A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?

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I seek not what his soul desires.
He dreads not what my spirit fears.
Our Heavens have shown us separate fires.
Our dooms have dealt us differing years.
Our daysprings and our timeless dead
Ordained for us and still control
Lives sundered at the fountain-head,
And distant, now, as Pole from Pole.
Yet, dwelling thus, these worlds apart,
When we encounter each is free
To bare that larger, liberal heart
Our kin and neighbors seldom see.

— Rudyard Kipling

INTRODUCTION

The past few decades have produced formidable scholarly efforts that have examined,[1] questioned,[2] criticized[3] and even shielded[4] the

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[1] *See, e.g.*, SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 1-121 (1984) (surveying methodology, documentation, and bibliography of public international law); Deborah Z. Cass, *Navigating The Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341, 341-44 (1996) (defining traditional public international law); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 1-11 (1988) (describing discipline and method of international law).

[2] *See, e.g.*, Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience*, 34 DUQ. L. REV. 277, 277 (1996) (stating that

theoretical and philosophical foundations of public international law[5] and liberal theory.[6] All of the international frameworks or paradigms attempt to explain the traits of international law and to address contemporary international issues.[7] Pragmatically speaking, the notion of methods or frameworks to international law as utilized here is the application of various approaches in an attempt to explain and address the actual problems the international community faces.[8]

This work reviews an important shortcoming of the dominant public international paradigm and the recent methodical responses to that edifice. Specifically, this article argues that issues of race have not been significantly addressed in international law discourse. In particular, this Article notes that in the theoretical discourse some writers have discussed race, but the thrust of the discourse marginalizes the importance of race. In the practice of in-

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realistic understanding of international law does not yet exist); R. St. J. MacDonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1, 3 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983) (lamenting loss of control over discipline of international law due to specialization and fragmentation); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 273 (1940) (asserting positivist international law's weakness in ignoring reality).

[5] *See, e.g.*, ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW?: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 1-11 (1986) (positing that international law has not been and cannot be purely positivist); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 1 (1989) (asserting that international law's traditional normative approach is faulty and should reflect social determinants); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621-43 (1991) (arguing that traditional international law ignores women's voices).

[4] *See, e.g.*, THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 483-84 (1995) (proposing modifying state-centered system of international law instead of radical change); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438 (Robert W. Tucker ed., 2d ed. 1966) (arguing that international law is valid even when understood as part of national law).

[5] *See* David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417, 418 (1994) (stating that in past two decades volume of scholarly work that is rethinking international law has increased).

[6] This debate is commonly referred to as the discourse on the methods or methodology of international law. *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 291 (1999) (stating that debate regarding public international law turns on methodology); *see also* ROSENNE, *supra* note 1, at 1 (asserting that questions regarding nature and purpose of international law are hotly debated).

[7] *See* Ratner & Slaughter, *supra* note 6, at 292 (noting that theories of international law explain nature of international law but may not always be relevant to contemporary issues).

[8] *See id.* (asserting that international law theory must be analyzed in light of its relevance to contemporary issues).

ternational law, people of color are affected but rarely recognized in policy debates. Additionally, this work attempts to explain how a discourse that positions race at the center of the discourse increases the prospect of a coherent view of international law. At its core, this work recognizes that both the traditional approach and its responses contain some virtue, but are woefully lacking in at least one important respect. The existing approaches to international law fail to adequately explore the consequential nature that race has played in the development of international law. By reviewing the theoretical foundations of the approaches and by providing vivid examples of the racialized nature of movements in international law, this article will demonstrate how race has been a real but unspoken determinant of international policy. This Article, in addition to acknowledging the beginnings of a new race-based approach to international law, formally proposes a race-focused international discourse in order to ensure that an often determinative variable to international action is not at best relegated to merely one of a host of potential relevant factors to international policy making. Following a handful of scholars who have begun to address the impact of race on certain international issues, this paper calls for the recognition of a race-focused discourse that will extend and expand the scope and depth of international dialogue, as well as ensure an inclusion of diverse voices in the already robust debate that is the methods discourse on international law. Finally, a race approach to international law will attempt to debunk the purported objectivity of the liberal paradigm and question the reality of the humanitarian rhetoric that is at the root of international law.

I. THE TRADITIONAL DISCOURSE

Traditional international law contains two doctrines that seek to provide the rationale for the rules of international law that validate the actions of nation-states.[9] Proponents of these doctrines attempted "to formulate a philosophical justification for the binding force" that international law has on nation-states.[10] The first is the

[9] See J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 49 (Humphrey Waldock ed., 6th ed. 1963) (stating that two rival doctrines attempt to explain why states must observe international law).

[10] Kennedy, *supra* note 1, at 17 (stating that traditional scholars struggled to justify why sovereigns should adhere to international law).

fundamental rights doctrine, which is a corollary of the doctrine of the "states of nature," also known as natural law, is one such justification.[11]

"Under the 'fundamental rights' doctrine, principles of international law can be deduced from the essential nature of the State."[12] Hence, much like individuals, "every State, by virtue of [being a state,] is endowed with certain fundamental, inherent, or natural rights."[13] However, recent responses to the traditional approach have criticized this theory because it is based on a naïve faith in a moral order or authority.[14]

The second traditional doctrine, positivism, asserts that international law is simply an aggregation of rules consented to by nation-states.[15] Under this theory, international law is reduced to the acquiescence of nation-states.[16] Thus for positivists, international law consists of the rules to which nation-states have agreed through treaties and custom.[17] Consequently, the nation-state or sovereign is the protagonist in the international drama, and in the absence of the nation-state's consent to a particular international law it is free to undertake whatever act it pleases.[18] Not surprisingly, the two underlying theoretical foundations of the traditional approach to international law conflict. While the natural law framework advocates an ordained basis for legitimacy, the positivist basis posits a consensual basis for legitimacy.

Despite the tension between them, the traditional doctrines to international law have produced what has been described as an uneasy positivist truce.[19] This positivist formulation has been referred to by its chief twentieth century proponent, Hans Kelsen, as

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[11] *See id.* at 17-18.

[12] Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 270, 303 (1999).

[13] *Id.*

[14] *See, e.g.*, Kennedy, *supra* note 1, at 16 (stating that ancient scholars' faith in moral order is dated because scholars today find distinction between legal and moral norms).

[15] *See* Ratner & Slaughter, *supra* note 6, at 293 (stating that international law comprises set of rules nations agree to through treaties, custom, or otherwise).

[16] *See id.* (stating that positivists assume nations are free to act unless nations choose to abide by international law).

[17] *See id.*

[18] *See id.* (stating that positivists view nation-states as only subjects of international law).

[19] *See* Kennedy, *supra* note 1, at 3 (stating that modern international lawyers in United States harmonized naturalism and positivism).

the pure theory of law.[20] Under the pure theory, the authority of law is not questioned but explained. As was recently observed, positivism

> is not necessarily taking the so-called bad man's view of the law, namely, that people would only obey the law because they fear . . . punishment . . . . For most of the time, most obey the law because they regard the law to rest upon moral order and to derive its legitimization from it.[21]

As this quote verifies, the so-called positivist truce is often explained by terminology that resembles the doctrine of natural rights.

And yet, the truce has not eradicated the traditional doctrines of which it is comprised. One vindicator of the traditional paradigm, Thomas Franck, has argued that the very consent-based structure of the international formulation promotes adherence among nation-states, and thereby legitimacy, because it accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of agreed upon formal requirements.[22] Such observations reflect the view that the primary subjects of international law are the nation-states.

The nation-state is thus "the authoritative political institution" which as a result has dominion or sovereignty over its citizens,[23] and is equal to all other nation-states.[24] This position is evidenced by the international court of justices holding that international law does not address individuals directly.[25] Though individuals can be beneficiaries of international legal norms, the traditional paradigm continues to assume that norms that affect individuals will be neu-

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[20] *See* HYMEN EZRA COHEN, RECENT THEORIES OF SOVEREIGNTY 57-79 (1937) (describing Kelsen's theory of international law as pure jurisprudence); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence,* 55 HARV. L. REV. 44, 44 (1941) (explaining how pure theory is positivist).

[21] KEOKOK LEE, THE POSITIVIST SCIENCE OF LAW 187 (1989).

[22] *See* FRANCK, *supra* note 4, at 25-26 (stating that legitimacy of rules is based on belief that rule exists and operates because process that created rule is correct).

[23] COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 1 (I. William Zartman ed., 1993).

[24] *See* CRAWFORD YOUNG, THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE 27-30 (1994) (outlining territorial and power limitations inherent in concept of "state")

[25] *See* Anglo-Norwegian Fisheries (U.K.V. Nor.), 1951 ICJ Rep. 166; Fisheries Jurisdiction (U.K.V. Ice.), Merits, 1974 ICJ Rep.

trally applied.[26] This belief appears to stem from the premise that the nation-state will act in the best interest of its constituency.

The classic positivist contends that the "[l]aw is regarded as a unified system of rules that . . . emanate from the will of the [nation-state]."[27] "This system of rules is an 'objective'" and legitimate reality, unlike the subjective questions of what the rules should be, that emanates from the nation-state's will,[28] so that in a sense, positivism is the acceptance of the systemization of international order.

II. THE RESPONSE TO THE TRADITIONAL APPROACH

The positivist-naturalist conventional doctrines, which are at the bedrock of the dominant liberal paradigm, have produced ample criticism. The critiques, which are rooted in a variety of theoretical methodologies, challenge the conventional doctrines. Particularly this is achieved by contesting the efficacy of the positivist formulation.

Arguably, the most prominent current critique stems from a group of theorists who have been labeled "new stream" scholars. This group, influenced by critical legal studies, seeks to move beyond the doctrine and relevance of law by exposing the contradictions of traditional international discourse.[29] In so doing they seek

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[26] *See* Charlesworth et al., *supra* note 3, at 625 (stating that international jurisprudence assumes that international norms directed at individuals are universally applicable).

[27] *See* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999) (describing classic positivism as associating law with emanation of state will).

[28] *See id.* (stating that classic positivism views legal rules as objective and divorced from subjective concerns).

[29] *See* Ratner & Slaughter, *supra* note 6, at 294 (describing *New Stream* scholars as influenced by critical legal studies and seeking to focus on contradictions of international law discourse). Anthony Carty described the range of critical legal studies' influence when he noted:

> Critical international legal studies . . . opposes itself to positivist international law, as representative of an actual consensus among States. [It asks] whether a positive system of universal internal law actually exists, or whether particular States and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others *as if it were a universally accepted legal discourse.* So post-modernism is concerned with unearthing difference, heterogeneity and conflict *as reality* in place of fictional representations of universality and consensus.

Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 66 (1992).

to refine an understanding of the importance of culture and policy in the development of international law.[30]

Another critique of the traditional discourse is from the camp of international law and relations. This group, known as the IR/IL camp, provides an interdisciplinary approach that seeks to incorporate political science and international relations insight into international law.[31] Meanwhile, another group, the New Haven or policy-oriented jurisprudence has taken an approach that eschews positivism's structuralism and formalistic adherence to rules.[32] This method views law as a process towards making decisions.[33] It shares with legal realism a focus on the empirical: on delineating the problem in the context of relevant conditioning factors.[34] After considering a problem in that light, this group seeks to resolve the problem in accordance with "a world public order of human dignity."[35]

Finally, feminist scholars have introduced an approach, known as feminist international jurisprudence,[36] which seeks to emphasize the significance of gender relations in the creation of international law. This group also questions international law's claim to objectivity and impartiality and challenges the traditional separation of public from private in the international law discourse because it serves as a tool for excluding gender issues.[37]

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[30] *See* Ratner & Slaughter, *supra* note 6, at 294 (stating critical legal studies scholars emphasize culture in development of international law); Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT'L L. 615, 615 (1996) (reviewing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW (1995)) (stating that *New Stream* scholars wish to shift focus to culture and policy).

[31] *See* Ratner & Slaughter, *supra* note 6, at 294 (describing IR/IL school as seeking to incorporate international relations theory). This piece is a survey of several critiques and is not to be interpreted as an extensive study of all the methodological approaches to international law. *See generally* Symposium, *Method in International Law*, 93 AM. J. INT'L L. 291 (1999).

[32] *See* Ratner & Slaughter, *supra* note 6, at 293-94 (describing New Haven School as rejecting positivism's objectivity and instead emphasizing policy).

[33] *See id.* at 294.

[34] *See* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 317-18 (1999) (stating that policy-oriented theory brings attention to relevance of context).

[35] *See id.* at 334 (stating that policy-oriented theory seeks ultimately to reflect global interest in human dignity).

[36] *See* Ratner & Slaughter, *supra* note 6, at 294 (stating feminist scholars seek to examine international law to reflect how it reflects men's domination).

[37] *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 392 (1999) (concluding that feminist approach to international law seeks to question objec-

While exerting different methods, all these critics of the traditional paradigm seem to share a common belief that in practice the actions of nation-states rarely comport with the humanitarian rhetoric of the traditional edifice.[38] Put another way, the responses examine the failure of international law to provide a viable framework for deterring and responding to human rights violations.[39] The new stream critiques, while considered harsh, are relevant in that they argue that the focus of the traditional paradigm is based on contradictory justifications that result in an inherent indeterminacy.[40] For example, they reject the positivist's blanket acceptance that what is fundamental is determined by mere sovereign agreement that such things are fundamental.[41] These critiques challenge the dominant paradigm by questioning the adherence to the normativity of the nation-state.[42] Accordingly, they note that the acceptance of the virtue of the sovereign or nation-state and its actions ignores the contemporary upheavals and transformations that will not stay swept under some static rug.[43]

Recently, a pointed critique of the positivist paradigm by the policy-oriented camp observed that positivism's "focus on 'existing' rules, emanating solely from entities deemed to be equally 'sovereign' does not properly reflect the reality of how law is made, applied and changed."[44] They noted that positivism "remains fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that

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tivity because this ignores gender); Charlesworth et al., *supra* note 3, at 644 (concluding that relegating gender issues to private discourse is inappropriate).

[38] *Cf.* Ratner & Slaughter, *supra* note 6, at 295 (noting that symposium question regarding accountability for human rights was accepted by all authors espousing differing methodologies).

[39] *Cf.* Kennedy & Tennant, *supra* note 5, at 419-20 (noting that new approach scholars are critical of international law's traditional response to what such scholars find important).

[40] *See* Ana Sljivic, *Why Do They Think It's Yours?: An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT'L L. & ECON. 393, 431-33 (1997-98) (stating that new stream scholars criticize traditional discourse because conflicting theories are continually advanced, thus leading to indeterminacy).

[41] *See* CARTY, *supra* note 3, at 110 (questioning whether mere acceptance of rule by states proves its validity internationally); KOSKENNIEMI, *supra* note 3, at 20-21 (noting that determining validity of international law is uncertain because standard to be used is uncertain).

[42] *Cf.* Paul H. Brietzke, *Self-determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69, 92-95 (1995) (noting that increased relevance of human rights concerns, interdependence, and nongovernmental organizations erode sovereignty).

[43] *See id.* at 102.

[44] Wiessner & Willard, *supra* note 34, at 320.

arises today or tomorrow in very different circumstances."[45] Thus, the thrust of the critiques of the traditional liberal international law paradigm has been whether the paradigm can adequately address and respond to the needs of those who are affected by actions of nation-states.

Given this deficiency, some of the critics, such as the policy-oriented approach and the international relations approach, have expounded alternative approaches to reach solutions for international law.[46] While others, such as the feminist critique, rather than discerning ultimate truths or explanations to international issues, have tried to shift the positioning of the discourse so as to insure that certain issues are not marginalized.[47] This latter group, building on deconstructionist philosophies, has introduced different perspectives or modes of emphasis that were omitted from the traditional discourse.[48] Some of these critics have concluded that international regimes that seem too weak to pursue an intended political program and, unable to withstand scrutiny, are also too technocratic to assist those in need.[49]

Despite the differences, a common trend exists among all critics. They all assert that the philosophical and theoretical structures justifying nation-states' compliance with the rules of international law have failed to cause nation-states to comport with these rules. This has produced incoherence in the application of international law, which in turn marks the utter failure of international law to achieve the reforms that were the impetus for its creation.[50] These critiques of the dominant formulation often also assert that the liberal foundations of the internationalist edifice fail to address the

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[45] *Id.*

[46] *See* Ratner & Slaughter, *supra* note 6, at 293 (noting that legal positivism, international legal process, policy-oriented, critical legal studies, international law and relations, feminism, and law and economics theories represent major theories of international law today).

[47] *See* KOSKENNIEMI, *supra* note 3, at 476-501 (using critical legal studies approach to critique the traditional discourse); Charlesworth et al., *supra* note 3, at 621-25 (challenging male dominated formulation of international law).

[48] *See supra* note 3 and accompanying text (using deconstructionist philosophy to criticize traditional discourse).

[49] *See, e.g.*, David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 103 (noting that "technocratic excesses and political weakness" renders lesser developed countries unable to help needy).

[50] *See* CARTY, *supra* note 3, at 1 (stating that no legal system comprehensively defines duties of states); Kennedy, *supra* note 1, at 2 (stating that international public law exists with its stated goal); Kennedy & Tennant, *supra* note 5, at 418.

problem of indeterminacy.[51] This problem of indeterminacy may display itself in different fashions. Namely, the indeterminacy may arise from decision-making that is not predictable, which is particularly troubling in the vast array of international context in which issues may arise. In addition, indeterminacy may arise from unpredictable value clashes.[52]

Professor David Kennedy, quite possibly the leading explorer of the traditional paradigm, has apparently come to a similar conclusion. He described the methodology of international public law as giving the appearance of movements from imagined origins to a desired end, but in actuality existing precariously and ever fluctuating among the constructed imagined points.[53] This critique of the positivist paradigm also recognizes that a considerable amount of cynicism stems from the traditional discourses anointment of the sovereign state as the core being of international order.[54] Related to this critique is the argument that the dominant liberal tradition of international law also produces policies and practices that are skewed against progressive politics.[55] In part because the new stream approach has introduced issues of consequence, such as culture and race, that had previously not been addressed, this paper will further explore this new wave of critiques.[56]

The new stream or new approaches group has attempted to shift the forms of international legal scholarship from analysis of doctrine to acceptance of the determinative quality of culture and policy.[57] The leader and founder of the New Approaches to International Law, or NAIL group, David Kennedy, recently described the traditional international law theorist as being constantly worried

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[51] *See, e.g.*, Peter Halewood, *Violence and the International Word*, 60 ALB. L. REV. 565, 569 (1997) (arguing that positivist and naturalist theories of international law collapse because of indeterminacy).

[52] *See* Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1472-73 (1990) (arguing that value clashes occur because law is same as politics).

[53] *See* Kennedy, *supra* note 1, at 38 (defining distinction between substance and process in international law).

[54] *See id.*

[55] *See* Carty, *supra* note 29, at 66 (focusing on contradictions in international law discourse).

[56] *See* Cass, *supra* note 1, at 341-42 (arguing that difference between mainstream and "new stream" changed perception about international law and public policy); Simpson, *supra* note 30, at 615 (explaining that "newstream" scholars shift focus from doctrine to culture).

[57] *See* Simpson, *supra* note 30, at 615 (stating that Kennedy has established new school of legal study).

about the ability of international law to accurately reflect the sovereign's will and to bring sovereign behavior within its ken.[58] He added that the traditional theorist is virtually always searching for better methods to enforce norms in international society and feels the need to defend international law even when enforcement seems unlikely.[59]

Kennedy notes that for the traditional theorist, law and culture occupy different stages of development.[60] In fact, cultural differences precede the move to the moral high ground of the law.[61] Kennedy argues that the internationalist seeks to build bonds among states by being agnostic about culture, by having no culture.[62] Another writer similarly observes western legal theory views law as an autonomous, abstract, and rational entity distinct from the society it regulates.[63] To the internationalist, the problem of culture disappears because it is equated with the notion of the nation-state.[64] In what perhaps would be of interest to critical race theorists, one of Kennedy's most recent works emphasized this point by means of the narrative mode of discourse, also referred to as explanation by metaphor. This story or metaphor will be the starting point of a movement that my colleague Tayal Mahmud in a panel at this conference somewhat fancifully characterized as a RAIL or Race Approaches to International Law.

In order to reveal the shortcomings of the traditionalist, Kennedy asks us to envision the traditionalist as a photographer, and the sovereign as the subject of his photograph.[65] Kennedy likens the traditionalist focus on the global to the local to that of a photographer's adjustment of the lens to capture the lake behind Aunt Betty's head.[66] Like Uncle Chuck, whose insistence on getting into the picture would be annoying to the photographer, culture throws

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[58] *See* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 Utah L. Rev. 545 (describing weaknesses in mainstream international law theory).

[59] *See id.*

[60] *See id.* (discussing precursors to mainstream international law).

[61] *See id.*

[62] *See id.*

[63] Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Nation*, 12 AM. U. J. INT'L L. & POL'Y 903, 971 (1997) (questioning supremacy of Western views to detriment of "multicultural dialogue").

[64] *See id.* at 967-68 (arguing that international law is "sovereign-centric").

[65] *See* Kennedy, *supra* note 58, at 551.

[66] *See id.*

a wringer into the international scene or snapshot.[67] According to Kennedy, culture may embody a host of issues and identities — ethnic, religious, familial, gender, racial, and indigenous.[68] Meanwhile, Aunt Betty, much like the sovereign is, as the result of the intrusion, no longer the focal point of the picture. She is reduced to merely a participant in the picture. At this point Kennedy's story essentially ends and a RAIL critique would begin.

What could RAIL effectuate?

A Race Approach to International Law could have the effect of including voices of people of color, even if they may be part of the intellectual elite that heretofore had not been adequately heard. While these voices may not represent all race perspectives, they may force the dominant gaze to consider differing perceptions of reality. A RAIL critique would invite race-centered international discourses from both within and without the United States. This is not to say that there have not been voices from the third world. However, there are numerous cultures within the United States. In a sense, because of the amalgam of cultures, nationalities, and races within this country, the United States has within itself the so-called first through third world, and as many as possible of those voices should be heard. The multicultural make-up of this country virtually ensures that international issues will affect people in this country. In particular, the voices of immigrants whose family originate from the so-called third world are often directly as well as indirectly affected by international law, but are rarely examined. Some examples of this impact include the recent incarnations of immigration and free trade issues arising in this country's relations with Mexico.[69] As the Chinese exclusion cases also demonstrate, the racialized history of U.S. immigration laws has literally affected the color of the migration of people into this country, who all too often live with immutable characteristics of both citizen and alien or foreigner status.[70] Similarly, the "free-trade benefits" of NAFTA,

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[67] *See id.*

[68] *See id.*

[69] *See* Gil Gott, *Critical Race Globalism? The Complex Relationship of Race and Globalization*, 33 U.C. DAVIS L. REV. 1503 (2000); Tanya K. Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 732-33 (1997) (stating that immigration laws with Mexico create middle class buffer); Kevin R. Johnson, *Race, the Immigration and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111, 1136-38 (1998) (describing "war" on illegal aliens from Mexico).

[70] *See* Neil Gotanda, *Asia American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1088-96 (Hyung-Chan Kim

which do not include "free or unrestricted migration," implicate the alien as well as those here who, because of race and ethnicity, are all too often treated as aliens.[71]

A RAIL critique could expand upon NAIL's cultural critique generally and Critical Race and LatCrit theories' focus on race in particular. It will likely be similar to the feminist international critique by seeking to examine the effect of international legal processes and norms that emanate from a western and accordingly white Eurocentric construction.[72]

A RAIL approach would also likely reject the assumption that there is some overarching neutral standpoint, a nonpolitical academic standard that allows this method of politics to be discussed from the outside of particular methodological or political controversies.[73] RAIL will likely question the normativity of the nation-state since it often is a mere reflection of majority voices and given the dominant international structure all too often promotes a form of European or western domination.[74] As was recently observed, "international law owes its origins to European Cultural norms which maintained that nation's owed duties to others of the same race."[75] "International law was a distillation of European cultural norms into a system of rules."[76] A clear division of the world into European and non-European realms marked international law.

RAIL could advance a variety of goals forcing the dominant perspective to appreciate the impact of European domination on the international discourse, an issue that has long been masked in the

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ed., 1992) (describing problems with racial stratification); Ediberto Román, *The Alien-Citizen Paradox: and other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 7 (1999) (describing citizenship of native-born Chinese).

[71] *See* Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121, 122-26 (1998) (discussing operation "wetback," in which Mexicans were deported by U.S. authorities in 1950s).

[72] *See* Charlesworth et al., *supra* note 3, at 613 (exposing gender bias of American legal theory).

[73] *See* Martti Koskenniemi, *Letter to the Editor of the Symposium*, 93 AM. J. INT'L L. 352, 354 (1999) (stating that international law is hopelessly old-fashioned with formalistic arguments).

[74] *See* Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 339 (1996) (arguing that there is no one representative nation-state).

[75] Gordon, *supra* note 63, at 936 (describing how Westerners did not value rights of indigenous people).

[76] Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 733 (1993) (describing how culture distilled Europeans from non-Europeans).

façade of neutrality. Such an emphasis will focus on the impact international policies or rules have on racial minorities, thereby continually providing a race conscious voice in international law.[77] In a sense, this approach would respond to Elizabeth Iglesias' call to expand the parameters of the antisubordination agenda of critical theory by highlighting the myriads ways in which white supremacy is embedded in the structures of privilege.[78] Heretofore critical race critics have focused on domestic struggles for racial justice.[79] While this Article's call for a race conscious examination is perhaps a novel approach, it is one that has already begun with scholars, such as Antony Anghie,[80] Ruth Gordon,[81] and Robert Williams,[82] who have examined a series of international issues from a critical race perspective.[83] This work is an effort to acknowledge this movement that is in its fledgling, as well as formally recognize the international critical race theory efforts as RAIL.

A race-focused discourse will likely depart from NAIL in the nature of the focus of the dialogue. While a discourse on culture could include race, issues of race would be relegated to a component part of the "cultural" focus. However, the amalgam of issues that can be included in the term culture fail to sufficiently capture

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[77] *See* Charlesworth et al., *supra* note 3, at 634 (noting Eurocentric view of international law).

[78] *See* Elizabeth Iglesias, *Out of the Shadow: Making Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Theory*, 19 B.C. THIRD WORLD L.J. 349, 358-64 (1998) (discussing how minorities display common trait in that white majority dominates culture and politics).

[79] *See id.* at 381.

[80] *See* Antony Anghie, *"The Heart at My Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 499 (1993) (describing failure and collapse of mainstream theory).

[81] *See* Gordon, *supra* note 63, at 963 (using critical race perspective to re-examine international law).

[82] *See* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 666-67 (1990) (using critical race perspective to address indigenous peoples' rights).

[83] *See* Isabelle R. Gunning, *Arrogant Perception, World Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries*, *in* CRITICAL RACE FEMINISM: A READER 352, 353-54 (Adrien K. Wing ed., 1997) (stating negative impacts of ethnocentrism); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 575 (1997) (combining critical race theory with international human rights); Henry J. Richardson, III, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 7 (1996) (arguing that "Failed States" should not pass into international law); 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, 404-05 (1997) (using critical race perspective to examine human rights issues).

the importance of race in many international issues. Much in the same way the feminists recognized the importance and need for a gendered emphasis, there is similarly a need for a race focus. In a recent work on the subject, Professor Gott emphasized the need to "reinvigorate the analysis of global white supremacy and, in so doing, inject Critical Race and LatCrit approaches into the growing mass of critical perspective on globalization."[84]

RAIL would emphasize conversations and dialogue, rather than the production of a single, triumphant truth.[85] RAIL would assert and focus on the importance of race, which would contain an intersectional component[86] by including, out of necessity, other related areas such as gender in international law. The intersection between RAIL and a feminist critique on certain international issues will create paradigm shifts from a RAIL discourse critiquing the traditional framework. Unlike a critique of white supremacy, when addressing an international issue that implicates race as well as gender that are oppositionally situated, such as in the case of Female Genital Mutilation, a RAIL critique would have to struggle with its goals and any proposed solution. When addressing controversial issues such as Female Genital Mutilation ("FGM") a RAIL critique would have to struggle with the conflicts concerning sovereignty, cultural relativism, and European or Western paternalism on the one side and human dignity, health, inviolability and sanctity of the body to be free from what many believe is a form of torture. In such a delicate debate a RAIL discourse may tread dangerously close to sanctioning violence or replicating western constructions of the so-called "other" on the third world. The question will likely turn on whether there are truly universal foundations to international law. In a sense a FGM examination from a RAIL critique will be another question of the moral foundationalism of the law. From this writer's perspective, obviously tainted by western norms, an exhaustive RAIL critique of FGM would ultimately conclude that the sanctity of human dignity and inviolability should

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[84] *See* Gott, *supra* note 69, at ___.

[85] Charlesworth et al., *supra* note 3, at 614-15 (questioning why feminism is not part of new stream legal theory).

[86] *See generally* Kimberlé Crenshaw, *Race, Gender, and Sexual Harrassment*, 65 S. CAL. L. REV. 1467 (1992) (introducing concept of intersectionality which arises when systems of subordination meet).

overcome concerns of sovereignty and western paternalism.[87] If successful, a race discourse could produce a reformation of international law that could insure all people, including those of the third world within and outside of the United States, are addressed and hopefully respected in international law.[88] Just as NAIL reminds us of the importance of culture and the feminist methods remind us of the need to consider gender, RAIL would bring to the forefront the significance of race in the international discourse. For instance, a RAIL critique would acknowledge the humanitarian interests behind the United Nations' military involvement in Bosnia, but would question the lack of similar interest in the taking of innocent lives in Rhwanda, and the utter silence of the domestic media in addressing these apparently fungible people.

In this sense, RAIL would enhance both NAIL and a fledgling discourse known as TWAIL or Third World Approaches to International Law. The TWAIL discourse, which is difficult to describe and research because of the lack of easily identifiable writings which would be considered TWAIL works,[89] is predominantly viewed as stemming from scholars originally mentored by NAIL founders, but who originate from various countries and are engaging in a third world perspective to the international law critique.[90] Nonetheless, a RAIL critique can be understood by analogism to

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[87] *See* Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1516 (1992) (arguing that when institutions ignore differences between men and women, women's issues will be ignored); Hope Lewis, *Between IRUA and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 10-12 (1995) (stating that women's concept of dignity outweighs sovereignty concerns); *see also* Jaimee K. Wellerstein, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 113-15 (1999) (arguing that because genital mutilation is such culturally-bound practice, U.N. must work with individual countries to abandon custom).

[88] *See* Charlesworth et al., *supra* note 3, at 644 (noting that restructuring international law could lead to revisions of state responsibility).

[89] *See generally* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 105 (1986) (describing unifying factors of TWAIL research); THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION xi (F. Snyder & S. Sathirathai eds., 1987) [hereinafter THIRD WORLD ATTITUDES] (stating that fluctuation of new states makes "Third World" fluctuating concept).

[90] *See* Kennedy & Tennant, *supra* note 5, at 418-20 (describing volume of scholarly work from third world countries).

the manner in which critical race theory is perceived as a response to critical legal studies.[91]

RAIL, as alluded to before, follows Critical Race and LatCrit theory by emphasizing that which is at the heart of what NAIL's Kennedy described as culture.[92] Instead of using the broad but cautious term of culture, RAIL would seek to have the international focus on the underlying and equally broad component relevant to virtually all legal discourse, race and the myriad of all its constructions. This is a significant contribution in that when we talk of culture, of minorities, of difference, of colonialism, of the first and third world, we are engaging in a discourse about race. Until this moment much of international discourse on race has masked the importance of race through the use of these other labels and has avoided race because many find it discomforting.

To illustrate how RAIL could force the global discourse to face the uncomfortable, let us return to Professor Kennedy's metaphor about the picture. A RAIL approach would add to the vista an issue that is so immersed with racial implications, but whose existence amazingly is rarely openly addressed.

When last we discussed Aunt Betty's picture, Kennedy compared Uncle Chuck's insistence on entering the frame to culture thrusting itself unto the traditional discourse. RAIL enhances this image by reminding us that part of the international picture involves all sorts of people of color that are too often, while not in the picture, the subjects of Aunt Betty's writings, the white or European description of the picture. RAIL in other words would be akin to a "color-advanced" film product, which would ensure that the viewer captures a truer picture of what has transpired.

Furthermore, by tapping into the antisubordinate, anti-essentialist nature of Critical Race and LatCrit theory, RAIL would force us to ask a few more questions. For example, if Uncle Chuck were African American, Latino, or Asian American, would he be in

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[91] Much of the TWAIL movement originates from the Harvard Law School's Conferences on New Approaches to International Law, in which some workshops focused on addressing the outsider's perspectives to traditional international law. The TWAIL working groups attendees reviewed works from such renowned theorists as Edward Said and Frantz Fanon. These papers, not unlike certain NAIL critiques, questioned the Eurocentric perspective of nineteenth and twentieth century history and attempted to debunk the nostalgic romanticism associated with the age of imperialism.

[92] I here seek to take ownership of the outsider perspective to international law if for no other reason that TWAIL other than discussion groups arising in workshops held by Harvard professors at Harvard, to me, does not qualify as at least a scholarly movement.

the picture? If so, then why did it take so long to include Uncle Chuck in the frame, which by analogy could very well be the theoretical discourse? Given the delay, will he ever truly be a participant in the practical discourse — will he ever be allowed to take the picture? Which, given the amount of control the photographer has over the final product, begs the question; who is currently taking the picture?[93]

While at first blush, this RAIL perspective as a theoretical progeny of NAIL appears to be narrow, upon closer examination it would provide a fuller discourse by forcing traditionalists and other participants in the method debate to face the reality of race, which does not neatly fall within the paradigm of the sovereign. A RAIL approach would challenge the assumptions of other methodological approaches. Specifically, it would question whether issues of race continue to be marginalized. In so doing RAIL would invite all of the outsiders' voices.[94] Unlike other approaches, it would not necessarily replicate the hierarchy it seeks to question as it was not conceived by inside international intelligentsia[95] and arguably did not originate in Europe or Cambridge, Massachusetts.

Functionally speaking RAIL could provide a critique of a concrete problem that is faced or avoided in the international community. Contrary to both the traditionalists and those that critique them, a RAIL critique would seek to focus on race in order to add an emphasis to new approaches. The following is an example of a RAIL discourse concerning the international issue of colonialism. By looking at the relatively small amount of race-focused discourse in the area of self-determination movements,[96] a RAIL discourse

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[93] As this article argues, the photographer, until this moment, has been the white male traditionalist.

[94] *See, e.g.*, Rosi Braidotti, *The Exile, The Nomad, and The Migrant: Reflections on International Feminism*, 15 WOMEN'S STUD. INT'L F. 7, 9 (1992) (embracing importance of multiple literacies); Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 191 (1991-92) (recognizing importance of views of others within identified group).

[95] *See* Kennedy, *supra* note 1, at 2 (demonstrating public laws' repetition of simple narrative structure).

[96] *See* HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 1-10 (1995) (discussing role of anti-Semitism in Nazi movement). Colonialism is defined as a relationship of domination between an indigenous (or forcibly imported) majority and a minority, of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers in pursuit of interests that are often defined in a distant metropolis. Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule. *See* JURGEN OSTERHAMMEL, COLONIALISM 16-17 (1999).

could bring to the forefront an issue that has been, in the past, merely a component of a cultural discourse.

This approach would enhance the dialogue in that, as Antony Anghie observed, "colonialism and the developing country experience is one that still remains to be elaborated and theorized in terms of its role in the making of international law."[97] And yet, with the exception of certain scholars in fields outside the law, such as Edward Said and Rubin Weston,[98] and within the legal academia, such as Ruth Gordon,[99] Antony Anghie,[100] and Henry Richardson,[101] in the context of colonial discourse race has been an all too often marginalized theme.

Despite this marginalization, issues of race permeate international and colonial discourse.[102] Issues of race have arisen subtly in a form of western paternalism that was and is at the heart of colonial discourse. This form of paternalism actually legitimized the institution of colonialism through nineteenth century notions such as manifest destiny and the white man's burden. More recently, in the League of Nations Mandate System and the United Nations Trusteeship System the theme was no less pervasive. Using terms such as "advanced," "matured," "sacred trust," "civilized," and "failed states," international bodies have used thinly veiled euphemisms for race in their international law lexicon.[103] These loaded terms have typically legitimized western determinations of when people of color could be endowed with the basic human right to rule themselves.

For instance, the United States' major twentieth century colonial expansion began as a consequence of the Spanish-American War.[104]

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[97] Kennedy & Tennant, *supra* note 5, at 422.

[98] *See* EDWARD SAID, CULTURE AND IMPERIALISM (1993); RUBIN WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946 (1972).

[99] *See* Gordon, *supra* note 63; Ruth Gordon, *Some Legal Problems With Trusteeship*, 28 CORNELL INT'L L.J. 301 (1995).

[100] *See* Anghie, *supra* note 80.

[101] *See* Henry J. Richardson, III, *Gulf Crisis and African-American Interest Under International Law*, 87 AM. J. INT'L L. 42 (1993).

[102] *See, e.g.*, FRANK FUREDI, THE SILENT WAR: IMPERIALISM AND THE CHANGING PERCEPTION OF RACE 236-38 (1998); SAID, *supra* note 98, at xxiv-xxvii.

[103] *See* Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 540 n.110 (1994) (noting that powerful "metropolitan" nations would freely intervene in affairs of current and former colonies); *id.* at 545 (associating "colonialism" with racism).

[104] *See* Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. IX, 30 Stat. 1754, 1759 (giving United States Congress sole right to determine "civil rights and political status" of "native

One of the repercussions of these conquests was the development of a United States Supreme Court jurisprudence that embraced colonialism. In a series of decisions known as the Insular cases the Supreme Court affirmed colonialism via issues of race and racial constructions.[105] And yet, few legal scholars and even fewer law school courses address this constitutional development.[106]

The Insular Cases occurred after the Spanish-American war, in a time of intense governmental debate over the fate of the territories acquired by the United States as booty of war.[107] While the debate centered on the largest possessions, Puerto Rico and the Philippines, the Island of Guam was also acquired.[108] Prior to this period the United States philosophy towards expansion as evidenced by the Northwest Ordinance of 1787 was acquisition of territories with the intention of future incorporation as states of the Union.[109] However, unlike its previous acquisitions, following the Spanish-American war, the United States occupied "offshore" territories in the Caribbean and the Pacific that were inhabited by people of color who had different cultures and spoke different languages.[110]

This distinction was the basis for the United States' development of a different approach towards incorporation with respect to these territories. Ultimately, the U.S. decided to take up a share of the white man's burden, and acquire distant lands while maintaining

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inhabitants" of lands ceded by Spain); UNITED STATES, 1 ANNUAL REPORTS OF THE WAR DEPARTMENT 15 (1902), *reprinted in* DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 55 (2d ed. 1964) (noting acquisition of Puerto Rico by United States in Spanish-American War); *see also* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3 n.1 (1985) (noting United Supreme Court jurisprudence affirming Congressional policies in Puerto Rico).

[105] *See, e.g.*, De Lima v. Bidwell, 182 U.S. 174, 196-97 (1901) (stating that Congress has power over acquired territories and their people fettered only by Constitution); Downes v. Bidwell, 182 U.S. 244, 279 (1901) (plurality opinion) (commenting upon "serious" consequences if inhabitants of unincorporated territories or their children become citizens en masse).

[106] *See* TORRUELLA, *supra* note 104, at 3-4. The leading scholarly work on the United States's relationship with its territorial possessions, *Defining Status: A Comprehensive Analysis of United States Territorial Relations,* for instance, is largely devoid of any references to the racial implications of the United States conquests. While this work is truly impressive and I have learned much from it, the book only discusses race in four pages of a 757 page book and largely focuses on racism among the inhabitants of the territories. *See* ARNOLD LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 102-05 (1989).

[107] *See* JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 4-5 (1979).

[108] *See* LEIBOWITZ, *supra* note 106, at 17.

[109] *See id.* at 6.

[110] *See id.* at 4; *see also* Roman, *supra* note 70, at 7.

the inhabitants of said territories in a subordinated status. From the statements of congressional leaders to the decisions of the United States Supreme Court, the determinative role that the race of the inhabitants played in this debate is unequivocal.[111]

For example, at a time when Filipinos were portrayed as "physical weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large clumsy feet,"[112] Representative Payne argued for preferential treatment for Puerto Rico via the census reports which demonstrated that Whites, generally full-blooded white people, descendants of the Spaniards, outnumbered by nearly two-to-one the combined total of Negroes and mulattoes.[113] Similarly, Representative Spight stated, "how different the case of the Philippine Islands. . . . The inhabitants are of wholly different races of people from ours — Asiatics, Malays, Negroes and mixed blood."[114] Representative George Gilbert further delineated the role of race when he warned against "open[ing] wide the door by which these Negroes and Asiatics can pour like the locusts of Egypt into this country."[115] Senator William Bate concurred with this sentiment when he proclaimed "let us not take the Philippines in our embrace to keep them simply because we are able to do so . . . . Let us beware of those mongrels of the East with breath of pestilence and touch of leprosy."[116]

The race debate concerning these territories is not limited to legislative history.[117] It also became part of United States Supreme Court jurisprudence. The *Insular Cases*, as mentioned earlier, created this permanency by endorsing territorial expansion and legitimizing colonialism. This effectively proclaimed American imperialism as constitutionally permissible. In *Downes v. Bidwell*,[118] Justice Brown, writing for the plurality warned: "If the[] inhabi-

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[111] *See* CABRANES, *supra* note 107, at 29-31; Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U. P.R. 225, 235 (1996); *see also* Downes v. Bidwell, 182 U.S. 244, 282 (1901) (asserting "that in the annexation of outlying . . . possessions grave questions will arise from differences of race" that would not arise "in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of Indians").

[112] 33 CONG. REC. 3613 (1900) (statement of Sen. Bate) (quoting from Report of Philippine Commission to President).

[113] *Id.* at 1941 (statement of Rep. Payne).

[114] *Id.* at 2105 (statement of Rep. Spight).

[115] *Id.* at 2172 (remarks of Rep. Gilbert).

[116] *Id.* at 3616 (remarks of Sen. Bate).

[117] *See* Kennedy & Tennant, *supra* note 5, at 419.

[118] 182 U.S. 244 (1901).

tants [of offshore territorial acquisitions] do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages of civilized, are such . . . . If such be their status, the consequences will be extremely serious."[119] Justice Brown further elaborated upon the prevalent Anglo-Saxon nativistic thought:

> If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.[120]

Justice White's opinion concurring in judgment further justified disparate treatment by warning against "the evil of immediate incorporation."[121] This shibboleth would open up the borders to "millions of inhabitants of alien territory" who could overthrow "the whole structure of the government."[122] Justice White's racially based incorporation doctrine is still effectively the law of the land and forms the basis for the existing disparate treatment of the residents of America's island dependencies.

Racial undercurrents were also at the heart of the global movement against colonialism, through the right of self-determination.[123] Self-determination is regarded as the right of a people to pursue freely, absent outside pressure, their political and legal status as a separate entity.[124] Self-determination is grounded

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[119] *Id.* at 279.

[120] *Id.* at 287.

[121] *Id.* at 313.

[122] *Id.*

[123] *See* Gordon, *supra* note 99, at 317-23.

[124] *See id.* at 320-21; Otto Kimminich, *A "Federal Right" of Self-Determination?*, *in* MODERN LAW OF SELF-DETERMINATION 85, 85 (Christian Tomuschat ed., 1993) (determining "right to self-determination . . . as the right of people or a nation to determine freely by themselves without outside pressure their political and legal status as a separate entity") (quoting Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Background and Practical Application*, 691 REVUE DE DROIT INT'L DE SCIENCES DIPLOMATIQUES ET POLITIQUES 259, 263 (1991)); Ediberto Román, *Empire Forgotten: The United States Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1127-61 (1998) (examining principle of self-determination with reference to dominion of United

on human rights precepts that recognize that all people are equally entitled to be in control of their own destinies. The principle is based on ideas of human freedom and equality, and is, as such, at odds with colonial rule or any other similar form of foreign determination.[125] As Professor Ruth Gordon notes, however, after World War I, the principle was applicable only to certain Europeans.[126] Any semblance of self-determination for non-Europeans was embodied in the League of Nations Mandate System.[127] Article 22 of the League of Nations Covenant called upon "advanced" guardians over certain colonies and territories that were incapable of self-rule.[128] These people who were categorized as incapable of self-rule were, as luck would have it, in many instances nonwestern Europeans, and in virtually every other instance residents of the third world.[129]

The reality is that, rhetoric about self-determination aside, under the framework of the mandate system, self-determination was essentially unavailable for the less-advanced people of the Third World.[130] Instead, these people, absent their consent, were entrusted to the tutelage of "advanced nations." Typically European or descendants of Europeans were responsible for the well-being and development of their charges and carried out this responsibility as a "sacred trust" of civilization.[131]

While the United Nations Charter referred to and adopted the principle of self-determination, it simultaneously retained vestiges of the subordinating mandate system through the Trusteeship System. So much so that Chapters XI and XII of the United Nations Charter established that self-determination for non-self-governing territories was to proceed at a pace dictated by the colonial administrators. Article 73(b), for instance, called upon the signatories "to develop self-government . . . according to the particular cir-

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States over people of Puerto Rico); *see also* Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1291-97 (1991) (identifying challenges facing self-determination under international law); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52-56 (1992) (tracing roots of doctrine).

[125] *See* James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 22 GA. L. REV. 309, 320 (1994).

[126] *See* Gordon, *supra* note 63, at 935.

[127] *See* Franck, *supra* note 124, at 53-54.

[128] LEAGUE OF NATIONS COVENANT art. 22, para. 2.

[129] *See* Franck, *supra* note 124, at 54.

[130] *See id.*

[131] LEAGUE OF NATIONS COVENANT art. 22, paras. 1 & 2.

cumstances of each territory and its peoples and their varying stages of advancement."[132] Article 76 likewise included a duty "to promote the . . . advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples."[133]

Again, the signatories of the charter were the so-called advanced nations and those who were to be "developed" were people of the third world. The largely demeaning and insulting proclamations contained in the international documents have a Messianic tone that reflects the self-proclaimed advanced nations' self-depiction as the White Messiahs, who utilize paternalism to perpetuate the so-called white man's burden of manifest destiny. Indeed, even the methodology of the trusteeship system, with terms such as advanced nations and sacred trust, is brimming with paternalism and, despite the countervailing nuances, resembles the nineteenth century's white man's burden of manifest destiny.

However, a change in the face of the international community occurred shortly after World War II via the formation of several "socialist democracies" in Eastern Europe as well as the liberation of a number of countries subjected to colonial domination. This latter group gained political independence as a result of the erosion of the colonial empires of France, the United Kingdom, Belgium, the Netherlands, Portugal, and Italy.[134] One scholar observed that this liberation resulted from a series of forces including indigenous liberation efforts, the increasing cost of empire, and a philosophical shift in the perception of empire by those doing the subjugating as well as the international community generally.[135] Those nations liberated during the first two decades after the war, including Syria, Lebanon, India, Pakistan, Burma, Libya, Tunisia, Morocco, Sudan, Ghana, Malaya, and Guinea,[136] showed, as Antonio Cassese has noted, "striking similarities to the emancipation of slaves which had taken place in the second half of the nineteenth century in the U.S. In both cases the people gaining emancipation

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[132] U.N. CHARTER art. 73, para. 6.

[133] *Id.* art. 76, para. 6.

[134] *See* CASSESE, *supra* note 89, at 67.

[135] *See* Neta C. Crawford, *Decolonization as an International Norm: The Evolution of Practices, Argument, and Beliefs, in* EMERGING NORMS OF JUSTIFIED INTERVENTION 37, 38 (Laura W. Reed & Carl Kaysen eds., 1993).

[136] *See id.*

were black and in both instances freedom came as a result of a war" which was not waged for the purpose of freedom from slavery or colonial rule, and which the black or colonial peoples did not begin or dictate.[137]

As a result of this liberation movement political life in the international community changed dramatically as western countries were no longer in a state of complete domination.[138] Not surprisingly, the newly formed developing countries, which were largely non-western and non-white, recognized a unifying factor in their desire to end colonial rule and the attendant western focus.[139] During the transition period of international structure the newly created countries recognized that the forms of modernity that were imbedded in international thought did not fully respond to their needs. These new countries, backed by socialist states, prompted a revision of the rules of international law.[140] Among the major changes that resulted from the creation of the new countries was reconfiguration of the legal focus of the United Nations. Notions of self-determination, decolonization, and racial equality became major points of the international community's legal agenda.[141] Fortunately, some of the goals on this agenda were met. For instance, in 1960 and 1966, three covenants on human rights included the current substantive components of the right of self-determination.[142] These resolutions were followed by other proclamations concerning the right of self-determination.

As this brief portrayal of recent international movements in the area of de-colonization demonstrates, it was only after people of color were free from the binds of colonialism that decolonization became a focus of the international community. More recently, several scholars have recognized that current discussions concerning colonialism in the context of the failed states phenomenon has had an equally racialized tone.[143] The following discussion will demonstrate the very different solutions proposed by those schol-

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[137] *See* CASSESE, *supra* note 89, at 66.

[138] *See id.* at 68.

[139] *See id.*

[140] *See id.* at 70.

[141] *See id.* at 72.

[142] *See* G.A. Res. 2625 (xxv), U.N. GAOR, 25th Sess., Supp. No. 28, Annex, Preamble, at 123, U.N. Doc. A/8082 (1970); G.A. Res. 2200 (xxi), U.N. GAOR, 21st Sess., Supp. No. 16, Annex, Part I, art. 1, at 49, U.N. Doc. A/6316 (1966); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

[143] *See, e.g.*, Gordon, *supra* note 63, at 903-40; Richardson, *supra* note 83, at 1-28.

ars within the traditional framework versus those who have examined the problem from a critical race perspective or framework.

The concept of failed states has arisen in large part due to the phenomenon of disintegrating, collapsed, or failing governments of recently decolonized African countries such as Somalia, Rwanda, and Liberia.[144] The concept of a failed state or government arises when, due to civil strife, war, or other calamity, a country's government is unable to discharge basic governmental functions.[145] These failed functions include an inability to: maintain control over its territory; provide oversight of its own resources; collect revenue; maintain an adequate infrastructure; and maintain law and order. While several solutions have been proposed to address this problem, most have suggested that the failed governments relinquish their authority to the United Nations or similar group of nation-states.[146] They have proposed a form of trusteeship or conservatorship,[147] which may last for decades or until the problem is fixed.[148] Professors Gordon and Richardson have responded to these proposed solutions by observing that they are a call to return to the paternalistic and cultural elitism that justified colonialism in the first instance.[149] Instead of focusing on an inclusive paradigm that will incorporate the views of those directly affected and propose cooperative diplomacy, the primary response was to return to foreign subjugation. As this ongoing dilemma demonstrates, even during these "enlightened times" when the third world is in trouble, the first and primary solution is to return these "failed" groups to the supervision of the advanced nations.

Thus, despite the fact that it was not directly mentioned, race has been and still remains an essential component in the decolonization movement which was geared towards the granting of freedom to all peoples as well as the discourse on how to treat the recently de-colonized who are facing serious problems. As these

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[144] *See* Gordon, *supra* note 63, at 913-16; *see also* Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 533-36 (1999) (focusing on Somalia).

[145] *See* Gordon, *supra* note 63, at 915.

[146] *See, e.g.*, Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Dec. 22, 1992, at 3; Paul Johnson, *Colonialism's Back – and Not a Moment Too Soon*, N.Y. TIMES, Apr. 18, 1993, at 22.

[147] *See* Johnson, *supra* note 146, at 22; William Pfaff, *A New Colonialism? Europe Must Go Back Into Action*, FOREIGN AFF., Jan.-Feb. 1995, at 2.

[148] *See* Pfaff, *supra* note 147, at 1.

[149] *See* Gordon, *supra* note 63, at 925-26; Richardson, *supra* note 84, at 29-30.

examples illustrate, race has been and perhaps may always be an essential component of international law.

CONCLUSION

Much to the credit of recent scholarly undertakings, theory in international law has gained importance. At the heart of the methods that defend or critique current structures is whether these methods adequately respond to the needs of those directly affected by international law. Some of the more challenging methodological approaches have taken this a step further by championing a focus on the importance of cultural and gender issues. Using the example of United States colonialism as well as the international effort to eradicate colonialism, this work argues that race has always been a real but unspoken factor in international policy. A Race Approach to International Law or RAIL a framework acknowledges the reality that race has been a focal point of the international discourse. This framework calls for scholars to consider centering an examination of an international issue from the perspective of the issue's implications on race as well as the implication of race constructions on an international issue. This request for the inclusion of a race conscious dialogue is in the spirit of extending recent methodological developments which seek to broaden the scope and depth of international issues, and in turn prevent the historical relegation of racial issues in the international discourse to unspoken or unemphasized components of a larger construct.