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# People Not Equal: A Glimpse into The Use of Profiling and the Effect a Pending U.N. Human Rights Committee Case May Have on United States' Policy

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# PEOPLE NOT EQUAL: A GLIMPSE INTO THE USE OF PROFILING AND THE EFFECT A PENDING U.N. HUMAN RIGHTS COMMITTEE CASE MAY HAVE ON UNITED STATES' POLICY

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## *I. Introduction*

Imagine you are an Iranian national who has recently legally arrived in the United States to get a much desired college degree. You are excited to arrive in Washington, D.C., the capital of the land of the free; free from discriminatory

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distinctions and arbitrary laws that made life for you so difficult in the past. Upon arrival, the United States government sends you an official letter demanding that you immediately go to the Immigration and Naturalization Services (INS) to be questioned on your living arrangements, reason for your stay, and your continued status as a non-immigrant. You ask your classmate, who happens to be a national of India, if he received the letter; he says no. You immediately feel that the United States government suspects you of being a terrorist and your feelings of fear and apprehension rise—the same feelings you worked hard to leave behind.

The use of racial profiling by police in the United States automatically has a negative connotation by many Americans. Unjust, arbitrary, and ineffective are just some of the words that may come to mind. The negative connotation is fully justified—racial profiling denies equal protection to people simply because of a distinguishing characteristic such as race, not because of illegal acts. Why is it then justified to single out and deny equal protection and treatment to certain aliens, based solely on their race, ethnicity, or nationality?

This Note will answer the above question and discuss the possible implications of a pending United Nations Human Rights Committee decision on a case regarding racial profiling on United States' foreign policy.[1] The case, *Lecraft v. Spain*,[2] questions the legality of profiling for immigration purposes.[3] The petitioners claim that the profiling is against international law norms[4] and the International Covenant of Civil and Political Rights.[5] This Note will first describe the use of profiling in the United States through immigration policies post 9/11. Section II will outline the policy on which our government relies for

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[1] *See* Lecraft v. Spain, Communication Submitted For Consideration Under the First Optional Protocol to the International Covenant On Civil and Political Rights, Sept. 11, 2006, *available at* www.justiceinitiative.org/db/resource2/fs/?file_id=18904 [hereinafter Lecraft Communication]; *see also infra* note 2 and accompanying text (describing the *Lecraft* case further).

[2] *See* Press Release, Open Society Justice Initiative, Groundbreaking Lawsuit Challenges Racial Profiling By Police (Sept. 12, 2006), http://www.justiceinitiative.org/db/resource2?res_id=103402 (last visited Apr. 14, 2008) [hereinafter Lecraft Press Release] (describing the facts of the *Lecraft* case as involving an African American woman of Spanish citizenship who was stopped by a National Police Officer in a train station because he was under orders to "identify persons who 'looked like her,' adding, 'many of them are illegal immigrants'") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[3] *See* FABIA WONG, WOMEN'S LINK WORLDWIDE (SPAIN), REPORT RE: 2006 DEVELOPMENTS 1 (2006), http://www.law.utoronto.ca/documents/ihrp/report06_Wong.doc (last visited May 8, 2008) (explaining that the *Lecraft* case is "the first case challenging the practice of racial profiling to be submitted to a human rights tribunal," and articulating the petitioner's claim as challenging "the Spanish Constitutional Court judgment which held that racial appearance is a legitimate indicator for immigration status, and as such, state officials were allowed to target specific ethnic groups for identity checks") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[4] Customary international law is "a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations § 102(2).

[5] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 179, *available at* http://www2.ohchr.org/english/law/pdf/ccpr.pdf.

the justification of profiling aliens, mainly the Plenary Power Doctrine,[6] despite the fact that profiling subjects its victims to unequal treatment under the law. Parts IV and V will point out why the Plenary Power Doctrine needs to be changed to account for the evolving standards of equal treatment that both domestic and international modern views demand that nations follow. Next, Part VI will provide a detailed explanation of the case, *Lecraft v. Spain*[7], which is currently under review by the U.N. Human Rights Committee (HRC). Finally, Part VII will discuss how the Judiciary and the Transnational Legal Process, in conjunction with the HRC ruling, could affect United States' foreign policy by limiting the absolute power given to the Executive and the Legislative branches of our government through the Plenary Power Doctrine.

## *II. Incidents of Unequal Treatment and Profiling of Aliens in the United States*

Racial profiling in the United States is commonly linked to police stopping African-Americans for traffic stops simply because they are black. The use of racial profiling for traffic stops is also known as "driving while black,"[8] insinuating the only violation that a victim of racial profiling committed was that they were black and on the road.[9] The victims of racial profiling are forced to undergo searches, frisks, and interrogations based on their racial characteristics instead of criminal behavior.[10]

The aftermath of the September 11, 2001 terrorist attacks on American soil has expanded the traditional view of racial profiling of African-Americans to include the racial/ethnic/nationality profiling of persons of Muslim, Middle-Eastern, and South Asian descent.[11] America's implementation of legislative acts such as the USA PATRIOT Act, restrictions on the Freedom of Information Act, and other anti-terrorist policies has allowed racial profiling to exist virtually unchecked.[12]

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[6] For a discussion of the Plenary Power Doctrine, *see generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 550–60 (1990).

[7] *See supra* note 2 and accompanying text.

[8] *See* DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS, http://www.aclu.org/racialjustice/racialprofiling/15912pub 19990607.html (1999) (last visited Apr. 20, 2008) (describing what occurs when a person is stopped for "DWB" or driving while black) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[9] *See id.* (asserting that most stops are for pre-textual purposes).

[10] *See id.* (describing several scenarios where people were stopped for a DWB).

[11] *See generally infra* notes 17–45 and accompanying text.

[12] *See generally* Kam C. Wong, *The USA PATRIOT Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161 (2006) (reviewing post 9/11 policies which have allowed for the large scale preventive detention of Muslims and South Asians and a "nation's dismissive attitude towards human, civil, and constitutional rights in the face of terrorist threats").

The Department of Justice (DOJ) issued a statement in 2003 condemning the use of racial profiling for federal law enforcement.[13] President Bush is quoted as saying, in regards to racial profiling: "[I]t's wrong, and we will end it in America. In doing so we will not hinder the work of our Nation's brave police officers. They protect us every day—often at great risk. But by stopping the abuses of a few, we will add to the public confidence that our police officers earn and deserve."[14] Additionally, former Attorney General John Ashcroft is quoted as stating: "[U]sing race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement."[15] However, the DOJ's statement does allow for profiling as a tool for terrorist identification and in U.S. immigration policies.[16]

One example of profiling used in U.S. immigration policy was the implementation of The National Security Entry and Exit Registry System (NSEERS), a nation-wide program developed by the DOJ and INS that ran shortly after 9/11 until December 2003.[17] NSEERS was developed in order to screen and track non-immigrants who posed increased national security risks.[18] The NSEERS procedures mandated that non-immigrants needed to re-register and be fingerprinted if they remained in the United States over thirty days.[19] Only certain non-immigrants from qualifying countries[20] were required to go through the NSEERS Special Registration because they fulfilled an "intelligence criteria,"[21] and were identified by officials as presenting an "elevated national security risk."[22]

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[13] U.S. DEPT. OF JUSTICE, FACT SHEET: RACIAL PROFILING (June 17, 2003), http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf (last visited May 8, 2008) (denouncing the use of racial profiling and establishing guidelines to aid in the enforcement of its prohibition) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[14] *Id.* at 1.

[15] *Id.*

[16] *See id.* at 5 (stating "race and ethnicity may be used in terrorist identification," and explaining that "given the incalculably high stakes involved in such investigations, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, alienage, and other relevant factors").

[17] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY, PUBLIC INFORMATION ON SPECIAL REGISTRATION, http://www.ice.gov/pi/specialregistration/index.htm (providing the procedures for foreign nationals entering the country).

[18] *See id.* (stating that NSEERS was put in place "to keep track of those entering and leaving our country in order to safeguard U.S. citizens and America's borders").

[19] *See id.* (describing the special procedures and stating that "DHS suspended the automatic 30-day and annual re-registration requirements for NSEERS" on December 2, 2003).

[20] *See id.* (listing countries such as Iran, Iraq, Libya, Sudan, and Syria).

[21] Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm (last visited Apr. 20, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[22] *Id.*

The potential and actual use of ethnic and racial profiling to target Middle-Eastern and South Asians through the NSEERS program was apparent. The NSEERS program intentionally targeted citizens and nationals from Middle-Eastern and South Asian countries.[23] Many people who came to the NSEERS facilities to re-register were then arrested and detained for minor infractions on their visa stays.[24] Traditionally, these minor visa infractions are a civil matter and would not interrupt an alien's right to stay in the U.S.[25] Under the new policies and subsequent expansion of FBI authority to arrest and detain aliens for immigration procedures; however, the unsuspecting non-immigrants coming to re-register were apprehended.[26] The impact of the NSEERS program's profiling of non-immigrants is best articulated by Samina Faheem, Executive Director of the American Muslim Voice and Pakistan American Alliance: "This program has created a culture of anxiety, humiliation, and despair in communities throughout this country. It has made people feel like common criminals, to register and re-register every time they leave the country. We are wasting precious resources on this program."[27]

The suspected impact and abuses of the post-9/11 policies on the Muslim, Middle-Eastern, and South Asian communities became a quantified reality with the release of a report by the Inspector General of the U.S. Department of Justice.[28] The investigation focused on the Pentagon/Twin Towers Bombing (PENTTBOM) criminal investigation launched by the Federal

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[23] *See* Wong, *supra* note 12, at 192 ("As operated, the NSEERS program targeted citizens and nationals from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen, though others have been involved.").

[24] *See id.* at 192–94 (describing the impact of the "Special Registration" program on the Muslim community, including personal accounts); *see also* MAX VANZI, CAL. SENATE OFFICE OF RESEARCH, THE PATRIOT ACT: OTHER POST 9/11 ENFORCEMENT POWER AND THE IMPACT ON CALIFORNIA'S MUSLIM COMMUNITIES 10 (2004), *available at* http://sor.govoffice3.com (search full site for "Max Vanzi"; then follow "2004 Publications" hyperlink; then follow The PATRIOT Act hyperlink under May 2004 heading) (describing the procedures used in Special Registration and personal accounts of aliens arrested and detained after arriving at the NSEERS facility to re-register) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[25] *See* VANZI, *supra* note 24, at 33 ("In recent times past, even being out of status, that is, remaining in the country after a visa had lapsed, would not automatically jeopardize the immigrant's ability to remain in the country.").

[26] *See id.* ("An immigrant found to be out of status was often detained instantaneously and placed in deportation proceedings, now called removal proceedings.").

[27] American Muslim Perspective, *Immigrants Targeted for Deportation After Participating in INS Special Registration Program Speak Out*, July 1, 2003, http://www.civilrights.ghazali.net/html/body_aclu-amv_presser.html (last visited May 8, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[28] *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) (last visited May 8, 2008) [hereinafter SEPTEMBER 11 DETAINEES], http://www.usdoj.gov/oig/special/0306/full.pdf (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Bureau of Investigation.[29] The report disclosed the impact on civil rights and problems with the implementation of post-9/11 terrorism policies.[30] It found that the government detained many people, citizens and aliens, of Middle-Eastern descent as material witnesses or persons of interest based on no more than their ethnicity, association with terrorists, or just anonymous clues.[31] Additionally, the report concluded that the government's treatment of aliens held as detainees violated various constitutional provisions. For example, with regard to Due Process, the aliens had not received notice of the charges against them, endured total communication blackout for weeks, were granted no legal representation, and in some cases were exposed to full body restraints.[32]

The California Office of Research investigated the Federal Government's handling of the war on terrorism, especially the personal experiences and human costs of the government's tactics.[33] The investigation revealed that many Muslims, South Asians, and Arab immigrants living in California faced humiliation, embarrassment, and intrusion of privacy.[34] The California study blamed the mistreatment of the Muslim community on the broad power granted to federal agents to investigate and conduct surveillance, indefinite detentions, and delayed warrant searches.[35] Members of Congress, state and local governments, and various civil liberties groups called for the repeal of certain provisions in the PATRIOT Act stating they violate constitutional rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments.[36]

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[29] *See id.* (discussing "PENTTBOM," the FBI investigation into the bombing of the World Trade Centers and the Pentagon).

[30] *See* Wong, *supra* note 12, at 187 (stating that the Office of the Inspector General's investigation was one of "the most comprehensive reports conducted by the DOJ on problems with the implementation of post 9/11 anti-terrorism measures").

[31] *See* SEPTEMBER 11 DETAINEES, *supra* note 28, at 15–17 (describing how arrests of citizens and aliens were "quite general in nature" and included living in the same building or area as a suspected terrorist, landlord and civilian reports of suspicious behavior by Arabs, and Middle-Eastern men arrested for having "suspicious items" including pictures of the World Trade Center and other famous buildings).

[32] *See id.* at 113–15 (describing the communication black-out); *see also id.* at 134 (discussing the lack of access to legal counsel); *id.* at 125 (explaining the extensive security measures including subjecting alien detainees to full restraints).

[33] *See* VANZI, *supra* note 24, at 10 ("[T]he Senate Office of Research has examined the USA PATRIOT Act and associated federal powers that the government acquired to protect the country against domestic terrorism following the attacks of September 11, 2001.").

[34] *See id.* (citing examples of "incidents of humiliation, embarrassment and intrusions upon the privacy of Muslims, South Asian and Arab immigrants and, in several cases, American citizens" during the period following the 9/11 terrorist attacks).

[35] *See id.* at 13–14 (describing how many members of Congress, state and local governments, and various civil liberties groups want to repeal parts of the Patriot Act for being unconstitutional).

[36] *See id.* at 14 (describing a legal challenge to the Patriot Act that states that "the PATRIOT Act, on its face, threatens constitutional rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments").

Both the Inspector General's investigation and the California Office of Research investigation provide examples of personal accounts of profiling. In the Inspector General's report there are specific instances of ethnic and racial profiling where people were detained simply because they were Middle-Eastern and engaging in a legal activity. For example, an alien was arrested as a 9/11 detainee after a caller told the FBI that "two Arabs"[37] who seemed "extremely nervous"[38] rented a truck from the caller and only went a certain number of miles.[39] Another example in the Inspector General's report described an alien who was arrested as a September 11th detainee because a caller told the FBI that the grocery store where the alien worked at was run by many Middle-Eastern men and it was "too many to run a small store."[40]

This post-9/11 complacency towards constitutional rights violations was not only apparent in law enforcement and federal agencies; the American public began to accept profiling for potential terrorists.[41] Before 9/11, about eighty percent of the American public thought it was wrong for law enforcement to use profiling techniques which ultimately targeted African-Americans.[42] However, after the 9/11 attacks, sixty percent favored racial profiling, "at least as long as it was directed at Arabs and Muslims."[43]

Top ranking government officials also seemed to feel national security measures permitted the use of profiling. The Chairman of Homeland Security, Peter King, recently stated that airport screeners should not be hampered by "political correctness."[44] He went on to endorse the practice of "requiring people of Middle-Eastern and South Asian decent to undergo additional security checks" because of their race or religion.[45] Moreover, when an alleged plot was revealed to blow up U.S. bound planes coming from England, King was quoted as saying "if the threat is coming from a particular group, I can see why it would

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[37] SEPTEMBER 11 DETAINEES, *supra* note 28, at 17.

[38] *Id.*

[39] *See id* ("Another alien treated as a September 11 detainee was arrested at his apartment in a few days after a caller told the FBI that "two arabs" rented a truck from his vehicle rental business . . . then returned it minutes later having only gone miles.").

[40] *Id.*

[41] *See* RONALD WEITZER & STEVEN TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM (Cambridge University Press 2006) (noting that Americans became more accepting of racial profiling after September 11, 2001).

[42] *See* DAVID COLE & JAMES DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 168 (The New Press 2002) (noting the vast majority of Americans were against profiling before September 11, 2001).

[43] *Id.*

[44] J. Jioni Palmer, *King Endorses Ethnic Profiling,* NEWSDAY, Aug. 17, 2006, http://www.newsday.com/news/nationworld/nation/ny-usking0817,0,1253522.story?coll=ny-leadnationalnews-headlines (last visited May 2, 2008 ) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[45] *Id.*

make sense to single them out for further questioning."[46] King has previously stated that while not all Muslims are terrorists, all terrorists have been Muslim, so he favors an "ethnic and religious" profiling scheme.[47]

Even though national security is a major concern, the United States must remember, as stated in *Hamdi v. Rumsfeld*,[48] that "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested and it is in those times that we must preserve our commitment at home to the principles we fight abroad. . . ."[49] In accordance with the sentiment stated in *Hamdi,* many top ranking government officials have stood up against the use of racial profiling for national security means.[50] In the same article where King is quoted as approving racial profiling, NYPD Commissioner Ray Kelly stated that racial profiling is "'nuts' and 'ineffective' and [he] eliminated the practice when he oversaw the U.S. Customs Service."[51] Former Attorney General Alberto Gonzales also stated that he does not favor the practice of profiling.[52] Ahmed Younis, of the Muslim Public Affairs Council, said that besides being ineffective, profiling ostracizes a community that could be essential in helping combat terrorism: "In many ways, it is allowing the terrorists what they want, which is the betrayal of our constitutional principles and the disenfranchisement of the communities that we need the most in the war against extremism and terrorism."[53]

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[46] *Id.*

[47] *Id.* ("King, who has said that all Muslims aren't terrorists but that all recent terrorists are Muslim, favors an ethnic and religious profiling scheme that would include foreign and American-born travelers.").

[48] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). In *Hamdi*, the U.S. Supreme Court reversed the dismissal of a habeas corpus petition of a U.S. citizen who was being detained indefinitely as an illegal enemy combatant. *Id.* at 533. The issue was whether U.S. citizens who are designated as illegal enemy combatants have a right to challenge their detainment under the due process clause. *Id.* at 510. Hamdi was captured in Afghanistan in 2001, and the U.S. claimed that he was fighting for the Taliban. *Id.* Hamdi was held in Guantanamo Bay and then eventually transferred to a Brig in Charlestown, South Carolina. *Id.* In 2002, Hamdi's father filed a habeas petition. *Id.* at 511. The U.S. District Court for the Eastern District of Virginia ordered that Hamdi receive access to a federal public defender. *Id.* at 512. The Fourth Circuit reversed the District Court's order. *Id.* After the Fourth Circuit denied a rehearing petition, Hamdi's father appealed to the Supreme Court. *Id.* at 512. Eight of the Nine justices agreed that the executive branch does not have the power to hold a U.S. citizen indefinitely without due process. Justice O'Connor wrote the plurality opinion which states that due process required that Hamdi be allowed to challenge his detention. *Id.* Using the three-prong test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), Justice O'Connor stated that in this case, due process required notice of the charges and an opportunity to be heard. *Hamdi* at 533. She also stated that Hamdi had the right to access to counsel. *Id.* The Court held that U.S. citizens who are designated as "illegal enemy combatants" have a right to challenge their detainment under the due process clause. *Id.* at 535.

[49] *Id.* at 532.

[50] *See* Palmer, *supra* note 44 (citing government officials opposed to racial profiling).

[51] *Id.*

[52] *Id.* (quoting Gonzales as saying that racial profiling is "problematic").

[53] *Id.*

### *III. Why Profiling is Permitted When Applied to Aliens: An Overview of Immigration Law in the United States*

This Part will shed light on why the Fourteenth Amendment does not fully protect aliens from racial/ethnic/nationality profiling under United States' immigration law. The following overview of cases allowing laws to be enforced in the immigration context, despite constitutional defects, molds the plenary power given to the Executive and the Legislative branches of our government.

In *Chae Chan Ping v. United States*,[54] commonly referred to as the Chinese Exclusion Case, a U.S. customs officer refused to allow the Appellant, a legal alien, to return to California after a trip to China and was detained in his vessel at the California port.[55] The appellant was refused access because of a recent act of Congress that prohibited Chinese laborers from reentering the United States after having once departed.[56] Congress justified the Act on China's violation of a treaty between the U.S. and China.[57]

Appellant filed a petition alleging that his liberty was unlawfully restrained and asked for a writ of habeas corpus.[58] The Supreme Court held that the exclusion of appellant was valid, that the power of exclusion of foreigners is granted to the executive and legislative branches of our government, and that such determinations are not to be questioned by the judiciary.[59]

In *Korematsu v. United States*,[60] petitioner, an American citizen of Japanese ancestry, was convicted for remaining in a portion of a military area from which persons of Japanese ancestry were excluded.[61] Petitioner asked the Supreme Court to review the judgment affirming his conviction, arguing that the exclusion order as applied only to those of Japanese ancestry was unlawful.[62]

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[54] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[55] *Id.* at 582 (discussing the facts of the case).

[56] *See id.* at 597 (stipulating that the arrival of Chinese laborers to the United States is suspended for a period of ten years after ninety days from the passage of the act).

[57] *See id.* at 589 ("The existence of war . . . might have justified the refusal of permission to land. Anything which . . . destroys or suspends the operations of a contract, would have been effective. . . . The exclusion act . . . was invoked by way of justification.").

[58] *See id.* at 582 ("[A] petition on [Appellant's] behalf was presented . . . alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued. . . .").

[59] *See Chae Chan Ping*, 130 U.S. at 606–11 ("The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.").

[60] Korematsu v. United States, 323 U.S. 214 (1944).

[61] *See id.* at 215–16 ("The petitioner . . . was convicted in a federal district court for remaining in . . . a 'Military Area,' contrary to Civilian Exclusion Order No. 34 . . . which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area.").

[62] *See id.* at 218 (stating that petitioner urged the court to reconsider prior conclusions and to find that the Act at issue was unnecessary).

The Supreme Court held that the exclusion order was valid and based their decision on their previous holding in *Hirabayashi v. United States*.[63]

The *Hirabayshi* case attacked the 1942 Act of Congress which provided for the implementation of various exclusion orders by the Executive, including curfews and area restrictions for people of Japanese descent, as being an "unconstitutional delegation of power."[64] The Supreme Court upheld the curfew exclusion orders and stated that it was within the proper "power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack."[65] The *Korematsu* Court determined that, like a curfew, the exclusion of people of Japanese origin was necessary because "it was impossible to bring about an immediate segregation of the disloyal."[66] Further, the Court stated that "[i]n light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry."[67]

Both the Political Question Doctrine and Plenary Power Doctrine need to be discussed to understand the extent to which the Executive and Legislative branches of government are able to make unconstitutional policies in regards to domestic immigration laws that ultimately have an effect on foreign relations.

The holdings in *Korematsu* and *Hirabayashi* demonstrate the use of the Political Question Doctrine,[68] a doctrine of judicial abstention, which gives the branches unfettered discretion in the manner the laws are executed and taking action that possibly abridges constitutional freedoms as long as they involve foreign relations. The Political Question Doctrine is very similar to Plenary Power Doctrine because both allow the Executive and Legislative branch to go unchecked when acting in the sphere of foreign relations and immigration, respectively. With regard to many foreign relations and immigration related laws, the court has ruled that it is not appropriate for the judiciary to interfere based on the two doctrines.[69]

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[63] *Id.* at 217 ("[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the . . . war area."); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

[64] *Korematsu*, 323 U.S. at 217.

[65] *Id.*

[66] *Id.* at 219.

[67] *Id.* at 217.

[68] For a discussion of the Political Question Doctrine, *see* Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substituted for Due Process*, 61 U. MIAMI L. REV. 169, 170–78 (2006) (discussing the history of the doctrine).

[69] *See* Goldwater v. Carter, 444 U.S. 996, 996 (1979) (holding that whether President Carter could unilaterally break a defense treaty with the Republic of China without Senate approval was a nonjusticiable political question); *see also* Baker v. Carr, 369 U.S. 186, 210-11 (1962) (discussing in depth the political question doctrine).

Although the *Korematsu* Court firmly stated that "legal restrictions which curtail the civil rights of a single group are immediately suspect," thus the review of the law goes under rigid scrutiny, "pressing public necessity" may justify the existence of such restrictions, but racial antagonism never can.[70] However, the Court's holding allows racial profiling based not only on nationality but ancestry, if the Executive or Legislative branches deems the practice a public necessity.[71] The Plenary Power Doctrine was recently upheld when applied to a current situation involving the discriminatory treatment of Middle-Eastern aliens in the D.C. Circuit case *Narenji v. Civiletti.*[72] The *Narenji* case was an appeal from a judgment of the District Court declaring unconstitutional a regulation which required all post-secondary nonimmigrant alien students who are natives or citizens of Iran to report to a local INS office or campus representative to "provide information as to residence and maintenance of nonimmigrant status."[73] The District Court declared the regulation "unconstitutional because it violates the Iranian students' right to equal protection of the laws."[74]

The D.C. Circuit Court disagreed with the District Court's finding that there was a "discriminatory classification."[75] They stated "distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. . . ."[76] The Circuit Court reasoned that because the Iranian government has used lawless conduct, the controversy involving Iranian students in the United States lies in the field of our country's foreign affairs and implicates matters over which the President has direct constitutional authority.[77] The Circuit Court applied a rational basis review to the regulation because precedent has held that classification among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis.[78] The *Narenji* case cited the Supreme Court case *Curtiss-Wright*[79] to further support its holding that the President has full authority in foreign

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[70] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[71] *See id.* at 215 (stating that under situations of "emergency or peril" such classifications are acceptable).

[72] Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (stating the Court's current jurisprudence regarding the Plenary Power Doctrine).

[73] *Id.* at 746.

[74] *Id.* at 747.

[75] *Id.*

[76] *Id.* at 745.

[77] *Id.* at 748.

[78] *See Narenji*, 617 F.2d at 748 (supporting the use of rational basis review based on the holdings in Mathews v. Diaz, 426 U.S. 67 (1970) and Fiallo v. Bell, 430 U.S. 787 (1977)).

[79] United States v. Curtis-Wright Export Corp., 299 U.S. 304, 320 (1936).

relations measures.[80] *Curtiss-Wright* reasoned that it is not the job of the courts to pass judgment on decisions the President makes in foreign policy.[81]

### *IV. Why the Plenary Power Doctrine Should be Modified to Prevent Discriminatory Profiling of Aliens*

The rationale behind the plenary power given to the political branches of our government is antiquated and should be revised to incorporate the global standards of human rights laws. In *Chae Chan Ping v. U.S.*,[82] in reaching the conclusion that the judiciary does not have the power to pass judgment on the political branches decisions regarding foreign affairs, the Supreme Court expressed underlying hostility and racial animus towards the Chinese laborers:

> [T]hese laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful. For some years little opposition was made to them . . . but as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field. The competition between them and our people was for this reason altogether in their favorer, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. *The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seems*

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[80] *Narenji* at 748.

[81] *See* Curtis-Wright Export Corp., 299 U.S. at 320 (stating the president is in a better position than the courts because the President has the opportunity of knowing the conditions which prevail in foreign countries; i.e. his confidential sources of information and his agents in the form of diplomatic, consular and other officials). The defendant, Curtiss-Wright, was charged with illegally selling arms to Bolivia at a time when the President had issued a temporary prohibition on the sale of weapons to certain countries due to their involvement in the Chaco War. *Id.* at 311. A joint resolution of Congress had been approved on May 28, 1934, which gave the President the authority to issue such a broad commercial prohibition. *Id.* at 312. The Supreme Court rejected the defendant's argument, stating that there was "sufficient warrant for broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries." *Id.* at 329.

[82] Chae Chan Ping v. U.S., 130 U.S. 581, 594–95 (1889). This case came forth on appeal, on a writ of *habeas corpus*, which the Supreme Court denied by refusing to intervene and release the appellant from his alleged unlawful detention in the main marine harbor of San Francisco, California. *Id.* at 581. The appellant was not a U.S. citizen, but was instead a subject of the emperor of China. *Id.* at 582. The Supreme Court openly expressed thinly veiled hostility and racial discrimination towards Chinese laborers with its ruling that the judiciary lacks the authority to pass judgment on the political branch's foreign affairs decisions. *Id.* at 594–95.

> *impossible for them to assimilate with our people, or to make any change in their habits or modes of living.*[83]

The result of the Chinese Exclusion Case seemed to be more about keeping the Asian race out of the United States than exerting control as a sovereign nation. The case is criticized for being based mostly on racist views.[84] The Jim Crow laws, which were designed to exclude those of African Descent from American society, have been compared to the laws excluding Asian immigrants upheld in *Chae Chan Ping*.[85] Both the Jim Crow laws and the laws upheld in *Chae Chan Ping* were supported by a Supreme Court that believed in racial separation. The plenary power cases, such as *Chae Chan Ping*, reflect values deeply at odds with those of contemporary society.[86] Further, the government's rationale behind the discriminatory measures in *Korematsu*, that it was "impossible to bring about an immediate segregation of the disloyal from the loyal,"[87] thus validating the exclusion of the whole group, would most likely not be tolerated in contemporary society. The landmark cases of the Civil Rights movement show that contemporary society will not tolerate separation based on racial/ethnic distinctions.[88] Recent interpretations of the Equal Protection doctrine require that all people (not just citizens) be given the equal protection of the law and no person shall be deprived of life, liberty, or property without due process of law.[89]

The Equal Protection doctrine would require a very different analysis than what the *Korematsu* Court used. Although preventing terrorism is a compelling government interest, under strict scrutiny, a racially discriminatory act or law is only permissible if it is absolutely necessary to further that interest.[90] David Cole's article, which criticizes the use of racial profiling in the name of national security, calls into doubt the effectiveness of ethnic profiling by using so-called "substitution effects."[91] Substitution effects question to what extent

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[83] *Id.* at 594–95 (emphasis added).

[84] *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (explaining how Congress has not hesitated to use the plenary power recognized by the Supreme Court to discriminate).

[85] *Id.* at 25 ("There is a limited but genuine similarity between treatment of Asians and African Americans in the late nineteenth century.")

[86] *Id.* at 72 ("[Chae Chan Ping] incorrectly expressed due process limitations on the federal immigration power because they exiled residents in ways now readily seen as unfair.").

[87] Korematsu v. United States, 323 U.S. 214, 219 (1944).

[88] *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (demonstrating legal precedent for society's intolerance towards racial segregation).

[89] U.S. CONST. amend. XIV, § 1.

[90] David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1744 (2007).

[91] *See id.* at 1743–44 (agreeing with Richard Posner's analysis of ethnic profiling which observes that whether profiling a suspect group will actually make us safer depends in part on "substitution effects").

paying closer attention to Arab and Muslim aliens will "make it easier for people who do not fit that profile to elude detection."[92] Cole further argues that constitutional law should not leave the question of profiling to the political process because it has done such a poor job of protecting racial minorities in the past: "Constitutional principles protect those who are likely to be the targets of such tyranny, such as terror suspects, religious and racial minorities, criminal defendants, enemy combatants, foreign nations, and, especially in this day and age, Arabs and Muslims."[93] This is another strong argument for the modification of the Plenary Power Doctrine to prohibit profiling and general discrimination.

Recently, the D.C. District Court in *Narenji* used rational basis review, allowing the discriminatory law towards the non-immigrant school children to stand. The law most likely could not have withstood strict scrutiny.[94] The Court justified the use of the rational basis test by citing past cases which held that "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."[95] The reasoning, however, like the justification in *Korematsu* which stated it is difficult to separate the loyal from the disloyal, is antiquated.

There are two main problems with adapting a rational basis test for discriminatory treatment based on nationality. First, profiling laws that on their face focus on nationality but in application discriminate based on race or ethnicity have a disparate impact. These profiling laws and regulations are applied to all people who look like they are from a certain nation; for example, a law can specifically target all people who look Middle-Eastern under the guise of a law targeting their nationality.[96]

Second, the international view that discriminating based on nationality is acceptable behavior for a nation to engage in has changed, as discussed in-depth below.[97] The D.C. Circuit Court in *Narenji* may be viewed as contradicting itself by stating "any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions

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[92] *Id* at 1744.

[93] *Id.* at 1747.

[94] *See* Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (stating that the District Court's finding that the regulation was unconstitutional because it violated the Iranian students' right to equal protection of the laws was in error and the regulation must be sustained as long as such distinctions are not wholly irrational).

[95] *See id.* at 748 (citing Mathews v. Diaz, 426 U.S. 67, 81–82 (1970) and Fiallo v. Bell, 430 U.S. 787 (1977)).

[96] *See* SEPTEMBER 11 DETAINEES, *supra* note 28 (alleging that both the Inspector General's investigation and the California Senate of Research investigation provided examples of personal accounts of ethnic and racial profiling).

[97] *See generally, e.g.*, International Covenant on Civil and Political Rights, *supra* note 5, art. 26; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted and opened for signature* Dec. 21, 1965, 660 U.N.T.S. 212, 218, *available at* http://www2.ohchr.org/english/law/pdf/cerd.pdf; Protocol Relating to the Status of Refugees, *entered into force* Oct. 4, 1967, 606 U.N.T.S. 267.

should be adopted only with the greatest caution."[98] The Plenary Power Doctrine, which the *Narenji* court relied upon, is a rigid doctrine that does not allow judicial review of any kind to the Executive and the Legislative branch, is of the very same breed of policy that the Court warns against. The Doctrine limits the courts from the ability of checking that our political branches are responding to changing world conditions. The Plenary Power Doctrine does not allow our government, as a whole, to respond to changing world norms on discrimination.

### *V. Current International View on the Use of Profiling*

Contemporary society in the United States has denounced racial and ethnic separation as a justifiable interest to support United States laws.[99] Additionally, "the notion that an inherent part of national sovereignty is the power to discriminate against aliens on the basis of race is no longer a part of international law."[100] Support for the changing view of international law regarding the right to exclude aliens based on race includes the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[101] The ICERD, to which United States is a signatory, broadly prohibits discrimination by having the nations commit "to engage in no act or practice of racial discrimination against persons, groups of persons, or institutions and to ensure that all public authorities . . . shall act in conformity with this obligation."[102] The Universal Declaration of Human Rights states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[103] The International Covenant on Civil and Political Rights (ICCPR), to which the United States is also a party, prohibits discrimination.[104]

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[98] Narenji, 617 F.2d at 748.

[99] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (stating generally that separation based on race is not equal and therefore unconstitutional).

[100] Chin, *supra* note 84, at 60.

[101] International Convention on Elimination of All Forms of Racial Discrimination, *supra* note 97.

[102] *Id.* art. 2(1).

[103] *See* Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (stating further that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-governing or under any other limitation of sovereignty").

[104] Article 26 of the ICCPR prohibits discrimination with regard to the civil and political rights listed therein:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour,

Additional prohibitions against discrimination apply to the treatment of aliens as well as citizens. The Protocol Relating to the Status of Refugees, which the United States has ratified, requires that benefits be offered to refugees "without discrimination as to race, religion or country of origin."[105] The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."[106] Under the Third Restatement of the Foreign Relations Law of the United States, systematic racial discrimination" violates customary international law.[107]

It is important to note that recently enacted international law prohibits discrimination based on race, ethnicity *and* nationality. The ICCPR and the Universal Declaration of Human Rights expressly prohibits unequal treatment based on race, color, sex, religion, and national or social origin.[108] Additionally, the Geneva Convention provision focusing on Prisoners of War prohibits discrimination based on race or nationality.[109]

Contemporary global society begs that equal protection be applied to immigration laws, the Plenary Power Doctrine notwithstanding. Critics may argue that the plenary power of Congress and the Executive should not be governed by international law. However, the reasoning behind the plenary power expressed in *Curtiss-Wright*, which bolstered the Plenary Power Doctrine and which the D.C. Circuit relied upon in *Narenji v. Civiletti*,[110] was based on international law.

In *Curtiss-Wright* the Supreme Court said "the power to expel undesirable aliens" stems from sovereignty itself rather than the Constitution.[111] Hence, the Court explained that the scope of that power could be found "not in the provisions of the Constitution, *but in the law of nations.*"[112] Since

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sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, *supra* note 5, art. 26.

[105] Protocol Relating to the Status of Refugees, *supra* note 97.

[106] Geneva Convention relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[107] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(f) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . systematic racial discrimination. . . .").

[108] *See infra* note 104 (restating Article 26, i.e. the non-discrimination clause, of the ICCPR).

[109] *See* Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 106, art. 3 (citing the Convention for the proposition that "any adverse distinction based on race, nationality, religious beliefs or political opinions, or any other distinction founded on similar criteria" is prohibited).

[110] *See* Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), for the proposition that it is not the business of the courts to pass judgment on the decisions of the President in the field of foreign policy).

[111] Curtiss-Wright Export Corp., 299 U.S. at 318.

[112] *Id.* (emphasis added).

international law provided the background and a justification for the establishment of the Plenary Power Doctrine, courts should look at the current norms expressed by international law to ensure that United States' foreign policy conforms.

### *VI.* Lecraft v. Spain*: Background and Details of the Case Pending Before the United Nations Human Rights Committee*

The use of profiling as a tool of law enforcement is also a problem in numerous European countries.[113] Profiling is used in many different ways throughout Europe, including "disproportionate and arbitrary identity checks, stops and searches of members of ethnic minority groups, and increased patrolling of ethnic minority neighborhoods."[114] The profiling in Europe is strikingly similar to the racial/ethnic/nationality profiling used in the United States in immigration policies to target terrorists.

In 2005, the Open Society Justice Initiative, a non-governmental organization (NGO), and its Spanish partner Grupo de Estudios y Alternativas 21, conducted an in-depth study to investigate the use of ethnic profiling by Spanish law enforcement agents.[115] The Study found that ethnic profiling was being used profusely by Spanish law enforcement.[116] It also found that racial and ethnic profiling "promote[d] a self-fulfilling prophecy that justifies the initial hypothesis that minorities commit more crimes."[117] Further, the study found that immigrants in Spain are treated less respectfully during stops than members of the majority, and that "supervision and indicators of police practice efficiency in Spain appear[ed] to be weak or sometimes non existent," even though such practices were more effective means of targeting stops than racial and ethnic profiling.[118] Ethnic minorities and immigrants confirmed the study's findings, reporting that they were stopped more frequently than non-minorities.[119]

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[113] *See* DANIEL WAGMAN & BEGOÑA PERNAS, *ETHNIC PROFILING IN SPAIN: INVESTIGATIONS AND RECOMMENDATIONS*, GRUPO DE ESTUDIOS Y ALTERNATIVAS 21, June 2, 2005, http://www.justiceinitiative.org/db/resource2?res_id=103400 (follow "Ethnic Profiling in Spain: Investigations and Recommendations" hyperlink) (last visited May 8, 2008) (describing ethnic profiling and its various manifestations) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[114] *Id.*

[115] *See id.* (engaging in the study to "raise awareness and increase understanding of ethnic profiling").

[116] *See id.* at 33 (stating that "even by their own admission, police officers at every law enforcement level (municipal, regional and national) stop and arrest ethnic minorities and immigrants more often than they do Spaniards").

[117] *Id.* at 34.

[118] *Id.*

[119] *Id.* at 33 (reporting that ethnic minorities and immigrants agreed with the police assessment that they were stopped more frequently than non-minorities; some said they were stopped on a daily basis. Minorities also reported that they knew of the visual and behavioral cues tied to their ethnic minority that prompted police to stop them).

The pending case, *Lecraft v. Spain,* challenges a ruling by the Spanish Constitutional Court which held that police could target blacks for identity checks using their racial appearance as a "proxy for immigration status."[120] This case stands to be an announcement by the HRC that profiling is a form of intolerable discrimination, and perhaps a catalyst for change in the United States. In 2001, the Spanish Constitutional Court condoned the police practice of relying on specific physical or racial characteristics as "reasonable indicators of the non-national origin of the person who possesses them."[121] The Court reasoned that racial criteria are "merely indicative of the greater probability that the interested party was not Spanish."[122]

The facts of the case are as follows: Lecraft is an African-American woman of naturalized Spanish citizenship.[123] She was stopped and asked for identity documents by a National Police officer at the Valladolid railway station in 1992.[124] The National Police officer targeted Lecraft from the crowd on the platform: No other passengers on the platform were asked to provide documentation of identity.[125] When Lecraft and her husband demanded an explanation for the identity check, the officer explained that he was obligated to check the identity of persons who "looked like her," stating that "many of them are illegal immigrants."[126] The officer further clarified that he was obeying the Ministry of the Interior, which ordered National Police officers to conduct identity checks on "persons of color."[127] In response to the officer's continued requests for identification, Lecraft's husband told the officer that his request for identification solely based on Lecraft's skin color "constituted racial discrimination."[128] The officer denied that he was participating in racial discrimination and justified his actions to check certain people's identity documents "due to the high number of illegal immigrants residing in Spain."[129]

Lecraft and her husband repeatedly asked to see the police officer's own identification, informing him that they intended to file a complaint with the

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[120] *See* Lecraft Communication, *supra* note 1 ("[A]s applied, this legislation generates a disproportionate impact upon persons of the 'black race' and/or anyone else with 'specific physical or ethnic characteristics' considered to be 'indicative' of non-Spanish nationality."); Lecraft Press Release, *supra* note 2 ("The application challenges a ruling by the Spanish Constitutional Court which held that police could target blacks for identity checks because racial appearance is a proxy for immigration status.").

[121] Lecraft Press Release, *supra* note 2 (citing the Spanish Constitutional Court's decision).

[122] Lecraft Communication, *supra* note 1, at 10 (citing the Spanish Constitutional Court Judgment STC Jan. 29, 2001 (R.J., No. 13/2001).

[123] *See id.* at 2 (setting forth information concerning Lecraft).

[124] *See id.* at 6 (describing the facts of the *Lecraft* case).

[125] *See id.* ("The National Police Officer did not ask her husband, son, or any other passengers on the platform for their identity documents.").

[126] *Id.*

[127] *Id.*

[128] *Id.* (describing the encounter between Lecraft and the officer).

[129] *Id.*

National Police.[130] The officer then took Lecraft and her husband from the platform into an office where he recorded their identification information.[131] The next day Lecraft filed a complaint of racial discrimination against the National Police.[132]

After numerous appeals to the General Registry of the Ministry of the Interior, Lecraft's complaint reached Spain's National Court on April 6, 1994.[133] Two years later, in 1996, the National Court held that "residents in Spain have a general obligation to identify themselves to public authorities, and that this obligation forms part of the 'social contract.'"[134] The Court went on to state that the identity check of Lecraft was "in accordance with the general application of Spain's immigration laws as set forth in Royal Decree 1119, article 72.1."[135] The Royal Decree authorizes police officers to demand identification from any foreigners seeking to enter Spain.[136] The identity checks were also justified as long as verification of the persons' identities were necessary for "the protection of security."[137]

Lecraft's appeal of the National Court's decision to the Spanish Constitutional Court was accepted on October 5, 1998.[138] Lecraft argued that the National Police Officer's actions violated her right to non-discrimination, the right to liberty and security of person, the right to freedom of movement, the right to effective judicial protection, and the right to a fair trial.[139] On January 29, 2001, the Constitutional Court agreed with the National Court's initial ruling that Lecraft's identity stop, despite the fact that it was based on race/ethnicity, did not violate Lecraft's fundamental rights.[140] Further, the Constitutional Court found that the identification requirement did not "amount to 'patent,' or direct, discrimination since there was no specific instruction to identify an individual of a specific race."[141] The Court explained that an individual's racial or ethnic identity is a legitimate indicator of nationality, and thus, no per se discrimination

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130 *See id.* ("The Applicant and her husband continued to insist on seeing the officer's badge and DNI, informing him that they intended to lodge a complaint with the National Police.").

131 *See id.* ("The police officer subsequently led them to an office at the railway station, where he took down the Applicant's and her husband's identification information.").

132 *See id.* at 6–7 (describing the complaint filed Dec. 7, 1992).

133 *See id.* at 7–8 (documenting the complaints to the Ministry of the Interior).

134 *Id.*

135 *Id.*

136 *See id.* (describing the National Court's interpretation of the Spanish immigration laws, specifically Royal Decree 1119/1986 of 26 May, Article 72.1, that permits police officers to demand identification from any foreigners seeking to enter Spain).

137 *Id.* (describing the interpretation of Organic Law 1/92 on Citizen Security).

138 *See id.* at 8 (stating the date applicant's appeal was accepted).

139 *See id.* at 8–9 (detailing the appeal filed to the Constitutional Court).

140 *See id.* at 9 (noting that the Court in a six to one decision rejected Lecraft's claim).

141 *Id.* at 10.

occurs when it is used in a descriptive manner.[142] The Court also found it "necessary to recognize that when police controls serve the purpose [of enforcing laws to protect citizen's security], specific physical or ethnic characteristics can be taken into consideration as reasonably indicative of the national origin of the person who has them."[143]

Represented by various human rights NGOs including Open Society Justice Initiative, Women's Link Worldwide, and SOS Racismo-Madrid, Lecraft has brought her case before the United Nations HRC. In her Submission for Consideration, Lecraft argues that the police action breached her rights to non-discrimination and freedom of movement and that "prohibition of racial discrimination has become a *jus cogens* . . . of international law."[144] The United Nations HRC has recognized these very rights: "Non-discrimination together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."[145] Lecraft contends that the National Police actions violated her basic human rights as recognized in international law.[146]

Lecraft bases her claim on Articles 2, 12(1) and 26 of the ICCPR.[147] Article 2(1) obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without discrimination of any kind, "such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[148] Article 26 of the ICCPR establishes the right to non-discrimination as an autonomous right by prohibiting discrimination "in law or in fact in any field regulated and protected by public authorities."[149]

Lecraft finds further support for her claim in the General Comments of the ICCPR. The ICCPR prohibits both direct and indirect discrimination, as stated in the Human Right's Committee's General Comments:

> The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race,

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[142] *See id.* (characterizing how the Constitutional Court dealt with the issue of whether or not an assumption about national identity based on race was per se discriminatory).

[143] *Id.* at 10–11.

[144] *Id.* at 11–12.

[145] *See id.* at 12 (incorporating in her Communication language from the United Nations Human Rights Committee, *General Comment No. 18: Non-Discrimination*, ¶ 1, U.N. Doc. A/45/40 (Oct. 11, 1989).

[146] *Id.* at 3 ("This case involves multiple violations of the ICCPR, including the rights to non-discrimination on the basis of race, colour, national or social origin, or other status, and freedom of movement. . . .").

[147] *See id.* at 23 (specifying which Articles of the ICCPR Lecraft contends that Spain violated).

[148] International Covenant on Civil and Political Rights, *supra* note 5, art. 2(1).

[149] *Id.* art. 26.

> colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose* or *effect* of nullifying or impairing the recognition enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[150]

The U.N. HRC recently accepted *Lecraft v. Spain* for review.[151] Currently, the Applicants have not heard any further information regarding when the case will be heard before the Committee.[152] Informal sources have confirmed that Spain received notification but have yet to respond to the communication submitted for consideration to the ICCPR regarding *Lecraft v. Spain*.[153]

The Executive Director of the Open Society Justice Initiative feels strongly that "this case is important because racial and religious minorities are increasingly being subjected to police stops and scrutiny. We are asking the HRC to make clear that racial profiling is unlawful."[154]

## *VII. Potential Impact of U.N. Human Rights Committee Ruling in* Lecraft v. Spain *on the United States' Use of Profiling Aliens*

The arguments being brought before the HRC in *Lecraft v. Spain* for why racial profiling is against international law and the ICCPR are similar to those for the modification of the Plenary Power Doctrine, which would allow the judiciary to prohibit the executive and legislative branches from making laws that allow the profiling of aliens.[155] Those similar arguments allege that certain aliens targeted for profiling are not given equal protection under the law, the right to be free from discrimination, and the freedom of movement.[156] Additionally, the argument that direct or indirect discrimination violates the ICCPR supports the prohibition of immigration laws that are justified in nationality profiling, but have a disparate impact of racial/ethnical profiling. Discussed below are ways in which the HRC's decision could affect the United States' Plenary Power Doctrine, in particular the power given to the political branches to make laws that have a the impact of discriminating against certain aliens.

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150 U.N. Human Rights Committee, *General Comment No. 18: Non-Discrimination*, ¶ 1, U.N. Doc. A/45/40 (Oct. 11, 1989) (emphasis added), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument.

151 E-mail from Indira Goris, Representative for Rosalind Williams Lecraft through the Open Society Justice Initiative (Oct. 4, 2007) (on file with author).

152 *Id.*

153 *Id.*

154 *Id.*

155 *See supra* notes 84–86 and 90–93 and accompanying text.

156 *See* Lecraft Communication, *supra* note 1 (alleging that racial profiling restricts these basic rights).

If the HRC decides that profiling by police and other government agents is not a violation of the ICCPR, the Unites States' recent practice of profiling aliens for anti-terrorism measures will go on unhindered. If the HRC ruling holds that the practice of racial or ethnic profiling is unlawful and a violation of the ICCPR, however, then the ruling may have strong implications on our branches of government and subsequently on the Plenary Power Doctrine.[157]

The HRC ruling will likely not have an immediate direct effect on the United States' foreign policy. The United States Senate ratified the ICCPR in June 1992.[158] On its face, under the U.S. Constitution this condition may be assumed, upon ratification by the Senate, to be "the Supreme Law of the Land."[159] However, the United States conditioned its consent to the ICCPR by attaching reservations, understandings, and declarations (RUDs).[160] No RUDs exist to Articles 2,[161] 12(1),[162] and 26[163]of the ICCPR.[164] More importantly, however, the United States took an exception to the treaty, stating it was not self-executing.[165] The ramifications of the ICCPR not being a self-executing treaty are that without an additional piece of legislation from Congress, an individual citizen of the United States cannot base a claim on provisions of the ICCPR.[166]

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[157] *See* Roper v. Simmons, 543 U.S. 551, 554 (2005) (using the international law rulings against the death penalty to support the U.S. decision that death penalty for juveniles should not be lawful).

[158] *See* International Covenant on Civil and Political Rights, Ratification Status, http://www2.ohchr.org/english/bodies/ratification/4.htm (last visited May 8, 2008) (listing signature and ratification dates of all signatory parties) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[159] *See* U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

[160] *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 424 (2d ed. 2005) (describing the process of ratification subject to reservations).

[161] *See* International Covenant on Civil and Political Rights, *supra* note 5, art. 2(3)(a) ("Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.").

[162] *See id.* art. 12(1) ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

[163] *See id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground. . . .").

[164] *See* DECLARATIONS AND RESERVATIONS at 26–27 (2008), http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservationsICCPR.pdf (setting forth Reservations made by the U.S. upon ratification) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[165] *Id.* at 28 ("That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").

[166] Christopher Harland, The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents, 22 Hum. Rts. Q. 187, at 253 (2000) (quoting Core Document Forming Part of the Reports of States Parties: United States of America, U.N. GAOR, Hum. Rts. Comm., addendum, ¶ 134, U.N. Doc. HRI/CORE/1/Add.49 (1994)) ("In the United States system, a treaty may be 'self-executing,' in which case it may properly be invoked by private parties in litigation without any implementing legislation, or 'non-self-executing,' in which case its provisions cannot be directly enforced by the judiciary in the absence of implementing legislation.").

This means that even if the HRC finds that profiling violates provisions of the ICCPR, a victim of profiling cannot sue the law enforcement agency responsible for profiling under the ICCPR. Additionally, a victim of profiling in the United States cannot file a complaint stating a violation of the ICCPR with the United Nations HRC because the United States has not ratified the First Optional Protocol to the ICCPR.[167] This basically allows official discriminatory actions to go unchecked by judicial review, leaving the victim without recourse.

Not all hope is lost, however; an HRC holding in *Lecraft v. Spain* announcing that racial profiling violates the treaty and is against international law can still have a substantial impact on the laws in America, despite the ICCPR not being self-executing. The first way that the HRC ruling can affect U.S. law is for the U.S. court system to limit the Plenary Power Doctrine by deciding, in a future case, that profiling of certain aliens is against customary international law.[168] The HRC ruling will be used as evidence of such customary international law.[169] Customary international law is a form of the "law of nations" found in the Constitution under Art. 1 Section 8.[170] Even though the U.S. has made reservations on the ICCPR and declared the treaty not self-executing, the U.S. is still obligated to follow customary international law.[171] Further, customary international law makes no distinction between the treatment of aliens and citizens.[172] The Supreme Court has looked at customary international law as persuasive authority in the past to overturn statutes.[173]

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[167] *See First Optional Protocol to the International Covenant on Civil and Political Rights*, http://www2.ohchr.org/english/bodies/hrc/procedure.htm (last visited May 8, 2008) ("Communications . . . cannot be considered unless they come from a person . . . subject to the jurisdiction of a state that is party to the optional protocol.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, http://www2.ohchr.org/english/bodies/ratification/5.htm (last visited May 8, 2008) (providing that, as of March 2008, the U.S. had not ratified the protocol) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

[168] *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

[169] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 884 (1980) (stating that "customary international law is derived from the usage of nations, judicial opinions and the works of jurists. . .").

[170] *See* U.S. Const. art. 1, § 8 ("Congress shall have Power to . . . define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.").

[171] *See Filartiga*, 630 F.2d at 882 (stating although the United Nations Charter was not wholly self-executing, "the prohibition [against torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution. . . .").

[172] *See id.* at 884 (stating that official torture is prohibited by the law of nations and that the prohibition is clear and unambiguous and admits no distinction between the treatment of aliens and citizens). Similarly, the ICCPR makes no distinction between aliens and citizens.

[173] *See* Roper v. Simmons, 543 U.S. 551, 554 (2005) (using the international law rulings against the death penalty to support the U.S. decision that death penalty for juveniles should not be lawful).

Moreover, the Supreme Court, in *Lawrence v. Texas*,[174] used international law holdings to justify its holding. In *Lawrence*, the Supreme Court cited both to British law and to a decision by the European Court of Human Rights, stating that the decision of the European Court of Human Rights (deciding that laws proscribing the conduct of sodomy were invalid) was important to the sodomy case being brought in the United States because the current U.S. law was at odds with Western civilization; this was persuasive to the Court's decision.[175]

The second way that the HRC ruling on racial profiling will have an impact on foreign policy, in particular the Plenary Power Doctrine, is through the transnational legal process (Process). The Process helps answer why "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[176] The Process is defined as "the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems."[177] The Process takes into account the "'regular interactions across national boundaries . . . when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization. Multinational enterprises, nongovernmental organizations, and private individuals re-emerg[e] as significant actors on the transnational stage."[178]

The Process by which norm-internalization occurs has three phases.[179] The first stage is when one or more transnational actors "provoke an interaction (or a series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation."[180] The HRC ruling will be an interpretation of a global norm for the parties interacting and

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174 Lawrence v. Texas, 539 U.S. 558 (2003).

175 *See id.* at 573 (describing the authority used to decide *Lawrence*). The court stated:

> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

*Id.* In *Lawrence*, plaintiff brought a case to strike down a Texas anti-sodomy law, claiming it was against the Equal Protection clause of the Fourteenth Amendment. *Id.* at 563. The Court used the decision of the European Convention on Human Rights as persuasive evidence that the anti-sodomy law is not in line with what the rest of Western civilization deems appropriate. *Id.* at 573. The Court held that the anti-sodomy law in Texas was unconstitutional as applied. *Id.* at 585.

176 Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2599 (1997) (quoting LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted)).

177 *Id.* at 2602.

178 *Id.* at 2624.

179 *See id.* at 2646 (suggesting that the process can have three phases).

180 *Id.*

discussing the ICCPR treaty.[181] Second, during these interactions, "the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system."[182] Third, these series of transactions generate a "legal rule that will guide future transnational interactions between the partie[s], [and] future transactions will further internalize those norms" and push for legislation and internalization of the norm (for example, that profiling is wrong) in the United States.[183]

Critics of the Process mainly favor an empirical balancing test for why states will comply with international rules.[184] These critics feel the state's interest is more focused on the cost-benefit analysis of following the rules instead of the internalized norms of international players such as NGOs.[185] Critics contend that whatever is in the state's best interest, rather than how individuals feel about issues, is what guides a state to follow international law.[186]

This approach eliminates the human aspect of political dealings and ignores the fact that a state's laws, especially a democratic state's, are created by individuals who feel strongly about issues, including on a personal level, and are not created simply by what individuals think will better advance a state politically or economically. Additionally, the welfare and equal treatment of citizens and people in the United States is a legitimate state interest that cannot be decided based on a cost-benefit analysis because it is influenced by the standards articulated by international law. Moreover, critics state that international law is limited because it is "bounded by . . . state interests and the distribution of power."[187] However, the United States is obligated by the

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[181] *See id.* at 2646 ("[The] interaction . . . forces an interpretation or enunciation of the global norm applicable to the situation.").

[182] *Id.*

[183] *See id.* (discussing generally the process in which the various interactions of international actors generate an international legal rule).

[184] *See generally* Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463 (2006) (summarizing the theory of international law written in the book *The Limits of International Law* in stating that international law emerges from and is sustained by nations acting rationally to maximize their interests, given their perception of the interests of other states, and the distribution of state power). States' moral obligations under international law are described as a null set: "Nations have no moral obligation to comply with international law, and liberal democratic nations have no duty to engage in the strong cosmopolitan actions so often demanded of them." *Id.*; *see generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford University Press 2005).

[185] *See* Goldsmith & Posner, *The New International Law Scholarship*, *supra* note 187, at 467 ("When international law changes, as it often does, it does so because state interests (again, state preferences over international relations outcomes) change due (for example) to changes in technology, or in relative wealth, or in domestic government.").

[186] *See id.* (arguing that state interest is a prevalent motivating factor).

[187] *Id.* at 468.

Constitution to follow the laws of nations and not to do an empirical balancing test as to whether it is in our best interest to follow international law.[188]

Further, the Process has worked in the past in the United States.[189] For example, during the Anti-Ballistic Missile Treaty Reinterpretation Debate, NGOs guided the Process and ultimately forced the United States to obey internalized norms.[190] In 1972, "the United States and the U.S.S.R. signed the bilateral Anti-Ballistic Missile Treaty (ABM Treaty), which expressly banned the development of space-based systems for the territorial defense of the United States."[191] In 1985, the Reagan Administration proposed the development of a space-based antiballistic missile system (Strategic Defense Initiative) for American territorial defense.[192] The Reagan Administration tried to broadly "reinterpret" the ABM Treaty to allow for the Strategic Defense Initiative, "essentially amending the treaty without the consent of the Senate or the Soviet Union."[193] This amendment upset many present and former government officials and many NGOs.[194] These actors fought for the original interpretation of the treaty that forbade the development of the Strategic Defense Initiative.[195] The ABM Treaty controversy was discussed and argued at Senate hearings, debates over other arms control treaties, journal articles, and op-ed columns.[196] Consequently, Congress withheld appropriations for any Strategic Defense Initiative testing that did not conform to the original ABM Treaty, and "the Senate reported the ABM Treaty Interpretation Resolution, which reaffirmed its original understanding of the treaty."[197]

It is easy to see how the HRC ruling stating that racial profiling is unlawful and against the ICCPR could be adopted by many government officials and NGOs as an internalized norm.[198] These actors would eventually push for the judicial, legislative, and executive branches to prohibit policies that allow for

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[188] *See* U.S. Const. art. I, § 8 (stating Congress has the power to define and punish offenses against the "Law of Nations" and, arguably, to establish at least a minimum of international rights and duties of the United States).

[189] *See* Koh, *supra* note 176, at 2647–48 (explaining the success of the norm-internalization process with regard to the Reagan Administration's "Star Wars" initiative).

[190] *Id.* at 2647 (explaining how two NGOs, the Arms Control Association and the National Committee to Save the ABM Treaty, aided the rally in support of the original, narrower, treaty interpretation as opposed to the broader interpretation of the Reagan Administration).

[191] *Id.*

[192] *Id.* ("In October 1985, the Reagan Administration proposed the Strategic Defense Initiative (SDI), popularly called 'Star Wars,' . . . for American territorial defense.").

[193] *Id.*

[194] *See id.* (discussing the "eight-year battle" that followed this action).

[195] *See id.* ("[N]umerous present and former government officials . . . rallied in support of the original treaty interpretation.").

[196] *See id.* (discussing the various fora in which the "controversy raged").

[197] *Id.*

[198] *Id.* at 2602. ("[I]nternational law norms . . . help construct national identities and interests through a process of justificatory discourse.").

the profiling of aliens because proscription conforms to their internalized norms and the international norm.[199] With multiple discussions and debates on the use of profiling by law enforcement agencies post-9/11 in Congressional hearings, journals, newspapers, and even on television,[200] the norm that profiling in any context is wrong may be internalized by the United States. This internalization could then lead to action by the judiciary to limit the Plenary Power Doctrine that allows profiling in the name of national security.[201]

## *VIII. Conclusion*

There is no question that the practice of profiling aliens has permeated into United States' immigration law enforcement policies.[202] As research and personal accounts tell us, post-9/11 use of profiling by law enforcement targets individuals of Middle-Eastern or South-Asian descent, many of whom are Muslim.[203] The landmark case *Lecraft v. Spain* should call more attention to the evils of discrimination and profiling, which chip away at fundamental constitutional liberties.[204] If the HRC ruling declares racial profiling illegal under both international law and the ICCPR, then the internalization of this international norm by NGO's and state actors will help spur the judiciary to limit the Plenary Power Doctrine to prohibit policies and laws that allow for the profiling of aliens. Victims of profiling could then have a better way to defend themselves against the imposition of restrictions on their freedom.

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[199] *See id.* at 2646 (stating the second step in the norm-internalization process includes seeking to internalize the new international norm into the other party's internal normative system).

[200] *See id.* at 2647 (stating how the mid-1980s ABM Treaty controversy was discussed and argued at Senate hearings, debates over other arms control treaties, journal articles, and op-ed columns).

[201] The Plenary Power Doctrine's vitality rests primarily on the fact "that it is so firmly embedded in Supreme Court precedent that stare decisis plays a major role in keeping it alive" and thus "the Court could . . . limit its force through the adoption and strengthening of other doctrines." Derek Ludwin, *Can Courts Confer Citizenship? Plenary Power and Equal Protection*, 74 N.Y.U. L. REV. 1376, 1384–85 (1999).

[202] *See generally* Sharon L. Davies, *Symposium: Reflections on the Criminal Justice System After September 11, 2001: Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2002).

[203] SEPTEMBER 11 DETAINEES, *supra* note 28 (discussing accounts of ethnic and racial profiling where the individuals detained were detained primarily because they were of Middle-Eastern descent).

[204] The issues before the HRC are that the police action breached Lecraft's rights to non-discrimination and freedom of movement and that racial discrimination has become a *jus cogens* of international law. The HRC has stated: "[N]on-discrimination together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." Lecraft Communication, *supra* note 1.