalf of the Africans for their freedom, by two Americans for salvage, and by the Spanish owners of the ship.

¶35 The U.S. government intervened on behalf of the Spanish government, which asserted that the Africans, as slaves, should be returned to their Spanish owners, pursuant to a treaty with Spain which provided for the return of property captured by pirates.<sup>124</sup> While it might appear that compliance with this treaty was mandated by international law, in fact the Africans had been captured in violation of an 1817 treaty between Great Britain and Spain which outlawed the slave trade

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was very important and that this was a significant and crucial aspect of the 'human rights struggle' that the American civil rights groups had too long neglected." CARSON, *supra* note 113, at 40 (citing December 16, 1964 report by John Lewis & Donald Harris, *The Trip*). King noted that, among other reasons, he was opposed to the war in Vietnam because it diverted resources from the domestic Poverty Program, it disproportionately sent the poor to fight and die, and it promoted violence at home. See *A Time to Break Silence*, reprinted in EYES ON THE PRIZE READER, *supra* note 12 at 388-389.

120. This point is made by Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 72 (1996) ("Binding international human rights norms provide significant protections beyond our "domestic" civil rights law."). See also Richardson, *supra* note 112 (discussing the importance of international law to African Americans).

121. I refer here to international law as it is found in each of the sources of international law identified in Article 38 of the Statute of the International Court of Justice: treaties, custom, general principles, and the writings of scholars and jurists. Statute of the I.C.J., signed June 26, 1945, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993. See also Howard S. Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751 (1982) (discussing customs and general principles as sources of international law).

122. *Gedney v. L'Amistad*, 10 F. Cas. 141 (D.C.D. Conn. 1840 (No. 5294a)), *aff'd in part, rev'd in part sub nom*, *United States v. Amistad*, 40 U.S. (15 Pet.) 518 (1841).

123. See, e.g., *AMISTAD* (Dreamworks 1997). Before its recent rediscovery, the case was discussed in other books, including HOWARD M. JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* (1987).

124. See Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1112 (1993); Frank J. Williams, *Natural Law Vanquishes Oppression in Amistad Case*, 46-JAN. R.I. B.J. 11, 11-12 (1998).

throughout the dominions of Spain<sup>125</sup> and, thus could not be regarded as "property" under international law. Recognized as human beings under international law, the Africans had the right to mutiny in self-defense.<sup>126</sup> It appears that the U.S. government was willing to disregard international law in order to maintain good relations with the Spanish government, and because the country was on the verge of splitting apart over the issue of slavery.

¶36 Federal courts, including the Supreme Court, had the courage to insist that the government comply with international law, despite fears that a judgment for the Africans would touch off yet another controversy about slavery. Looking back, we can see that this was the right thing to do, legally and morally, and that it contributed to the demise of slavery in the United States by acknowledging publicly that the slave trade—though not slavery itself—was illegal and by treating the Africans as human beings, not property, in the highest courts of the land.

¶37 A more recent example of the positive effect that compliance with international law can have in domestic matters is that of U.S. foreign policy regarding apartheid. Racial discrimination, particularly apartheid, was banned by the United Nations Charter, the United Nations Declaration of Human Rights, and numerous conventions that were drafted after World War II.<sup>127</sup> Nonetheless, the U.S. persisted in allowing racial segregation at home and, for decades afterward, supported white minority governments in South Africa that practiced apartheid. It was public insistence that the United States government comply with international law and popular pressure on multinational corporations to ban racial discrimination in their operations in southern Africa that resulted, finally, in the Comprehensive Anti-Apartheid Act of 1986, which Congress enacted over President Reagan's veto.<sup>128</sup> By forcing the U.S. government to catch up; in its policies and its actions; with the consensus of the international community, activists in the United States not only helped to end apartheid in South Africa and encourage a peaceful transition to a democratic state, but also assisted in reshaping the image of Africa in the eyes of the American public. Now, in addition to images of warfare, famine, and disease, Americans see African National Congress leader Nelson Mandela and

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125. "Under this law, an African imported into any of the Spanish colonies contrary to the treaty would be declared free in the first port at which the African arrived." Holden-Smith, *supra* note 124, at 1112.

126. See also Jackson, *supra* note 59, at 124.

127. See Art. 2 of the ICCPR, *supra* note 115; and the ICERD, *supra* note 115; Art. 2 of the UDHR, *supra* note 115; U.N. CHARTER art. 55.

128. See Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1986) (requiring U.S. corporations that employ more than 25 people in South Africa to comply with a Code of Conduct that prohibited racial discrimination and mandated minimum wages and working conditions); see also Nathan A. Fagre & Catherine Casey, *Use of Economic Sanctions to Promote Human Rights: The Case of Economic Sanctions Against South Africa*, C399 ALI-ABA 165 (1989) (discussing the effectiveness of sanctions against South Africa); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law; Economic Sanctions: South Africa*, 80 AM. J. INT'L L. 151 (1986) (discussing economic sanctions); Jeff Walker, *Economic Sanctions: United States Sanctions Against South Africa—Comprehensive Anti-Apartheid Act of 1986*, Pub. L. No. 99-440, 100 Stat 1086, 28 HARV. INT'L L.J. 117 (1987) (discussing the Act);

other leaders of the struggle for liberation in South Africa treated with tremendous respect by the United States media.<sup>129</sup>

¶38 A struggle is now being waged to bring the United States' domestic policy into compliance with emerging international law regarding the death penalty. International law clearly prohibits both the racially discriminatory use of the death penalty and the execution of juveniles.<sup>130</sup> There is, in addition, an emerging movement to prohibit capital punishment altogether.<sup>131</sup> Although the racially disparate imposition of the death penalty is well established, the U.S. Supreme Court has refused to prohibit its use.<sup>132</sup>

¶39 In February 1998, the Inter-American Commission on Human Rights, a body of the Organization of American States, found that the United States had violated the rights of William Andrews, an African American executed by the State of Utah, to life, to equality before the law without regard to race, to an impartial hearing, and to protection from cruel, infamous, or unusual punishment in violation of the American Declaration of the Rights and Duties of Man.<sup>133</sup> Andrews was executed despite the fact that, among other things, a juror handed a napkin to the bailiff at the trial on which was written "hang the niggers."<sup>134</sup> While the Inter-American Commission's decision does not affect this individual's fate, it illustrates that the arguments about racial disparity being advanced—and rebuffed—in domestic courts are in line with international law, and that those who are being adversely affected by this domestic policy can be

129. See John F. Harris, *Clinton and Mandela: Paying Mutual Homage*, WASHINGTON POST, Mar. 28, 1998, at A1; Sonya Ross, *Clinton Hails 'Promise of New Africa'*, SEATTLE POST-INTELLIGENCER, Mar. 30, 1998, at A1.

130. See Hernandez-Truyol, *supra* note 120, at 73-76 (noting that the imposition of the death penalty in a discriminatory manner, or on juveniles, violates the International Covenant on Civil and Political Rights, and that U.S. practices have been questioned by the UN Human Rights Committee).

131. See generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995) (arguing that because discrimination and arbitrariness continue to play a role in the imposition of the death penalty, it should be declared unconstitutional); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993) (arguing that the United States should prohibit the imposition of the death penalty on persons under 18 years).

132. See INTERNATIONAL COMM'N OF JURISTS, ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES 54 (June 1996) (finding that in a majority of death penalty cases in the US, there is a class and racial disparity in charging, sentencing, and imposition of the death penalty); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (rep. No. GGD-90-57); Bright, *supra* note 131, at 467-480 (discussing the failure of U.S. courts to deal with racial discrimination in capital sentencing). In *McCleskey v. Kemp*, the Supreme Court allowed Georgia to continue to execute persons despite evidence that death sentences were four times more likely to be imposed in cases in which the victim was white than in cases with black victims. 481 U.S. 279, 287-291 (1987).

133. Case 11.139, Inter-Am. C.H.R. 44-49, OEA/Ser/L/V/II.98, Doc. 7 rev. (1998) (Report No. 57/96) (on file with author).

134. See *id.* at 39-40; see also *Andrews v. Shulsen*, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting from denial of certiorari); SOUTHERN CENTER FOR HUMAN RIGHTS, CAPITAL PUNISHMENT ON THE 25TH ANNIVERSARY OF *FURMAN V. GEORGIA* 5 (1997) (reproducing the note written by the juror).

aided by the insistence that the United States comply with international norms.<sup>135</sup>

#### V. CONCLUSION

¶40 Activists and intellectuals have recognized the connections between U.S. foreign policy and domestic racism in some contexts—understanding, for example, that we could not allow the U.S. government to support apartheid in South Africa and still expect that African Americans would be respected at home. As long as the United States supported virulent racism in another country, no border could keep it from infecting public attitudes and domestic governmental policies. As the African American experience has so painfully demonstrated, citizenship—the nominal protection of the border—is not enough to protect human rights and human dignity.

¶41 As with the anti-apartheid movement, we need to take on the responsibility of paying attention to, and holding the government accountable for, the effects of its actions on the rest of the world. Sometimes we feel that the problems of racism at home are so overwhelming that we cannot afford to pay attention to what happens overseas. But we need to understand that the two are inseparable, and that if we want our government to treat all Americans with respect, we have to insist that the government treat "foreigners" with respect as well.

¶42 A foreign policy that promotes human dignity is not limited to, but certainly requires respect for international law. The United States could be at the forefront of the movement to expand international human rights law. Until we get to that point, we can at least insist that our government comply with existing law and promulgate a foreign policy that does not discount the value of human life in any country.

¶43 We are tempted sometimes to believe that gross violations of human rights and international law by the United States are a thing of the past. We cannot imagine that our government would support slave traders or hold hundreds of innocent civilians hostage simply because of their race

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135. In April 1998, in a particularly flagrant violation of international law, the United States ignored a stay of execution requested by the International Court of Justice and allowed the execution of Angel Breard, a Paraguayan national who had been convicted of murder without having access to Paraguayan consular officials, in violation of the Vienna Convention on Consular Relations. See *Execution in Virginia Killing Should Have Been Stayed*, SYRACUSE HERALD AM., Apr. 19, 1998, at D2; Philippe Sands, *An Execution Heard Round the World, The Virginia Sentence on a Paraguayan Threatens the International Role of Law and the Safety of American Travelers*, L.A. TIMES, Apr. 16, 1998, at B9. There are other situations in which international law provides more protection than domestic law. In addition to constraining the use of the death penalty, Hernandez-Truyol argues that "other excellent examples of ways international human rights norms can expand, develop and transform U.S. law" include privacy rights for homosexuals and a challenge to the legality of California's Proposition 187. Hernandez-Truyol, *supra* note 120, at 76-79; accord Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 4 FORDHAM URBAN L.J. 1075, 1117-29 (1996) (applying international human rights norms to domestic policies that discriminate on the basis of alienage).

or national origin. Nonetheless, a closer look at the recent actions and policies of the U.S. government reveals a disturbingly familiar disregard for the rights of people, particularly people of color, on the other side of the border.<sup>136</sup>

¶44 In matters of both international and domestic concern, human rights violations are often rationalized as necessary to preserve "national security." In examining these situations, we must not accept assertions of military necessity or national security interests uncritically. If there were ever a case where national security interests could override international law, it surely would have been the *Amistad* case, given the imminent threat of civil war. Yet it is clear in retrospect that the Supreme Court furthered the cause of justice both at home and internationally by ruling as it did. Conversely, the rationale of military necessity was accepted almost without question at the time of the internment of Japanese Americans and Japanese Peruvians during World War II. One of the few to challenge this justification was Professor Eugene Rostow, who noted that the rights and liberties of all Americans were endangered by the Supreme Court's willingness to allow the military to determine the extent to which constitutional protections would apply to an ethnic minority in times of war.<sup>137</sup> It has since come to light that the War Department deliberately had misled the courts about the nature of the military danger,<sup>138</sup> and that Justice Murphy correctly identified racism, rather than military necessity, as the true motivation for the internment.<sup>139</sup> As these cases illustrate, it is in times of war that the military is given the greatest latitude and therefore requires the most scrutiny. During the Cold War, the excesses of McCarthyism were said to be justified by concern for national security, but then, too, the human rights and dignity of American citizens suffered the most.<sup>140</sup> Today

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136. Particularly with respect to American Indians, this disregard also exists within the border. See Robert A. Williams, Jr., "The People of the States Where They are Found are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism, 38 ARIZ. L. REV. 981, 982-84 (1996).

137. See Rostow, *supra* note 61, at 491-92.

138. See *Hirabayashi v. United States*, 828 F.2d 591, 597-99 (9th Cir. 1987) (vacating convictions on the basis of newly discovered evidence); *Korematsu v. United States*, 584 F. Supp 1406, 1416-19 (N.D. Cal. 1984) (same); JUSTICE AT WAR, *supra* note 61, at 269-310 (discussing ways in which War Department misled courts); JUSTICE DELAYED, *supra* note 61, at 103-21 (same).

139. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting); see also *Ex parte Endo*, 323 U.S. 283, 302-04 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

140. Senator McCarthy's skepticism about international human rights agreements was consistent with his domestic agenda. "Senator Joseph McCarthy and his cohorts were deeply suspicious of internationalism." Barbara Stark, *Urban Despair and Nietzsche's "Eternal Return": From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT'L L. 185, 216 n.105 (1996). We are still living with the legacy of the Bricker Amendment, a 1953 proposal by Ohio Senator John Bricker to amend the Constitution to restrict the government from entering into a wide range of international agreements. To defeat the amendment, Secretary of State Dulles pledged that the United States did not intend to sign any human rights treaties. See Elizabeth M. Calciano, Note, *United Nations Convention on the Rights of the Child: Will It Help Children in the United States?*, 15 HASTINGS INT'L & COMP. L. REV. 515, 521 (1992).

the United States is unquestionably the most powerful nation on earth. We need to be extremely cautious about accepting "national security" or analogies to war as justifications for curtailing human rights at home or abroad, whether they are framed in terms of military warfare, economic threat, the invasion of our geographic borders, or the "war on drugs." During war, human rights should not be violated because these are precisely the situations in which we most need human rights to be protected.<sup>141</sup>

¶45 Speaking about his experiences representing Haitian refugees interdicted at sea, Professor Harold Koh has said:

I heard our government assert claims of national security and national emergency in support of its demand for presidential power: the *Korematsu* argument being made against the Haitians. I heard the *Chinese Exclusion* arguments about sovereignty and inherent power to protect our borders invoked against the Haitians. The Government cited *U.S. ex rel. Knauff v. Shaughnessy*, an egregious case that had declared that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

...

... [I]t finally dawned on me that the Haitian saga is not someone else's saga. It is my story.<sup>142</sup>

We need to apply this analysis to all of our foreign policy. The Haitian story is certainly the story of Asian American immigrants, but it is more than that. As Koh says, "I realized that the Haitian story reduces to a story about 'we' and 'they.' Our government was able to depersonalize the Haitians because Americans wanted to believe that the Haitians are not us."<sup>143</sup> That depersonalization comes back to harm us.

¶46 In the struggle for racial justice at home, it is sometimes tempting to believe that we will achieve more progress on domestic rights by avoiding criticism of U.S. foreign policy. There are several problems with this approach. One is that we all become part of the problem when our silence can be bought with the promise of a higher standard of living or a little less discrimination. Another is that as we struggle for domestic respect and recognition, we have to demonstrate that we are part of this

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141. See Gibney, *supra* note 128, at 261-62 (noting that federal courts have been much more receptive to suits by foreign plaintiffs against foreign state actors than to suits alleging violations of human rights by the U.S. government).

142. Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1, 19-20 (1994).

143. *Id.* at 20.

polity. This is *our* government acting in the world and if it is not representing us in those actions, we need to insist that it change. And finally, as discussed above, disregard for the rights of those identified as "other" does not stop at the border. Discussing the reaction to his decision to speak out against the war in Vietnam, Martin Luther King, Jr. said

[M]any persons have questioned me about the wisdom of my path. . . . Why are you speaking about the war, Dr. King? . . . Peace and civil rights don't mix, they say. Aren't you hurting the cause of your people? they ask. And when I hear them, though I often understand the source of their concern, I am nevertheless greatly saddened, for. . .their questions suggest that they do not know the world in which they live.<sup>144</sup>

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144. A Time to Break Silence, *reprinted in* EYES ON THE PRIZE READER, *supra* note 12, at 388. King says further that after speaking with the "desperate, rejected and angry young men" following the urban uprisings of the mid-1960s, "I knew that I could never again raise my voice against the violence of the oppressed in the ghettos without having first spoken clearly to the greatest purveyor of violence in the world today—my own government." *Id.* at 389.