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CRUMBS FROM THE TABLE: THE SYROPHOENICIAN WOMAN AND INTERNATIONAL LAW

*Mark A. Chinen**

INTRODUCTION

A few years ago I visited Nicaragua as part of a program sponsored by my university. We traveled by bus to the coffee country outside of Matagalpa and met with members of the Union of Organized Women of Yasica Sur, in a community center the women had built in a hollow beside the road. The president of the group described how thirty years ago, she and a small group of women organized to improve the supply of drinking water for their children. Over time, the women moved from providing water to providing schools and bridges, and then affordable medical care and medicines. The organization now has about one thousand members and is one of the most effective in the region. Yet the needs are still great.

Many of the women had walked for over an hour in their best clothes to visit with us. As we listened to them, I heard also my aunts and grandmothers, who did not look so very different from these women, who were just as smart, determined and hard-working, and whose lives were not so very different, except their crop was not coffee: it was sugarcane and pineapple. The sense of connection was short-lived, however. There was a question-and-answer period, and the president asked us what we did at home. One of my colleagues shared she was an environmental engineer, who specialized in lakes. The president smiled and said, "We could use you here." Then I told her I taught international law. The president listened for the translation, regarded me and said, "I am not educated. Your work is too high for me." So much for my solidarity with the Union of Organized Women of Yasica Sur.

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I doubt the president really thought the work of an international lawyer was too high for her. Perhaps I am interpreting her remark through the conversations around the dinner table, when my aunts and uncles expressed their resentment of and bemusement with those more powerful and educated than they were; but it seemed in that brief encounter and in the president's statement were unspoken associations of status, hierarchy, privilege, past injuries and injustices, and more than a bit of disdain. I should not have been surprised by such a reaction. Of course, we could have discussed how the very ground on which the community center stood is tied to the law, as are the rights to the water she wants, as is the market for coffee, as are the international policies that contribute to the situation in which she and her colleagues find themselves. But the president was probably well aware of these things, and it is only now I realize she had much to teach me about the way the law was actually working itself out in her community. But such a conversation was not possible under those circumstances: she did not know me, and I did not know her, not really, for all the sense of recognition (or nostalgia) I felt that afternoon. That would have to change before we could talk about the law.¹

1. With regard to what we are able to teach one another, Chandra Mohanty argues that women like the members of the Union of Organized Women of Yasica Sur provide "the most inclusive viewing of social power." Chandra Talpade Mohanty, *"Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles*, 28 SIGNS: J. WOMEN & CULTURE IN SOC'Y 499, 511 (2003) [hereinafter *"Under Western Eyes" Revisited*].

For a discussion of the challenges facing the region we visited, see CENTRO DE SERVICIOS EDUCATIVOS EN SALUD Y MEDIO AMBIENTE, DIAGNÓSTICO DE PERCEPCIONES DE VIOLENCIA HACIA NIÑOS, NIÑAS Y ADOLESCENTES, EN QUINCE COMUNIDADES RURALES DEL MUNICIPIO DE SAN RAMÓN, MATAGALPA [DIAGNOSIS OF PERCEPTIONS OF VIOLENCE TOWARDS BOYS, GIRLS AND ADOLESCENTS IN 15 RURAL COMMUNITIES OF THE MUNICIPALITY OF SAN RAMÓN, MATAGALPA] 4, 8 (2008), available at http://www.cesesma.org/documentos/CESESMA-percepciones_de_violencia.pdf (Spanish).

The type of trip I participated in is not without controversy. On the positive side, it provides economic benefits to the host country. Tomás J. López-Guzmán & Sandra María Sánchez Cañizares, *Desarrollo socioeconómico de las zonas rurales con base en el turismo comunitario: Un estudio de caso en Nicaragua [Socioeconomic development of rural areas based on community tourism: A case-study in Nicaragua]*, 62 CUADERNOS DE DESARROLLO RURAL 81 (2009). In addition, some commentators argue that alternative forms of tourism alert visitors to the issues that face particular communities. Nancy Gard McGehee, *Alternative Tourism and Social Movements*, 29 ANNALS TOURISM RES. 124 (2002). The trips can also enable cultural exchanges that are good in themselves, Freya Higgins-Desbiolles, *More Than an "Industry": The Forgotten Power of Tourism as a Social Force*, 27 TOURISM MGMT. 1192 (2006); and they can lead to activism upon return to the home country. Nancy Gard McGehee, *Social Change, Discourse and Volunteer Tourism*, 32 ANNALS TOURISM RES. 760 (2005).

At the same time, such trips can evoke memories of the grand tours associated with the nineteenth and twentieth-century social policies of Western Europe. Scholars express concerns that pre-existing biases prevent real learning; that such biases can be imposed in the host country and simply be reinforced while tourists are there and upon their return. Harng Luh Sin, *Volunteer Tourism—"Involve Me and I Will Learn"?*, 36 ANNALS TOURISM RES. 480 (2009). They argue

* * *

For many, the international response to current global crises is more reason to suspect the value of international law and those who wield it. Events are still unfolding in connection with the global financial crisis of 2008-09 and the challenge it poses to international cooperation, international institutions, and international law in general. The same holds for the international response to climate change. Some wonder about the degree to which older power arrangements will accommodate themselves to new economic and political realities, while others wonder how much of the old order is really changing. All the while, there are concerns about who is being left out and who are the objects, rather than agents, of these developments.

It is common in such times to turn to one's traditions and convictions to better perceive and respond to present circumstances. That is my purpose here: to draw from the theological tradition that informs me as I think about international law. I organize my discussion of that tradition as follows: Part I begins with a passage from the gospel of *Mark*, a story that grates on the modern ear. A woman of Syrophoenician origin, whose daughter is possessed by an evil spirit, asks Jesus for help. Jesus protests, "First let the children eat all they want, for it is not right to take the children's bread and toss it to their dogs." The woman replies, "Yes, Lord, but even the dogs under the table eat the children's crumbs."² Jesus is impressed by this reply and tells the woman her daughter is well.

Part I also discusses the story's possible meanings. The theological point seems to be that everyone is welcome to life and love, the signs of the new order being ushered in by Jesus. However, the way in which the story unfolds is crucial. Jesus is insulting, and his statement smacks of racism, sexism, and nationalism. Some interpreters have tried to gloss over this offense, but I argue that the less flattering interpretations of the story offer more insight. Under those readings, the story folds back on itself: the all-embracing invitation to life and love undermines the denigrating statement of even the founder and by implication the structures, conceptual and institutional, that make such a statement possible. Everyone is invited to the table. Indeed, what is not right is a

that such trips, particularly because they are more participatory, use up scarce resources and can destabilize communities. R.W. Butler, *Alternative Tourism: Pious Hope or Trojan Horse?*, 3 J. TRAVEL RES. 40, 41, 45 (1990); DAVID BRUCE WEAVER, SUSTAINABLE TOURISM: THEORY AND PRACTICE 46 (Elsevier 2006). One of the reasons for sharing this story is because of the ambiguities it presents.

2. Mark 7:27-28 (Unless otherwise indicated all Biblical citations are taken from the New International Version 1978).

situation where some are at the table and others are not, where some have loaves and others have crumbs, where some are given the status of children and others are dehumanized. The passage also suggests a subtheme. The Syrophoenician woman's story implies that those orders and outcomes where some are at the table and others are not, or where some get loaves while others get crumbs, are unacceptable as responses to various world crises.

In Part II, I argue that the Syrophoenician woman's story, and the ethos it represents, requires us to take seriously three often-heard, related critiques of international law: first, international law does not respond to widespread human suffering and at worst, contributes to that suffering; second, international law facilitated Western expansion, whose negative effects linger today in former colonies that bear the brunt of human suffering, effects international law still perpetuates; and third, despite recent attempts to rectify this problem, international law excludes women in important ways in substance and in process.

In Part II, I also use the story as a foil for discussing three recent attempts to address those critiques of international law or to pose solutions to questions of international justice, justice that many postcolonialists or feminists argue must be part of international law's rehabilitation. The first approach is a nascent theory of resistance under international law, proposed by scholars such as Bhalakrishna Rajagopal;³ the second is the temporary resolution of what Emmanuelle Jouannet calls the paradoxical nature of international law;⁴ and the third is a comparative-capabilities approach to justice proposed by Amartya Sen, strongly influenced by Martha Nussbaum.⁵ Each of these approaches represent a common effort that David Boucher believes informs contemporary international political theory: each sees "an extension of the moral community which posits a certain degree of universalism, while at the same time seek[s] to preserve difference and

3. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (Cambridge Univ. Press 2003) [hereinafter *INTERNATIONAL LAW FROM BELOW*]; Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 410 (2003) [hereinafter *Challenges of Theorizing Resistance*].

4. Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18 EUR. J. INT'L L. 379 (2007).

5. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 57 (Anchor Books 1999) [hereinafter *DEVELOPMENT AS FREEDOM*]; AMARTYA SEN, *RATIONALITY AND FREEDOM* (Belknap Press 2002); AMARTYA SEN, *THE IDEA OF JUSTICE* (Belknap Press 2009) [hereinafter *THE IDEA OF JUSTICE*]; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (Cambridge Univ. Press 2001); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (Belknap Press 2007) [hereinafter *FRONTIERS OF JUSTICE*].

respect for diverse identities.”⁶ Such writers are not persuaded by the claims of rational choice theory or economic approaches that emphasize utility maximization. They take seriously the post-modern critique of older political theories and thus are suspicious of final answers, although they reject radical indeterminism. Each has a pragmatic cast and wants to see how “solutions” play out in the real world. Under these approaches, solutions are tentative, without any sense that they should have precedential effect.

These approaches are serious attempts to address the modern challenge to international law and resonate with many of the themes that arise from the Syrophoenician woman’s story. However, they also underscore, but do not resolve, the problem of human enmity the story also foregrounds. Thus, in Part III, I evaluate a recent attempt by the theologian, Miroslav Volf, to address this issue. Volf’s work,⁷ motivated in part by the conflict in the former Yugoslavia, navigates the same landscape as the three approaches I discuss in Part II. Volf argues that the crucial theme of the New Testament narrative, implicit in the story but express in Jesus’ execution, is a particular kind of “embrace,” a strong form of altruism that at a minimum requires making room for the other even though this means being open to a change in one’s own identity. Volf captures a crucial element of Christian theology that if lived out would go a long way towards completing what Rajagopal, Jouannet, Sen and Nussbaum set out to accomplish. I conclude that Volf’s articulation of embrace also does not present a complete answer to the issues under discussion here because of the difficulties posed by that embrace. However, it serves as an important marker that also must be taken into account in responding to criticisms of international law because it represents the possibility that, as with the encounter between Jesus and the Syrophoenician woman, the current “negotiation” among countries, in which international law plays a role, can lead to insight and reconciliation.⁸

6. DAVID BOUCHER, *POLITICAL THEORIES OF INTERNATIONAL RELATIONS: FROM THUCYDIDES TO THE PRESENT* 395 (Oxford Univ. Press 1998).

7. MIROSLAV VOLF, *EXCLUSION & EMBRACE: A THEOLOGICAL EXPLORATION OF IDENTITY, OTHERNESS, AND RECONCILIATION* (Abingdon Press 1996) [hereinafter *EXCLUSION & EMBRACE*]; MIROSLAV VOLF, *FREE OF CHARGE: GIVING AND FORGIVING IN A CULTURE STRIPPED OF GRACE* (Zondervan Pub. House 2005) [hereinafter *FREE OF CHARGE*]; MIROSLAV VOLF, *THE END OF MEMORY: REMEMBERING RIGHTLY IN A VIOLENT WORLD* (W.B. Eerdmans Pub. Co. 2006) [hereinafter *THE END OF MEMORY*].

8. I acknowledge that many who are engaged in these issues do not find a theological perspective meaningful; thus, this paper will be of little interest or relevance. It is my hope, however, this article will be seen as part of what Jürgen Habermas terms ‘reflexive appropriation.’ JÜRGEN HABERMAS, *BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS* (Polity

I. CRUMBS FROM THE TABLE

As the story is told in *Mark*,⁹ Jesus travels out of his home region of Galilee to the outskirts of Tyre, a port city along the eastern Mediterranean Sea. Jesus stays at a home there and orders that his whereabouts not be known, but a woman, whose little daughter is possessed by an evil spirit, learns that Jesus is there. She enters the house, falls at Jesus' feet and begs him to help her daughter. The woman is Syrophenician by birth, a Gentile.¹⁰ When the woman asks Jesus to drive the spirit from her daughter, Jesus says, "First, let the

Press 2008). Charles Griswold's recent work on the philosophy of forgiveness, which draws in part from the sermons of Joseph Butler, is a good example of such appropriation. CHARLES L. GRISWOLD, *FORGIVENESS: A PHILOSOPHICAL EXPLORATION 19-37* (Cambridge Univ. Press 2007).

For a masterful treatment of issues of belief and unbelief and of the possibility of meaningful theological discourse, see generally CHARLES TAYLOR, *A SECULAR AGE* (Belknap Press 2007). In this regard, for an argument that religion and international law share the same conceptual features, see David Kennedy, *Images of Religion in International Legal Theory*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 137 (Mark W. Janis ed., Marinus Nijhoff Publishers 1991).

The literature on the intersection of religion and disciplines such as political science, foreign relations, and law is voluminous and even a cursory review of it is well beyond the scope of this article. Discussions of the relationship between religion and international law are found in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW*, *supra*, and *RELIGION AND INTERNATIONAL LAW* (Mark W. Janis & Carolyn Evans eds., Marinus Nijhoff Publishers 1999). For recent works on Christianity and public affairs more generally, see, e.g., Harold J. Berman, *An Ecumenical Christian Jurisprudence*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS & HUMAN NATURE* 752 (John Witte Jr. & Frank S. Alexander eds., Colum. Univ. Press 2006) [hereinafter *TEACHINGS OF MODERN CHRISTIANITY*]; Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 25 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., Yale Univ. Press 2001); DUNCAN B. FORRESTER, *CHRISTIAN JUSTICE AND PUBLIC POLICY* (Cambridge Univ. Press 1997); Kent Greenawalt, *Reflections on Christian Jurisprudence and Political Philosophy*, in 1 *TEACHINGS OF MODERN CHRISTIANITY*, *supra* at 715; J. Bryan Hehir, *Responsibilities and Temptations of Power: A Catholic View*, 8 *J.L. & RELIGION* 71 (1990); Jan Rothkamm, *On the Foundations of Law: Religion, Nature, Morals*, 21 *RATIO JURIS* 300 (2008); JOHN WITTE, JR., *GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* (W.B. Eerdmans Pub. Co. 2006).

I am also aware that this article will follow two familiar argumentative structures, both subject to criticism. In one, theology provides a solution to an otherwise intractable conceptual or ethical problem. The weakness of this approach is that over time, plausible non-theological solutions tend to edge theology to the margins of discourse. This leads to a second related approach: an attempt to show either how non-theological solutions were anticipated by theology or can be accommodated by theology. The problem with this approach is related to the problem with the first: in the end theology ends up "baptizing" an otherwise non-theological solution, with the result that theology provides no critical value and indeed becomes invested in such a solution.

9. Mark 7:24-30. The story also appears in *Matthew*. Matt 15: 21-28.

10. One translation reads, "The woman was a Greek, born in Syrian Phoenicia." Mark 7:26. According to Joel Marcus, the Greek term used here could indicate a "Phoenician from the province of Syria" or a descendent of Phoenicians who had intermarried with Syrians. Joel Marcus, *The Jewish War and the Sitz in Leben of Mark*, 111 *J. BIB. LIT.* 441, 445-46 (1992).

children be filled, for it is not right to take the children's bread and toss it to their dogs."¹¹ But the woman answers and says to Jesus, "Yes, Lord—and the dogs under the table eat from the crumbs that fall from the children." Jesus responds, "At this word, arise and go. The demon has left your daughter."¹² The woman returns to her home and finds her daughter lying in her bed with the demon gone.

Like all iconic stories of the New Testament, the story of the Syrophoenician woman has been interpreted in several ways. Some frame the story within one of Mark's larger theological concerns: how to account for a religious movement rooted deeply within Judaism, but which by Mark's time is attracting non-Jews too.¹³ Some of these interpretations argue that Mark uses the incident to illustrate the temporal spread of the religion: the benefits of the kingdom of God need to be offered first to the children of Israel before they can be made available to the Gentiles.¹⁴

These and other commentators are taken aback by Jesus' insult to the woman.¹⁵ In Old Testament tradition, dogs "represent . . . the

11. Mark 7:27 (author's translation).

12. Mark 7:29-30 (author's translation).

13. It is important to recall that Christianity began as a movement within Judaism. Anders Runesson, *Rethinking Early Jewish-Christian Relations: Matthean Community History as Pharisaic Intragroup Conflict*, 127 J. BIB. LIT. 95, 100 (2008). One of the more important results of recent scholarship is a growing understanding that Judaism, as practiced in the first century, was more diverse than it is depicted in the gospels. See, e.g., JUDAISM IN LATE ANTIQUITY (Jacob Neusner ed., Brill Academic Publishers 1996); HYAM MACCOBY, EARLY RABBINIC WRITINGS (Cambridge Univ. Press 1988); JAMES C. VANDERKAM, AN INTRODUCTION TO EARLY JUDAISM (W.B. Eerdmans Pub. Co. 2003); STEPHEN M. WYLEN, THE JEWS IN THE TIME OF JESUS: AN INTRODUCTION (Paulist Press 1996). One implication is that in several respects, the contrasts between Jesus, and for example, the Pharisees, were not as sharp. See, e.g., HYAM MACCOBY, JESUS THE PHARISEE (SCM Press 2003) (arguing that Jesus was not only sympathetic to aspects of the Pharisee movement, but a Pharisee himself). For a discussion of the field, see William Scott Green, *Introduction: The Scholarly Study of Judaism and its Sources*, in JUDAISM IN LATE ANTIQUITY I (Jacob Neusner ed., Brill Academic Publishers 1996).

14. A.T. Robertson, *The Teaching of Jesus in Mark's Gospel*, 52 THE BIBLICAL WORLD 83, 88 (1918); T.A. Burkill, *The Historical Development of the Story of the Syrophoenician Woman (Mark VII:24-31)*, 9 NOVUM TESTAMENTUM 161, 162 (1967); RALPH MARTIN, MARK: EVANGELIST & THEOLOGIAN 212 (Zondervan Pub. House 1973).

J. Duncan M. Derrett gives a closely related, jurisprudential account of the story. Under this interpretation, the woman's reply gives Jesus legal grounds to provide benefits to Gentiles that belong first to the Jews. J. Duncan M. Derrett, *Law in the New Testament: The Syro-Phoenician Woman and the Centurion of Capernaum*, 15 NOVUM TESTAMENTUM 161, 165, 171 (1973).

15. George Howard, *A Note on the Short Ending of Matthew*, 81 HARV. THEOL. REV. 117, 119 (1988), (citing FRANCIS W. BEARE, THE EARLIEST RECORDS OF JESUS (Blackwell Pub. 1962) ("The harshness of the sayings of Jesus . . . still puzzles the Christian reader, who finds it impossible to imagine Jesus addressing the distraught mother in such terms. . .")); MARTIN, *supra* note 14, at 211 ("That term 'dog' is one of grave insult and it cannot be denied that an extremely harsh refusal of her request is implied. She is reproached for what she is, by birth and religion.") (citations omitted).

extremity of baseness.”¹⁶ Some interpretations try to soften the harshness of the insult or have that effect, although the demeaning nature of the words is conceded.¹⁷ Commentators point out that the word “dog” used in the text is the Greek word *kunáron*. This is a diminutive that can be translated “little dog.”¹⁸ Under this argument, the word softens the harsh term into one, which, if not one of endearment, can connote tolerance bordering on grudging affection.¹⁹ Others argue that Jesus does not really mean what he says: Jesus is testing the woman and uses the provocative language on purpose to elicit the woman’s faith-filled response.²⁰

Of particular interest to this Article, however, are commentators who ground their interpretations in critical narrative approaches, while at the same time try to understand the socio-economic and historical context out of which the story might have emerged or in which it was used.²¹ Much New Testament scholarship has tried to place Jesus, the

16. Sigfred Pedersen, “κύων,” in 2 EXEGETICAL DICTIONARY OF THE NEW TESTAMENT 332 (Horst Balz & Gerhard Schneider eds., W.B. Eerdmans Pub. Co. 1981) [hereinafter EXEGETICAL DICTIONARY]. See also BEN WITHERINGTON III, THE GOSPEL OF MARK: A SOCIO-RHETORICAL COMMENTARY 232 (W.B. Eerdmans Pub. Co. 2001) (describing the term as an insult).

17. For a discussion of early interpretations of the story, see Pablo Alonso, *La Mujer Sirofenicia en la Interpretación Patristica* [The Syrophenician Woman in Patristic Interpretation] 80 ESTUDIOS ECLESIASTICOS 455 (2005) (discussing allegorical interpretations of the story by early church leaders). The *Pseudo-Clementine Homilies*, a romance written sometime between the second and fourth centuries CE, contains a more elaborate version of the story: the woman is named Justa, and her daughter, Bernice. Jesus rejects her as a Gentile who engages in unclean eating practices, hence the reference to throwing food to the dogs. Justa’s reply indicates she is willing to forsake such practices and becomes a convert, thus allowing Jesus to heal her daughter. Justa’s husband drives her from the home because of her conversion. Because she is affluent, she is able to remain single and adopts two males as sons. THE CLEMENTINE HOMILIES, Homily II, chs., XIX-XXI, in 8 ANTE-NICENE FATHERS: FATHERS OF THE THIRD AND FOURTH CENTURIES: THE TWELVE PATRIARCHS, EXCERPTS AND EPISTLES, THE CLEMENTINE, APOCHRYPHA, DECRETALS, MEMOIRS OF EDISSA AND SYRIAN DOCUMENTS, REMAINS OF THE FIRST AGES, 223, 232 (Alexander Roberts & James Donaldson eds., Thomas Smith trans., American ed., Christian Literature Publ’g Co. 1886), available at http://files.libertyfund.org/files/1975/1333.08_Bk.pdf. Alan Cadwallader argues that the recasting of the story in the *Homilies* is an attempt to reassert male hierarchy. Justa, as depicted in the *Homilies*, “serves the needs of the . . . male characters in the story and the narrative concerns of the male author.” Alan H. Cadwallader, *What’s in a Name? The Tenacity of a Tradition of Interpretation*, 39 LUTHERAN THEOL. J. 218, 231 (2005). This is done in part by embedding the story as a conversation between Clement and Peter. *Id.* Further, Cadwallader points out, she remains a “widow” for the sake of her faith, yet brings required male authority into the home in the form of her two adopted sons. *Id.*

18. “κυνάριον,” EXEGETICAL DICTIONARY, *supra* note 16, at 332. The same word *kunáron*, also appears in the Matthean version.

19. See, e.g., FLOYD V. FILSON, A COMMENTARY ON THE GOSPEL ACCORDING TO ST. MATTHEW 180 (Harper 1960); VINCENT TAYLOR, THE GOSPEL ACCORDING TO ST. MARK 350 (St. Martin’s Press 1952).

20. FILSON, *supra* note 19, at 180.

21. This implies at least three contexts for meaning: first, how the story was used and

early church, and the writings from that period within the socio-cultural milieu of the time. Michael White, who supports such an approach, argues that one should think about the historical development of the early church and the writings which emerge from this period as “a complex set of interactions ranging across broader and narrower planes of reference.”²² Along one axis is the “macrosociety,” at this time, the Roman Empire, at one end, and the “microsociety” of Judea, Asia Minor or Egypt—areas where the early church first developed—on the other end.²³ On the other axis are the forces that might impact any community: on one end are sociopolitical and legal forces and on the other are philosophical and religious forces.²⁴ This method has its limits: reconstructions of that milieu are based on relatively scant historical data, and as one might expect, leave ample room for debate about the salient features of that milieu, let alone the value of such reconstructions for matters of faith and tradition.²⁵ White concedes that these planes of reference might be an “overly simplified” way of visualizing what was happening in the Greco-Roman and early Jewish world.²⁶ Yet, in his view, it is helpful to keep in mind that “each one of these areas is at work in any given situation or writing.”²⁷

Interpretations from this perspective underscore the complex nature of identity and privilege as Jesus and the woman interact. Jesus is Jewish and the woman is a Gentile. Yet, because he is a Galilean, the authenticity of Jesus’ own Judaism could have been subject to question. Galilee was a region only recently made part of the Jewish state, at the periphery of Jewish religious life centered on the temple in Jerusalem.²⁸

interpreted when it was first told, probably in oral form; second, how it was used and heard by Mark’s first audience, as the story was integrated into his gospel; and third, how it was interpreted by the wider church.

22. L. MICHAEL WHITE, *FROM JESUS TO CHRISTIANITY* 14 (Harper San Francisco 2004).

23. *Id.* at 15.

24. *Id.*

25. A good discussion of these issues is found in LUKE TIMOTHY JOHNSON, *THE REAL JESUS: THE MISGUIDED QUEST FOR THE HISTORICAL JESUS AND THE TRUTH OF THE TRADITIONAL GOSPELS* (Harper 1996). For a recent discussion of a method for using historical-critical methods, tradition, and reason to derive a picture of Jesus, see JOSEPH RATZINGER, *JESUS OF NAZARETH: FROM THE BAPTISM IN THE JORDAN TO THE TRANSFIGURATION* xi-xxiii (Doubleday Pub. 2007). For a more general discussion of how scripture functions as an authoritative source in theology, see DAVID H. KELSEY, *THE USES OF SCRIPTURE IN RECENT THEOLOGY* (Fortress Press 1975).

26. WHITE, *supra* note 22, at 15.

27. *Id.*

28. John K. Riches, *The Social World of Jesus*, 50 *INTERPRETATION* 383, 388 (1996); Miguel Pérez Fernández, *Rabbinic Texts in the Exegesis of the New Testament*, 7 *REV. RABBINIC JUDAISM* 95, 100 (2004) (“[G]alilee was a particularly Hellenized region, recently reconverted to Judaism by the Maccabees”).

It had also been the base for certain anti-Roman dissident groups.²⁹ In some circles, therefore, Jesus might also be considered a religious outsider.

Jesus and the woman also differ in gender, and the story reflects the inequalities embedded in both religious authority and gender. David Rhoads sees the interaction between Jesus and the woman as a “classic Near Eastern” response of inferior to superior: “[t]he woman clearly treats Jesus as a superior, for he is a healer and a male. She came, fell at his feet, and made a request . . .”³⁰ At the same time, however much the story reflects that hierarchy, it also shows how oppressed persons can use what means they have to resist and sometimes outwit and overcome those who oppress them.³¹ Rhoads points out that the woman does not contradict Jesus: she extends his proverb instead.³² “Yes, Lord, but even the dogs eat the crumbs that fall.” According to Rhoads, the woman “honored his rejection and still found a place for her request. Thus . . . she has . . . cleverly made use of the dynamics of honor and shame in order to get her question granted.”³³ As Surekha Nelavala puts it, the woman “defeats Jesus in two ways: first, by pretending she was accepting what Jesus said and using his argument to her own advantage; second, by paying no attention to whether Jesus wanted to insult her, while playing smart.”³⁴ The story can thus be interpreted as vindicating the woman’s agency, as Paolo Freire might put it, her ability to act purposely and reflectively and in the world, and in so doing, have a hand in shaping that world.³⁵

That interpretation alone suggests intriguing possibilities for application, but the narrative raises the possibility of an additional complexity that does not detract from the woman’s agency, but rather

29. Fernández, *supra* note 28, at 100.

30. David Rhoads, *Jesus and the Syrophoenician Woman in Mark: A Narrative-Critical Study*, 62 J. AM. ACAD. REL. 343, 358 (1994).

31. These forms of resistance are discussed in the now-classic JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (Yale Univ. Press 1985).

32. Rhoads, *supra* note 30, at 358.

33. *Id.* at 358-59 (citations omitted).

34. Surekha Nelavala, *Smart Syrophoenician Woman: A Dalit Feminist Reading of Mark 7: 24-31*, 118 EXPOSITORY TIMES 64, 68 (2006).

35. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 126 (Myra Bergman Ramos ed., Continuum Pub. Co. 1970). Elisabeth Schüssler Fiorenza views the woman as being less deferential than do either Rhodes or Nelavala. For Fiorenza, “the woman has broken all the rules of conduct. She has shown no proper feminine sensitivity at all.” ELISABETH SCHÜSSLER FIORENZA, *BUT SHE SAID: FEMINIST PRACTICES OF BIBLICAL INTERPRETATION* 103 (Beacon Press 1993). Further, “[a]lthough Jesus does not address her directly, brushing away her request, she continues to insist that the boundaries between inside/outside, private/public, male/female must be crossed.” *Id.*

makes the story even richer. Recall that the story emerges from a period of Roman occupation. Hostilities existed between Tyre and Galilee: the Tyrians had killed many Jews at the opening of the Roman Jewish war.³⁶ Galilee was considered the “breadbasket” for Tyre;³⁷ the rural poor were required to provide their wealth to urban centers, and some scholars suggest the Syrophoenician woman probably belonged to the upper urban class.³⁸ Thus, it is possible that the Syrophoenician woman is privileged, while the Galileans to whom Jesus ministered were poor and subservient—it was their children who were being forced to eat crumbs while Gentiles had loaves.

Yet the woman’s daughter is possessed by an evil spirit. Paul Hollenbach argues that the many exorcism stories in the gospels are consistent with the prevalence of mental illness in colonized societies.³⁹ Hollenbach follows Frantz Fanon’s work⁴⁰ to argue that “the colonial situation of domination and revolution nourishes mental illness in extraordinary numbers of the population.”⁴¹ For Hollenbach, mental illness becomes a “socially acceptable” form of protest against or escape from oppression.⁴² Evoking Foucault, Hollenbach suggests that such maladies are acceptable to those in power because they are also bases for social control, in that illness or, as understood by the ancients, demon possession justify institutionalism, imprisonment, or other forms of banishment from the community. “Through classifying persons as mentally ill,” writes Hollenbach, “society gains control over persons by destroying their selfhood and by degrading persons even further than they were originally.”⁴³ Under this interpretation, the Syrophoenician woman’s daughter, a child of privilege, is also possessed by an evil spirit, thus hinting at the cost of injustice to those in positions of relative economic power. Just as those in the countryside are being pushed to the periphery, so too the woman’s daughter is in danger of being pushed farther out from the center of her circle of relationships and her

36. Rhoads, *supra* note 30, at 370.

37. *Id.*

38. Gerd Theissen, *Lokal-und Sozialkolorit in der Geschichte von der Syrophoenikischen Frau (Mark 7:24-30)*, 75 ZEITSCHRIFT FÜR DIE NEUTESTAMENTLICHE WISSENSCHAFT 202 (1984) (German); GERD THEISSEN, *THE OPEN DOOR: VARIATIONS ON BIBLICAL THEMES* 41 (Fortress Press 1991) (arguing the woman belongs to a “tiny Hellenized upper class in the east of the Roman Empire.”). As discussed earlier, the version in the *Pseudo-Clementine Homilies* also depicts the woman as a person of means. *Supra* note 17.

39. Paul W. Hollenbach, *Jesus, Demoniacs, and Public Authorities: A Socio-Historical Study*, 49 J. AM. ACAD. REL. 567 (1981).

40. FRANZ FANON, *THE WRETCHED OF THE EARTH* (Grove Press 1963).

41. Hollenbach, *supra* note 39, at 575.

42. *Id.*

43. *Id.* at 579.

community.⁴⁴ As the narrative is framed and re-framed, the characters trade roles of oppressor and oppressed, superior and inferior.

Hyunjun Bae accepts that the woman is a member of the privileged urban class. As such, the Syrophoenician woman knows she is taking a risk in approaching Jesus.⁴⁵ The woman is aware, Bae writes, of the “complex set of political, economic and ethnic conflicts, as well as the intensity of animosity she would confront once she enters this rural area.”⁴⁶ The woman goes to Jesus anyway because she cares for her daughter. She enters the house where Jesus is staying and makes her request. When Jesus tells her it is not right for food for children to be given to dogs, he is exactly right. In his statement he is identifying with the poor he serves: “Yes, your child is in peril, but how can it be right that I help you when our own children are starving and you all are responsible for it?” Thus in his insult, Jesus evokes a second Old Testament image of the dog, not only a base animal, but also one representing “grave, possibly life-threatening danger.”⁴⁷

There is no arguing with a question like that. The woman can only respond with another truth: “Yes, the children should be fed first, but even so the dogs eat the crumbs the children let fall.” In her reply, she puts a twist on something Jesus might well have said about his people’s situation, in which their children eat the crumbs that the dogs let fall.⁴⁸ As discussed above, the woman’s response does not directly contradict Jesus’ statement, but extends it. For Derrett, the Syrophoenician woman bases her claim on Old Testament traditions of charity: “[r]efusal of charity would thus be unthinkable. God shows compassion to all creatures, irrespective of race.”⁴⁹ Judith Gundry-Volf understands similarly the woman’s response as an appeal to “the power of mercy that

44. Most scholars acknowledge that a major portion of Jesus’ ministry was devoted to healing the sick and performing exorcisms. See, e.g., MARCUS J. BORG, *JESUS: UNCOVERING THE LIFE, TEACHINGS, AND RELEVANCE OF A RELIGIOUS REVOLUTIONARY* 146-50 (Harper 2006). Persons afflicted by illness stood outside the ambit of the community, as well as God’s favor. As N.T. Wright puts it, “The effect of these cures [by Jesus] . . . was not merely to bring physical healing; not merely to give humans . . . a renewed sense of community membership; . . . but to reconstitute those healed as members of the people of Israel’s God.” N.T. WRIGHT, *JESUS AND THE VICTORY OF GOD* 192 (Fortress Press 1996). However, Wright is dubious of what he terms “fashionable” interpretations of the story. *Id.* at 309 n.244.

45. Hyunju Bae, *Dancing Around Life: An Asian Woman’s Perspective*, 56 *ECUMENICAL REV.* 390, 399 (2004).

46. *Id.*

47. Pedersen, *supra* note 16.

48. Rhoads suggests “[i]ronically, the woman’s proverb may well have expressed the despair of the Galileans themselves, that (unlike us Galileans), ‘Even dogs get crumbs.’” Rhoads, *supra* note 30, at 370.

49. Derrett, *supra* note 14, at 173.

is not based on privilege through birth or deserts.”⁵⁰

The exchange between Jesus and the Syrophenician woman thus opens up space for something that their traditions hint at but which needs new expression: despite the many ways in which the two have identified themselves up till then, they understand that they, as Bae puts it, “should not let the conceptual framework of the past determine their future, and that they need to shatter together ‘the certainties of centuries’ to create a new reality of life.”⁵¹ Jesus seems to grasp this new possibility and changes his mind. In effect, he says to the woman, “You are right: go on your way, the demon has left your daughter.” The woman returns home to her daughter and finds that it is so.

What is the possible meaning of the story? The story folds back on itself: if Jesus’ people are indeed suffering, then Jesus’ words ring true, and the woman acknowledges that truth, but, the hostility evident in Jesus’ words still remains. The woman’s reply, a statement Jesus could have made himself, becomes a valid expression of her own situation, and ring true as well. The all-embracing invitation to life and love undermines both the verities and the hostility of the founder himself and by implication, but only just so, the structures, conceptual and institutional, that make “inevitable” the situation in which both Jesus and the woman find themselves. In the new era Jesus purports to herald, everyone is invited to the table. True, it is not right for food to be taken from children’s mouths, but what is ultimately not right are situations in which some have loaves and others have crumbs, where some are elevated to the status of children and others are dehumanized. The passage calls into question constructs about the way things are or ought to be, even if they are made by those considered to be of the highest authority, and it demands equal access to all the good God has to offer to humankind. Gerd Theissen uses a bit of hyperbole in making this point: the woman’s faith “gives us the right to contradict the highest theological authorities, even Jesus himself, the Bible, God. Wherever we know that theological convictions and traditions result in suffering, we have the right and duty to contradict them.”⁵²

50. Judith Gundry-Volf, *Spirit, Mercy and the Other*, 51 THEOLOGY TODAY 508, 521 (1995).

51. Bae, *supra* note 45, at 399.

52. THEISSEN, *supra* note 38, at 46.

II. THE SYROPHOENICIAN WOMAN'S CHALLENGE TO INTERNATIONAL LAW

A. International Law and Its Critics

The encounter between the Syrophoenician woman and Jesus thus gives warrant to challenge the highest authority when there is suffering and exclusion, including something that purports to be as “high” as international law. One can argue that the first decade of the twenty-first century has not been a good one for such law. The behavior of states over that period appears to reaffirm arguments by realists, rational choice theorists and critical commentators alike, that international law is epiphenomenal, only a manifestation of other, more fundamental dynamics at play.⁵³ Martti Koskeniemi observes a structural bias in international law such that one can almost predict the outcomes of international decision-making in favor of more powerful actors, even though, in his view, legal argument is necessarily indeterminate and thus as a logical matter should not tend towards any particular direction. “[T]he lack of coherence (‘politics’) of legal argument,” he writes, “is only a preface to the more important point that [although] all the official justifications of decision-making are such that they may support contrary positions or outcomes, in practice nothing is ever that random.”⁵⁴

International law as an intellectual and moral enterprise has also been called into question. The critique of foundations, of course, is not new. Koskeniemi's analysis of the open-endedness of international legal argument is one of several that question any attempt to ground international law in a set of organizing principles, international law's coherence, or both.⁵⁵ Added to questions of practice and coherence are

53. See, e.g., MARTTI KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (Cambridge Univ. Press 2002) [hereinafter *THE GENTLE CIVILIZER OF NATIONS*]; JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005).

54. Martti Koskeniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT'L L. 7, 9 (2009) [hereinafter *The Politics of International Law—20 Years Later*].

55. MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT: REISSUE WITH NEW EPILOGUE* (Cambridge Univ. Press 2005) [hereinafter *FROM APOLOGY TO UTOPIA*]. Nathaniel Berman identifies challenges to both the status of international law and international law's coherence and argues that there will never be a completely satisfactory answer to those challenges. Nathaniel Berman, *Intervention in a “Divided World”: Axes of Legitimacy*, in FAULT LINES OF INTERNATIONAL LEGITIMACY 115, 118-19 (Hilary Charlesworth & Jean-Marc Coicaud eds., Cambridge Univ. Press 2010). Nikolaos Tsagourias discusses the shortcomings of natural law, and positivist and procedural accounts of international law in NIKOLAOS K. TSAGOURIAS, *JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION* (Manchester Univ. Press 2000). Both natural law and positivist

concerns that international law is becoming too compartmentalized or “fragmented” and that much of international law now takes the form of “managerialism,” to use Koskeniemi’s terms, in which technical discourse related to specific issues such as international finance or climate change masks or defers questions of value.⁵⁶ Yet, those questions of value are also highly contested. Perhaps this is precisely what should be happening with international law. The numbers regarding the scale of human suffering and the uneven way it is distributed have been often cited.⁵⁷ As is so with the Union of Organized Women of Yasica Sur, the needs are still great. If international law plays any role in this situation, then the Syrophoenician woman’s story tells us it becomes imperative to question it.

Here I focus on three well-known and interrelated arguments that something is wrong with international law. First, Thomas Pogge and others argue that the disparities in human well-being and continued human suffering are linked to a world economy that law facilitates, a system governed by “an increasingly dense and consequential system of rules governing trade, investments, loans, patents, copyrights, trademarks, double taxation, labor standards, environmental protection, use of seabed resources and much else.”⁵⁸ Pogge observes that such

theories of international law seek a “rational foundation for legal rules which is a matter of knowledge not of opinion.” *Id.* at 54. However, “[b]ecause the search for foundations can regress ad infinitum, the selection of a certain basis is unavoidably subjective.” *Id.* In this regard, even an approach which seeks to base law on a set of shared human values is not completely satisfactory, as Tsagourias points out, because “it simultaneously embraces individualist criteria based on rational decision but also communitarian criteria based on the negotiated wishes of particular communities.” *Id.* As for procedurally based conceptions of international law, the problem is that the chosen procedures almost invariably embed substantive values that predetermine procedural outcomes. *Id.* at 55.

56. *The Politics of International Law—20 Years Later*, *supra* note 54, at 9, 15-16.

57. Thomas Pogge writes:

Official estimates show 830 million humans chronically undernourished, 1,100 million lacking access to safe water, and 2,600 million lacking access to basic sanitation. About 2,000 million lack access to essential drugs. Some 1,000 million have no adequate shelter and 2,000 million lack electricity. Some 774 million adults are illiterate and 218 million children between five and seventeen do wage work outside their household—often under harsh or cruel conditions. . . . Roughly one-third of all human deaths, 18 million annually, are due to poverty-related causes. . . . People of color, females, and the very young are heavily overrepresented among the global poor, and hence also among those suffering the staggering effects of severe poverty.

Thomas W. Pogge, *Growth and Inequality: Understanding Recent Trends and Political Choices*, 55 *DISSENT* 66, 72 (2008) [hereinafter *Growth and Inequality*].

58. *Id.* at 72. Pogge argues these rules enable and enforce the transfer of natural resource and borrowing privileges that harm the poor. THOMAS POGGE, *WORLD POVERTY & HUMAN RIGHTS* 118-22 (2d ed., Polity Press 2008) [hereinafter *WORLD POVERTY & HUMAN RIGHTS*]. See also Peter Koller, *International Law and Global Justice*, in *LEGITIMACY, JUSTICE AND PUBLIC*

rules are heavily contested precisely because they have an economic impact. Affluent countries and organizations are better able to shape those rules, while the global poor have almost no voice in that process.⁵⁹

Second is the related critique that international law was used in service of and developed in tandem with Western colonialism,⁶⁰ and its

INTERNATIONAL LAW 186, 187 (Lukas H. Meyer ed., Cambridge Univ. Press 2009) (“[I]t becomes pretty clear that the misery in many regions has a lot to do with the prevailing international system, comprising international law as its normative order and international politics as its actual practice.”).

59. *Id.* Koskeniemi also believes “our practices, institutional and conceptual frameworks somehow help to sustain” this division. FROM APOLOGY TO UTOPIA, *supra* note 55, at 606. This is the structural bias in which “the system still de facto prefers some outcomes or distributive choices to other outcomes or choices.” *Id.* at 605-07.

The disparate impacts and the disadvantages of poorer countries with respect to international law have been the subject of a wide-ranging literature. For discussions of the experience that poorer countries have with the international trade regime in dispute resolution, the formation of policy, and the substantive law itself, see, e.g., James Smith, *Inequality in International Trade? Developing Countries and International Change in WTO Dispute Settlement*, 11 REV. INT’L POL. ECON. 542 (2004) (arguing that procedural rulings by the WTO Appellate Body, such as allowing NGO participation in some disputes, disadvantages poorer countries in the WTO dispute resolution process); Kent Jones, *Green Room Politics and the WTO’s Crisis of Representation*, 9 PROG. DEV. STUD. 349 (2009) (discussing the problems poorer WTO members encounter in attempting to influence WTO policy); Robert Hunter Wade, *What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of ‘Development Space,’* 10 REV. INT’L POL. ECON. 621 (2009) (arguing that WTO substantive disciplines have limited the ability of poorer countries to craft their own development policies, thus perpetuating the disparities between richer and poorer countries).

In the area of climate change, several have argued that poorer countries will be hurt more by the adverse effects of climate change than polluter countries and will be less able to respond to those effects. These poorer countries, however, have less ability to influence climate change negotiations. See, e.g., John Ashton & Xueman Yang, *Equity and Climate in Principle and in Practice*, in JOSEPH E. ALDY ET. AL., BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE 61, 61-62 (Pew Ctr. on Global Climate Change 2003); Godwell Nhamo, *From Brazil’s CDF to Kyoto’s CDM: Revisiting Equity Issues in Global Climate Governance*, in GLOBALISATION & GOVERNANCE 236 (Laurence Boule ed., Siber Ink 2011) (arguing that the rejection by developed countries of a 1995 Brazilian proposal to establish a Clean Development Fund underscores the tensions between developed and developing countries in the international response to climate change).

Finally, in international finance, institutions such as the International Monetary Fund have been criticized for failing to be representative of non-Western countries, even despite their growing economic power. Among more recent works see, e.g., COMMITTEE ON IMF GOVERNANCE REFORM, FINAL REPORT, Mar. 24, 2009, available at <http://www.imf.org/external/np/omd/2009/govref/032409.pdf>; Geske Dijkstra, *Supranational Governance and the Challenge of Democracy: The IMF and the World Bank*, in GOVERNANCE AND THE DEMOCRATIC DEFICIT: ASSESSING THE DEMOCRATIC LEGITIMACY OF GOVERNANCE PRACTICES 269 (Victor Bekkers et. al. eds., Ashgate Pub. Co. 2008); INDEPENDENT EVALUATION OFFICE OF THE INTERNATIONAL MONETARY FUND, GOVERNANCE OF THE IMF: AN EVALUATION (2008), available at http://www.ieo-imf.org/eval/complete/pdf/05212008/CG_main.pdf; Hector R. Torres, *Reforming the International Monetary Fund—Why Its Legitimacy is at Stake*, 10 J. INT’L ECON. L. 443 (2007).

60. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 267, 311 (Cambridge Univ. Press 2004) [hereinafter IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW]; Anthony Anghie, *The Evolution of*

impact continues to be felt in the countries where most suffering occurs. As Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens write, “it is evident that from times past, international law has provided the powerful with a series of instruments by which to exploit and control the weak, and even provided legal cover for colonial rule.”⁶¹ According to these scholars, the powerful devised property and sovereignty rules that justified colonial expansion, the extermination of indigenous populations and the expropriation of their property,⁶² and set up standards of “civilization,” gradations of “statehood” and then standards for “development” that have always identified Western states as being on the top of the ladder and non-Western states on the bottom,⁶³ all without meaningful participation by the colonized. Such scholars argue that these developments in international law doctrine helped create inequalities among countries, and the path-driven nature of international relations causes the disparities between wealthier and poorer countries (most of them former colonies) to linger and to be worsened by the policies of wealthier, more powerful countries through the legal mechanisms Pogge describes.⁶⁴ For this reason, several scholars in this vein of thought are wary of the potential misuses of concepts such as development⁶⁵ and human rights,⁶⁶ which in their view can be used to

International Law: Colonial and Postcolonial, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 35 (Richard Falk et. al. eds., Routledge-Cavendish 2008) [hereinafter RESHAPING JUSTICE]; Boucher, *supra* note 6; THE GENTLE CIVILIZER OF NATIONS, *supra* note 53; Bhupinder S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMM. L. REV. 3 (2006) [hereinafter *Manifesto*]; Peter Fitzpatrick & Eve Darian-Smith, *Laws of the Postcolonial: An Insistent Introduction*, in LAWS OF THE POST-COLONIAL 1 (Peter Fitzpatrick & Eve Darian-Smith eds., Univ. Mich. Press 1999); Susan S. Silbey, “Let Them Eat Cake”: Globalization, Postmodern Colonialism, and the Possibilities of Justice, 31 L. & SOC’Y REV. 207 (1997).

61. Richard Falk et. al., *Introduction*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 1, 5 (Richard Falk et. al. eds., Routledge-Cavendish 2008).

62. *Id.*

63. IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW, *supra* note 60, at 267, 311.

64. Several scholars argue (this in line with some of the criticisms raised by Pogge) that the web of international institutions form, to use Bhupinder Chimni’s terms, a kind of quasi state whose purpose is to facilitate and create the conditions for the operation of capital. See generally Bhupinder S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1, 1-2 (2004). See also *Challenges of Theorizing Resistance*, *supra* note 3, at 410.

65. See, e.g., INTERNATIONAL LAW FROM BELOW, *supra* note 3. Rajagopal argues that development as currently understood preserves and has its origins in earlier forms of colonialism. At the same time, this understanding of development has itself evolved in response to resistance from the various instantiations of the Third World. *Id.* at 39-49.

66. See, e.g., *Manifesto*, *supra* note 60, at 16-17 (criticizing an emphasis on private human rights over social rights); Mosope Fagbongbe, *The Future of Women’s Rights from a TWAIL Perspective*, 10 INT’L COMM. L. REV. 401, 404 (2008) (arguing that the development of human

sustain the colonial experience and its legacy.

These claims are not uncontroversial, although I find the general argument to be persuasive.⁶⁷ What is important for this article is that the criticism of international law as law in service of power, largely Western in nature, is part of the discourse of countries that make claims that they were adversely impacted by that power. Thus the question emerges, as put by Antony Anghie: “[C]an the post-colonial world deploy for its own purposes the law which had enabled its suppression in the first place?”⁶⁸ Unless there is a positive answer to that question, the future of international law could be quite dim, and from the perspective of the Syrophoenician woman, rightly so.⁶⁹

A third critique is mounted by international law scholars informed by feminist theory. The Syrophoenician woman might have been privileged, but that was not true for most of the women of her time, and

rights law at the same time Western influence increases over the Third World creates a contradiction, allowing human rights to serve as both a “taming device” and a “weapon” of struggle (citations omitted); Balakrishnan Rajagopal, *Culture, Resistance, and the Problems of Translating Human Rights*, 41 TEX. INT’L L.J. 419 (2006) (expressing concerns that human rights discourse could push out other types of emancipatory discourse taking place in the Third World). Rajagopal in particular argues that international human rights discourse has become subsumed by development discourse, as unsuccessful attempts by the Third World to address economic issues directly caused the Third World to turn to human rights discourse and through it, to emphasize economic and social rights. INTERNATIONAL LAW FROM BELOW, *supra* note 3, at 216–18. Thus, for Rajagopal, the tension between universality and cultural relativity that troubles human rights discourse is the same as the tension between modernity and tradition that runs through development discourse. *Id.* at 212.

67. A thorough appraisal of these issues requires the input of many fields, each of which has contributed a large literature. Among the evaluative tasks are: tracing the history of western expansion; assessing the political, social, and economic impacts of such expansion on other societies; determining the extent to which that past experience has put into place or set into motion structures and dynamics that both persist and continue to be reinforced by powerful international actors; clarifying the relationship between these structures and dynamics and human suffering; and of course, determining the role that international law plays in each of these areas. Besides the literature cited in other parts of this Article, *see, e.g.*, Todd Jones, *Liberalism and Cultural Policy in Indonesia*, 13 SOCIAL IDENTITIES 441 (2007) (discussing the impact of liberalism on Indonesian cultural policy in both the colonial and post-colonial periods); Marnia Lazreg, *The Colonial in the Global: Where Does the Third World Fit In?*, 26 J. THIRD WORLD STUD. 17 (2009) (arguing that colonialism persists or has been revived with increasing globalization); James D. Sidaway, *Spaces of Postdevelopment*, 31 PROGRESS IN HUMAN GEOGRAPHY 345 (2007) (surveying the literature of postdevelopment and linking current trends to colonial and post-colonial legacies in various countries).

68. IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW, *supra* note 60, at 8.

69. As William Scheuerman puts it, “Western ideals of the rule of law and human rights are unlikely to gain a firm footing if they continue to be plausibly associated with economic and social policies which exacerbate the economic misery of hundreds of millions of our fellow human beings.” William E. Scheuerman, *“The Center Cannot Hold”: A Response to Benedict Kingsbury*, in MORAL UNIVERSALISM AND PLURALISM 205, 216 (Henry S. Richardson & Melissa S. Williams eds., N.Y.U. Press 2009).

that is not true now, where women bear the brunt of global inequality.⁷⁰ In the development and practice of international law, Hilary Charlesworth and Christine Chinkin argue that “the absence of women . . . has produced a narrow and inadequate jurisprudence that has . . . legitimated the unequal position of women around the world rather than challenged it.”⁷¹ More recently Charlesworth has argued that a decade of gender mainstreaming (the attempt to integrate issues of concern to women into major international institutions such as the United Nations) has yielded few results, so that women continue to be excluded from the table.⁷² She points out in 2004, women held 37.4% of UN professional and managerial posts, 83.3% of positions at the lowest professional level, and just 16.7% of positions at the highest staff level.⁷³ Charlesworth contends that gender mainstreaming has been resisted, as evidenced by inadequate funding and lack of other forms of institutional support.⁷⁴ But in Charlesworth’s view, perhaps the most crucial failing of the mainstreaming movement is that it fails to take into account nuanced understandings of gender, particularly relational and constructive aspects of gender that render women substantively unequal to men.⁷⁵ By associating gender issues exclusively with women, current attempts at mainstreaming leave “both the roles of men and male gender identities unexamined, as though they were somehow natural and immutable.”⁷⁶

70. The United Nations Development Program reports in 2005 that in India, the death rate for children ages 1-5 is 50% higher for girls than boys. KEITH WATKINS ET. AL, HUMAN DEVELOPMENT REPORT 2005: INTERNATIONAL COOPERATION AT THE CROSSROADS: AID, TRADE AND SECURITY IN AN UNEQUAL WORLD, UNITED NATIONS DEVELOPMENT PROGRAM 6 (2005). The United Nations Population Fund reports that as of 2005, although there had been improvements in access to primary education in Northern Africa and Southern Asia, disparities between boys and girls with access remain “a serious concern” in Southern Asia, sub-Saharan Africa and Western Asia. UNITED NATIONS POPULATION FUND, GENDER EQUALITY FACT SHEET, available at http://www.unfpa.org/swp/2005/presskit/factsheets/facts_gender.htm. At that time, of the 800 million illiterate adults in the world, two-thirds of them were women. *Id.* Sixty percent of the estimated 550 million working poor are women. Women have less access to paid employment and make up the largest share of the informal employment sector (with the exception of the Middle East). *Id.* With respect to political power, the United Nations Population Fund notes that as of 2005 women held only 16% of legislative seats worldwide. *Id.*

71. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 1 (Juris Pub. 2000) [hereinafter *THE BOUNDARIES OF INTERNATIONAL LAW*].

72. Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 11 (2005).

73. *Id.*

74. *Id.*

75. *Id.* at 14-15. See also *THE BOUNDARIES OF INTERNATIONAL LAW*, *supra* note 71, at 48-50.

76. *Id.* at 15.

Dianne Otto raises similar concerns. On the one hand, Otto argues, three recent developments at the institutional level are worth celebrating: first, the use of gender-inclusive language conceptualizes women as full subjects of international law, rather than vulnerable subjects in need of protection; second, initial institutional moves toward inclusion provide a foothold for further advances; and third, institutional recognition of women's rights assists in organizing local and international women's rights movements and organizations.⁷⁷ On the other hand, Otto is concerned about institutions selectively engaging feminist ideas in service of their own institutional goals; the lack of accountability in mainstreaming efforts that hamper progress in institutional change; and the persistence of concepts of women as dependent and vulnerable.⁷⁸ On balance, Otto concludes, "[t]he feminist project in international law is losing ground, even as many are celebrating its victories."⁷⁹

77. Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELBOURNE J. INT'L L. 1, 5 (2009) [hereinafter *The Exile of Exclusion*]. Otto argues these three developments are illustrated by the UN Security Council's adoption of Security Council Resolution 1325, which recognized the role women play in international peace and security. *Id.* at 5-9; S.C. Res. 1325, U.N. SCOR, 4213th meeting, U.N. Doc S/RES/1325 (Oct. 31, 2000).

78. *The Exile of Exclusion*, *supra* note 77, at 10. Otto argues that despite the progress marked by Security Council Resolution 1325, that resolution itself and follow-up Resolution 1820, also illustrate these concerns. *Id.* at 13-15; S.C. Res. 1820, U.N. SCOR, 5916th meeting, U.N. Doc S/RES/1820 (June 19, 2008).

Otto engages the earlier work of other scholars who have identified the dangers of mainstreaming in other international settings. *The Exile of Exclusion*, *supra* note 77, at 9-10, (citing among others Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, in FEMINIST VISIONS OF DEVELOPMENT: GENDER ANALYSIS AND POLICY 19, 20-12 (Cecile Jackson & Ruth Pearson eds., Routledge 1998) (raising concerns about mainstreaming in international development); Shahra Razavi & Carol Miller, *Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues*, Occasional Paper No. 4, U.N. Research Institute for Social Development 67-69 (Aug. 1, 1995) (discussing how gender mainstreaming has been sidetracked in those institutions through lack of senior management support, resources, and expertise, and marginalizing of mainstreaming efforts)).

79. *The Exile of Exclusion*, *supra* note 77, at 15.

A report issued in August 2010 by the United Nations Office of Internal Oversight Services confirms many of the criticisms of gender mainstreaming raised by Charlesworth, Otto, and Razavi and Miller. United Nations, Office of Internal Oversight Services, *Thematic Evaluation of Gender Mainstreaming in the United Nations Secretariat*, U.N. Doc. A/65/266 (Aug. 9, 2010) [hereinafter *Internal Oversight Report*]. Among other things, the report found that mainstreaming was not always well understood in various parts of the UN Secretariat, *id.* at 15, and that leadership and accountability for gender mainstreaming was weak. *Id.* at 19.

In 2010, the United Nations reorganized various parts that addressed women's issues into a single entity, the United Nations Entity for Gender Equality and the Empowerment of Women, or UN Women for short. G.A. Res. 289, U.N. GAOR, 64th Sess., at 8, U.N. Doc. A/64/289 (July 21, 2010). (The UN Women website is available at www.unwomen.org.) UN Women is charged, among other things, with furthering gender mainstreaming in the United Nations system. *Id.* at 9. The Internal Oversight Report recommends that UN Women engage in a re-evaluation of gender mainstreaming within three years. Internal Oversight Report, *supra* at 79.

In this area, one sees arguments that even more progressive critiques of international law need to pay greater attention to the diversity of experiences of women in the Third World. For example, at the intersection of the postcolonial and feminist critiques of international law, a large literature is being produced by postcolonial feminist writers, who argue the “heterogeneous nature of women’s experiences” must include the experience of colonialism and postcolonialism.⁸⁰

[T]he conditions experienced by women in the third world cannot be reduced *only* to gender or biology; exploitation by multinational capital, the deeply etched racism not only among some indigenous populations, but also in the legacy of colonial relations between “first” and “third” worlds, and a host of other factors all conspire to oppress women.⁸¹

Such literature articulates the ways in which social constructions render women as subordinate, but such subordination can be couched or analyzed in ways that differ from Western analogues of similar phenomena. These writers aim to deconstruct a single view of “woman” or “Third World Woman” as an object amenable to a single type of analysis and for whom solutions, such as development or modernity, are proposed or imposed.⁸² This represents both the danger and opportunity present in meeting groups such as the Union of Organized Women of Yasica Sur. Amalia Sa’ar, for example, concludes that more binary forms of analyses, such as the public-private distinction used in Western feminist analysis, do not capture adequately the way in which power is distributed between men and women in the Middle East, so that other approaches must be developed.⁸³

More finely-grained accounts of the conditions experienced by women in the Third World also lead to different political agendas and different oppositional strategies. Thus, Amina Jamal suggests that for

80. Syzliiyati Ibrahim, *Malay Women’s Responses to a Changing World: A Feminist Postcolonial Reading of Ellina binti Abul Majid’s “Perhaps in Paradise,”* 5 CANADIAN SOC. SCI. 26, 28 (2009).

81. Kevin J. Ayotte & Mary E. Husain, *Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil*, 7 NWSA J. 112, 114 (2005) (citing GAYATIRI CHAKAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* 409 (Harv. Univ. Press 1999)).

82. Amina Jamal, *Transnational Feminism as Critical Practice: A Reading of Feminist Discourses in Pakistan*, 5 MERIDIANS 57, 59 (2005) (citing Deniz Kandiyoti, *Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing*, in FAITH AND FREEDOM: WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD 19 (Mahnaz Afkhami ed., Syracuse Univ. Press 1995). See also Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 12 BOUNDARY 2, at 333 (1986)).

83. Amalia Sa’ar, *Feminine Strength: Reflections on Power and Gender in Israeli-Palestinian Culture*, 79 ANTHROPOLOGICAL Q. 397, 401 (2006).

middle class women in Pakistan, “modern” concepts of citizenship, public space, democracy, and human rights continue to be important ways to counter what she argues are attempts by some forms of Islam to redefine modernity in Pakistan.⁸⁴ In contrast, Musa Dube argues that essentialized visions of traditional African culture were useful tools during African independence movements, even while she recognizes they have been used to subject African women to what she calls double or triple oppression from patriarchy, colonizing cultures and Western domination.⁸⁵

Recalling the reply of the president of the Organized Women of Yasica Sur, it is not so much that under these circumstances international law is too high. It is that an international law that either refuses or is unable to take into account women’s concerns in these nuanced ways is at the same time harmful and irrelevant. Indeed, in all of the three assessments of international law, one senses that international law is so complicit in harming so many people that its status is naturally brought into question. My reading of the Syrophoenician woman’s story would require this. But the story is more than a critique of existing structures; it demonstrates the possibility of moving beyond old patterns of exclusion and harm to something that results in healing. In these next three sections, I use the story to evaluate three attempts to address these three indictments against international

84. Jamal, *supra* note 82, at 65-66.

85. Musa W. Dube, *Searching for the Lost Needle: Double Colonialization and Postcolonial African Feminisms*, 5 STUD. WORLD CHRISTIANITY 213, 214, 216-17 (1999). As might be expected, these differences exist within countries. Aida Hernández Castillo, for example, discusses the differing priorities of Mexican feminists located in urban areas and indigenous Mexican feminists. R. Aída Hernández Castillo, *Entre el etnocentrismo feminista y el esencialismo étnico. Las mujeres indígenas y sus demandas de género* [Between Feminist Ethnocentrism and Ethnic Essentialism: Indigenous Women and their Demands of Gender], 24 DEBATE FEMINISTA 206 (2001). On the possibility of a transnational feminism, see, e.g., Vera MacKie, *The Language of Globalization, Transnationality and Feminism*, 3 INT’L FEM. J. POL. 180 (2001) (suggesting that an examination of feminism movements in the Asia-Pacific region could help move the focus away from the dichotomy between western and non-western feminisms).

Rhoda Howard-Hassmann provides an interesting schematic of what in her view is the “complex reality that characterizes the lives of most women in the West, and that is increasingly characteristic of the lives of women in the non-Western world.” Rhoda E. Howard-Hassmann, *(Dis)embedded Women*, 24 MICH. J. INT’L L. 227, 236 (2002). Using a sociological approach, Howard-Hassmann argues a woman has her own identity and at the same time overlapping commitments to a number of groups: family, job, private interests, religion, friendships, community and country. *Id.*

This complexity does not imply that points of view are incommensurate. Rather, “[t]he challenge is to see how differences allow us to explain the connections and border crossings better and more accurately, how specifying difference allows us to theorize universal concerns more fully.” *“Under Western Eyes” Revisited*, *supra* note 1, at 505.

law, two of which envision some role for international law and a third which sets out a view of justice that could serve as a guide for international law.⁸⁶

B. Resistance and International Law

The Union of Organized Women of Yasica Sur is an example of a group of persons whom some have constructed as powerless, but who have decided for themselves how they will be constituted, by marshalling collective intelligence and capacities to enable them to live out at least part of the lives they have imagined for themselves. In doing so, they have resisted a great deal of what the world has constructed for them, the same constructs that Jesus and the Syrophoenician woman were able to transcend.

It is in movements of which the Organized Women are a part that some scholars wish to find a different role for international law. In their view, international law does not yet adequately take into account how people are using such social movements to resist global developments they believe are harmful to their lives. Scholars such as Obiora Chinedu Okafor, Rajagopal, and Muthucumaraswamy Sornarajah argue that social movements operating outside of traditional institutions of power

86. As is well known, the post-colonial and feminist critiques of international law are significantly informed by concepts taken from post-modernist thought. There is in some strands of both critiques a suspicion of universalism, especially universal concepts such as "civilization," "development," the "Third World," or "woman" or "man" when they are given ontological status as natural parts of the "real" world. Besides the epistemological and ontological problems associated with identifying universally applicable concepts such as liberty or freedom, attempts to universalize are often unsuccessful and are always "formulated from a particular standpoint." *Id.* at 106-07. On the issues related to essentialism and its relationship to forms of oppression, see, e.g., ELIZABETH SPELMAN, *IN ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 133-59 (Beacon Press 1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For this reason, universalities make possible scales and gradations and the measurement of people or countries based on purportedly universal criteria, which makes oppression possible. On the misuses of the universal concepts in the encounter with other peoples, see IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW, *supra* note 60, at 52-55; BOUCHER, *supra* note 6; THE GENTLE CIVILIZER OF NATIONS, *supra* note 53.

The suspicion of universalism is closely tied to concerns about essentialism: the belief that one can get to the heart of what it is to be a woman or a man, Asian, African, or European, and then base one's actions on those purportedly essential aspects. As Charlesworth and Chinkin put it, such essentialism "confuses social relations with immutable attributes" and thus excludes other possibilities for social relations that would better respond to the complexity that makes up the human being in the world. THE BOUNDARIES OF INTERNATIONAL LAW, *supra* note 71, at 52. Thus one of the goals appears to be particularity that has a greater appreciation for the nuances of human life and could allow for greater individual thriving, a set of rich communities of the kind envisioned by Iris Young. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (Princeton Univ. Press 1990). As I will show, the approaches described in the next three subparts respond in some way to these theoretical critiques.

have enjoyed some success in reducing agricultural subsidies, increasing access to medicines, controlling foreign investment, and banning antipersonnel landmines.⁸⁷ Sornarajah writes, “the rise of power in international law is being met with sufficient resistance on the basis of ethical and justice-related notions through other bases of power by non-state actors which are gathering significant countervailing strength to affect international relations.”⁸⁸

Rajagopal argues that if international law is to remain relevant to the Third World, it needs a theory of resistance that makes room for these kinds of movements and does not dismiss them as a distraction at best or as a threat at worst.⁸⁹ Such law would reflect and enable a new kind of politics that Rajagopal sees emerging from the common attributes of these movements. For him, each movement coheres through institutions such as non-governmental organizations, but each is more than the sum of those institutions; each includes many individual and corporate actors; each uses various forms of resistance and protest; and the organizational activity of each is based on shared beliefs and collective identities.⁹⁰ When such movements “deploy alternative conceptions of women, nature, race, economy, democracy, or citizenship that unsettle dominant cultural meanings, they enact a cultural politics.”⁹¹

For Rajagopal, the cultural politics enacted by social movements has several distinctive features. First, such politics encompasses social contests that play out inside and outside of traditional political institutions, which implies among other things that distinctions between public and private concerns are less important in these politics, and that the resolution of these contests can happen in any number of places. Under these politics then, there is no special reason for privileging

87. Obiora Chinedu Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 95, 105 (Richard Falk et. al. eds., Routledge-Cavendish 2008); *Challenges of Theorizing Resistance*, *supra* note 3, at 399-400; Muthucumaraswamy Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE Y.B. INT'L L. 19 (2006).

88. Sornarajah, *supra* note 87, at 25.

89. *Challenges of Theorizing Resistance*, *supra* note 3, at 400. As Otto puts it, it is quite possible for subaltern speech to be described as “a ‘clamor,’ the spread of ‘rumor,’ the noise of ‘the mindless rabble,’ the disorganization of ‘the traditional community,’ and the impulse of ‘religious fanaticism.’” Diane Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, in LAWS OF THE POSTCOLONIAL 145, 167 (Eve Darian-Smith & Peter Fitzpatrick eds., Univ. Mich. Press 1999) [hereinafter *Subalternity and International Law*].

90. *Id.* at 408-11.

91. *Id.* at 416 (citing CULTURES OF POLITICS/POLITICS OF CULTURES: RE-VISIONING LATIN AMERICAN SOCIAL MOVEMENTS 7 (Sonia E. Alvarez et al. eds., Westview Press 1998)).

established political structures. Second, cultural politics is concerned with more than who has access to resources, it is also concerned with issues of meaning and value. Thus, cultural politics is not simply materialist. Third, unlike other political approaches, cultural politics does not emphasize social harmony; instead, cultural politics sees conflict among social classes as “the heart of politics.”⁹² Fourth, cultural politics often takes place in the Third World, where debates about social policy are still often framed in terms of a tension between tradition and modernity. That tension is often resolved by domestic and international institutions beyond an average person’s reach, often at the cost of tradition. Some social movements set their own terms for negotiating between tradition and modernity and thereby redefine modernity itself. Finally, Rajagopal argues that in cultural politics, “identities do not result merely from individual choice, but from relational activities among a group of people who unite to achieve a common purpose in the form of a movement.”⁹³ Thus, Rajagopal emphasizes that identity is socially determined and suggests that the right to identity is relational as well.⁹⁴ This implies a different grounding for individual human rights.

In cultural politics, therefore, formerly disparate groups of people, not necessary bound by a nation or state, coalesce around common concerns, such as the supply of drinking water or the banning of land mines, and in doing so better themselves and find collective and individual meaning. As of this writing, social movements in the Middle East are engaged in such politics in an attempt to bring about significant change. There is much one could say in response to this vision, but I focus on two points. First, much of what Rajagopal has to say resonates with the themes that emerge from the encounter between Jesus and Syrophenician woman. Jesus and his followers could be understood as initiating a kind of cultural politics that played itself out first in Palestine and then in all parts of the Roman Empire. The historical record is thin, but it appears that the early church lived out alternative conceptions of gender, nature, race, economy, and citizenship. The early followers of “the Way” cared for their sick instead of throwing them out into the street; they did not practice female infanticide as did the larger society; and women played important roles in their communities.⁹⁵ In living out these politics, these people found a different kind of identity: they saw

92. *Id.* at 417.

93. *Id.*

94. *Id.*

95. RODNEY STARK, *THE RISE OF CHRISTIANITY: A SOCIOLOGIST RECONSIDERS HISTORY* 73-93, 104-11, 118, 124-25 (Princeton Univ. Press 1996).

themselves as children of God first and subjects of an empire second.

What does this have to do with international affairs and international law? Boucher argues, “[t]he fundamental question that links political theory and international relations theory is simply ‘who are you?’ or self-referentially ‘who am I?’”⁹⁶ These questions are relevant to international relations because human life is lived in the “context of social institutions which are constitutive of our identity.”⁹⁷ Problems on the international level reflect the dynamics of identity at any level of organization. To conceive of identity as being constituted by one’s social relations sets into motion a self-reinforcing dynamic because in Boucher’s terms, one’s self-perception impacts what one chooses to do, with whom one associates, to whom one will give her allegiance, etc.⁹⁸

Boucher joins others in arguing that the predominant institutional source of identity at the international level continues to be the nation,⁹⁹ “the sustainer of all of our cultural, social, and political institutions and practices” and as such, “is the predominant agent through which citizens are collective actors on the world scene.”¹⁰⁰ Although valid distinctions are made between the nation and state, international law is constituted to accommodate the nation-state much better than other forms of organization. The social movements Rajagopal describes provide an alternative and sometimes even more powerful means for people to craft identities and to have substantive impacts on the international level without having to work through traditional channels of power, from which they might be excluded (even though those channels are not automatically ruled out). International law that does more than tolerate these movements, but instead makes room for them, would be much less vulnerable to charges that it is used in service of a relatively small number.

But the construction of one’s identity, whether it is as a member of an organization, citizen of a state, or member of a social movement, poses its own challenges. Boucher puts it in terms of recognition. “Self-identification,” he writes, “is of little value without recognition, recognition by those with whom one wishes to be associated, and externally by those whose acknowledgement of one’s identity is deemed

96. BOUCHER, *supra* note 6, at 378.

97. *Id.*

98. *Id.*

99. Boucher distinguishes the nation from the state. “A nation is a community of people with an aspiration to be politically self-determining, and the state is the set of political institutions that they aspire to achieve.” *Id.* at 389 (citations omitted).

100. *Id.* at 387.

important.”¹⁰¹ A tension thereby arises from the possibility that one will not be so recognized and thus be excluded.¹⁰² The Catch-22 is that such exclusion might be inevitable: it might be that “every community is based on an exclusion.”¹⁰³ For all that Jesus and his movement might have been doing to redefine themselves, Jesus was initially not inclined to recognize the Syrophoenician woman, not as she wanted and needed to be recognized so that her daughter would be healed.

The Catch-22 of inclusion and exclusion is particularly salient under the theory of resistance, because as discussed above, Rajagopal insists that conflict among classes drives the cultural politics needed for that resistance. Under such a theory, is it important to account for and then mediate conflicts that are likely to arise between various social movements, as opposed to the conflicts that arise from resisting? And if it is important to do so, what are the mechanisms for such resolution? Perhaps it is more important at this stage of resistance theory to focus on whom or what social movements struggle *against* as opposed to whom or what they struggle *for*.¹⁰⁴ This seems to be the case for Rajagopal.¹⁰⁵

To be fair, Rajagopal recognizes the problem and discusses in general terms how cultural politics would play out as resistance movements interact with each other. He imagines a broad form of civil society that extends to groups that are often marginalized under more traditional conceptions of such society.¹⁰⁶ Rajagopal is quite clear,

101. *Id.* at 379.

102. A classic literary example is RALPH ELLISON, *INVISIBLE MAN* (Vintage Books ed. 1972) (1952).

103. THE GENTLE CIVILIZER OF NATIONS, *supra* note 53, at 517. See also BOUCHER, *supra* note 6, at 379 (The state is also founded on patterns of exclusion and inclusion, patterns which are historically contingent and thus not pre-ordained.).

104. In this regard I appreciate conversations with Tayyab Mahmud, who reminds me that in post-colonial studies the work of understanding the history of international law in the context of colonialism and its current impacts is far from over. For an example of his contributions to this literature, see Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders and Enduring Failures of International Law: The Unending War along the Afghanistan-Pakistan Frontier*, 20 BROOKLYN J. INT'L L. 1 (2010) (discussing among other things how colonial demarcation of borders influence the current conflict in Afghanistan and Pakistan).

Rajagopal is aware of the questions I raise here. He acknowledges that social movements are “extremely diverse and dramatically vary from country to country or even from region to region.” INTERNATIONAL LAW FROM BELOW, *supra* note 3, at 249.

105. Writing in 2003, his primary interest is in understanding how social movements might impact the current doctrines and principles of international law. *Id.*

Chimni, on the other hand, suggests some form of democratic socialism. *Manifesto*, *supra* note 60, at 21. Such ideals would be realized through reform instead of revolution and would be open to reliance on market institutions. *Id.* At the same time, Chimni’s article is intended only to initiate a debate on these issues, *id.* at 4, and thus does not develop fully how such ideals would be realized.

106. INTERNATIONAL LAW FROM BELOW, *supra* note 3, at 262.

however, that there would be contestation among these movements.¹⁰⁷ He believes Habermasian deliberative democracy marks an advance over traditional liberalism by recognizing a much greater role for civil society,¹⁰⁸ so it may be Rajagopal thinks that techniques such as incomplete theorization among groups¹⁰⁹ will enable various movements to negotiate and co-exist. But Habermas and other deliberative theorists recognize a stronger role for the state in accommodating the kind of diversity such social movements represent.¹¹⁰ In short, social movements will eventually need their own Syrophoenician woman's story, as motivation for an international law that would permit this kind of diversity. Otherwise, the hegemonies Rajagopal sees as objects of opposition will be replaced by the hegemonies of victorious social movements.

C. International Law and the Resolution of the Conflicted Self

Conflict between classes is the engine that drives Rajagopal's cultural politics that in turn becomes a force to be reckoned with in international law. In a recent article, *Universalism and Imperialism: The True-False Paradox of International Law?*¹¹¹ Emmanuele Jouannet is concerned how conflict within the self drives international law itself. She suggests that the temporary resolution of that inner conflict might address the criticism that international law's universal reach is harmful to people. Just as the social movements Rajagopal describes are suspicious of dominant "conceptions of women, nature, race, economy, democracy, or citizenship" because those concepts serve others more than those to whom they have been applied, so too people are suspicious of international law that, as discussed earlier, established universal standards like "civilization," "statehood," and "development"¹¹² that

107. *Id.*

108. *Challenges of Theorizing Resistance*, *supra* note 3, at 412.

109. As Cass Sunstein explains it, incompletely theorized agreements are theoretical compromises that allow persons with different points of view to reach an agreement on one level of abstraction while not reaching agreement on other levels. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 44 (Oxford Univ. Press 2001). I discuss this concept in somewhat more detail in my discussion of Sen's comparative approach. See *infra* text accompanying notes 158-59.

110. Habermas, for example, sees one of the roles of formal legislatures as selecting and justifying policies that have already been "discovered" through interactions in the public sphere. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO DISCOURSE THEORY OF LAW AND DEMOCRACY* 307 (William Rehg trans., MIT Press 1996) [hereinafter *BETWEEN FACTS AND NORMS*].

111. Jouannet, *supra* note 4.

112. See *supra* text accompanying note 63. The problems of ideology are discussed in connection with the concept of democracy in SUSAN MARKS, *THE RIDDLE OF ALL*

justify the uneven way in which the Westphalian international system and globalization have played themselves out among states, as David Held puts it.¹¹³

Jouannet begins by conceding that international law is by nature universal and imperialist: “[International law] is paradoxical because it is both one *and* the other, it is an instrument for universalization and a reflection of ambivalent particularities: a means of domination and a space for cooperation and emancipation.”¹¹⁴ This paradox was present in international law during its classical, formal stage and exists now in “substantive” international law, a law that posits a common good or common set of values for all humankind, most salient in the body of human rights law.¹¹⁵ Jouannet argues that just as international law’s formal universalism lent itself to imperialism, contemporary international law’s substantive universalism does so too because the values that underlie that substance need to be protected, sometimes by force. Yet the suspicion remains that such values are Western in origin and perspective.¹¹⁶ “The new legal values of contemporary international law,” she writes, “are drawn from a particular—Western—culture, but can be applicable if they are genuinely recognized as legitimate by those to whom they are to be applied.”¹¹⁷ However, those legal values “will not be recognized as such unless they are based on a common ethics or a global culture that, for the moment, does not exist.”¹¹⁸

Jouannet believes that under these circumstances, the most one can hope for is that the paradox of international law can be resolved

CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY (Oxford Univ. Press 1999). Marks’ analysis of ideology is found in ch. 1, *id.* at 1-29, and then used throughout.

113. David Held, *Democracy: From City-States to a Cosmopolitan Order?*, 40 POL. STUD. 10, 25-26 (1992).

114. Jouannet, *supra* note 4, at 406. See also Martti Koskenniemi, *International Law and Imperialism*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: A COLLECTION OF THE JOSEPHINE ONOH MEMORIAL LECTURES 197, 198 (David Freestone et. al. eds., Springer 2002) (“There is an ambivalence about international law. Sovereignty and international governance seem both good and bad, liberating and threatening at the same time: neither provides a recipe against domination.”).

115. *Id.* at 380-87. Jouannet stresses that she does not mean that international law has adopted “a particular form of religion, culture, morality or conception of happiness.” *Id.* at 388. Instead, ideas embodied in international law, such as democracy and human rights,

express a juridical and liberal conception of “justice” that should remain neutral vis-à-vis the varying conceptions of the good, and aim instead to respect the plurality of subjective individual values and goods, the internal plurality of each state, and the cultures, religions and opinions of each individual.

Id.

116. *Id.* at 389.

117. *Id.* at 390.

118. *Id.*

temporarily. She argues that four developments in international legal practice and scholarship suggest ways that this might be possible. Jouannet is encouraged by signs that some negotiations taking place within certain international institutions, such as UN-sponsored discussions of human rights, have begun to take on a level of nuance and sensitivity. In these negotiations, "the defense of . . . interests is intermixed with the possibility of sharing or accepting the position of the other."¹¹⁹ According to Jouannet, in these arenas, international law is being used in service of consensus, not imposition. This relates to her second point, that new "trends of thought," possibly Habermasian in origin, provide a philosophical basis for those more nuanced negotiations and give a plausible response to the critique that law's universalism is imperialist. In particular, these trends allow a "refounding of reason and a *certain* universality of values" through an emphasis on what she calls "practical rationality" and "inter-subjectivity."¹²⁰ The implication is that the act of solving common problems through dialogue employs its own forms of reason and reflects values that emerge from the persons who participate in that process, not from above. Third, in Jouannet's view, this new philosophical approach points to a process suggested by Habermas for addressing intractable cultural conflicts, one of "reflexive appropriation." In this process, the genuine sharing of positions can lead individuals to appropriate or take into account certain views of one another without being compelled to adopt those views wholesale.¹²¹

As mentioned, the fourth (and for Jouannet perhaps most important) development is the contribution that psychoanalysis has made to international relations scholarship by showing how a deep ambivalence in the self manifests itself in social institutions and international law.¹²² This might be the heart of the problem for

119. *Id.* at 398.

120. *Id.* at 401 (emphasis supplied). Jouannet does not expressly identify what those trends of thought are. My guess is that Habermas's theory of communicative action and his attempt to ground law and democracy from such action is an example of inter-subjective thought to which Jouannet is referring. 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., Beacon Press 1984); 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., Polity Press 1987); *BETWEEN FACTS AND NORMS*, *supra* note 110.

121. Jouannet, *supra* note 4, at 401-02. Habermas's more recent discussions of this process appear in *BETWEEN NATURALISM AND RELIGION*, *supra* note 8.

122. Jouannet, *supra* note 4, at 404 (citing Nathaniel Berman, *Les ambivalences impériales*, [*Imperial Ambivalences*], in *DROIT INTERNATIONAL ET IMPÉRIALISME EN EUROPE ET AUX ETATS-UNIS* [INTERNATIONAL LAW AND IMPERIALISM IN EUROPE AND THE UNITED STATES] 131 (Emmanuelle Jouannet & Hélène Ruiz-Fabri eds. 2007); Nathaniel Berman, "*But the Alternative*

international law in Jouannet's view. To be ambivalent is to have negative and positive feelings about oneself and the other. These mixed emotions of hate and love and attraction and repulsion are lived out in the self, in one-on-one relationships, and in larger groups. "If . . . our conduct, individual and collective is ambivalent, then even our most formal ideals and legal rules are equally so. . . ."¹²³ Thus, to the extent international law is both universalist and imperialist in its relations with others, it is because those impulses lie within ourselves. According to Jouannet, the "solution" is to be aware of this ambivalence: the insight that our behavior, values and laws are manifestations of inner conflict gives us greater freedom to act. We have this freedom even though we now know that our activities and uses of law on the international level are essentially irrational: "[W]e must thus accept the need to struggle against that which we view as wrong; and to impose that which we consider to be best, without seeking to pretend that the solutions we propose are the fruits of rational or legal reason."¹²⁴

Jouannet's article makes at least two contributions to the issues under discussion here. First, one could argue that human ambivalence drives much of what takes place in the encounter between Jesus and the Syrophoenician woman. The story does not indicate that Jesus or the woman is conflicted, but certainly both of them show their ambivalence towards one another. The warring emotions on display are part of what makes the story accessible and compelling to us. The story provides a fresh perspective because we know that the movement that Jesus represents eventually became an institution with global reach, with doctrinal claims that purport to be all-embracing but have been enforced by violence. And in a similar way, the insight that the best and worst of international law reflect the best and worst impulses within the human person and human society has the effect of removing the law from its "high" status and restores it to human proportions.

The second contribution is that, although Rajagopal and others might argue Jouannet's emphasis on psychodynamic ambivalence

is *Despair*": *European Nationalism, and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993); Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J. L. & HUMANITIES 351 (1992); Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992)).

Another scholar who has employed psychoanalytic concepts to international law is Tawia Ansah. See, e.g., Tawia B. Ansah, *Genocide and the Eroticization of Death: Law, Violence and Moral Purity*, 14 SO. CAL. INTERDISC. L.J. 181 (2005); Tawia B. Ansah, *A Terrible Purity: International Law, Morality, Religion, Exclusion*, 38 CORN. INT'L L.J. 9 (2005).

123. Jouannet, *supra* note 4, at 405.

124. *Id.*

reflects a Western pre-occupation with the self, in my view the idea of ambivalence actually supplements our understanding of social movements, indeed any form of human organization. If Jouannet is right, human ambivalence is present in all social relations, which in turn means that it will be just as manifest in social movements as in international law itself. It furthers the argument that eventually a robust theory of social movements will need to account for the positive and pernicious aspects of any human interaction.

While these are positive insights to the issues under discussion here, there are at least two questions one might raise about this approach. First, recall that Jouannet proposes that the act of recognizing in deep way that human ambivalence exists in ourselves and in our institutions, in itself frees us to act in the world with a sense of humility but without a nagging feeling of guilt.¹²⁵ But if human conduct is embedded in an ambivalence which is pre-rational, to what extent can we “trust” this aspect of ourselves? Jesus and the Syrophenician woman do not reach agreement simply by acknowledging their ambivalence; they reason with one another too, in a way similar to the negotiations Jouannet sees in some international contexts. Further, Jouannet believes that there is a human anthropology, not culturally determined, which values human dignity, freedom, and cooperation.¹²⁶ But human ambivalence appears not to be part of this more stable anthropology.¹²⁷ If so, our “struggling against what we view as wrong and imposing what we consider to be best” comes from other parts of ourselves, the part of identity disconnected from values rationally conceived, the part that is fundamentally ambivalent. We thus might well be engaged in struggle and imposition and be completely wrong under the circumstances.¹²⁸ Taken to an extreme, we seem to act with

125. There is a sense in which Rorty reaches the same result, although he writes in hermeneutic terms. For him too, it is not rationality or legality which leads liberal society to an aversion to cruelty. It is the warp and woof of modern life, most importantly expressed in literature. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 141-88 (Cambridge Univ. Press 1989).

Martha Nussbaum also explains the human propensity for “bad behavior” through psychoanalytic concepts. She argues that such bad behavior stems from the anxiety and shame of incompleteness each person experiences at infancy as it dawns on him or her that “good things” do not always come instantaneously. Such pain leads to shame and revulsion that is projected outwards “onto subordinate groups who conveniently symbolize the problematic aspects of humanity, those from which people want to distance themselves.” Martha C. Nussbaum, *Radical Evil in the Lockean State: The Neglect of the Political Emotions*, 3 J. MORAL PHIL. 159, 164 (2006).

126. Jouannet, *supra* note 4, at 403.

127. *Id.*

128. Nussbaum argues that the shame and disgust that motivate bad behavior against others

the knowledge that there are no better reasons for our actions other than that we take them.¹²⁹

Second, Rajagopal and others might well ask where the Third World fits within the psychodynamics of ambivalence and their temporary resolution. Jouannet concludes “we are compelled to take responsibility for the ambivalences of international law . . . and the constitutive ethnocentrism of its ideas and its values,”¹³⁰ and to “take responsibility for the historical meaning of international law for non-Western peoples.”¹³¹ Presumably, “we” refers to the West. If this demand is linked to the other claim that there are universals for which we must struggle or which we must impose, the Third World seems to be either only an object of such conflicts or excluded from the picture or itself an agent imposing its will on others. Jouannet partly anticipates this: the paradox of international law can be overcome, “but only ever in a temporary and provisional manner, through the use of ‘universal pragmatics,’ bit by bit alongside the development of international society.”¹³² I save my assessment of the temporary and incremental nature of solutions for the next section. The issue arising here is well put by Boucher: “The question then becomes not that of the rational egoist, who asks, ‘Why should I be moral?’ but instead ‘Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?’”¹³³ It is a question both Jesus and the Syrophoenician woman might well have asked.

can be overcome in part through the cultivation of compassion through public institutions and public education as an aspect of civil religion. *Id.* at 169. See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (Cambridge Univ. Press 2001); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (Princeton Univ. Press 2004).

129. These are the same questions Rorty asks of the ironist, for whom there is no vocabulary that is somehow in touch with some outside reality that does not derive from herself, see RORTY, *supra* note 125, at 73. Namely, he asks, is it possible to be a “private self-creator and a public liberal?” *Id.* at 85. On the ironist’s conception, human solidarity is a matter of “a common selfish hope, the hope that one’s world—the little things around which one has woven into one’s vocabulary—will not be destroyed.” *Id.* at 92. As for public purposes, for Rorty “it does not matter if everybody’s final vocabulary is different, as long as there is enough overlap so that everybody has some words with which to express the desirability of entering into other people’s fantasies as well as into one’s own.” *Id.* at 92-93. Although there are no valid reasons to care about suffering—all the ironist can hope for is “making sure that she notices suffering when it occurs.” *Id.*

130. Jouannet, *supra* note 4, at 406.

131. *Id.* (citing Mikhaïl Xifaras, *Commentaire, in DROIT INTERNATIONAL ET IMPÉRIALISME EN EUROPE ET AUX ETATS-UNIS [INTERNATIONAL LAW AND IMPERIALISM IN EUROPE AND IN THE UNITED STATES]* 183 (Emmanuelle Jouannet & Hélène Ruiz-Fabri eds. 2007)).

132. Jouannet, *supra* note 4, at 407.

133. BOUCHER, *supra* note 6, at 400.

D. A Comparative-Capabilities Approach to International Justice

When Jesus says, "It is not right for bread meant for children to be given to dogs," he is appealing to norms of justice. It is this appeal that motivates a third reply to the critics of international law. Falk, Rajagopal, and Stevens argue that, emerging from the post-colonial critique of law, is the belief that "international law is not an alternative to other narratives of justice . . . but is simply one more terrain on which contestation over the contours of justice take place."¹³⁴ Reinhold Niebuhr anticipates this view: he argues legal norms are "compromises between the rational-moral ideals of what ought to be, and the possibilities of the situation as determined by given equilibria of vital forces."¹³⁵ Law is needed, and yet can never purport to replace justice, for proper relations on the international level. If Falk, Rajagopal, and Stevens are right, an international law that seeks to serve a wider portion of the world community must be engaged in questions of international justice as well.

The past twenty years have seen much work in international ethics and justice, so much so that it is hard to make out even the roughest contours of the field.¹³⁶ The debates coalesce around a number of interlocking issues. Much of the literature has assessed whether John Rawl's theory of justice can be extended to the international level, a debate to which Rawls himself contributed with his publication of *The Law of Peoples*.¹³⁷ This is one aspect of larger questions about the

134. Falk et. al., *supra* note 61, at 5.

135. REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN: A CHRISTIAN INTERPRETATION: VOL. II: HUMAN DESTINY* 257 (Charles Scribner's Sons 1943).

136. Ramon Das gives a good summary of the contours of the field. Ramon Das, *Ethics and International Affairs*, 48 PHIL. BOOKS 329 (2007). See, e.g., ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (Oxford Univ. Press 2004) (arguing for a system of international law that ensures access to institutions to vindicate basic human rights); James Brasset & Richard Higgott, *Building the Normative Dimension(s) of a Global Polity*, 29 REV. INT'L STUD. 29 (2003) (providing an overview of different approaches to international justice and suggesting a pragmatic perspective derived from Rorty); Nigel Dower, *Global Economy, Justice and Sustainability*, 7 ETHICAL THEORY & MORAL PRACTICE 399 (2004); Rainer Forst, *Towards a Critical Theory of Transnational Justice*, 32 METAPHILOSOPHY 160 (2001); Dirk Haubrich, *Normative Concepts of Global Distributive Justice and the State of International Relations Theory*, 15 CAMBRIDGE REV. INT'L AFF. 183 (2002) (discussing the ability of international relations theory to accommodate proposals of distributive justice); Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005); Terry Nardin, *International Political Theory and the Question of Justice*, 82 INT'L AFF. 449 (2006) (among other things, comparing and contrasting the literature on just war and distributive justice and suggesting that the principles of coercion found in just war theory, particularly the duty to protect, might be a bridge to distributive justice).

137. JOHN RAWLS, *THE LAW OF PEOPLES* (Harv. Univ. Press 1999); John A. Berteaux, *What are the Limits of Liberal Democratic Ideals in Relation to Overcoming Global Inequality and Injustice?*, 6 HUMAN RTS. REV. 84 (2005); Ronald Paul Hill et. al., *Global Consumption and*

relationship between justice understood from the perspective of the person¹³⁸ and justice manifested in states or other institutions.¹³⁹ There are also empirical¹⁴⁰ and philosophical¹⁴¹ debates about the nature of global inequality and global justice, which in turn lead to questions of distributive justice and whether and how one should respond to such inequality.¹⁴²

Such debates are far from being resolved. Yet, to return to our story, Jesus assumes that the Syrophenican woman would understand his appeal to justice, and in her reply, she indicates she does. What enables the two to reach agreement about what would be just in that circumstance? Amartya Sen's, *The Idea of Justice*,¹⁴³ tying together themes developed in earlier work, is an intriguing response to this question. Sen defers questions about universally applicable norms or ideal institutions as a way of responding to the same critique of universals that Jouannet addresses. Further, Sen's approach takes on a family resemblance to forms of deliberative democracy, in turn

Distributive Justice: A Rawlsian Perspective, 23 HUMAN RTS. Q. 171 (2001); Thomas W. Pogge, *Rawls on International Justice*, 51 PHIL. Q. 246 (2001); David A. Reidy, *Rawls on International Justice: A Defense*, 32 POL. THEORY 291 (2004); John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT'L L. 993 (2002).

138. Sharon Anderson-Gold, *The Cosmopolitan Foundations of the (Kantian) State*, 1 CONT. READINGS L. & SOC. JUSTICE 20 (2009); Charles R. Beitz, *Cosmopolitanism and Global Justice*, 9 J. ETHICS 11 (2005); Luis Cabrera, *The Cosmopolitan Imperative: Global Justice through Accountable Integration*, 9 J. ETHICS 171 (2005) (arguing for greater integration of states along democratic principles to allow for more just global distribution); Simon Caney, *Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance*, 32 SOC. THEORY & PRAC. 725 (2006) (arguing for supranational institutions charged with protecting fundamental rights); Anne Peters, *Humanity as the α and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (arguing that state sovereignty should be seen to exist only in service of humanity).

139. David Armstrong, *Law, Justice and the Idea of a World Society*, 75 INT'L AFF. 547 (1999) (arguing that although globalization has changed what it means to be a state, how states interact, and how they make international rules, any unfairness which arises from globalization will be addressed at the state level); Mervyn Frost, *Justice and Sovereignty*, 51 THEORIA 54 (2004); Byron Kaldis, *World Justice, Global Politics and Nation States: Three Ethico-Political Problems*, 7 EUR. LEGACY 167 (2002).

140. Stephen Castles, *Hierarchical Citizenship in a World of Unequal Nation-States*, 38 POL. SCI. & POL. 689 (2005); WORLD POVERTY & HUMAN RIGHTS, *supra* note 58; *Growth and Inequality*, *supra* note 57; Matthias Risse, *How Does the Global Order Harm the Poor?*, 33 PHIL. & PUB. AFF. 349 (2005).

141. ANDRE ALTMAN & CHRISTOPHER HEATH WELLMAN, *A LIBERAL THEORY OF INTERNATIONAL JUSTICE* (Oxford Univ. Press 2009); Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); Richard T. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339 (2000); David Miller, *Against Global Egalitarianism*, 9 J. ETHICS 55 (2005).

142. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972) [hereinafter *Famine, Affluence, and Morality*]; PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2d ed., Yale Univ. Press 2004); Sylvie Loriaux, *Beneficence and Distributive Justice in a Globalizing World*, 20 GLOBAL SOCIETY 251 (2006).

143. THE IDEA OF JUSTICE, *supra* note 5.

influenced by Habermas. His approach to justice thus resonates with Rajagopal's call for an enlarged civil society and with Jouannet's suggestion that post-critical developments in philosophy can help resolve the paradoxical nature of international law. Finally, Sen's approach to justice produces tentative results, reinforcing the sense that any answers to questions of international justice will be temporary at best, thereby echoing Rajagopal's temporary social movements and Jouannet's temporary resolution of paradox.

Sen argues that the international community should turn from questions of "transcendental justice" to questions of "social realizations" that would result from comparing and then choosing from among various social policies.¹⁴⁴ Transcendental justice refers to establishing justice through the design of just social arrangements.¹⁴⁵ Rawls' *The Laws of Peoples*¹⁴⁶ represents such an approach. Sen argues that the search for just social arrangements is hampered by two problems: first, the approach is not feasible because debates about the foundations of social arrangements (whether they should be based on utilitarian or Rawlsian perspectives, cosmopolitan or state-oriented principles, etc.) are irresolvable. Second and perhaps more importantly, the design of just institutions cannot tell us what to do in specific situations: an understanding of just social arrangements is neither necessary nor sufficient in helping persons make choices that raise issues of justice.¹⁴⁷ As Sen argues, "If we are trying to choose between a Picasso and a Dali, it is of no help to invoke a diagnosis . . . that the ideal picture in the world is the *Mona Lisa*."¹⁴⁸

Sen believes that it is better to put aside the question of social arrangements and take up a comparative approach, "an agreement, based on public reasoning, on rankings of alternatives that can be realized."¹⁴⁹ The framework has several features. One is Sen's belief that public reasoning is the vehicle for social comparison. Such reasoning, in his view, provides the objectivity and impartiality needed in a comparative

144. *Id.* at 5-7.

145. *Id.* at 5-6.

146. *See supra* note 137.

147. THE IDEA OF JUSTICE, *supra* note 5, at 15-16, 96-105.

148. *Id.* at 16. Koskeniemi shares this intuition. He also downplays the role of international legal institutions in addressing questions about the distribution of what he terms "material and spiritual values." FROM APOLOGY TO UTOPIA, *supra* note 55, at 604. Inasmuch as institutions are themselves a set of rules and procedures, they too are indeterminate, such there can be no sense that institutions work towards a common good. *Id.* The result is that different societies demand different things of the same institution, while common solutions proposed by institutions affect different societies in different ways. *Id.*

149. THE IDEA OF JUSTICE, *supra* note 5, at 17, 86.

approach; but in this context, objectivity has less to do with capturing some objective truth than it does with the ability of a particular point of view to withstand the scrutiny of other points of view.¹⁵⁰ For Sen, such public reasoning is closely tied to democracy, conceived as “government by discussion.”¹⁵¹ The phrase, which Sen attributes to Walter Bagehot, is meant to encompass the work of proponents of deliberative democracy such as Habermas, as well as Rawls, Bruce Ackerman, Seyla Benhabib, Joshua Cohen, and Ronald Dworkin.¹⁵² Thus, public reasoning appears to reflect recent developments in international negotiation and in philosophy that Jouannet believes can help resolve the paradox of international law.

Sen also suggests that modified social choice theory can provide the means to compare and rank policy alternatives and in doing so undermine preference-based theories of social decision-making. Social choice tries to determine the conditions under which societal choices are coherent. Kenneth Arrow’s Impossibility Theorem states that it is impossible to devise any system of mapping individual preferences onto a social welfare function and at the same time satisfy relatively modest conditions we would assume would be part of any acceptable group decision-making process.¹⁵³ Much of the subsequent literature in social

150. *Id.* at 45-46. Sen is aware of the limitations of reason and acknowledges the powerful role emotions play in human behavior. *Id.* at 48-51. For Sen, however, that reason has limitations does not mean it should be abandoned; the solution to bad reasoning is better reasoning. *Id.* at 49. Further, for Sen reason and emotion do not necessarily conflict, and in any case, even emotion benefits from an assessment via reason. *Id.* at 50-51.

151. *Id.* at 324.

152. *Id.* Sen uses instances of such democracy in the histories of non-Western societies to argue democracy is not purely a Western tradition. *Id.* at 329-32. See also Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 12-16 (1999) (arguing that Asian and democratic values are not necessarily in conflict).

Koskeniemmi is similarly attracted to this form of deciding what to do “here and now.” FROM APOLOGY TO UTOPIA, *supra* note 55, at 544-45. He also believes that decision-making involves reconciling “incompatible suggestions for how to solve normative problems,” a process which involves public discussion and criticism: “The legitimacy of critical solutions . . . [lies] in the openness of the process of conversation and evaluation through which it has been chosen and in the way it accepts the possibility of [f] revision—in the authenticity of the participants’ will to agree.” *Id.*

153. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed., Yale Univ. Press 1963). Arrow proposes several conditions. First, every set of possible orderings of preferences should be admissible. *Id.* at 24. Second, there should be a positive relationship between social orderings and individual preferences: if every individual’s preference for a particular state rises, one should see it rise in any corresponding social ordering. *Id.* at 25-26. Third, any social ordering should be independent of irrelevant alternatives. *Id.* at 26-27. Fourth, there should be unanimity: the social welfare function representing citizens’ preferences should not be imposed. *Id.* at 29. Finally, there should be no dictatorship; that is, there should be no one person whose preferences are the sole basis for the choices made by a society. *Id.* at 30. Arrow goes on to show formally that no majority voting system can satisfy all these conditions. *Id.* at 46-

choice theory has responded to the Impossibility Theorem by relaxing one or more of the conditions imposed by Arrow. Sen has made a number of important contributions in this regard.¹⁵⁴ To overcome impossibility, Sen proposes that societies engage in “interpersonal comparisons of well-being and relative advantages.”¹⁵⁵ Sen thus departs from much of welfare economics, first because he believes that interpersonal comparisons are possible, and second because he does not believe utility should be the “indicium” of social welfare.¹⁵⁶ Instead of equating such welfare with utility, Sen is well-known for proposing a system that maximizes human freedom and human capabilities. Under Sen’s framework, freedom requires both the chance to pursue one’s life objectives and an enforced process of choosing.¹⁵⁷ It is important for Sen that a person achieves a desired objective, but also that she is not coerced into doing so.¹⁵⁸ In championing human capabilities, Sen’s work thus echoes and has been influenced by that of Martha Nussbaum. Nussbaum is also concerned with the life choices available to humans, particularly women. Under the human capabilities or capacities approach, the question for evaluation is whether a person has the opportunity to engage in what one would normally think of as a good life.¹⁵⁹ This involves not only ensuring political and civil liberties as

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154. For a non-technical discussion of the major responses to Arrow’s theory, see Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349 (1999). On the significance of Amartya Sen’s contribution to the literature, see Kenneth J. Arrow, *Amartya K. Sen’s Contributions to the Study of Social Welfare*, 101 SCAND. J. ECON. 163 (1999).

155. THE IDEA OF JUSTICE, *supra* note 5, at 93. Permitting interpersonal comparison of utilities is one means of achieving formally coherent consensus. Kenneth J. Arrow, *Freedom and Social Choice: Notes in the Margin*, 18 UTILITAS 52, 55-57 (2006) [hereinafter *Freedom and Social Choice*].

156. For a discussion of the limitations of conventional utility theory to solve normative issues, see Daniel Read, *Experienced Utility: Utility Theory From Jeremy Bentham to Daniel Kahneman*, 13 THINKING & REASONING 45, 56 (2007). Read, who champions a form of experienced utility proposed by Daniel Kahneman, gives a good overview of the major developments in utility theory as he compares and contrasts experienced utility with other approaches. One of Sen’s most significant contributions to social choice theory is his showing that even in situations where several of Arrow’s conditions are relaxed, it is impossible to reconcile even modest Pareto-based decisions with a strongly held liberal belief that individuals should have freedom to choose particular outcomes (such as the color of one’s room or what book one will read). Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970). This result puts in question whether Pareto-efficiency alone can serve as the basis for social choice.

157. THE IDEA OF JUSTICE, *supra* note 5, at 228; DEVELOPMENT AS FREEDOM, *supra* note 5, at 17.

158. THE IDEA OF JUSTICE, *supra* note 5, at 228; DEVELOPMENT AS FREEDOM, *supra* note 5, at 17. Sen distinguishes between “comprehensive outcomes,” in which the outcome and the methods or reasons associated with an outcome are taken into account, and “cumulative outcomes,” in which only end-states are considered. THE IDEA OF JUSTICE, *supra* note 5, at 22-23.

159. Nussbaum’s framework conceives of the human being as “a dignified free being who

they are understood, but also access to resources and knowledge that allow a person to function in the world as a full human being.¹⁶⁰

A comparative human capabilities approach will necessarily be multi-faceted. Social choice could focus on any number of factors or capacities that enable a human being to function in the world, such as literacy, birth rates, access to health care, etc.¹⁶¹ This underscores Sen's point that any public choice will be justified by a plurality of reasons and at most will be partial and tentative.¹⁶² To return to Sen's image of the paintings, this must be so because under the comparative approach, various social actors in essence are asked to choose between a Picasso and a Dali. If they select the Picasso, there are any number of reasons why each member of the group would have done so. Thus, that choice in itself can have no bearing on what would happen if a Rothko now becomes available. Further, because decisions are highly dependent on the circumstances, the fact a group chose a Picasso to decorate an office does not mean it will choose a Picasso to decorate a residence.

The comparative-capabilities approach is intriguing because it speaks directly to the problem of widespread human suffering and acknowledges that the lives of many people could be improved significantly if extreme poverty were eradicated or people were given greater access to health care.¹⁶³ International law that emerges from a comparative-capabilities approach and facilitates solutions to those kinds of issues would thereby enjoy greater legitimacy in parts of the world where those problems exist. Further, the approach purports to resolve important issues of justice while avoiding the criticisms brought

shapes his or her own life, rather than [is] passively shaped or pushed around by the world in the manner of a flock or herd animal." Martha Nussbaum, *Capabilities and Social Justice*, 4 INT'L STUD. REV. 123, 130 (2002) [hereinafter *Capabilities and Social Justice*].

160. *Id.* at 132.

161. *Id.* at 132-33; THE IDEA OF JUSTICE, *supra* note 5, at 106, 233.

162. THE IDEA OF JUSTICE, *supra* note 5, at 102-05, 107.

163. For a discussion of international global health and recommendations for changing the international structure of intellectual property protection to address the issue, see, e.g., Thomas W. Pogge, *Human Rights and Global Health: A Research Program*, 36 METAPHILOSOPHY 182 (2005). At the same time, the comparative approach avoids some of the formal and practical conundrums raised by a purely Pareto-optimizing approach to social questions discussed above.

As might be expected, the capabilities approach has also generated a wide literature that has tried to assess whether it serves as a viable alternative to standard economic accounts of development. Wiebke Kuklys provides, among other things, a good overview of attempts in the literature to implement various aspects of Sen's approach, in particular addressing the difficulties in measuring human capabilities. WIEBKE KUKLYS, AMARTYA SEN'S CAPABILITY APPROACH: THEORETICAL INSIGHTS AND EMPIRICAL APPLICATIONS (Springer 2005).

For a good example of how a human capabilities understanding of development (in conjunction with public goods theory) would impact international intellectual property law, see Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

against other approaches to international justice, such as those extending liberal concepts to the international level, those concerned with access to and development of resources, and those based on extensions of human rights. Such approaches to justice have been criticized by scholars as taking on an ideological cast used to justify impositions,¹⁶⁴ thus displaying the same paradox of universalism and imperialism that Jouannet identifies in international law itself.¹⁶⁵

One can question, however, whether the comparative-capabilities approach is successful in avoiding the criticisms brought against other approaches to justice. Take, for example, the post-colonial and feminist distrust of the universal. Universals arise when one emphasizes human capacities or capabilities because such capacities or capabilities must apply broadly to be of any use in making social choices. In this regard, Nussbaum has been unapologetic in claim that there are certain functions, such as reason, that distinguish human life from animal life. She is particularly interested in “the level at which a person’s capability is ‘truly human,’ that is *worthy* of a human being.”¹⁶⁶ Nussbaum believes “we can produce an account of these necessary elements of truly human functioning that commands a broad cross-cultural

164. See generally MARKS, *supra* note 112 (cautioning against the ideological uses of democratic liberalism as applied outside the West).

165. This is not to say that such approaches should be rejected simply because they have been criticized. Still, since one of the concerns of this Article is how international law is perceived and operates in parts of the world and among people where suffering is attributed in part to impositions of ideologies, it is worth exploring a view that tries to avoid capture by a particular kind of ideology.

Sen himself is aware of the criticisms raised by scholars of post-colonialism. For his views on issues of identity, see AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN CULTURE, HISTORY AND IDENTITY* 85 (Picador 2005) [hereinafter *THE ARGUMENTATIVE INDIAN*]; AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (W.W. Norton & Co. 2006).

In reviewing Sen’s work, Vishanthie Sewpaul notes that Sen agrees “[t]he need to resist colonial dominance, is of course important.” However, Sen insists, “it has to be seen as a fight against submissive compliance, rather than as a plea for segregation and localism.” Vishanthie Sewpaul, *Challenging East-West value dichotomies and essentialising discourse on culture and social work*, 16 INT’L J. SOC. WELFARE 398, 404 (2007) (citing *THE ARGUMENTATIVE INDIAN*, *supra*, at 85). In this vein, Sewpaul makes the point: “Simply because certain ideas, values, theories and technologies are linked to the West, they should not be condemned or rejected.” *Id.* “Moreover,” she adds “given the historical, cultural and intellectual interconnections across the globe, it is often hard to differentiate what is Western and what is Eastern.” *Id.* As discussed earlier, Sen argues that elements of authoritarianism and democracy are present in both Western and Eastern traditions. Sewpaul also points out that even science, often associated with the west, was valued and heavily influenced by Islamic and Chinese culture. *Id.*

166. *Capabilities and Social Justice*, *supra* note 158, at 130. See also Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, reprinted in *GLOBAL JUSTICE: SEMINAL ESSAYS* 495, 526 (Thomas Pogge & Darrel Moellendorf eds., Paragon House 2008) (arguing “we do have in these areas of our common humanity sufficient overlap to sustain a general conversation, focusing on our common problems and prospects.”).

consensus, a list that can be endorsed for political purposes by people who otherwise would have very different views of what a complete good life for a human being would be.”¹⁶⁷

This raises the issue whether such a list could be uncontested, and not simply at the margin. For example, although Arrow himself supports freedom as a basic value, he asks without concluding whether even freedom enjoys universal acceptance. He observes that sometimes people appear to abandon freedom by electing autocratic governments; they fight against freedom (e.g. the Civil War) and are sometimes afraid of freedom.¹⁶⁸ Recent events in the Middle East indicate that freedom is a widely shared value (although as of this writing it is still unclear whether the various protest movements will result in greater freedom).¹⁶⁹ But if we accept such common denominators, whether represented by human capabilities, a human anthropology, or a set of human rights, then we might have to accept, as does Pogge, that such a concept of justice will necessarily be paternalistic.¹⁷⁰ Jouannet may be right that the paradoxical nature of international law cannot be avoided.

A second question one can ask of the comparative-capabilities approach is whether it is really possible to avoid questions about ideal social arrangements, as Sen’s approach tries to do. Even if one puts aside the question whether an approach that supports democratic forms of negotiation is in fact neutral about institutions, it could be argued that the comparative-capabilities approach itself raises other institutional questions because comparative decisions leave “residue” that has unintended consequences. For example, under this approach, a public decision about how to respond to climate change will result from a series of partial evaluations and inconsistent reasoning, and by definition will be temporary. Nonetheless, that decision will almost always have a continuing or permanent impact on social arrangements as part of its effect on human capabilities.¹⁷¹ Further, because nothing in the

167. *Capabilities and Social Justice*, *supra* note 158, at 131. For further discussion of Nussbaum’s concept of universals, see SABINA ALKIRE, VALUING FREEDOMS: SEN’S CAPABILITY APPROACH AND POVERTY REDUCTION 32-34 (Oxford Univ. Press 2002).

168. *Freedom and Social Choice*, *supra* note 154, at 58-60. On the latter point, Arrow cites Eric Fromm’s classic *ESCAPE FROM FREEDOM*. *Id.* at 59, n.22; ERIC FROMM, *ESCAPE FROM FREEDOM* (Farrar & Rinehart, Inc. 1941). One could of course characterize such fear of freedom as pathological, but to do so would open oneself to the criticism of Foucault.

169. Sen anticipates democratic impulses in the Middle East before these recent events. He writes, “The illusion of an inescapably non-democratic destiny of the Middle East is both confused and very seriously misleading—perniciously so—as a way of thinking about either world politics or global justice today.” *THE IDEA OF JUSTICE*, *supra* note 5, at 335.

170. *WORLD POVERTY & HUMAN RIGHTS*, *supra* note 58, at 40-43.

171. This is a feature of any cultural tool, including a comparative approach. J.M. BALKIN, *CULTURAL SOFTWARE* (Yale Univ. Press 1998).

comparative approach prevents it from being applied to large albeit discrete issues, it has the potential to have significant structural impacts on social arrangements. Yet, as discussed above, the comparative approach can say nothing about whether such arrangements are either wise or desirable.

This last point becomes a potential critique, not just of the comparative-capabilities approach, but of any account of justice that results in temporary solutions, subject to reevaluation at a later time, including the results of social resistance and the temporary resolution of paradox (and as we shall see in the next Part, the approach urged by Miroslav Volf). Just as there may be no way to proceed without positing commonalities among human beings (no matter how much one's identity is impacted, indeed constituted, by one's social relations), so too there may be no way to instantiate particular and temporary solutions to problems without letting loose in the world precedential effects that persist over time. These unplanned effects have an impact on the very social relations these approaches as yet do not fully address.¹⁷²

E. Resistance, Ambivalence, Immanence and the Self

Resistance, resolution of paradox, and comparative capabilities offer ways¹⁷³ that international law might better respond to the criticisms of those discussed in Part II.A. Rajagopal, Jouannet and Sen are not persuaded by the claims of rational choice theory or of economic approaches that emphasize utility maximization. They either take seriously the post-modern critique or try to circumvent it, and thus each approach does not purport to arrive at final answers; yet, each rejects the prospect of radical indeterminism. Irrespective of their grounding, each emphasizes that any "solutions" must be worked out in the real world. Such solutions are tentative, without any sense they should have precedential, let alone totalizing, effect.

How well do these approaches suggest a new vision for international law that answers better the critiques of widespread suffering, colonial legacies and the suppression of women discussed in Part II.A? Responding to a theory of resistance, international law would do well to recognize and embody the norms which would emerge as various groups counter world developments with their own set of ideas about how they wish to live, particularly if this is an important way that

172. Perhaps this is one reason why Nussbaum parts with Sen by exploring how a human capacities approach would be implemented by the state. See generally FRONTIERS OF JUSTICE, *supra* note 5.

173. Expressly with regard to Rajagopal and Jouannet and impliedly with regard to Sen.

silenced women and men in the Global South are making their way to the table and claiming a part of the loaf. But as I discussed earlier, at some point such a theory of resistance will, in my view, need to say more about how social movements will allow others to sit at the table and not exclude them, particularly because the cultural politics that drive such movements envision conflict.

The same is true with the temporary resolution of paradox. It may be that the attraction and repulsion we feel both for ourselves and others, which becomes manifest in the universalist and imperialist aspects of international law, is tempered by honest deliberation—Habermas' communication to understand. However, accepting the need to "struggle against that which we view as wrong and to impose that which we consider to be best" in a way that encompasses both our devils and better angels is worrisome, precisely because of how violently that ambivalence can manifest itself. As is true with a theory of resistance, it is unclear under this view how international law can be prevented from becoming just "an epiphenomenal summary of . . . configurations of power . . . at any particular moment."¹⁷⁴

Finally, international law that facilitates a comparative approach to justice, in which human capabilities serve as the measure of human wellbeing, is attractive. Of course, the work on human capabilities has already influenced the way in which international organizations such as the United Nations Development program assess human well-being. Nussbaum's capabilities approach is expressly intended to increase the life chances for women. At the same time, the capabilities approach is tied to ideas about the commensurability of human experience, decisions which are at bottom beliefs about the human being itself. We might well believe in such commensurability, but I doubt whether there will be a satisfactory way to distinguish between a common human anthropology, to use Jouannet's phrase, and particularized human culture.

With regard to Sen's comparative-capabilities approach to justice, there is another question one might ask of it, similar to those I have posed to the theory of resistance and to the temporary resolution of paradox. As I wrote earlier, when Jesus says, "It is not right that bread meant for children be tossed to the dogs," he is appealing to a common sense of justice. But recall he is also using that appeal to show his hostility towards the Syrophoenician woman. Put another way, the comparative-capabilities approach echoes deliberative understandings of

174. Benedict Kingsbury, *International Law as Interpublic Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167, 173 (Henry S. Richardson & Melissa S. Williams eds., N.Y.U. Press 2009).

democracy and, to avoid parochialism, foresees a diversity of persons at the table where decisions about what is just are made. This seems exactly right, but here is where my encounter with the president of the Union of Organized Women of Yasica Sur comes to mind. As I wrote in the Introduction, before she and I could even begin to have a meaningful conversation about the law, our relationship would have had to change. It is an open question whether there are any good reasons why she or I would have wanted to make the effort to sit at a common table in the first place. I turn to that question as addressed by theologian Miroslav Volf.

III. A PLACE AT THE TABLE AS ONE'S OWN

A. Exclusion and Embrace

The Syrophoenician woman's story is compelling because an encounter between strangers who had reason to be hostile towards each other results in mutual recognition and healing. The story does not explain precisely how that happens; but in a 1996 book entitled *Exclusion and Embrace*, Miroslav Volf tries to give a theological answer to that question, implied in the story but expressed in Jesus' execution by crucifixion. Volf's study is motivated by the ethnic conflicts in the former Yugoslavia, where he was raised, and in Los Angeles, where he then taught and lived.¹⁷⁵ Like Sen, Volf is not primarily interested in social institutions or arrangements; his concern is how one might foster "social agents capable of envisioning and creating, just, truthful, and peaceful societies, and . . . shaping a cultural climate in which such agents will thrive."¹⁷⁶

By way of background, Volf uses the same concepts of identity and alterity used by the post-colonial and feminist scholars previously discussed in Part II to frame his vision of social agents. As is well known, othering finds its roots in Hegel's master-slave relationship: Hegel argues that self-consciousness requires an encounter with the other, but such an encounter of one consciousness with another who has its own world view challenges the world view of the first. Inevitably, the two self-consciousnesses can co-exist only if one is subordinated to the other.¹⁷⁷ Although the implications of Hegel's thought are subject to

175. EXCLUSION & EMBRACE, *supra* note 7. Volf writes about his own experience of being interrogated by Yugoslav security officers as a potential security risk during the 1980s in THE END OF MEMORY, *supra* note 7, at 3-6.

176. *Id.* at 21 (emphasis removed).

177. GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT 111-19 (A.V. Miller

debate, the master-slave dialectic has informed modern academics who have focused on oppression and subordination of various peoples: Frantz Fanon and Edward Saïd in the context of colonialism,¹⁷⁸ Simone de Beauvoir in her analysis of the subordination of women.¹⁷⁹

As previously discussed, feminist scholars have used the other to show how conceptions of women as inferior have played into and reinforced dominant legal narratives, for example, in contract law.¹⁸⁰ Feminist legal theorists have also pointed out how law assumes a male default. “Much political thought that is apparently neutral in abstracting from the particularity of sex difference begins from a self-understanding that is historically male, and thus from a particularized understanding after all.”¹⁸¹ This assumption of a male default implies a biased vision of gender equality: “for women to be treated as equal, they must be treated *as men*, *like men*, because equality is premised on men.”¹⁸² The “equal treatment” that women are entitled to is therefore treatment as men. One possible result of othering, therefore, is oppression of the other and impoverishment of the self, in this sense: “Where one’s own identity is shaped without any relationship, reciprocity, or mutual respect for those defined as ‘other,’ what is valuable becomes deeply and profoundly biased in the direction of one’s own identity.”¹⁸³ Here then is a philosophical account of the ambivalence that Jouannet puts in psychodynamic terms.

Volf asks how people can live together without falling into the dynamic of exclusion: exclusion that arises either from destroying the other as an enemy or from subsuming the other under one’s own terms. For Volf, any answer to that question must also respond to the problem of enmity between individuals and peoples. Like Jouannet, Volf is

trans., Oxford Univ. Press 1977) (1807). For a recent discussion of the master-slave relationship, see Muhammad Kamal, *Master-Slave Relationship in Hegel’s Philosophy*, 25 INDIAN PHIL. Q. 455 (1998).

178. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Richard Philcox trans., Grove Press 2008) (1952); EDWARD W. SAID, *ORIENTALISM* (Pantheon Books 1978); EDWARD W. SAID, *CULTURE AND IMPERIALISM* (Alfred A. Knopf, Inc. 1993).

179. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., Penguin 1972) (1949).

180. Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN’S L.J. 501, 504 (2004). See *supra* text accompanying notes 72-81.

181. Emily R. Gill, *Autonomy and the Encumbered Self*, in RADICAL CRITIQUES OF THE LAW 109 (Stephen M. Griffin & Robert C.L. Moffat eds., Univ. Press Kan. 1997).

182. *Id.* at 114 (quoting ZILLA EISENSTEIN, *THE FEMALE BODY AND THE LAW* 54 (Univ. Cal. Press 1988)).

183. John A. Berteaux, *What Are the Limits of Liberal Democratic Ideals in Relation to Overcoming Global Inequality and Injustice?*, 6 HUMAN RTS. REV. 84, 93 (2005) (arguing that liberal ideals have been shaped to legitimate inequality and injustice in liberal states: as a consequence the application of liberalism to other parts of the world can have the same result).

therefore willing to address head-on what is skirted by Rajagopal and Sen; and as a theologian, Volf's answer to enmity centers on Jesus' death by execution. For Volf, Jesus' execution on a cross represents the unreciprocated donation of the self for others, and it implies that at times, any true reconciliation of paradoxes, and any true invitation to the table, whether to share resources or to reason together to solve common issues of justice, requires a strong form of self-giving that goes beyond reciprocity.¹⁸⁴

Volf concedes that such self-donation is "scandalous," not just because it is foolish but also because it seems irresponsible: "The ultimate scandal of the cross is the all too frequent failure of self-donation to bear positive fruit: you give yourself for the other—and violence does not stop but destroys you; you sacrifice your life—and stabilize the power of the perpetrator."¹⁸⁵ Jesus' execution thus stands for the possibility that one's self-donation will be pointless and only serve to strengthen the other who seeks to do you and others harm. Volf does not argue everyone must lay down his or her life for an enemy; at a minimum, however, those who stand within this tradition are called to embrace the other, that is, to make room for him or her. "The will to give ourselves to others and 'welcome' them, to readjust our identities to make space for them," he writes, "is prior to any judgment about others, except that of identifying them in their humanity."¹⁸⁶ Embrace thus resembles "the possibility of sharing or accepting the position of the other" that Jouannet is encouraged by in her observations of international negotiation.¹⁸⁷

For Volf, self-donation is necessary to avoid the dangers of universalism on the one hand and particularity on the other. Making room for someone else, even an adversary, requires a person to suspend for a moment universal concepts of justice and of right and wrong. At the same time, it requires the suspension of particularities by which one is identified, such as gender, class, and ethnicity, in order to welcome the other in all of his or her particularity. Jesus and the Syrophoenician woman were able to suspend both claims to the universal and particular

184. Robert Trivers argues that altruism between unrelated individuals is plausible if it is returned. Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971). Under some circumstances, the approach Volf advocates would exceed the strong version of Peter Singer's maxim of preventing "bad things from happening unless in doing so we would be sacrificing something of comparable moral significance." *Famine, Affluence, and Morality*, *supra* note 142, at 241.

185. EXCLUSION & EMBRACE, *supra* note 7, at 26.

186. *Id.* at 29.

187. See *supra* text accompanying note 119.

and meet each other in their common humanity. Volf thus appears to align himself with Jouannet, Sen, and Nussbaum, who believe there are anthropologies or capabilities common to all.

Writing as he does out of the context of the former Yugoslavia, Volf must respond to the question whether embrace is called for when oppression creates legitimate grounds for enmity, and he is unapologetic in arguing that embrace is exactly what is needed in such circumstances. Volf believes that oppression is real and must be resisted, but he argues that ultimately the concept is flawed. For one thing, oppression evokes a sense of disempowerment and victimhood. Second, just as we saw that there are cross-cutting power differentials between Jesus and the Syrophoenician woman, in times of conflict, the lines between oppressor and oppressed quickly blur. Finally, the construct does not provide guidance once the oppressed are liberated.¹⁸⁸ Volf continues by arguing that to the extent oppressed and oppressor can be identified, both must realize that each of them pose a risk of perpetuating hostility.¹⁸⁹ Therefore, both need to repent: the oppressor must repent by engaging in superabundant restitution.¹⁹⁰ The oppressed must repent by foregoing envy and enmity: envy because it legitimates the ideologies used by dominant persons to justify why things are; enmity because it turns the behavior of the dominant into the behavior of the dominated.¹⁹¹

Embrace goes further; it requires forgiveness as well as repentance. Here, Volf is aware that embrace could mean that sometimes one must forego justice. Volf does not want to go that far: he concedes that there can be no true forgiveness without justice, but adds that forgiveness is necessary because in his view strict restorative justice can never be satisfied.¹⁹² “Only those who are forgiven and who are willing to forgive will be capable of relentlessly pursuing justice without falling into the temptation to pervert it into injustice.”¹⁹³ Finally, Volf argues the last step in embrace is a kind of “nonremembering.”¹⁹⁴ This is

188. *Id.* at 103.

189. *Id.*

190. *Id.* at 118.

191. *Id.* at 115-16.

192. As Charles Griswold writes, “Forgiveness is a virtue against the background of a narrative about human nature and its aspirations that accepts imperfection as our lot.” GRISWOLD, *supra* note 8, at 14.

193. EXCLUSION & EMBRACE, *supra* note 7, at 123. Volf believes, however, in the value of rage at oppression. Volf refers to the imprecatory *Psalms* in which the Psalmist calls on God to wreak vengeance on his enemies. *Id.* at 123. Volf argues that the expression of rage before God is necessary to prevent the double exclusion: “[B]y placing unattended rage before God we place both our unjust enemy and our own vengeful self face to face with a God who loves and does justice.” *Id.* at 124.

194. *Id.* at 131-40. Volf explores these themes further in *THE END OF MEMORY*, *supra* note 7.

because in Volf's view, no final redemption is possible without some kind of redemption of the past.¹⁹⁵ However, the redemption of that past cannot be achieved because that would require us to give a satisfactory explanation of past suffering. But it is impossible to reconcile the existence of a good and all-powerful God with the existence of evil.¹⁹⁶ Since "no theodicy can succeed, the final redemption is unthinkable without a certain kind of forgetting."¹⁹⁷

The dynamics of embrace are not restricted to interpersonal relations on the small scale. For example, Volf argues that embrace is needed to resolve competing accounts of justice. Here, a person who holds a particular view of justice must engage in "double vision," a process in which one tries, albeit imperfectly, to reverse one's perspective and to see from the perspective of the other. In a move that resonates with Sen, such an encounter might not lead to complete agreement and might simply reinforce one's own vision, but it might also result in the enrichment or correction of one's own view.¹⁹⁸ At the same time, such double vision does not mean neutrality: those who stand within the biblical tradition must always be suspicious of the perspective of the powerful.¹⁹⁹ This is "not because the powerless are innocent but because the powerful have the means to impose their own perspective" through argument, propaganda, and force.²⁰⁰

Volf believes that "along with new understandings and peace agreements new conflicts and disagreements are permanently generated,"²⁰¹ so that like Jouannet's temporary resolution of paradox, any resolutions of tensions between persons will be temporary. In this regard, Volf is aware that embrace can be dismissed as utopian. He tries to avoid this criticism by arguing he does not envision a final reconciliation in this life. To the contrary, a vision of final reconciliation would lead to a form of universalism that would also perpetuate the vicious cycle he wants to avoid.

From the postmodern critique of emancipation . . . we can learn that we must engage in the struggle against oppression, but renounce all attempts at the final reconciliation; otherwise, we will

195. EXCLUSION & EMBRACE, *supra* note 7, at 135.

196. See "theodicy" in ANTHONY C. THISELTON, A CONCISE ENCYCLOPEDIA OF THE PHILOSOPHY OF RELIGION 306 (Oneworld 2002).

197. EXCLUSION & EMBRACE, *supra* note 7, at 135.

198. *Id.* at 212-13. This is how Volf interprets the Syro-Phoenician woman's story. *Id.* at 213-14.

199. *Id.* at 219.

200. *Id.*

201. *Id.* For a detailed discussion of the unintended consequences of social tools, see BALKIN *supra* note 170, at 32-39.

end up perpetuating oppression. From the limitations inherent in the projects of liberation . . . we can learn that the struggle against oppression must be guided by a vision of reconciliation between oppressed and oppressors, otherwise it will end in “injustice-with-role-reversal.”²⁰²

Thus, “[b]oth the modern project of emancipation and its postmodern critique suggest that a *nonfinal reconciliation in the midst of the struggle against oppression* is what a responsible theology must be designed to facilitate.”²⁰³ What can be hoped for now is a way of living with the other, expressed in embrace, which ends in a letting go “so that ‘the negotiation of difference,’ which can ‘never produce a final settlement,’ may be continued.”²⁰⁴

Volf’s embrace thus resonates deeply with the temporary resolution of paradox imagined by Jouannet in that both scholars are addressing the problem of human ambivalence or enmity and the ways in which they play out in the world. The difference, I think, is that while the temporary resolution of paradox allows us to “accept the need to struggle against that which we view as wrong, and to impose that which we consider to be best,” the Christian response as framed by Volf also struggles against oppression, but resolves the paradox by requiring its adherents to be prepared at the extreme to sacrifice themselves for the other to break the cycle of violent imposition.

Obviously, this approach is very risky and for several reasons. Embrace is marked by a fluidity of identities, as discussed above.²⁰⁵ Volf demands embrace even when the strong try to dominate the weak and the weak try to subvert such power.²⁰⁶ Under those circumstances, embrace is asymmetric.²⁰⁷ Embrace can lead to any number of outcomes and is thus unpredictable: “we can never know in advance how the reshaping of the self and the other will take place in embrace.”²⁰⁸ Finally, such an embrace is perilous: because true embrace is asymmetric and underdetermined, “I . . . make a movement of the self toward the other, the enemy, and do not know whether I will be

202. *Id.* at 109.

203. *Id.* at 109-10.

204. *Id.* at 145 (quoting MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENTS AT HOME AND ABROAD* 83 (Harv. Univ. Press 1994)). Volf does not believe in incommensurability of language games, but this appears to echo Otto’s point that “noncommensurability can be a positive dynamic of social relations rather than something that requires disciplining and silencing.” *Subalternity and International Law*, *supra* note 89, at 172.

205. *EXCLUSION & EMBRACE*, *supra* note 7, at 145.

206. *Id.* at 145-46.

207. *Id.* at 146-47.

208. *Id.* at 147.

misunderstood, despised, even violated or whether my action will be appreciated, supported, and reciprocated.”²⁰⁹

To respond to this risk, Volf must leave his project of imagining proper social actors and turn to social arrangements. He concedes that the asymmetry and under-determination that attend embrace undermine it as the basis for social life because it is too risky and volatile.²¹⁰ As a result, Volf proposes that social actors live within covenant communities.²¹¹ But because covenant itself is neutral in respect of oppression (apartheid South Africa can be understood as a covenant among dominant peoples), to prevent a social covenant from becoming another means of oppression, it must be informed from an outside force. For Volf, that force is morality, in turn informed by theology, in which God enters into covenant with humankind.²¹² That covenant in turn exemplifies embrace because in Jesus’ execution, God embraces humankind even though (in the Trinitarian scheme) humankind executed that God. God refuses to allow the covenant to be undone and repairs it, even though God was not responsible for breaking it.

Thus, just as Rajagopal uses an expanded version of civil society to counteract the uncertainties of conflicting social movements,²¹³ Volf uses the covenant community to counteract the uncertainties of embrace. Here, however, embrace runs into at least two additional problems. The first goes to a question beyond the scope of this Article. For a person who stands in the Christian tradition, the answer to the question I posed for Sen’s comparative approach, “Why should I welcome someone to the table?” is “Because God welcomes us.” The question then arises whether Volf’s approach is convincing for someone who does not stand within that tradition—are there satisfactory non-theological reasons why I should welcome my enemy to the table?

The second dilemma is to what extent should a vision of how social agents should interact, either through comparative choice or through embrace, guide larger communities? This is a problem identified by Reinhold Niebuhr in *Moral Man and Immoral Society*, in which he argues essentially that morality that works among individuals and smaller groups is not scalable.²¹⁴ It is analogous to the problem of the residue of Sen’s comparative choices to maximize human capabilities;²¹⁵

209. *Id.*

210. *Id.* at 147-48.

211. This is opposed to social arrangements based on social contract. *Id.* at 148-50.

212. *Id.* at 151.

213. See *supra* text accompanying notes 106-10.

214. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (Scribner 1932).

215. See *supra* text accompanying note 172.

although one can see the need to focus on social agents instead of social arrangements. Volf's approach is far from reducible to a chicken-and-egg problem, but it is fair to ask whether even a theologically informed covenant community, which encourages us to risk embrace yet protects us from its inherent uncertainty, is itself required to take that risk. Communities have indeed incorporated aspects of embrace in response to past individual and social harms: means that South Africa and other countries have devised to address mass injustices, reparations for Japanese Americans, and other similar movements are the best examples.

Achieving reconciliation for past injustice has been hard enough,²¹⁶ but responding to present or immanent injustice is even more so. Volf is clear that embrace does not prevent us, and indeed might require us, to fight such injustice, but it is one thing for an individual to risk embrace in that fight, and quite another for that individual to ask her family or members of her community to do so. However, once we distinguish between personal and community responses to the other, this opens up space for a theory of embrace not only for the individual, but also for the community that allows responses to the other that begin to resemble exclusion.²¹⁷ Such a theory could involve a community that has already excluded the other or whose embrace allows exclusionary responses. Perhaps one can develop an ethic in which the individual, perhaps even encouraged and supported by his community, might sacrifice himself for someone outside that community. But the same community might feel itself morally obligated not to embrace the other; in fact, it might feel obligated to respond in ways that do not look like embrace, and the scale of corporate harm that could result might extend much farther than any individual exclusion. Moreover, because self-identity depends so much on the relations that constitute the community, the question arises

216. Volf describes how his parents' community enabled them to forgive people who were responsible for the death of one of their children. *FREE OF CHARGE*, *supra* note 7, at 211-14.

217. To be fair, Volf does distinguish between exclusion on the one hand, that is, to treat the other as an enemy, or to ignore, or to subsume him, *id.* at 67, and judgment on the other, meaning, the ability to tell when others seek to harm or to subsume you, to recognize when others are excluding you. He does not argue that we should abandon judgment. *EXCLUSION & EMBRACE*, *supra* note 7, at 68. Moreover, he argues elsewhere that embrace is necessarily reciprocal—it is entirely possible the other will not wish to embrace the self. *Id.* at 142. But unless Volf is calling for pacifism as a social and not just an individual policy (he argues in this regard that God has a monopoly on violence, but concedes that it “may be that consistent nonretaliation and nonviolence will be impossible in the world of violence.” *Id.* at 301, 306), a community's resistance to the other, based on a judgment the other seeks to exclude it, could have the same downward spiraling effects as action motivated by exclusion. Perhaps we will have better motives for resistance, and such motives might temper that resistance, but it is unlikely the other will care. The other will view what we have done as exclusion.

whether a community that must sometimes respond in seemingly exclusionary ways can provide the validation that would encourage even individuals to embrace. As a result, Volf's depiction of the ways in which we share aspects of both oppressor and oppressed and his description of how we could overcome the "logic" of othering seems to capture an important aspect of Christian theology, and I believe, a way forward. At the same time, much more work must be done to explain how communities are supposed to live this out, particularly on the international level.²¹⁸

B. The Syrophoenician Woman and International Law

It can be argued this discussion of one theological framework for reconciliation has taken us far afield from the encounter between Jesus and the Syrophoenician woman.²¹⁹ Nowhere in the story do we see a step-by-step formula for embrace, nor in fact do we see any indication

218. *Id.* at 156. It is not within the scope of this Article to compare and contrast self-donation with the large literature that articulates an ethic of care. As Selma Sevenhuijsen describes it, such an ethic "focuses on values such as attentiveness to the need for care, willingness to accept responsibility for others as well as for the results of actions, and responsiveness." SELMA SEVENHUIJSEN, *CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS OF JUSTICE, MORALITY AND POLITICS* 70 (Routledge 1998), *citing* JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 127-37 (Routledge 1993). An ethic of care also involves "attention to specific contexts and situations, and the opening up of a moral dialogue in which outcomes are not determined in advance." *Id.* Such an ethic is intriguing because among other things, it views many relationships as givens, whereas the framework Volf uses understands that identity is determined by relationships, but begins with the potential for enmity. Under the ethic of care, relationships need not be framed in terms of selfishness or altruism. VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 13-14, 129 (Oxford Univ. Press 2006). See also RUTH E. GROENHOUT, *CONNECTED LIVES: HUMAN NATURE AND AN ETHICS OF CARE* 21-51 (Rowman & Littlefield Pub. 2004) (describing the understanding of human nature in an ethic of care, as well as the ideals implicit in such an ethic); PETA BOWDEN, *CARING: GENDER-SENSITIVE ETHICS* (Routledge 1997) (discussing an ethic of care in the context of the roles of mothering, friendship, nursing and citizenship).

219. I recognize the irony of a paper that discusses a variety of responses to current critiques of international law but focuses on only one theological viewpoint from only one faith tradition. For a discussion of how other faith traditions might address similar issues, see, e.g., SALLIE B. KING, *BEING BENEVOLENCE: THE SOCIAL ETHICS OF ENGAGED BUDDHISM* 202-28 (Univ. Haw. Press 2005) (discussing Buddhist concepts of justice and reconciliation); Ahmet Alibašić, *The Place for Others in Islam*, 3 COMP. ISLAMIC STUD. 98 (2007) (discussing a basis for co-existence under Islam); Hans KÜNG & WALTER HOMOLKA, *HOW TO DO GOOD AND AVOID EVIL: A GLOBAL ETHIC FROM THE SOURCES OF JUDAISM* (John Bowden trans., SkyLight Paths Pub. 2009) (a collection of essays by the authors and others providing the basis for a global ethic from Judaism).

The Sarvodaya Shramadana Movement of Sri Lanka is an example of a major development organization deeply informed by Buddhist thought. See A.T. Ariyaratne, *Sarvodaya Shramadana Movement: Towards a Global Perspective from a Rural Experience*, Talk delivered at the International Conference on Sarvodaya and World Development held at Damsak Mandira, Moratuwa, Sri Lanka (Apr. 1978), *available at* <http://www.sarvodaya.org/about/philosophy/collected-works-vol-2/global-perspective>.

that such an embrace is called for: in the narrative, the encounter is brief, there is no indication Jesus and the woman meet again, and there appear to be no grounds for further relationship, if in fact such a relationship is called for. Finally, the framework of “othering” is surely a post-modern overlay onto the story and can at best be found only in its interstices.

And yet, what is powerful about the story is that it lends itself to interpretations imaginative and yet true to the course of the narrative. The narrative does in fact use terms such as “woman,” “Syrophoenician by birth,” “children,” and “dogs,” which allow the reader to conclude the author has experienced divisions based on gender, nationality, religion and economic class. The initial hostility with which Jesus treats the woman, who in some accounts is described as inferior and in others as part of a superior class that has benefited from exploiting a people with whom Jesus identifies, shows that enmity can threaten to undermine an encounter even with someone who is supposed to represent the best God has to offer. The story recognizes the danger that beliefs and institutions, whose inclusions have led to exclusions, can pose. Thus, if the story does mean that all belong at the table and that any dehumanization of others, leaving only crumbs to some, is unacceptable, then the need for a means of reconciliation that does not set into motion a cycle of exclusion does arise. The story, in combination with Volf’s image of embrace, imagines a way to respond to social conflict, and thus offers the kind of imagined reality Kosekenniemi calls for to revive a flagging international law.²²⁰ At a minimum, the encounter leads to insight, which in turn, at least for a moment, allows Jesus and the woman to see one another in new way, and someone’s suffering is alleviated as a result.

In his review of Hans Küng’s attempt to frame a global ethic,²²¹ Richard Falk admires the man but criticizes the result.²²² Falk argues that attempts like Küng’s tend to end in an emphasis on the golden rule and an admonition to treat others humanely. For Falk, such an ethic poses two conceptual problems. On the one hand, such ethics can be viewed so abstractly that they are either irrelevant or too vague to guide behavior and policy—they become platitudes. On the other, if they purport to guide behavior, the implications can seem too radical in light

220. FROM APOLOGY TO UTOPIA, *supra* note 55, at 557.

221. HANS KÜNG, A GLOBAL ETHIC FOR GLOBAL POLITICS AND ECONOMICS (Oxford Univ. Press 1998).

222. Richard Falk, *Hans Küng’s Crusade: Framing a Global Ethic*, 13 INT’L J. POL., CULTURE & SOC’Y 63 (1999). Volf does too. See EXCLUSION & EMBRACE, *supra* note 7, at 284-85.

of “the distribution of power and privilege in the world,” such that the ethic becomes utopian and again irrelevant.²²³ Further, Falk argues, any ethic must identify the agents who will live it out in relation to the state and to the market.²²⁴ Apropos to those admonitions, I spend the last few pages of this Article discussing some of the ways in which the Syrophoenician woman’s story might be lived out in international law.

A phrase like “everyone is welcome at the table” runs the danger of irrelevancy or inapplicability because of its abstraction, but not always: like the phrase “Third World” that also serves as a heuristic;²²⁵ this phrase serves as shorthand for a series of complex meanings and underlying realities. We cannot do without these images, and they serve powerfully to orient the way we understand and shape reality. Such images were the very things that made the transformative encounter between Jesus and the Syrophoenician woman possible. The questions, “Who is at the table and who isn’t?” and “Who is receiving bread and who is left with crumbs?” can and do influence the way international law is understood; they either influence or criticize how international actors behave.²²⁶ Those who live out the story on the international level are already found in the social movements Rajagopol and others describe the conversations taking place at some of the international forums that help to resolve Jouannet’s paradox; and Sen’s vision of a wide range of peoples engaged in social choice. These are particular visions of people at the table, although each raises their own sets of issues, as I have described above.²²⁷

223. Falk, *supra* note 221, at 77.

224. *Id.* For Falk’s own understanding of the role spirituality plays in international affairs, see Richard Falk, *Politically Engaged Spirituality in an Emerging Global Civil Society*, 15 REVISION 2 (Spring 2003).

225. RESHAPING JUSTICE, *supra* note 60, at 3-4.

226. In the same way, Susan Marks suggests that international law ask the question, “Who benefits and at whose expense?” Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 281, 306 (Susan Marks ed., Cambridge Univ. Press 2008).

Questions like these motivate the “method” proposed by Charlesworth and Chinkin to address the problem of exclusion of women in international law: to first ask whether women are literally present in international institutions, then explore the vocabulary of international law and the disparate impact of purportedly neutral concepts on women, which in turn raises questions how those concepts reflect deeper constructions of gender. THE BOUNDARIES OF INTERNATIONAL LAW, *supra* note 71, at 49-50.

227. There are other, more specific examples of how this approach could impact international law. Margaret Chon, for example discusses how an approach that takes into account the agency “of groups and individuals with relatively less voice and representation in formal legal structures” would reshape aspects of international copyright law. Margaret Chon, *Intellectual Property “From Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 816 (2007).

But are parts of the story irrelevant because they are utopian, particularly if Volf's self-donation is a logical implication of the narrative? A response to that question has two aspects. Recall Volf argues that the appropriate response of an oppressor to past oppressions is superabundant restitution.²²⁸ If we are persuaded by the argument that the West participates, through international law, in the suffering of women and men elsewhere, then the Syrophenician woman's story puts into the foreground and validates calls like Pogge's to establish a global resources dividend²²⁹ and to reshape resource and borrowing rights to acknowledge the moral claims that poorer people have on the world's resources. It also supports the international community's halting efforts to remedy the legacies of an arguably colonial and exploitative past, efforts that recognize to some extent the impacts that Western industrialized countries have had on the distribution of the world's wealth and on the global environment.²³⁰ At the same time, the principle of restitution calls for a serious hearing of arguments that these efforts are just window-dressing or ineffective or both, and that they neither address the real concerns of poorer countries, nor allow for meaningful participation at the international table.²³¹ Finally, if such efforts are not forthcoming and international law plays a role in justifying inaction, then the story gives grounds for unmasking such law as mere ideology.

On the other side, Volf asks people who have suffered from the actions of more advantaged others to turn away from envy and enmity. Given the complex ways in which we are constituted and identified and how we all capable of doing good and ill to one another, in my view Volf is right because to yield to either is to perpetuate the very thing one is trying to resist. Anghie, who is a leader in Third World criticisms of international law, is mindful of this danger. He observes:

[M]any Third World states which have been the victims of colonialism have themselves been imperial in their ambitions and

228. This "principle" is lived out in the New Testament story of Zacchaeus. Luke 19:1-10. Zacchaeus is a tax collector, who after encountering Jesus, says "Look, Lord! Here and now I give half of my possessions to the poor, and if I have cheated anybody out of anything, I will pay four times the amount." Luke 19:8.

229. WORLD POVERTY & HUMAN RIGHTS, *supra* note 58, at 202-21.

230. These doctrines include special and differentiated treatment and the generalized system of preferences in international trade, and they include principles such as "the polluter pays" and "common but differentiated responsibility" for environmental harms in international environmental law. U.N. Framework Convention on Climate Change, art. 3, ¶ 1 (common but differentiated responsibility and polluter pays), art. 4, ¶ 1 (common but differentiated responsibility), S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 170 (May 9, 1992); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (June 14, 1992).

231. See *supra* note 59.

practices, if not in relation to other states then in relation to minorities and indigenous peoples within their borders. Imperialism[] is not by any means a purely Western practice.²³²

Anghie believes alterity plays a vital role in this problem. “The construction of the ‘other’ . . . is crucial to the extension and universalization of international law.”²³³ He continues, “Complex issues arise as to whether it is possible to somehow imagine the ‘other’ and behave towards it in some different and non-imperial way.”²³⁴ This is exactly the question Volf’s account of the cross tries to address: it is not so much how one constructs the other as it is whether one will embrace the other, no matter how he is constructed, in all the complexity that affects that construction. But as I discussed above, it is still not completely clear how communities are to live this out. On this latter point, however, it seems obvious from my encounter with the Union of Organized Women of Yasica Sur that I cannot presume to speak to them, or to anyone who has been disadvantaged by others, about what they should or should not do. Listening seems more in order.

In a recent essay, Upendra Baxi writes that various social movements taking place within the Third World have succeeded in identifying a set of normative expectations to which serious attention is being paid on the international level. These include equal rights for women; the norm against torture and cruel, inhumane and degrading treatment; indigenous rights; a fresh appreciation for social, economic and cultural rights; and sustainable development.²³⁵ Baxi adds to these norms a longer list of expectations that persons in the Third World have of international law, including expectations of “coequal discourse”: “global reparative justice”; and “fair versus free trade.”²³⁶ Each of these expectations emerges from and represents the lived experience of people and deserves to be regarded, to be embraced.

232. IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW, *supra* note 60, at 319.

233. *Id.* at 318.

234. *Id.*

235. Upendra Baxi, *What May the ‘Third World’ Expect from International Law?*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 9, 17 (Richard Falk et. al. eds., Routledge-Cavendish 2008).

236. *Id.* at 18. The entire list includes: 1) the expectation of territorial non-aggression; 2) the expectation of gender equality and justice; 3) expectations regarding duties of assistance; 4) expectations concerning “global confessional politics;” 5) expectations of addressing new forms of “human rightlessness;” 6) expectations regarding human-rights based practices of human development; 7) expectations regarding sustainable development as they impact nuclear proliferation; 8) expectations of equal respect for all minorities; and 9) expectations regarding the subsuming of market principles to human rights. *Id.* at 18-19.

Yet the question is whether international law and lawyers will listen; who is at the table and who is not, and who receives loaves and who does not, thus remain powerful questions. Obiora Okafor argues it is highly unlikely that in the near and middle term, international law will be fully responsive to two major areas of concern for most Africans: first, the reduction of severe poverty and second, agency.²³⁷ For Okafor, the reduction of agricultural subsidies is an important step in addressing African poverty, and although he is encouraged by the fact that such subsidies are a subject of the Doha Development Round, in his view, the glacial pace of those negotiations confirms “the law’s historical tendency to reflect and respond more effectively to the economic worries and demands of the North, and to be at the same time much less responsive to the socioeconomic challenges facing most African peoples.”²³⁸ Similarly, Okafor joins others in worrying that the formal and informal governance of international finance has taken important economic decisions to the international level, thus reducing African agency.²³⁹ He writes, “There is . . . little reason to suppose that the countries of the North that currently dominate our global order will willingly concede to Africans the level of agency that they desire.”²⁴⁰ Claims such as Okafor’s are not uncontested, but if he is even partially correct, then international lawyers have much work to do.

CONCLUSION

In the end, the current debates over the ways that international law can and has been used for good and ill reflect a larger set of questions about what we are justified in doing to one another. The Syrophoenician woman teaches that if international law will be used for harm, it must be abandoned. But if we abandon it, we would be saying more about ourselves than about international law: we would be saying that all we are capable of as a world community is doing harm. Of course that is not true. The encounter between the Syrophoenician woman and Jesus also points to the possibility for insight and reconciliation. To avoid the danger, not that it is too high for many people in the world, but that it is useless or an obstacle to justice, international law should do all it can to make this vision so.

237. Okafor, *supra* note 87 at 100, 103-04.

238. *Id.* at 99.

239. *Id.* at 100-04. *See also supra* note 59.

240. *Id.* at 103.

