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THE LIBERAL NOMOS OF EMPIRE:
EXTRATERRITORIALITY, LEGAL ORIENTALISM, AND THE UNIVERSALIZATION OF "CIVILIZED" INTERNATIONAL LAW IN CHINA

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For my parents

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ABSTRACT

When and how did international law become a universal order applicable to all states on the earth? Existing scholarship has framed the universalization of international law in one of two ways. Traditionally, scholars have analyzed this legal process with reference to European global imperial expansion during the nineteenth-century and the concomitant legal domination of non-European societies. More recently, however, scholars have analyzed this process of legal universalization with reference to non-European states' legal resistance to European imperial domination, and specifically their critical re-appropriation of European international law as an anti-imperial counter-discourse. This historiographical opposition, I argue, was mirrored in an historical opposition between nineteenth-century European imperial jurisprudence and non-European anti-imperial jurisprudence. Viewed together, historically, these discursive oppositions raise heretofore largely overlooked questions about the kinds of global practices that underpinned the universalization of modern international law, and rendered its attendant imperial/anti-imperial counter discourses equally plausible to both sides. My dissertation analyzes the historical nature and significance of those practices through an investigation of the global spread and deepening of commodity exchange relations, which, I argue, necessitated a particular liberal form of private law and rights-bearing legal subject. That liberal form of private law structured the historical constitution of nineteenth-century public law, including, most significantly, modern "universal" international law. It did so by supplying and lending legal legitimacy to the latter's core liberal normative assumptions, rendering their derivative legal-jurisprudential imperial and anti-imperial discourses plausible to both European and non-European legal actors. It is in this critical frame, I argue, that we should understand the dual

nature and significance of modern liberal international law, and the paradoxical historical trajectories borne out through its universalization.

Introduction

Extra-European extraterritoriality underwent a global legal and historical transformation during the nineteenth century. In its earlier historical incarnations, extraterritoriality functioned as a *modus vivendi* for commercial relations between communities with different and incompatible customs, laws, and religions.[1] These customary extraterritorial arrangements were, on the whole, mutually beneficial for both the host polity and the admitted foreign community: migratory merchant groups were allowed to self-police and foreign hosts could relieve themselves of the burden of administering justice to foreigners. In its plurality of pre-modern customary forms, extraterritoriality was neither inequitable nor exploitative; nor did its dispensation translate into an inferior legal status for the host polity. As opposed to the plurality of its pre-imperial customary forms, extraterritoriality assumed its singular "modern" legal form, i.e. consular jurisdiction, during the nineteenth century. This legal redefinition of extraterritoriality took place alongside its globalization, which proceeded through both coercive and non-coercive means, but, in each and every nineteenth-century case, European-non-European extraterritorial relations came to be formalized in international treaty law. That legal formalization legitimated Western imperial privileges-cum-"civilized rights" to trade, travel, and proselytize in "un-civilized" and "semi-civilized" non-European lands. Nineteenth-century Western international lawyers justified these "unequal treaties," as well as the necessity of establishing and maintaining Western consular jurisdiction, by denying non-European

[1] Early historical examples of mutually beneficial legal-jurisdictional arrangements can be found in Ancient Egypt where Jews, Phoenicians and Greeks were permitted to both worship in specially designated regions and retain their own agents and institutions for administering law and order. In ancient Greece, a more developed system of foreign jurisdiction consisting of special magistrates, Ξενοδικαι (xenodikai), typically appointed or agreed upon by the foreign government of the foreign resident in question, was instituted in order to try cases involving foreigners.

indigenous law the status of "civilized" law and systematically excluding non-European societies from the "Family of Nations."

My dissertation examines this global turn to extraterritorial empire – its historical conditions of possibility, its core legal and jurisprudential forms, and its ambivalent doctrinal legacy in the history of modern "universal" international law. I do so through an investigation of the rise and decline of modern British extraterritoriality in China, which historians traditionally date from its formal inception in the 1842 Sino-British Treaty of Nanjing through the 1943 Sino-British Treaty for the Relinquishment of Extra-Territorial Rights in China. My study, however, broadens this traditional formal chronology in order to analyze the pre-treaty constitution of legal orientalism – a transnational normative discourse which structured British/Euro-American ideas of what counted as "civilized" law and what did not, as well as who was included as a "civilized" legal subject and who was not. The pervasiveness of legal orientalism during the late eighteenth and nineteenth centuries recommends a broad analytical purview, and my inquiry covers an array of discursive practitioners: English/British East India Company (EIC) agents, British lawmakers and consular officials, merchants, missionaries, diplomats, lawyers and jurists. First, I investigate the socio-historic production of legal orientalism, as a predominantly essentializing discourse, as it took rhetorical shape in and around Sino-British/Western commercial and jurisdictional disputes at the turn of the eighteenth century. Next, I examine its historical re-iteration – from an essentializing discourse into a reformist-developmentalist discourse which aimed to "normalize" Sino-British relations through treaty law – in the context of a shift from EIC quasi-sovereign control to British metropolitan legal control in 1833, and its stalled juridical consolidation in the years leading up to the first Sino-British opium war (1839-42). This is followed by a critical investigation of the discursive parallels between the British legal orientalist

critique(s) of the particularistic nature of Chinese law and the English legal positivist critique of the particularistic nature of the English common law tradition. Those legal discursive parallels indicate a common liberal normative standpoint of critique, which, I shall argue, relates to the determinate capitalist context of possibility that gave rise to these liberal legal discourses and rendered them plausible to social actors-cum-legal subjects, both European and non-European. Following a critical social theoretical delineation of these liberal normative underpinnings, I then trace the post-1842 institutional instantiations of legal orientalism in British international law and positivist jurisprudence, on the one hand, and, on another, in the "self-orientalization" involved in the early twentieth-century formation of a Chinese anti-imperialist legal discourse that challenged the legal legitimacy of Western/foreign extraterritoriality as an encroachment on China's sovereignty.

Despite the overabundance of studies on orientalism, scholars have been slow to consider the distinctly legal dimensions of this normative discourse. More recently, however, a small contingent of Saidian/Foucauldian historians and legal scholars has begun to paint a genealogical picture of this discursive phenomena by critically tracing its historical and contemporary instantiations in various bodies of domestic, international, and global law and legal jurisprudence.[2] And while such genealogical accounts have undoubtedly advanced our understanding of the global historical consequences of legal orientalism, they have also tended to frame it as an exclusively imperial and/or colonial legal discourse that justified Western domination of non-Western societies. I seek to complicate and qualify this imperial framing by relating legal orientalism to its historically determinate capitalist context. To do so I shall analyze the points of articulation and tension between the British legal orientalist critique of "un-

[2] The most important of these is Teemu Ruskola's, *Legal Orientalism. China, The United States, and Modern Law* (Cambridge: Harvard University Press, 2013).

civilized" Chinese law and the English legal positivist critique of the common law tradition, which found its most paradigmatic expression in the practical and theoretical works of Jeremy Bentham (1748-1832). These critical legal discourses mobilized the same core tropes about the "particularistic" nature of Chinese law, on the one hand, and the English common law tradition, on the other: both were cast as "personal," "irregular," "arbitrary," and "despotic" in order to deny each the status of "civilized" law; and both, on those same normative grounds, were made subject to certain "universal" liberal laws and legal reformist projects. I shall theorize these legal discursive parallels – and their normative grounding in a liberal standpoint of critique – through a non-traditional Marxian reading of Foucault's genealogical account of the "Great Reformers" (e.g. Beccaria, Servan, Duport, Pastoret) and their role and significance in the historical transition to a modern capitalist economy in his famed *Discipline and Punish*. This critical reading provides a theoretical point of departure for the historicization of a transnational movement towards abstraction in Euro-American domestic and international law and legal jurisprudence, as well as of the juridical agents whose liberal reformist projects, implemented (with varying degrees of success) in both the metropole and the periphery, gave that movement concrete doctrinal expression.[3]

I then use this critical reading of Foucault in order to delineate a Marxian theory of capitalist socio-legal forms that can historically ground not only the liberal normative underpinnings of legal orientalism-positivism, but also the global historical context of possibility that rendered these liberal legal discourses meaningful to practitioners of law, both European and

[3] On this movement towards abstraction in nineteenth-century law and legal jurisprudence, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* [henceforth: *Imperialism*] (Cambridge: Cambridge University Press, 2004). Compare with Carl Schmitt's analysis of the abstract "spaceless universalism" of modern legal and jurisprudential thought in The *Nomos of the Earth in the International Law of the Jus Publicum Europaeum* [henceforth: *Nomos*] (New York: Telos Press, 2003 [1950]).

non-European. Such a critical social theory moves beyond orthodox Marxian understandings of law as a superstructural reflex of an economic base and/or an ideological reflection of particular set of class interests (or, in the case of "bourgeois" international law, the national interests of the state) in order to investigate the liberal legal and jurisprudential forms – contracts, treaties, legal personhood, legal positivism – through which "civilized" law was universalized in China. I shall argue that the global-cum-imperial expansion of these liberal domestic and international forms gave rise to new global modes of legal domination and resistance, new forms of legal inequality and equality, and new types of legal subjects and non-legal subjects. Such a dialectical perspective illuminates the socio-historic conditions of possibility for Chinese legal anti-imperialism – a critical legal discourse and oppositional legal consciousness predicated on the internalization of Euro-American legal orientalism-positivism[4] and the critical re-appropriation of its underlying universalist-particularist logic. In this way also, it complicates and qualifies the imperial framing of not only Foucauldian genealogies of legal orientalism, but also the existing critical scholarship on the "universalization" of modern international law, which posits Europe as the subject of this global historical process, and the non-European world as the object of it.[5]

My inquiry into the rise and fall of modern British extraterritoriality in China illuminates, in sum, the historical production and global circulation of a contradictory liberal legal discourse, which informed both imperial and anti-imperial legal arguments, doctrines, and jurisprudential theories. I trace its pre-1842 constitution in the form of an ambivalent British legal orientalism, which essentialized China as a "lawless" and "un-civilized" Other, on the one hand, and, on

[4] I use this term to designate the historical articulation of these two legal discourses, which, as we will see, became inextricably bound in nineteenth-century international law; it found its paradigmatic historical expression in "civilized" international legal discourse.

[5] On the general theoretical struggles of Foucault in accounting for resistance and oppositional forms consciousness, see Neal Brenner, "Foucault's New Functionalism" *Theory and Society* 23 (1994).

another, worked to "normalize" Sino-British/Western relations and reform China's international and domestic legal behavior by incorporating it into the global domain of "civilized" international law. The essentializing and reformist logics at work in the pre-treaty constitution of British legal orientalism were mirrored in the concurrent formation of English legal positivism, in both its domestic and international iterations. I shall argue that the globalization of this ambivalent legal orientalist- positivist discourse, which accompanied the global-cum-imperial expansion of Euro-American treaty law and extraterritoriality, constituted the formal and normative grounds for the "universalization" of "civilized" international law in China – a paradoxical juridico-political process that played out over course of the unequal "Treaty Century"/"Century of Humiliation" (1842-1943).[6] On the one hand, this liberal discourse underwrote British/European legal orientalist legitimations of the post-1842 unequal treaty order in China, the legal centerpiece of which was modern extraterritoriality. Those legal orientalist legitimations were then codified in nineteenth-century international positivist jurisprudence, which produced China as an object/"semi-civilized" international legal subject. On the other hand, this liberal legal discourse also underwrote a self-orientalizing anti-imperialist critique of the legal legitimacy of Sino-foreign unequal treaties and extraterritoriality, as articulated by a new class of professional Chinese international lawyers in the early decades of the twentieth century. That anti-imperialist critique – which must itself be understood vis-à-vis the rise of a transnational anti-imperialist legal discourse articulated by "semi-peripheral" international lawyers – worked to juridically transform China from a "semi-civilized" object/quasi-sovereign subject to a fully "civilized" sovereign subject of international law.

[6] "Treaty Century" is John Fairbank's phrase. See Fairbank and Merle Goldman, *China. A New History* (Cambridge: Harvard University Press, 2006), 204; "Century of Humiliation" was the common Chinese pejorative designation for this Treaty Century, which gained currency in the early twentieth century.

Rethinking the "Colonial" History of Modern "Universal" International Law

The legal orientalist redefinition of modern British/European extraterritoriality in China took shape during the late-eighteenth/early nineteenth-century in the context of the expansion of licit and illicit commerce in China (the latter primarily in opium), and the increasingly frequent and prolonged Sino-British/Western jurisdictional disputes that accompanied it. That historical redefinition shall be adduced from the early British/European legal histories[7] of modern Sino-British/European extraterritorial relations, written in the context of a global turn to extraterritorial empire that spanned the late eighteenth through early twentieth century. The municipal and international orientalist lawyers who penned these histories sought to formally and normatively define extraterritoriality in China – its customary origins, its domestic and international legal sources,[8] its normative (i.e. "civilizational") foundations, its various geographic scope, etc. To that end, one of their basic strategies involved the enlistment of major Sino-Western jurisdictional disputes (e.g. the Lady Hughes incident (1784), the Terranova affair (1821)) as evidence of the "deficiencies" of Chinese law and/or as cautionary tales of the "un-civilized" nature of Chinese law and justice.[9] It was on these "civilizational" grounds that Euro-American legal orientalist lawyers legitimated the retention of their respective country's

[7] Broadly construed to include an array of historical and contemporaneous accounts of European-non-European extraterritorial relations in general, and Sino-Western extraterritorial relations in particular.

[8] This included appeals to imperial legal precedents in their legal orientalist legitimations of British extraterritorial rights in China, including the Ottoman Capitulations precedent. Such appeals reflected the global historical context of articulation for the legal orientalist redefinition-cum-legitimation of modern extraterritoriality.

[9] Those alleged "deficiencies" of Chinese judicial regime included: its draconian and opaque nature, the use of torture to extract confessions, and its failure to recognize criminal intent. See G.W. Keeton, *The Development of Extraterritoriality* 2 vols. (London: Longmans, Green and Co.,1928), esp. vol. 1., 27-136.

jurisdictional control over their foreign nationals in China – to safeguard the rights and liberties of their citizens in an "un-civilized" land.

The early historical articulation of legal orientalism took shape alongside the global legal homogenization of extra-European extraterritoriality. Whereas a plurality of customary legal forms existed prior to the nineteenth century, extraterritoriality assumed its singular modern legal form, i.e. consular jurisdiction, only during this century, and only through treaty law. The global formalization of customary European-non-European extraterritorial relations proceeded through both coercive and non-coercive means. In the case China, British gunboat diplomacy dictated the iniquitous terms of modern Sino-British commercial and extraterritorial treaty law, which, in turn, provided a legal template for subsequent Sino-Western/foreign "unequal" treaty relations during the "Century of Humiliation." And those unequal treaty relations, in turn, formed part of an emergent global legal constellation of European extraterritorial empires in the Ottoman Empire, Korea, Siam, Japan, and the newly independent republics of Latin America.

My contention is that this global turn to extraterritorial empire – and the concomitant socio-historic production and global circulation of legal orientalism-positivism – must be situated in the context of the "universalization" of modern international law. And secondly, that understanding how and when international law became a modern "universal" legal order requires a fundamental reconsideration of the predominant "critical" historical framing of this global process of legal universalization as one of Western domination of non-Western societies. By most accounts this process began during the nineteenth century in the context of European global imperial expansion and colonial rule. It took institutional shape in two interconnected international legal developments – the global spread of the Westphalian model of sovereignty, and the hegemonic rise of positivist international jurisprudence and its standard of civilization,

which justified European imperial domination by denying non-European societies international rights and excluding them from the Family of Nations.[10] Europe, in this global imperialist narrative, constitutes the historical subject of the universalization of international law; the non-European world, the object of it.

One of the clearest and most powerful articulations of this type of critical history of the universalization of nineteenth-century "civilized" international law as Western domination is Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law.*[11] His critique of the relationship between imperialism and international law – which spans from Vitoria's natural law jurisprudence to nineteenth-century positivist jurisprudence through contemporary pragmatic jurisprudence – typifies one of the dominant trends in histories of international legal imperialism – to locate empire in the realm of politics and the state. Legal imperial domination is understood, accordingly, with reference to "formal empire," that is, in terms of "powerful Western states exercising their political domination in the non-European world."[12]

My contention is that this "traditional" public law framework has profoundly underestimated the significance of capitalism and private (economic) law in the historical structuring and restructuring of modern universal international law. That historical structuring was dual in character; it pertains to a socially specific logic or movement towards liberal

[10] See, e.g., Georg Schwarzenberger, "The Standard of Civilisation in International Law," *Current Law Problems* 8 (1955); Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984); Ian Brownlie, "The Expansion of International Society: The Consequences of the Law of Nations," in *The Expansion of International Society*, eds. Hedley Bull and Adam Watson (Oxford: Oxford University Press, 1984).

[11] This work has become *the* standard reference for critical international legal histories of European legal domination of non-European societies. It forms part of a broader critical project undertaken jurists involved in Third World Approaches to International Law (TWAIL). As part of the second generation of TWAIL, Anghie is engaged in a political project to resist and reform the structure of domination implied by modern international law's claim to universality. See also, Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

[12] Martti Koskenniemi "Empire and International Law: The Real Spanish Contribution," *University of Law Journal* 61 (2011): 2. This article is based on the Cecil A. Wright Memorial Lecture delivered at the University of Toronto on Thursday, 28 January 2010.

abstraction, which I define, below, with reference to commodity exchange practices. This form of liberal abstraction underpinned the historical production of antinomic discursive forms of "universal" law (i.e. contract, property, personhood) and legal jurisprudence (i.e. legal orientalism-positivism), and their attendant normative projects, both in the metropole and in the periphery, of legal and jurisprudential reform. The historical circulation of these liberal forms of law and jurisprudence operated in and through *the global nomos of capitalism's empire*. My argument, pace Anghie, is that it is this global imperial realm – constituted during the nineteenth century, in juridical form, not by any one particular imperial state or concrete institution lending it ideological support, but rather by the abstract principles and practices of commodity-mediated exchange relations which acquired "universal" significance in civilized international legal discourse – within which the development of modern European extraterritoriality and the universalization of nineteenth-century international law must be situated if we are to fully come to terms with the paradoxical historical trajectories of the latter and the rise and decline of the former.

Anghie's critical history, moreover, elaborates a trenchant critique of the Euro-centricity of modern "universal" international law (which he traces back to Vitoria's natural law jurisprudence). With respect to nineteenth-century "civilized" international law, Anghie argues Euro-American positivist international lawyers' invocations of legal universality worked to manufacture sites of cultural difference, exclusion and exception in order to justify the West's civilizing mission in the non-European world. Such universalistic legal appeals were essentially Eurocentric – historical articulations of parochial values and norms in the guise of legal

universals – and thus inauthentic and false.[13] Given this sweeping characterization, how, it must be asked, did this legal orientalist-positivist discursive system of international law become a normatively compelling legal-jurisprudential frame of reference for a new global class of non-Western international lawyers (including the Chinese international lawyers under review) in their formal and normative critiques of unequal treaties and extraterritorial empire? What, in other words, rendered this "Eurocentric" nineteenth-century international legal discursive framework plausible as an anti-imperial counter-discourse across geographic and linguistic boundaries? These questions are essential to understand the paradoxical historical trajectories borne out through the universalization of nineteenth-century "civilized" international law in China – a dynamic process underpinning the historical production of both a legitimating ideological discourse of extraterritorial empire and a counter-discourse and anti-imperial critique of the legitimacy of extraterritoriality. My study challenges Anghie's monochromatic view of the Eurocentric nineteenth-century international law and its universalization, as well as the over-determined conception of (colonial) legal structure upon which that view is predicated. I do so through an analysis of the rise and decline of modern British extraterritoriality in China, which, as I have suggested, offers one especially illuminating window into the historical production and global circulation of legal orientalism-positivism *via* "civilized" international legal discourse. Understanding the constitutive assumptions and core antinomies (universal-particular, civilized-un-civilized, lawful-lawless) of this complex legal-jurisprudential discursive phenomena requires

[13] Anghie couples his critique of the colonial structures of domination undergirding modern "universal" international law with a critique of how those colonial structures have been obscured in "Eurocentric" accounts of the origins of international law. Such Eurocentricity, he argues, is most characteristically expressed in the disciplinary fixation on "Westphalian sovereignty," which, in turn, has over-determined the Eurocentric nature and trajectory of both the modern discipline of international law and conventional histories of it. I provide a critique of this critique of Euro-centricity in the fifth chapter.

an investigation of its various historical contexts of articulation, which, I have argued, cannot be reduced to European imperial expansion and domination.

For that reason, I propose a comparative analysis of legal orientalism-positivism, which examines one of its early historical articulations as a form of legal critique of the "particularistic" nature of Chinese law in relation to the historically concurrent articulation of an analogous legal positivist critique of the "particularistic" nature of the English common law tradition. My analysis of the affinities of legal orientalism and "classical" legal positivism uncovers their common liberal underpinnings – the formal and normative grounds upon which a variety of European and non-European laws and legal traditions could be cast as "particularistic," and then accordingly, be made subject to a "universal"-cum-"civilized" law and its attendant projects of liberal legal and jurisprudential reform. Nineteenth-century European international lawyers brought this legal orientalist-positivist form of critique to bear on non-European societies in order to legitimate their systematic international legal exclusion and subjugation.[14] But, as my study will also show, this historical form of legal critique also inhered in the self-orientalizing, anti-imperial legal movement prosecuted by early twentieth century Chinese international lawyers, who internalized and re-appropriated civilized international law as a counter-discourse to both call into question the legal legitimacy of the "unequal treaties" and extraterritoriality and to appeal for international recognition of China as a fully sovereign and "civilized" legal subject.

Whereas Anghie defines the history of the universalization of nineteenth-century "civilized" international law in terms of the imposition of alien European norms and values, in the guise of legal universals, on non-European societies, I do so in terms of a historically

[14] What Koskenniemi makes clear, however, is that nineteenth-century European international lawyers applied this reformist logic not only to the imperial peripheries, but also to the domestic legal sphere. See his *Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2004).

contradictory process which provided the legal-jurisprudential grounds for both ideological imperial discourses and anti-imperial counter-discourses. Redefined in this way, the salient question then becomes, how are we to best understand the *dual character* of this historical process of legal universalization? My contention is that this requires coming to terms with the abstract and antinomic liberal forms of law and legal personhood that were being "universalized" though non-Western international lawyers' reception and re-appropriation of "civilized" international legal discourse. And this, in turn, requires a social theory of law that can grasp the historically specific form of *liberal abstraction* underpinning the discursive production and global proliferation of legal-orientalism-positivism, and its contradictory instantiations in "civilized" international legal discourse.

Below, and in the following chapters, I shall make the case that a non-traditional Marxian social theory of legal forms is best suited to explain this historical specific movement towards liberal abstraction, and the contradictory forms of legal and jurisprudential discursive practice it made available and rendered normatively meaningful to practitioners of law, both European and non-European. By liberal abstraction is meant a socially specific form of conceptual abstraction bound, historically and normatively, to commodity-mediated exchange relations.[15] This historically limited form of conceptual abstraction – which made possible the juristic articulation of an abstract, rights-bearing legal subject – is a product and core feature of modern capitalist society, which Marx analyzed, in *Capital*, with reference to a peculiar form of social practice he called, "abstract labor." It refers to the basic historical condition in modern capitalist society that people do not produce goods for their own means of subsistence, but rather as a means to buy

[15] See Andrew Sartori, *Liberalism in Empire. An Alternative History* (Berkeley, CA: University of California Press, 2014).

goods and services from others through exchange. In this way, Marx reasoned, labor in capitalism assumes a general social function: it mediates how individuals relate to each other and to nature, and, as such, it constitutes a unique, historically specific form of impersonal social interdependence.[16]

Marx's category of the "commodity" purported to grasp the socially specific features of this labor-mediated form of practical interdependence. The real, practical abstraction of human labor that creates commodities lies at the core of a historical logic of equivalent exchange – a constitutive exchange principle, which Marx calls "value," that establishes a commonality among people abstracted from the qualitative specificities of particular persons. It does so by reducing qualitatively distinct forms of concrete laboring activity (e.g. handloom and powerloom weaving) into an abstract, homogenous quantum of socially average labor time. Marx understood the twofold character of the commodity form accordingly. Considered as a product of concrete, qualitatively specific laboring activity, the commodity was an object whose qualitatively particular properties rendered it serviceable to human needs. Considered as a value, however, the commodity was merely a product of socially average labor time.

It was precisely the "lack of a concept of value," Marx reasoned, that rendered Aristotle unable to see how different things (Aristotle's example, cited by Marx, was five beds and one house) could be made commensurable. Marx explained the conceptual absence of this exchange principle in Aristotle's thought *not* as a result of insufficient analysis or flawed reasoning, but rather on account of the historical fact that Greek society was founded on slave labor, and thus presupposed "the inequality of men and of their labour-powers. The secret of the expression of value, namely the equality and equivalence of all kinds of labour because and in so far as they

[16] This reading of Marx is indebted to Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge: Cambridge University Press, 1993).

are human labour in general, could not be deciphered until the concept of human equality had already acquired the permanence of a fixed popular opinion. This however becomes possible only in a society where the commodity-form is the universal form of the product of labour, hence the dominant social relation is the relation between men as possessors of commodities."[17] Marx's claim, then, was that as the real principle governing the production of commodities, the formal abstract equivalence of human labor rendered a concept of universal human equality plausible to social actors; this abstract concept, in other words, only became available for historical reflection in the context of the real abstraction of human labor characteristic of modern capitalist society.[18]

Marx's category of the commodity purported not only to grasp a historically specific form of social interdependence, but also the *phenomenal appearances* that this abstract social form assumed to its practitioners. Presently we are concerned with Marx's critique of *legal* phenomenal appearances – and specifically, the abstract rights-bearing legal subject – which he analyzed, in *Capital*, with reference to the socially necessary conditions of possibility for commodity exchange. Because ["c]ommodities themselves cannot go to the market and perform exchange in their own right," Marx reasoned, what is required for a transaction of values to take place is "recourse to their guardians, who are the possessors of commodities." On that basis, Marx proceeded to set the modern "economic stage" with its characteristic legal "guardians" as follows:

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[17] Karl Marx, *Capital*, vol. 1, trans. Ben Fowkes. Vol. 1, (Harmondsworth: Penguin, 1976), 152.
[18] The paradigmatic expression is the modern idea of the formally equal citizen, which "makes an abstraction of real men in a way homologous to the abstraction of commodities from 'real products." See Isaac Balbus: "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law & Society Review* 11, no. 3 (Winter, 1977): 576.

> In order that these objects may enter into relations with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. Here the persons exist for one another merely as representatives and hence owners, of commodities.[19]

For Marx then, the realization of value in the act of exchange presupposes a conscious act of will on the part of the commodity owner. And it is this judicially constituted will, generated in the sphere of exchange relations, which makes commodity owners "free" and "equal" to other owners of commodities. In this transactional context, legal personality – man's "will" (which resides in the commodity) and formal capacity to be a subject of rights – is simply an abstraction of the value relation. Hence, these guardians of commodities "appear on the economic stage [as] merely personifications of economic relations."[20] By that same reasoning Marx argued that commodity exchange requires a socially specific form of legal regulation – the contract – which regulates conflicts between two formally equal and autonomous wills who mutually recognize and defend their rights and interests in this legal form. Hence, "the juridical relation mirrors the economic relation": just as value abstracts from the concrete, particular qualities of disparate laboring activities to render them commensurable by virtue of their common social substance (abstract labor), the legal form, as a relation between two bearers of rights, abstracts from the qualitative differences and inequalities of particular individuals to render them formally equal under the law.

[19] Marx, *Capital*, 178.
[20] Ibid., 179.

This very dense critique of bourgeois law, and its phenomenal appearances, provided the theoretical groundwork for Pashukanis's commodity exchange theory of law, as presented in *The General Theory of Law and Marxism* (henceforth: *GTLM*). Following from Marx's discussion of the "guardians" of commodities, Pashukanis identified three legal phenomenal appearances which came to light in exchange: 1) Each actor must recognize the "free" *will* of the other, which "resides in the object" being exchanged; 2) Each actor must recognize the other as the rightful *owner* of the commodity; and 3) Each actor must recognize the other as an *equal*, irrespective of any inherent differences between them. Pashukanis's argument is that the constant exchange of commodities in the sphere of circulation gives rise to these three phenomenal forms of appearance – equality, free will and private ownership interest – which, in their historical totality, give expression to "a single social relation." The formation of the bourgeois egoistic legal subject – the abstract, undifferentiated bearer of these rights and interests – represents the crystallization of these three phenomenal forms in one "mystified," that is to say, "fetishized" legal form. So construed, the bourgeois legal subject comes to logically approximate the commodity form in that "all concrete peculiarities which distinguish one representative of the genus homo species from another dissolve into the abstraction of man in general, man as a legal subject."[21] Man's capacity to act as a "bearer" of private rights and interests thereby becomes entirely "separated from the living concrete personality," and, as a result, the legal subject "ceas[es] to be to be a function of its effective conscious will and becom[es] a purely social function."[22]

[21] Evgeny B. Pashukanis, *The General Theory of Law and Marxism* [henceforth: *GTLM*] (New Brunswick, NJ: Transactions Publishers, 2007 [1978]), 153.

[22] Marx, *Capital*, 179.

For Pashukanis, this process of abstraction intrinsic to commodity exchange (i.e. value) relations was historically reflected, in the domain of bourgeois jurisprudence, in modern jurists' general theories of law, and the fundamental definitions of law articulated therein – legal subject, legal norm, legal relation. The historical articulation of these general concepts, which "comprise a theoretical reflection of the legal system as a perfected whole," only became possible once capitalism had become the predominant social form of organization. Hence, this intellectual process of abstraction underlying the juristic formulation of general concepts of law mirrors the social process of abstraction inherent in modern commodity exchange relations; jurists are only able to make use of abstract categories, such as the "legal subject," because of this socially specific form of practical abstraction bound to commodity exchange. Prior to the rise and generalization of commodity exchange relations, this "free and equal" abstract legal subject was *a priori* inconceivable. In the feudal world, man was viewed *not* as a bearer of abstract rights, but rather in terms of various privileges associated with concrete distinctions established by birth, social rank, education, and occupation. Within this context of organic patriarchal relations, "every right was a privilege": "all rights were considered as appertaining exclusively to a given concrete subject or limited group of subjects." As such, equality was assumed only "in a narrow legal sphere", on the periphery of ancient and feudal society; legal personality possessed no "constant element," no homogenous meaning, in an epoch in which labor did not function as a social means, and, as a result, lacked any notion of "universal" formal equality between men.[23]

Following Marx's line of reasoning, Pashukanis argued that this commodity-mediated idea of universal equality finds its most paradigmatic legal expression in the modern contract – a historically limited form of legal relationship between "free and equal" individuals. He

[23] Pashukanis, *GTLM*, 119.

maintained, with Marx, that commodity exchange practices necessitated a specific form of legal regulation, the contract, which regulates disputes between two formally equal individuals, who mutually recognize and defend their rights and interest in this legal form.[24] This, then, is socially specific legal relationship between two autonomous entities with abstract wills, who can relate to each other as "free and equal" private individuals (i.e. private property owners) *only* through a contract.[25] Hence the modern contract form "mirrors" the value form insofar as both function as a general principle of equivalence, abstracting from the concrete differences of individual persons in order to bind them together, *qua* "free and equal" subjects, in a socio-legal system of mutual interdependence. And it is this structured and structuring relationship between commodity owners, *rather than an external norm-setting authority*, which lends these normative ideals of freedom, equality, and the autonomy of personality, their specific social meaning and significance.[26]

I read this argument as part of Pashukanis's general critique of instrumentalist conceptions of law. It was largely directed at orthodox Marxist jurists, who viewed the normative content of law as a direct reflection of the material interests of the ruling elite; the

[24] Pashuaknis contrasted this contractual form of legal regulation with technical regulation; the former involves a dispute between two autonomous parties, each defending their rights; whereas the latter is characterized in the main by a certain "unity of purpose" So then, "train timetables regulate rail traffic in quite a different sense than…the law concerning the liability of the railways regulates its relations with consigners of freight." Ibid., 81.

[25] Law emerges historically, according to Pashukanis, to regulate these conflicts of private interest: "Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interests begins." So then, "it is dispute, conflict of interest" between which creates the legal form." Ibid., 93, 81.

[26] In other words: "the concepts of subject and of will only exist, in the legal sense, as lifeless abstractions. These concepts first come to life in the contract." In setting up his investigation of the legal relation is its simplest, most abstract form, Pashukanis argued against those jurists who "attempt to make the idea of external regulation the fundamental logical element in law [which] leads to law being equated with a social order established in an authoritarian manner." Ibid., 101. And while Pashukanis directed that critique specifically at Hans Kelsen's Pure Theory of Law, it can also be readily applied, I shall argue in chapter four, to nineteenth-century positivist jurisprudence: Bentham's and John Austin's command theories of law, both of which trace the source of all law ("properly so-called") to a determinate sovereign source, are the exemplary English cases in point.

social function of law was then viewed, accordingly, as either purely ideological or as a state-mediated form of coercion.[27] While Pashukanis certainly did not deny either this class-based instrumentalism or the coercive social functions of the law, he viewed an analysis of the *function* of law as secondary to an analysis of the historically specific legal form of relationship between "free and equal" individuals. On this methodological point, he insisted that the central task of a Marxist jurisprudence was not simply to "uncover the class content concealed within legal forms, but [rather to] explain why this content assumes that particular form." Likewise, he cautioned that it was "not enough to…poin[t] out that it is advantageous to the ruling class to erect an ideological smokescreen, and to conceal its hegemony beneath the umbrella of the state. For although such an elucidation is undoubtedly correct, it still does not explain how such an ideology could arise, nor, therefore, does it explain why the ruling class has access to it. For the conscious exploitation of ideological forms is of course something separate from their emergence, which usually occurs independently of people's will." It was on these *non-orthodox* Marxist grounds that Pashukanis unfolded his commodity-exchange theory of legal forms, in *GTLM*, with reference *not* to class interests, but rather to the contradictory historical logic of capitalism – an abstract social(izing) process that occurs "behind the backs" of both the bourgeoisie and the proletariat, "quite independently of their will."[28] And it is on these same theoretical grounds, I shall argue, that we can move beyond instrumentalist accounts of the universalization of modern international law, like Anghie's, in order to throw crucial new light on the abstract and contradictory historical logics and forms of law that were being universalized through non-

[27] See, e.g. Piotr I. Stuchka, *Selected Writings on Soviet Law and Marxism*. Edited, annotated and introduced by Robert Sharlet, Peter B. Maggs, and Piers Beirne (Armonk, NY: M.E. Sharpe, 1988). Anghie's overarching critique of the colonial nature of modern international law approximates this orthodox Marxist view of international law.
[28] Pashukanis, *GTLM*, 84, 140, 112.

Western international lawyers' internalization and re-appropriation of civilized international law as an anti-imperial counter-discourse.[29]

The nature and significance of that contradictory historical logic is quite complex and will be unfolded, in full, in subsequent chapters. For the time being, it will suffice to note that the abstract, free and equal legal subject constitutes, according to Pashukanis, the cell form of modern capitalist society and the controlling premise of bourgeois legal theory. Consequently, bourgeois legal theory is plagued by a certain structural indeterminacy associated with a distinctly liberal (bourgeois) paradox: how to justify normative order on the basis of "free and equal" subjects. This liberal paradox – which has particular significance for modern liberal international law insofar as it lacks a super-ordinate legal authority – creates the conditions of possibility for opposing yet equally valid legal arguments regarding the nature of order and obligation.[30] And *this*, according to Pashukanis, is what makes bourgeois law – and the antinomies articulated therein (public-private, subjective-objective, law-politics, law-morality, etc.) – conceptually coherent and normatively meaningful to law practitioners. Pashukanis relates this antinomic structure of bourgeois legal theory to the *practical* antinomy between legal subjects with equal rights inherent in modern capitalist legal forms (contracts, treaties).

I take this as my theoretical point of departure in arguing that this liberal abstraction of legal personhood constituted the cell form of an emergent global imperial order of capitalism, which took juridical shape through the universalization of "civilized" international law during the nineteenth and early twentieth centuries; second and relatedly, this liberal idea of legal

[29] By the same critical reasoning, we can also move beyond instrumentalist analyses of the reception and re-appropriation of modern international law by non-Western international lawyers. More specifically, I have in mind Arnulf Becker Lorca, *Mestizo International Law. A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press, 2015).

[30] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* [henceforth: *FATU*] (Cambridge: Cambridge University Press, 2006).

personhood constituted the controlling and contradictory premise of that global imperial order's "civilized" international legal discourse, which posited the abstract rights-bearing "civilized" legal subject as its formal and normative premise. "Civilized" international law, so defined as a distinctly liberal form of legal discourse, can then be understood as historically capable of generating both ideological legal discourses legitimating extraterritorial empire (i.e. legal-orientalism-positivism) and critical legal discourses of and resistance to extraterritorial empire (e.g. Chinese international lawyers' anti-imperialism, which internalized and re-appropriated legal orientalism-positivism).

In arguing, on these critical social theoretical grounds, that liberal international legal forms have a dual structure I intend to avoid the trappings of over-determined analyses of the "colonial" structure of international law, such as Anghie's, which have no real theoretical recourse in explaining the historical possibility of agency and change from the operations of those "colonial" legal structures themselves (that is, without appealing to exogamous factors).[31] Whereas the understanding of dual legal structures proposed in this study implies a very different idea of historical agency – one that is not opposed to structure, but rather is itself a constituent of structure. Such a conception seeks to grasp how practitioners of law (broadly construed) are both enabled and constrained by law's formal and normative structures. It is my contention that a dialectical theoretical framework, which regards the formal and normative structures of modern liberal law as dual in this way, can allow for a more robust understanding of the mutual

[31] For a discussion of the problems of traditional structuralisms, see William Sewell, *Logics of History: Social Theory and Social Transformation* (Chicago: University of Chicago Press, 2005), esp. 124-151.

constitution of nineteenth-century imperial legal structures and the forms of political agency produced within and against those imperial legal structures.[32]

Moreover, by drawing on a Marxian social theory to open up and re-center the question of capitalism to the contradictory process of international legal universalization, I intend to uncover the dual significance of private law (contract, property, personhood) in structuring the principles and practices of nineteenth-century civilized international law and the transnational anti-imperial legal movement that internalized and critically re-appropriated those "civilized" legal principles and practices. That dual significance has been overlooked in "traditional" public law analyses of the imperial history of modern international law, which, like Anghie's, locate empire in the realm of politics and the state. I contend that this state-centric framework has limited explanatory power when it comes to understanding the global legal dynamics involved in the rise and fall of non-territorial commercial empires, such as Britain's extraterritorial one in China. Rather, those global legal dynamics must be understood with historical reference to the global-cum-imperial expansion of liberal forms of law and legal personhood bound to commodity exchange practices. It was these liberal legal forms of abstraction that constituted the formal and normative underpinnings of an emergent global nomos of empire – one not historically bound to any one particular imperial state, but rather to a global, supranational logic of capitalism that sought to commodify all things and all persons.[33] Civilized international law provided an ambivalent universalizing vehicle for this contradictory historical logic.

[32] On contradictory social structures as the precondition for "the existence of social critique," see Postone, *Time, Labor, and Social Domination*, 88.
[33] It was precisely this global juridical order, which lacked any concrete spatial (i.e. territorial) moorings, that Carl Schmitt saw taking shape at the turn of the twentieth century. See Schmitt, *Nomos*, 214-258.

Overview of Chapters

The first and second chapters of the dissertation set the stage for the historical rise of legal orientalism in the context of the pre-1842 turn to British extraterritorial empire in China. My analysis throws light on two distinct, though interrelated historical logics that informed this normative discourse – one essentializing, the other reformist/developmentalist. Their historical co-articulation underwrote British views of China as "lawless" and "uncivilized" – legal orientalist tropes that found purchase in a liberal, utilitarian critique of Chinese law as "irregular," "unlimited," "personal," and "arbitrary." I analyze the historical production and circulation of these legal orientalist tropes, in the first chapter, as they took rhetorical shape in and around Sino-British/Western commercial and jurisdictional disputes at the turn of the eighteenth century: East India Company officials, British lawmakers, merchants, and lawyers formulated a set of legalistic arguments regarding the essential *incommensurability* of Occidental and Oriental Law in order to justify, *inter alia*, the necessity of British interventions in Sino-British relations (via the Company) to retain jurisdictional control over, i.e. "extraterritorialize," British foreign nationals. This incommensurability thesis was underwritten by core binary oppositions which fixed China's identity as a lawless, "uncivilized" Other in relation to a lawful, "civilized" West; likewise, Chinese law was defined, through a variety of culturalist tropes, as "particularistic" in relation to the West's "universal" form of law and legal subjectivity. My analysis of pre-treaty Sino-British jurisdictional disputes illuminates not only the historical emergence and proliferation of this legitimating legal discourse at the frontiers of British empire in China. It also throws light on the myriad of ways in which historians and legal scholars have perpetuated these same essentializing legal schemas and orientalist tropes.

What were the normative underpinnings of this essentializing discourse? I argue that legal orientalists essentialized and naturalized a historically specific dualistic liberal form of law and rights-bearing liberal subjectivity. This builds on Teemu Ruskola's important new work, *Legal Orientalism*, which frames these essentialized liberal discursive forms in terms of the "binary political ontology of Anglo-American liberalism." That liberal ontology grounded a normative legal framework within which only a particular type of rights-bearing individual and rights-bearing state were recognized as real, authentic, "civilized," and "universal" legal subjects, as opposed to non-legal subjects, "un-civilized" others, and enemies. As such, this liberal political ontology had a historically narrowing and homogenizing effect on Euro-American legal and normative imaginaries when compared to the variegated and heterogeneous qualities of medieval political cosmologies, which were characterized by fluid and overlapping jurisdictions, defined by multiple sources of law and sovereignty, and inhabited by a plurality of legal subjects. Following Ruskola's line of reasoning, we can *begin* to make sense of how this liberal ontology normatively grounded Euro-American legal orientalists discursive oppositions between the "universality" of Occidental law and the "particularity" of Oriental law. Likewise we can begin to situate this emergent imperialist legal discourse – which Ruskola refers to as "epistemological imperialism" – within a historically specific liberal discursive matrix which produced both "civilized" legal subjects and "un-civilized" non-legal subjects.[34] (These binary oppositions, which Ruskola views as a *fixed* feature of legal orientalism, will be complicated in subsequent chapters in light of the juridical formation of China as a "semi-civilized" legal subject.)

The incommensurability thesis underwent partial, though significant revision in the context of the abolition of the EIC's monopoly on trade in China and the shift to metropolitan

[34] Ruskola, *Legal Orientalism*, 209.

control in 1833/34. My investigation of this period from 1833 leading up to the first Sino-British opium war in 1839, in chapter two, throws light on the historical re-articulation of the monolithic essentialist justifications for British extraterritoriality in China, which fixed China's identity as lawless Other, into a reformist-developmentalist legal discourse that aimed to "normalize" Sino-British/Western relations and (nominally) bring China into the global domain of "civilized" international law. I explain that legal-discursive shift with reference to the British legal orientalist construction of an "anomalous state of affairs" – an imperial rhetoric and legal-normative imaginary which was invoked in conjunction with certain prescriptive remedies seeking to formalize *both* customary (read: "anomalous") intra-British imperial legal relations and customary (read: "anomalous") Sino-British/Western imperial legal relations…to bring both within the pale of "civilized" law. In terms of the former, British lawmakers and officials adopted this imperial rhetoric of legal anomaly to refer to the lack of effective extraterritorial state controls on British lawlessness in China: the expansion of commerce at the turn of the eighteenth century brought a wave of rapacious European merchants to China whose networks of trade, both licit and illicit, operated within and beyond the bounds of the "Canton system" and the Company's legal and jurisdictional controls therein. This highly profitable but "anomalous" legal situation became unstable and increasingly conflict-prone with the expansion of the illicit opium trade, as the major and minor Sino-British/Western extraterritorial disputes (e.g. 1784 Lady Hughes incident, 1821 Terranova affair) at the turn of the eighteenth century attest. The prescribed remedy for this lawless situation on the frontiers of British empire – to "save imperialism from itself"[35] in China – was to legislate into existence, in 1833, an extraterritorial legal infrastructure (courts, consuls, etc).

[35] The phrase comes from Eileen Scully, *Bargaining with the State from Afar. American Citizenship in Treaty Port*

The legal legitimacy of this legislative remedy to the extraterritorial problem of British lawlessness in China hinged, in turn, on attaining an international legal remedy to the "anomalous" state of Sino-British/Western relations. And the British remedy to this anomaly articulated to the dominant Western liberal form of global international legal intercourse – treaty law. Hence the "normalization" of Sino-British/Western relations became historically synonymous, in the context of the shift from Company rule to British metropolitan legal control in China, with their international legal formalization: not only would a treaty provide the requisite consent to legitimate British foreign jurisdiction in China, it would also serve as a formal expression of China's recognition of Britain's sovereign equality. It was this perceived lack of recognition that the British read not only as dishonorable, but also, and more significantly, as *unlawful*. The legal orientalist framing of Chinese "unlawfulness" was twofold. On the one hand, legal orientalists claimed that China was violating "universal" and "civilized" international norms by, for example, refusing to recognize the equality of British diplomatic representative and by adhering to its "inveterate anti-commercial policies." These anomalies became actionable offenses, for hawkish British officials (enter Lord Napier) and rapacious merchants (enter Jardine Matheson & Co.), who increasingly came to articulate Britain's "customary" trading and extraterritorial rights in China in terms of *de jure* contractual rights. This raised the corresponding claim that China, its officials and merchants, was violating British customary and contractual rights – a sweeping claim that provided the formal grounds upon which British lawmakers, officials, and merchants 1) repudiated China's anti-commercial behavior as a violation not only of British trading rights, but of the universal norms of "civilized" international society; and 2) justified various forms of British coercive intervention, including the first and

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China (New York: Columbia University Press, 2001), 8.

second opium wars (1839-42, 1858-60), to normalize Sino-British/Western relations and bring them within the fold of civilized international law.

In sum, British invocations of the "anomalous" state of Sino-British relations and China's putative "unlawfulness" recast China from an essentially lawless, state of nature, into a determinate lawbreaker – a violator of "universal"-cum-"civilized" norms, who nonetheless could and should be made, through force if and when necessary, to conform to these universal norms of "civilized" international intercourse. Such conformity meant, first and foremost, formalizing Sino-British commercial and extraterritorial relations through treaty law. In this way, then, there emerged, alongside an essentializing legal orientalist discourse, a separate, though intimately related normative discourse that aimed to reform China's international behavior by (nominally) incorporating it within the global domain of "civilized" international law. Legal orientalists drew on both normative discourses, leading up to and following the first opium war, to subject China to set of universalist norms (i.e. the right to free trade), which, they claimed, superseded "particularistic" Chinese indigenous law (e.g. the imperial prohibitions on opium trading dating back to the late eighteenth century).

The main issue I have with Ruskola's exposition of legal orientalism is that it *fixes* this universal-particular/civilized-uncivilized opposition in terms of a Sino-Western (U.S.-China) one. (In an analogous way, Anghie's critical history fixes the colonial, Eurocentric structure and "primordial identity" of modern international law.) Before problematizing this imperial framing and fixation from the standpoint of Chinese anti-imperial legal resistance, I shall first problematize it, in chapter three, through a comparative legal historical analysis of the points of articulation and tension between the British legal orientalist critique of "un-civilized" Chinese law and the English classic legal positivist critique of the common law tradition, which found its

most paradigmatic expression in the practical and theoretical works of Bentham.[36] These critical legal discourses mobilized the same core tropes about the "particularistic" nature of Chinese law, on the one hand, and the English common law tradition, on the other: both were cast as, *inter alia,* "personal," "irregular," "uncertain," and "arbitrary" in order to deny each the status of "civilized" law; and both, on those same normative grounds, were made subject to certain "universal"-cum-"civilized" laws and their associated projects of legal and jurisprudential reform. This critical legal reformist discourse was borne out in British appeals to normalize and formalize Sino-British/Western commercial and extraterritorial relations leading up to and following the first opium war; in the historically concurrent context of England (as well as in the British imperial peripheries), it was borne out in the codification movement. Those legal discursive parallels indicate a common liberal normative standpoint of critique, which, I shall argue, relates to the determinate capitalist context of possibility that gave rise to these critical legal reformist discourses and rendered them normatively compelling to practitioners of law, both European and non-European.

Next, I theorize these legal discursive parallels – and their normative grounding in a distinctly liberal, utilitarian standpoint of critique – through a non-traditional Marxian reading of Foucault's genealogical account of the "Great Reformers" (e.g. Beccaria, Servan, Duport, Pastoret) and the historical transition to a modern capitalist economy, in *Discipline and Punish*. I find Foucault's account descriptively useful on two fronts. First, he delineates the principle characteristics of the Enlightenment Reformers' utilitarian critique of the old customs – as "personal," "arbitrary," "irregular," "uncertain," "inhumane" – associated with sovereign law in

[36] Specifically, I will be interrogating Bentham's "universal jurisprudence" which posited an opposition between "universal" and "particular" law. Within his positivist legal-jurisprudential schema, universal law denoted general, codifiable rules; it was opposed to, inter alia, the particularistic qualities of English common law.

the *ancien regime*. Second and relatedly, he offers an instructive schematization of the core features of a transnational movement towards abstraction in Euro-American domestic and international law and legal jurisprudence: its formalizing and normalizing tendencies; its capacity to produce new legal subjects; and the centrality of private economic law (i.e. contract, property, legal personhood).

And yet Foucault offers no real explanation as to what the historical impulse was behind this movement towards abstraction in law. It is to this unanswered question that I submit a Marxian social theory of legal forms, which purports to relate the abstract character of modern law to historically determinate commodity exchange practices that were readily generalizable to all formalized social relations (public and private, domestic and international, civil and criminal, etc). On that critical theoretical score, I shall recruit Pashukanis and Martti Koskenniemi, the eminent contemporary international jurist, in order to argue that the abstract, universally transposable legal subject constituted the cell form of the modern capitalist "community of law" and the controlling and contradictory premise of liberal legal theory. By that same logic I have also begun to argue that the abstract legal subject constituted the cell legal form of an emergent global commercial international society and the controlling and contradictory premise of its "civilized" legal discourse. So defined in this way as a distinctly *liberal* form of legal discourse, "civilized" international law can then be understood as historically capable of generating both ideological legal discourses legitimating extraterritorial empire, i.e. legal-orientalism-positivism, and critical legal discourses of and resistance to extraterritorial empire, e.g. Chinese international lawyers' anti-imperialism, which internalized and re-appropriated legal orientalism-positivism.

It is on these critical social theoretical grounds that I pivot, in chapters four and five, to investigate the dual structures of "civilized" international legal discourse and the paradoxical

historical trajectories borne out through its universalization in China. That investigation centers around the juridical production of China as an international legal subject – that is, its transformation from a "semi-civilized"/"semi-sovereign" legal personality into a fully sovereign, "civilized" international legal subject. Historicizing that juridical transformation, which spanned the century-long rise and fall of modern European extraterritoriality in China, first requires an exposition of the constituent elements of nineteenth-century international law – the doctrine of absolute sovereignty, the standard of civilization, international society, and positivist jurisprudence. I elaborate upon these, in the fourth chapter, through an examination of the practical and theoretical works of a new professional class of British international lawyers: John Westlake (1828-1913), William Edward Hall (1835-1894), T.E. Holland (1835-1926), and Thomas Lawrence (1849-1919), and Lassa Oppenheim (1849-1920).

This British cohort was part of an emergent international discipline of Euro-American international lawyers. The professionalization of that discipline during the nineteenth century entailed: the establishment of new academic university posts, professional journals, and the formation of international institutions (i.e. *Institut de droit international*). Reading with Koskenniemi, we will learn how professionalization also entailed the liberalization of legal argumentation – a particular structuring of international legal argument defined by a contradictory logic that makes possible opposite but equally valid legal interpretations of sovereignty and international order. Koskenniemi then extends this critical theoretical framework in *The Gentle Civilizer of Nations* (2003) to investigate the rise and fall of the modern professional discipline of international law, which he dates from 1873 to 1960. The value of this work – which represents one of the few synthetic accounts we have of the modern discipline of international law – is that it *begins* to historically concretize the abstract theoretical framework

delineated in Koskenniemi's *From Apology to Utopia* (henceforth: *FATU*). My contention is that we can critically appropriate Koskenniemi's theoretical insights into the liberal premises and problematics of the modern professional discipline of international law in order to elucidate the contradictory structure of "civilized" international legal discourse – that is, to explain how this distinctly liberal discourse lent legal legitimacy to both imperial and anti-imperial international legal arguments. I then draw on a Marxian social theory of law to historicize these ambivalent liberal legal discursive practices, and here I depart from Koskenniemi's theory by relating the contradictory structure of "civilized"/professionalized international legal argument and its normative underpinnings to historically determinate commodity exchange practices.[37]

Having delineated the constituent elements and contradictory structure of nineteenth-century international law, I then examine the types of liberal legal arguments that transformed China into an object/quasi-subject of international law, and then into a fully sovereign, "civilized" international legal subject. The formal origins of China's quasi-legal international status were bound historically to the introduction, that is, imposition of modern European treaty law and extraterritoriality in China: Euro-American jurists first recognized China as a "semi-sovereign"/"semi-civilized" legal personality following the 1842 Sino-British Treaty of Nanjing, which concluded the first Sino-British opium war (1839-42). Its signing, under Britain's threat of naval bombardment, marks the formal culmination of a historical shift from a legally and jurisdictionally pluralistic extraterritorial space in China occupied by various quasi-sovereign entities (European charter companies, Hong merchants) to a state-centric legal-jurisdictional system, within which only a particular type of rights-bearing sovereign state was recognized as a legitimate, "civilized" subject of international law. At a minimum, I argue, China's "semi-

[37] Whereas Koskenniemi situates the rise of the modern discipline of international law in the context of an underspecified "liberal modernity." See Koskenniemi, *The Gentle Civilizer of Nations*, 57-66.

sovereign"/"semi-civilized" legal status reflected the historical fact that, to quote the American jurist and diplomat, Henry Wheaton (1785-1848), "China has been compelled to abandon its inveterate anti-commercial and anti-social principles" and formalize its relations with Britain and the Western "civilized" world.[38] By that same reasoning, recognition of China's quasi-legal personality also denoted its treaty-making capacity; whereas "un-civilized" African kingdoms, whose lands were deemed *terra nullius* by nineteenth-century European international lawyers, were denied any such quasi-legal personality.

These legal orientalist-positivist distinctions between "civilized," "semi-civilized," and "un-civilized" constituted the hierarchical divisions of "international society." With some notable exceptions,[39] the predominant juristic articulation of that hierarchical "international society" was couched in a positivist, developmentalist schema within which "civilized," "semi-civilized," and "un-civilized" were *not* geographically fixed, but rather understood along a universal historical continuum. Such developmentalism paved the way for the juridical transformation of "semi-civilized" states like China into fully sovereign, "civilized" states – once they had reformed their domestic and international legal behavior to conform to the "civilized" norms and abstract legal forms of "international society." From this developmentalist perspective, Chinese inferiority was not immutable, but conditional, and thus remediable. In chapter four, I trace this developmentalist logic of legal orientalism-positivism through treatises on modern international law and extraterritoriality, as well as in Sino-British/Western treaties and conventions. This is coupled with a comparative historical analysis of the stadial histories of

[38] Henry Wheaton, *Elements of International Law* 5th ed. (London: Stevens and Sons; New York: Baker, Voorhis & Co., 1916), 19.

[39] James Lorimer's racialized natural law hierarchy of civilization is the most significant British case in point. See James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: William Blackwood and Sons, 1884). See Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago: The University of Chicago Press, 2009).

civilization written by nineteenth-century Euro-American international lawyers, on the one hand, and, on the other, those written by modern political economists, with special attention given to Adam Smith's history of civilization in *The Wealth of Nations*. I shall argue that the developmentalist logic inherent to these stadial histories was bound to a particular form of commercial society, which was being globalized during the nineteenth century.

Returning to my critique of Anghie's colonial history of modern international law, I argue, in chapter four, that this universalizing developmentalist logic, and the stadial histories informed by it, distinguishes nineteenth-century "civilized" international law from Vitoria's natural law jurisprudence. Furthermore, the incorporation of China (and other "semi-civilized" states) into a global commercial international society – first as an object/quasi-subject, then as fully sovereign, "civilized" international legal subject – tracks a historical transformation from *jus publicum Europaeum* to *jus publicum universal*, which Anghie's colonial history papers over entirely. That omission is a result of his over-determined conception of the deep colonial structure of modern international law, which, I have suggested, theoretically limits him in explaining the possibility of political agency and historical change from the operation of those "colonial" legal structures themselves. It is also the result of Anghie's under-theorization of the historical (read: dual) significance of capitalism and private law to the formation of a modern universal international law. I seek to move beyond these theoretical limitations by drawing on a Marxian social theory of *law in capitalism* to elucidate the mutual constitution of nineteenth-century capitalist imperial international legal structures and the forms of political agency and legal subjectivity produced within and against those dual capitalist legal structures.

In the fifth chapter, I shift the critical lens from European to non-European international lawyers in order to further illuminate the dual structures of "civilized" international law and the

historical transformation from *jus publicum Europaeum* to *jus publicum universal* made possible by those dual legal structures. My specific focus is on Chinese legal resistance to Western legal imperialism (i.e. the unequal treaties and extraterritoriality), which took institutional shape during the early decades of the twentieth century in the form of an anti-imperial legal-diplomatic movement whose central political goal was attain international recognition of China as a fully "civilized" and sovereign subject of international law. Comprised of a new professional class of Chinese lawyers – Sao-Ke Alfred Sze (1877-1958), Chengting T. Wang (1882-1961), W.W. Yen (1877-1950), and V. K. Wellington Koo (1888-1985) – this anti-imperial movement emerged in full force during the 1920s and 1930s in the context of the early Republican government's efforts to "modernize" Chinese state and economic law.[40] Its basic discursive strategy involved the re-appropriation and re-signification of doctrines and concepts of nineteenth-century "civilized" international law. This entailed, most fundamentally, the re-appropriation of the positivist doctrine of absolute sovereignty – and its twinned normative ideals of territorial integrity and sovereign equality in international relations – as the formal and normative grounds upon which to make appeals to abrogate the Sino-Western unequal treaties and extraterritoriality. I examine those appeals and critiques of foreign legal imperialism as they were made in professional journals, treatises, and at major international conferences following the First World War (esp. the 1919 Versailles Peace Conference and 1921-1922 Washington Conference) leading up to the abrogation of Western extraterritoriality in China during the 1940s.

My investigation of Chinese international lawyers' anti-imperial legal discourse illuminates its ascending-descending/positivistic-universalistic argumentative structure. I shall

[40] Legal modernization entailed bringing Chinese law and jurisprudence into structural conformity with Western legal systems and ideas of positive law. See Turan Kayaoglu, "The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality," *International Studies Quarterly* 51, no. 3 (Sept. 2007).

make the case that their overarching anti-imperial legal discursive strategy involved, on the one hand, making an *ascending* argument that prioritized sovereignty and sought to augment China's jurisdictional competence and defend its particular national interests and rights as a "civilized" state, and, on another, making a *descending* argument that prioritized order and systematicity and exhibited China's allegiance to the "universal" international standard of civilization. This normative standard occupied a dual signification in this polyvalent liberal legal strategy: it was mobilized to justify both sovereign will and public order. What we shall come to see, then, is a dialectical movement in Chinese international lawyers' anti-imperial legal reasoning from the concrete to the abstract, from the particular to the universal…from apology to utopia. Which further speaks to the global historical implications of Koskenniemi's theory as it pertains to the socialization-cum-professionalization of non-Western international lawyers, whose (implicit) acceptance of liberalism, and its core premises and problematics, provided the discursive conditions of possibility for their ascending-descending/universalistic-particularistic legal reasoning, and the dualistic anti-imperial legal strategies built on that liberal reasoning.

I then critically extend Koskenniemi's theoretical framework by relating the dualistic liberal structure of Chinese international lawyers' anti-imperial legal discursive strategies to its historically determinate capitalist context of possibility. The critical historical grounding of this liberal form of anti-imperial legal discourse will be accomplished in several ways, in the fifth chapter, including through an investigation of Chinese international lawyers' appeals to positive international law (treaties, conventions, etc.), on the one hand, and, in their appeals to regain China's "lost rights," on the other." This latter critical legal discourse was, in essence, a liberal naturalist, descending argument about China's fundamental right to self-determination. It assumed this right existed anterior to any consensualist ascending legal principles; legal order

and obligation were thus derived, in this descending schema, from a pre-existing "universal" normative code which overrode an individual sovereign's will and interests, and to which all "civilized" states were necessarily bound. I argue that this descending naturalist argument was built on a private law analogy between property and sovereignty: Just as a private property owner could appeal for the restoration of wrongfully taken property, Chinese international lawyers' made appeals to China's right of self determination in order to remedy a past wrong (i.e. Sino-Western/foreign unequal treaties) and restore its territory to its rightful owner.[41] So whereas nineteenth-century European international lawyers mobilized the private law analogy to justify colonial expansion and legal domination, Chinese international lawyers employed this liberal analogical reasoning as a counter-discourse to reclaim China's fundamental rights of sovereignty, which had been "lost" at the hands of imperialist foreign Treaty Powers.[42]

My argument is that this liberal form analogical legal reasoning was historically embedded in the dual liberal structures of "civilized" international legal discourse, which both enabled and constrained Chinese international lawyers' anti-imperial strategies of legal appropriation. Through my investigation of their struggle for recognition of China as a fully sovereign state and international legal subject, I aim to throw light on the constitutive social power of "civilized" international legal discourse to generate and structure liberal ideas of Chinese national "interests," rights, and international order. In so doing I also intend to illuminate the legal-historical dynamics of a global international politics of "civilized" sovereignty within which competing ideas of national "interest," sovereign rights, and

[41] This discourse has been absorbed in contemporary scholarship more than it has been the subject of critical inquiry. For a recent history of the rise and proliferation of the "unequal treaties" discourse in China, see Dong Wang, *China's Unequal Treaties. Narrating National History* (Lanham, MD.: Lexington Books, 2005).

[42] These fundamental sovereign rights were "extinguished" in the nineteenth century, according to Anghie, *Imperialism*, 82; R.P. Anand, *New States and International Law* (Delhi: Vikas Publishing House, 1972), 21.

international order came to be articulated by a new class of non-Western international lawyers. It was their critical engagement with the principles and practices of nineteenth century international law that laid the groundwork for a transnational anti-imperial international legal discourse, which, in turn, transformed modern international law into a global subject and site of political contestation.

This transnational anti-imperial legal discourse and the transformations in modern international law it facilitated are the central critical foci of Arnulf Becker Lorca's recent history of "semi-peripheral" international lawyers – a new professional class of non-Western international lawyers from "semi-peripheral" polities (Japan, China, the Ottoman Empire, Latin American states).[43] He frames this comparative global intellectual history as a counter-thesis to Anghie's colonial history of the universalization of international law. Whereas Anghie argues that modern international law became universal as a result of global European domination of non-European societies, Becker Lorca insists, to the contrary, that international law only became universal once non-Western international lawyers re-appropriated it as a counter-hegemonic tool of resistance and restraint against European expansion and domination. His examination of semi-peripheral international lawyers uncovers a "common pattern" of appropriation, which, he argues, was pragmatic and strategic in nature insofar as "it served the interest of semi-peripheral states by allowing their jurists greater room for agency." And the historical emergence of this new mode of non-Western political agency, he suggests, signified the *true* moment of the universalization of modern international law.[44]

[43] See Arnulf Becker Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation," *Harvard International Law Journal* 51 (2010): 475.
[44] Becker Lorca, *Mestizo International Law*, 66.

Through my analysis of the universalization of "civilized" international legal discourse in China, I challenge Becker Lorca's "alternative history" of the semi-peripheral development of modern universal international law on three major fronts. The first relates to his critique of the "Eurocentric" character of nineteenth-century international law, on the one hand, and, on the other, his account of the universalization of that historical body of law, which, for him, means its reception and strategic re-appropriation by non-Western international lawyers. This critical account raises the question (posed earlier in the context of Anghie's critique of the false Eurocentric universalism of nineteenth-century positivist international lawyers): how did this "Eurocentric" legal-jurisprudential system become a normatively compelling critical frame of reference for a new global class of non-Western international lawyers? What rendered "civilized" international law plausible as an anti-imperial counter-discourse across geographic and linguistic boundaries? Becker Lorca's only available theoretical recourse, in addressing a question he does not, or rather, is theoretically unable to pose, is to his general conception of international law as a neutral legal instrument and/or strategic discourse that can be mobilized by different interested parties, for different political ends.[45] Hence, it could be appropriated just as easily by Western international lawyers seeking to legitimate imperial expansion and domination as it could by non-Western international lawyers trying to resist it. While this type of instrumental analysis may begin to account for how non-Western international lawyers deployed international law, it does not address the logically prior question of the conditions of possibility for the historical

[45] This conception of international law "as an empty vessel which could be filled with any content" was held by much of the first generation of TWAIL (Third World Approaches to International Law) scholars, and has been critiqued by second and third generation TWAIL scholars for, among other things, "overestimate[ing] the liberating potential of international law." They "failed to appreciate that international law, as it had evolved, did not offer space for a transformational project." B.S. Chimini, *International Law and World Order* (New York: Sage Publications, 1993), 17. See B.S. Chimni, "Third World Approaches to International Law: A Manifesto', in *The Third World and International Order: Law Politics and Globalization, Developments in International Law*, eds. B.S. Chimni, Karin Mickelson and Obiora Okafor (Leiden: Brill Academic, 2003).

reception and plausibility of nineteenth-century international legal norms and modes of reasoning by non-Western international lawyers. Nor does it explain why these anti-imperial interests and strategic modes of resistance employed by non-Western international lawyers should have been served by the specific *form* of international law that they were critically appropriating as a counter-discourse. Becker Lorca's instrumentalist analysis of semi-peripheral appropriation and the resultant universalization of international law is, in sum, exclusively one of the historical *content* of international law; it "leaves the social and historical character of its form unexamined."[46]

The second and related problem concerns Becker Lorca's misconstrual of the historical nature of and constraints on semi-peripheral appropriation and the political agency signified by it.[47] For political reasons discussed below, Becker Lorca emphasizes the instrumental nature of this historical agency, and, from that standpoint, he then assumes a quite large scope of freedom for semi-peripheral international lawyers to choose among particular international legal doctrines and concepts in their anti-imperial legal strategies. I shall problematize this instrumentalist conception of agency by illuminating the constitutive and contradictory liberal logic of "civilized" international legal discourse, which both enabled and constrained Chinese anti-imperial legal resistance. By internalizing nineteenth-century international legal structures (the doctrine of absolute sovereignty, the standard of civilization, international society, and positivist jurisprudence) and then appropriating them, Chinese international lawyers could mobilize those legal structures to defend and bolster their respective state's jurisdictional competence. So,

[46] See Bob Fine, *Capitalism and the Rule of Law*: *from deviancy theory to Marxism* (London: Hutchinson, 1979), 34–35.

[47] This particular line of historical critique builds on the insights of Umut Özsu. See Umut Özsu, "Agency, Universality, and the Politics of International Legal History," *Harvard International Law Journal* 52 (Oct. 2010).

while those anti-imperial legal strategies of re-appropriation did signify a new mode of non-Western political agency, as Becker Lorca rightly argues, that agency was historically limited in ways that he is incapable of theorizing. I analyze those constraints with reference to the aforesaid global historical process of the professionalization-cum-liberalization of modern international law – a transnational socializing process which constituted a new class of non-Western international lawyers as "bearer[s] of a mode of legal expertise" and "guardian[s] of a form of legal order."[48] The historical significance of those constraints goes beyond China's relative geopolitical weakness vis-à-vis foreign Treaty powers (which meant that the Chinese international lawyers and diplomats under investigation "never negotiated from a position of strength"[49]). A realpolitik assessment of power differentials in Sino-Western international relations may well be able to illuminate the historically contingent geopolitical constraints on, for example, Chinese diplomats inability to press the issue of Japanese territorial encroachment at the 1919 Paris Peace Conference. But what I have in mind is a qualitatively different, structural form of constraint, whose existence was related but not reducible to asymmetric power relations; its historical significance lies in the normative international legal discursive universe within which Chinese international lawyers' anti-imperial legal strategies (claims for sovereign rights and civilized international legal status) were plausibly formulated, advanced, and contested.

My third criticism of Becker Lorca concerns his political project, which I take up, in full, at the conclusion of the dissertation. It is expressed most clearly in his desire for contemporary non-Western jurists from oppressed and marginalized societies to actively "recover" a critical and universalistic semi-peripheral juristic perspective on political and disciplinary developments

[48] Ibid., 63.

[49] Stephen G. Craft, *V.K. Wellington Koo and the Emergence of Modern China* (Lexington: University Press of Kentucky, 2004), 21.

in international law. Crucially for Becker Lorca, semi-peripheral appropriation transformed *jus publicum Europaeum* to *jus publicum universal*; and that historical transformation entailed an effective recovery of the legal universalism that been lost during the nineteenth century when positivism superseded naturalism as the hegemonic Western international jurisprudential paradigm. Setting aside this debatable and largely unsubstantiated claim concerning natural law's universality, what is of special interest to me is that Becker Lorca's reading of semi-peripheral jurists' recovery of natural law universalism parallels his own political project to "recover" a universalistic semi-peripheral orientation towards contemporary international law. It can also be seen in Chinese international lawyers' discourse of recovering China's "lost rights." I find Becker Lorca's political project of recovery highly questionable on a number of fronts, particularly as it concerns the nature of *what* was actually being internalized and appropriated by the semi-peripheral jurists from whom Becker Lorca seeks to recover a lost universality. I shall argue the *what* was a fetishized, naturalized notion of universal sovereign rights – which were "lost" only when non-Western international lawyers had internalized a liberal conception of bourgeois legal subjectivity.

Chapter I:
British Extraterritoriality in China in Historical and Historiographic Perspective

Prior to the nineteenth century, sovereignty was not a one size fits all legal and doctrinal affair. The historical norm was in fact quite the opposite – there existed no singular historical sovereign form or unified doctrinal definition of sovereignty. Instead, a plurality of different shapes and sizes of sovereigns, with various powers and rights, frequently overlapped within the same geography.[1] Sovereignty, as such, did not yet have a determinate territorial referent. Recall along these lines that Kingdoms in the medieval period had ill-defined territorial boundaries. As the eminent jurist Henry Maine noted in *Ancient Law*, during the Middle Ages kings affirmed their sovereignty towards their own people, rather than with respect to a portion of the earth. They claimed, for example, to be Kings of the Franks, and not Kings of France.[2] Maine's claim also speaks to the historical primacy of personal law over territorial law as the primary determinant of the scope of a state's powers and the nature of its rights over its subjects.

An abstract, homogenized conception of legal sovereignty came to be doctrinally defined over the course of the nineteenth century, when it became a generally recognized principle of international law that sovereign states possessed exclusive territorial jurisdiction over persons and things within their territorial boundaries. In this way, modern sovereignty became territorially defined as a jurisdictional space in which the state exercised absolute competence, irrespective of the nationality, race, or religion of the person who came before the state's courts. The paradigmatic doctrinal expression of this territorial principle of sovereignty came in case of

[1] See David Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Quinnipiac Law Review* 17 (Spring 1997).

[2] See Henry Maine, *Ancient Law* (New York: Henry Holt and Co., 1906), 106.

The Schooner Exchange v. McFaddon & Others in 1812. The famous passage of Chief Justice Marshall's opinion reads:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[3]

Marshall then admits several exceptions in practice to this general rule, including immunities of foreign sovereigns, diplomatic agents, military forces and public vessels, when jurisdiction was not coextensive with state sovereignty. Crucially, these special exceptions for which Marshall makes allowance, which fall under the category of European exterritoriality[4] (as distinguished from extraterritoriality), were based on common usage in the "civilized world."

The rise and institutional development of modern nineteenth-century extra-European extraterritoriality presents a very different kind of exceptional legal practice to this modern principle of exclusive territorial jurisdiction. Modern extraterritoriality in non-European, non-Christian countries outside the "Family of Civilized Nations" can be broadly defined in terms of the formal but non-reciprocal extension of European consular jurisdiction over foreign nationals abroad, which exempted them from local jurisdiction and placed them under the laws and judicial administration of their native state. In the particular case of China, modern European extraterritoriality established the legal-jurisprudential underpinnings of a non-territorial form of

[3] The Schooner Exchange v. M'Faddon, 7 (Cranch) 116 (1812).

[4] On the distinction between exterritoriality and extraterritoriality, see Sir Francis Taylor Piggot, *Exterritoriality. The law relating to consular jurisdiction and residence in Oriental countries* (London: W. Clowes, 1892). For discussion of the immunities of foreign sovereigns, diplomatic agents, military forces and public vessels, see W.E. Hall, *A Treatise on International Law* 7th ed. (Oxford: Clarendon Press, 1917), 179-209; Robert Phillimore, *Commentaries upon International Law* 3rd ed. (London: Butterworths, 1879-89), vol. 1. 475-481, vol. 2, 139-141; James Lorimer, *Institutes of the Law of Nations* (Edinburgh & London: W. Blackwood and Sons, 1883-84), vol. 1, 248; Wheaton, *Elements of International Law*, 300.

imperialism, which has been referred to in terms of the "semi-colonialization" of China.[5] More than just an exceptional extra-European legal practice, modern extraterritoriality presents us with a contradictory global international legal practice. On the one hand, modern extraterritoriality was rooted in the historical consolidation of modern territorial sovereignty and the concurrent global expansion of the modern European inter-state system. On the other hand, its establishment in China also signified, within the framework of modern "universal" international law, a blatant violation of Chinese sovereignty.

Nineteenth-century European international jurists, diplomats, and various imperial authorities approached modern extraterritoriality not as a contradictory extra-European legal practice, but rather as an "anomalous" one – a historical vestige from a bygone age of personal law and personal sovereignty. For the purposes of the present chapter what is most significant is that extraterritoriality was not conceived of as an anomalous legal practice, nor did it become a theoretical problem in international law, until the nineteenth century. The question, then, is why at this particular historical juncture did this customary legal practice – the origins of which can be traced back to the ancient world – become viewed as a legal anomaly?

I shall argue that the answer lies in the particular form of "absolute" sovereignty that was being consolidated in Europe and globalized through modern "universal" international law during the nineteenth century. That abstract, homogenous form of political authority – typified in Justice Marshall's aforementioned opinion in Schooner v. McFaddon – became the legal-jurisprudential standpoint from which judges, jurists, diplomats, state officials, imperial authorities, etc. judged, on the one hand, the customary principals and practices of

[5] See Jurgen Osterhammel, "Semi-Colonialism and Informal Empire in Twentieth-Century China: Towards a Framework of Analysis," in *Imperialism and After. Continuities and Discontinuities*, eds., Wolfgang J. Mommsen and Jurgen Osterhammel (London: Allen & Unwin, 1986).

extraterritoriality, and its associated customary forms of quasi- and shared sovereignty, to be "anomalous," and, on the other hand, the levels of "civilization" of non-European states and their laws.

Against this legal-historical background, the present chapter investigates the pre-imperial constitution and early development of principals and practices of British extraterritoriality in China during the charter company era. Those extraterritorial principals and practices took shape in early Sino-Western legal colonial encounters and were mediated, on the British side, by the quasi-sovereign powers of the English (later British) East India Company (EIC), which was granted a monopoly over the India and Far East trade in 1600 by Queen Elizabeth that lasted until 1833/34 (Parliament abolished the EIC's monopoly on trade in China in 1833, though the act took effect in 1834).[6] The next chapter then examines the extraterritorial remedies brought to bear on, and constitutive of, what British contemporaries referred to as the "anomalous" state of law in China in the context of a historical shift from Company to metropolitan control.

Historians traditionally date the rise and fall of modern extraterritoriality in China from its formal inception in the 1842 Sino-British Treaty of Nanjing through the 1943 Sino-British Treaty for the Relinquishment of Extra-Territorial Rights in China.[7] My study, however, broadens this traditional formal chronology in order to analyze the pre-treaty constitution of legal

[6] In 1689, after a series of failed attempts to gain a foothold in the China trade, the Company ship, *Defence*, arrived in Canton. Its arrival inaugurated an era of monopolist European chartered companies controlling much of the foreign trade in Canton. The EIC was followed by French, Dutch, Austrian, Danish and Swedish East India Companies, along with private "country" ships from India and the Americas after 1784. See John Francis Davis, *China: A General Description of That Empire and Its Inhabitants*, 2 vols. (London: John Murray, 1857); James Martin Miller, *China, the yellow peril at war with the world* (Chicago: Monarch Book Co., 1900).

[7] See, most notably, John Fairbank, "The Creation of the Treaty System," in *The Cambridge History of China*, eds. John Fairbank and Denis Twitchett (Cambridge: Cambridge University Press, 1978); John Fairbank, *Trade and Diplomacy on the China coast: the opening of the treaty ports, 1842-1854* (Cambridge: Harvard University Press, 1964); John Fairbank, "The early treaty system in the Chinese world order,' in *The Chinese World Order; traditional China's foreign relations*, eds., John Fairbank and Ta-tuan Ch'en, (Cambridge: Harvard University Press, 1968).

orientalism – a transnational normative discourse which structured British/Euro-American ideas of what counted as "civilized" law and what did not, as well as who was included as a "civilized" legal subject and who was not.[8] I argue that this legal orientalist discourse crystalized in Sino-British/Sino-Western commercial and jurisdictional conflicts at the turn of the nineteenth century, and it informed British views of the necessity of establishing consular jurisdiction in China as a precondition for the protection and promotion of its commercial interests and the safeguarding of the rights and liberties of British/Western subjects. It was then pressed into service by British authorities in order to justify both the unilateral establishment of metropolitan control over British foreign nationals following the abolition of the Company's monopoly in 1833/34. The pervasiveness of legal orientalism during the late eighteenth and nineteenth centuries recommends a broad analytical purview, and my inquiry covers an array of discursive practitioners: English/British East India Company (EIC) agents, British lawmakers and consular officials, merchants, missionaries, diplomats, lawyers and jurists. In tracking the historical emergence and proliferation of legal orientalist justifications of British extraterritoriality in China, I aim more broadly to historically and theoretically differentiate customary forms of extraterritoriality from the modern singular form of extraterritoriality (i.e. consular jurisdiction)

[8] Edward Said refers to Orientalism in terms of a discourse that has structured Western conceptions of the Orient, whereby the Orient is reduced to a passive object, known by a privileged knowing Western subject. Orientalism formed a "systematic discipline by which European culture was able to manage – even produce – the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period." See Edward Said, *Orientalism* (New York: Random House, 1978), 3. The term, legal orientalism, has been used in at least three different cases by my count: *See* Hilary McGeachy, "The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism," *Australian Journal of Asian Law* 4, no. 1 (May 2002); Veronica Taylor, *Beyond Legal Orientalism*, in *Asian Laws Through Australian Eyes*, ed. Veronica Taylor (Sydney: LBC Information Services; Holmes Beach, FL: Wm W. Gaunt & Sons, 1997); Teemu Ruskola, *Legal Orientalism. China, The United States, and Modern Law* (Cambridge: Harvard University Press, 2013). I am appropriating the term from Ruskola, who uses it in a postcolonial sense to refer to a specific historiographic tradition of othering, which views China on the whole as ontologically "lawless." Inspired by Dipesh Chakrabarty's project of "provincializing Europe," Ruskola's sets out to "provincialize" the Western jurisprudence of Chinese law. Note that within the critical discursive framework laid out by Ruskola, "the West" and "China" are conceived of not as determinate geographic units, but as ideal-typical discursive constructs produced through the rhetoric of law.

with reference to an epochal transformation in the practices and principals of legal sovereignty and modern "civilized" international law.

The structure of the chapter is as follows. First, I situate the company's quasi-sovereignty in the historical and theoretical context of divisible forms of sovereignty. Second, I give an overview of early historical forms of extraterritorial jurisdiction, with special reference to the Western capitulations in the Ottoman Empire. Next, I examine the legal orientalist imaginary brought to bear on contemporary accounts of early Sino-British/Sino-Western jurisdictional disputes in Canton. Fundamental aspects of that legal imaginary, I suggest, have been absorbed and recapitulated in conventional accounts of the origins of modern extraterritoriality in China, and Chinese historiography more generally. I then draw on recent scholarship in order to make several critical interventions in this Orientalist history and historiography. Finally, I interrogate the particularly salient legal orientalist notion of China's "state of nature" in order to illuminate the historical dynamics and legal tensions of British/Western extraterritoriality as they unfolded, at both the intra-foreign and inter-foreign levels, leading up to the abolition of the EIC's monopoly on trade in China in 1833/34.

I.1. The World Beyond Absolute Sovereignty

As recent historical scholarship has persuasively demonstrated, the European-chartered company was part and parcel of a very fluid world of early modern political formations characterized by a multiplicity of overlapping sovereign and quasi-sovereign powers.[9] Unlike

[9] See David A. Lake, "Delegating Divisible Sovereignty: Sweeping a Conceptual Minefield," *The Review of International Organizations* 2, no. 3 (Sept. 2007); and Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of British Empire in India* (New York: Oxford University Press, 2011). Both should be read alongside Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of*

modern (absolute) territorial sovereignty, however, which was defined through international doctrine, quasi-sovereignty does not admit a straightforward definition. For future purposes, the term will be used with reference to the imperial construction of China as a quasi-sovereign state[10] following the Treaty of Nanjing when jurists recognized China as a semi-sovereign/"semi-civilized" subject of international law. The term will be used in this chapter with reference to the "rented extraterritorial authority" of the EIC in southern Chinese port Canton, which consisted of both formal and informal legal powers.[11] Formally speaking the Company's Select Committee, which managed its affairs in Canton, lacked legal authority over British subjects in China, apart from granting and withdrawing trading licenses to British merchants. Informally, however, the Company became the de facto representative of the whole British community to Chinese merchants: its Supercargoes held a quasi-diplomatic status, serving as mediators in both intra-foreign and inter-foreign commercial and legal disputes.[12] In this way, the Company played a pivotal role in protecting the rights and interests of British foreign nationals, while also, and often at odds with, its efforts to maintain an increasingly fragile jurisdictional status quo with Chinese authorities at Canton.

This overview of the Company's legal and jurisdictional authority in China highlights two interrelated forms of sub-state sovereignty – namely, shared sovereignty and divisible

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Difference (Princeton: Princeton University Press, 2010) insofar as both challenge the nation-state as the natural and inevitable conclusion of political organization – an overriding assumption of much of the liberal historiography.

[10] The term, "quasi-states" has also been used elsewhere to describe sovereign statehood in the Third World. See Robert Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (New York: Cambridge University Press, 1990).

[11] See Eileen Scully, *Bargaining with the State from Afar. American Citizenship in Treaty Port China, 1844-1942* (New York: Columbia University Press, 2001).

[12] For a general discussion of the status and duties of Supercargoes, see H.B. Morse, *Chronicles of the East India Company Trading to China, 1635-1834*, 5 Vols. (Oxford: Clarendon Press, 1926-29).

sovereignty. It will be argued that the historical constitution and development of both forms of extra-territorial sovereignty demonstrates that, contrary to the absolutist discourse surrounding modern sovereignty (discussed below), sovereignty was neither inherently territorial nor was it exclusively the province of state actors. It would become so, however, during the nineteenth century, at which point quasi-sovereign entities and their customary extraterritorial relations were judged to be "anomalous." Shared sovereignty will be subsequently explored with reference to the intersecting sites of partial legal authority and overlapping jurisdictional control, which characterized the Canton system – a commercial regulatory regime managed by and between Company agents and Chinese (Hong) merchants and authorities. The legal nature and jurisdictional boundaries of this historical form of shared sovereignty, was highly contested and constantly negotiated, at both the international and/or inter-foreign (i.e. Sino-British/Sino-Western relations) and domestic or intra-foreign levels. The inter-foreign dimension will be examined with reference to Sino-British/Sino-Western conflicts over criminal jurisdiction, particularly in cases involving homicide; the intra-foreign dimension will be examined with reference to the Company's (ultimately failed) attempt to control commercial interlopers and the criminal behavior of European merchant entrepreneurs who (like the Company itself) sought to exploit legal anomalies and jurisdictional ambiguities in China.

The other pertinent legal issue of the Company's jurisdictional control in China concerns the delegation or division of various sovereign powers by the British state to a sub-state entity. This was, of course, not an isolated example of divisible sovereignty in the constitution of corporate legal personalities. Rather, it was indicative of a more general pre-nineteenth-century European practice by which European-chartered companies were granted extensive public powers by their respective governments and thereby came to exercise authority over their

employees and properties in ways analogous to that of a government.[13] This common practice of divisible sovereignty took a variety of institutional forms, depending on the particular charter company and colonial context in question. So, then, in the case of the EIC, its formal powers in China were limited to granting and withdrawing licenses to British merchants; whereas its formal legal authority in India was far more extensive and included the right to conclude alliances with foreign princes, the right to maintain armies, as well as the right to administer law and justice.[14] The particularities of the various historical case of company quasi-sovereignty notwithstanding, the underlying commonality of this general European practice was that sovereign rights were, like property rights, eminently transferrable (I return to this analogy below).[15]

What the history of quasi-sovereign powers like European-chartered companies underscores is a fundamental tension between the legal norm of absolute indivisible sovereign authority and the fact of its divisibility in historical practice.[16] That legal-historical tension, which was stable until the mid-nineteenth-century, comes into greater theoretical focus upon juxtaposing two seminal early modern theories of sovereignty – the absolutist theory of Jean

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[13] That world has been recently illuminated by historians who have placed the Company in a constellation of early modern constitutional forms. Specifically, the EIC's quasi-sovereignty, which has been referred to elsewhere as the "company state," by which is meant "the subjection of impressive numbers of people (along with growing territories and sea lanes) to the company's, as opposed to any state's, jurisdiction." See Stern, *The Company-State*, 24.

[14] James D. Tracy, "Introduction," in: *The Political Economy of Merchant Empires: State Power and World Trade 1350-1750*, ed. James D. Tracy (Cambridge: Cambridge University Press, 1991), 1-21.

[15] As Stern notes: "As proprietors, colonial governors and councils were in this sense like manorial lords, who could alienate land, administer justice, exact fines, and control populations within the bounds of their estates." Stern, *The Company-State,* 24.

[16] The tension that exists between the traditional view of sovereignty as absolute and indivisible, and the actual dispersion of political power and legal authority – that is, the tension between *de jure* and *de facto* sovereignty – has come to preoccupy a great deal of literature concerned with the critical exposition of the historical and historiographical "myths" of Westphalian sovereignty. See, e.g. See Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); Jacques Lezra, "Phares, or Divisible Sovereignty" *Religion & Literature* 38, no. 3 (Autumn 2006); Stephen D. Krasner, "Compromising Westphalia" *International Society* 20, no. 3 (Winter 1995/96).

Bodin (1530-1596) with Hugo Grotius's (1583-1645) theory of divisible sovereignty. Their contrasting conceptions of sovereignty, it will be suggested, anticipated in fundamental ways the contradictory principles of organization and legitimacy, which historically characterized two distinct modern juridical orders – one European, the other extra-European. The historical merging of these two juridical orders in the nineteenth century constituted what I, and others,[17] have called the universalization of modern international law.

Bodin is normally credited with formulating the theoretical underpinnings of the "classic" conception of modern sovereignty as absolute and indivisible.[18] Writing during a period of civil war in France between the Catholic monarchy and the Calvinist Huguenots, he viewed the problem of order as central to his theory: only a supreme authority within a territory could maintain order in a divided body politic. Moreover, in Bodin's view, sovereignty could only be vested in a single person or institution within a political community: "[H]e is absolutely sovereign who recognizes nothing, after God, that is greater than himself." As he is not under the command of another and is supreme law-giver for his subjects, this singular authority does not require "the consent of any greater, equal, or below him."[19] Sovereignty, so defined, could have but one locus of authority; its establishment was thus coterminous with the formal exclusion of competing sources of authority from a particular territory.[20] Within this absolutist

[17] See, in particular, Arnulf Becker Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation," *Harvard International Law Journal* 51 (Summer 2010).

[18] See, e.g. Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973).

[19] Jean Bodin, *On Sovereignty: Four Chapters from "The Six Books of the Commonwealth,"* trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 1, 4, 56.

[20] Consider, also, Hans Morgenthau's oft-quoted claim that: "sovereignty over the same territory cannot reside simultaneously in two different authorities, that is, sovereignty is indivisible." Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered," *Columbia Law Review* 48, no. 3 (1948): 350.

framework, then, sovereignty cannot be divided between other political actors, or it ceases to be sovereignty in the proper sense of the word.[21]

In traditional histories of the development of modern international law, Bodin's absolutist conception of sovereignty is generally understood to have prefigured "Westphalian sovereignty."[22] In such histories, the 1648 Peace of Westphalia marks a turning point in the organization of Europe – a decisive historical shift away from a medieval territorial order organized around the universal authority of emperor and pope, and the beginning of the modern international system constituted by territorially unified, autonomous sovereign states. Along these narrative lines, one historian has depicted Westphalia as the "majestic portal" through which the age of sovereign states arrived: "It marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, *each sovereign within its territory, equal to one another, and free from any external earthly authority.*"[23] Neatly summarized in this passage is the twofold character of Westphalian sovereignty. The internal dimension of Westphalian sovereignty, à la Bodin, relates to the domestic autonomy exercised by a supreme authority – i.e. the formal control over a bounded territory and the right to prescriptive jurisdiction. The "external" corollary of

[21] As others have remarked, Bodin's theory of indivisible sovereignty, as coterminous with the unity of the state, was more prescriptive than descriptive – "a normative ideal in the service of state building." See Lake, "Delegating Divisible Sovereignty," 227. Specifically, Bodin's formulation was used to justify the exercise of absolute power in the context of the French religious wars. Furthermore, this prescriptive norm conditioned his view that a lack of absolute sovereignty led to instability and disorder, as with the contemporaneous struggle between kings and nobles in Sweden and Denmark.

[22] There is an extensive critical literature on the "myth" of Westphalia. A sampling of which would include: S. Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" *Journal of the History of International Law* 2 (2000); D. Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *International History Review* 21, no. 3 (Sept. 1999); Benno Teschke, *The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations* (London; New York: Verso, 2003).

[23] L. Gross, "The Peace of Westphalia 1648-1948," *American Journal of International Law* 42 (1948): 20, 28.

Westphalian internal sovereignty relates to international autonomy and inter-sovereign equality. That principle of sovereign equality undergirded what one of the widely recognized founders of modern international law, Emer de Vattel (1714-1767), called, "the great society established by nature between all nations."[24] For Vattel, as for contemporary modern positivist international jurists (Burlamaqui, Wolff, Moser), the society of states, or "international society" as nineteenth-century positivists would later refer to it as, was characterized by self-contained European sovereign states that mutually recognized each other as juridical persons with equal legitimacy and equal rights.[25]

In marked contrast to the absolutism of Bodin, Grotius claimed that sovereignty was not unitary, but divisible.[26] His theory of sovereign divisibility is borne out in his polemical defense of the seizure by the Dutch East India Company of the Portuguese ship, Santa Catarina, in 1603. The legality of the prize was challenged not only by the Portuguese, who demanded the return of their cargo, but also a (Mennonite) faction of the Company's shareholders who objected to the seizure on moral grounds. With the validity of this privateering commission in doubt, representatives of the Company enlisted Grotius to defend the legality of the seizure. Countering

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[24] E. Vattel, *The Law of Nations, Or, the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. B. Kapossy, R. Whatmore (Indianapolis: Liberty Fund, 2008), 73. Vattel derived his notion of sovereign equality from a domestic analogy between states and individuals, thereby imputing to equal rights to states in the same way that liberal theory imputed equality to individuals. See Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946). For the liberal underpinnings of Vattel's theory see Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

[25] A. Hurrell, "Vattel: Pluralism and its Limits," in *Classical Theories of International Relations*, eds. Ian Clark. and Iver B. Neumann (New York: St. Martin's Press, 1996), 239.

[26] It should be noted that, Grotius did initially define sovereignty in terms not entirely dissimilar to Bodin. For Grotius, sovereignty denoted "that power whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will." He then went on, however, to demonstrate a variety of exceptions to this rule, including the two discussed above. See Grotius, *De Jure Belli ac Pacis*. D. Alland and S. Goyard-Fabre, eds. 1999 [1625]): Book 1, Chapter 3, para. 7.

the predominant contemporary jurisprudential view that only a sovereign could declare a public war, Grotius claimed that the law of nations entailed rights and duties not only for states, but also for individuals and private corporations, including the right to defend themselves by violent means for self-protection.[27] Because the Company was defending the property of the Dutch sovereign in its war with Portugal and Spain, it had acquired the right to wage a private war to defend said property. Hence, "the prize in question was acquired *ipso iure* for the Company."[28]

The theoretical crux of Grotius's defense of the seizure of the Santa Catarina rested on a private law analogy between sovereignty and property: As with property rights, sovereign rights could be acquired, partitioned, and alienated from one entity to another.[29] To the extent that his theory of sovereign divisibility was analogically bound up with his conception of individual property rights, it can be historically situated in the context of a general political-economic development over the course of the seventeenth century – namely, the commercialization and increased transferability of rights, at both the individual and state levels. That historical development was bound up with the market-based contractual character of early modern

[27] Grotius made a similar claim in his defense of the Dutch Revolt in Commentarius in Theses XI. There he argued that sovereignty had been transferred from prince to the representative institutions of the people, thereby bestowing them with the right to wage war: "whoever possesses a part of the sovereign power must possess also the right to defend his part." See Grotius, *De Jure Belli ac Pacis*, Book 1, Chapter 4, para. 13. As with the Dutch seizure of the Santa Catarina, the legitimacy of the Dutch Revolt hinged, for Grotius, on a conception of the Law of Nations, which included rights and duties not only for states, but also for individuals and private companies.

[28] Grotius, *De Jure Praedae*, 316. See Edward Keene, *Beyond the Anarchical Society: Grotius, colonialism, and order in world Politics* (Cambridge: Cambridge University Press, 2002), 50-52.

[29] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presse Universitaire de France, 1983), 538. In this way, as Lauterpacht has remarked, "The very notion of sovereignty, which Grotius conceived, like property, as dominion held under law, helped to deprive it of the character of absoluteness and indivisibility." See Lauterpacht, *International Law*, vol. 2, "The Law of Peace," Part 1, (Cambridge: Cambridge University Press, 1975), 339. Elsewhere Grotius noted: "To every man it is permitted to enslave himself to any one he pleases for private ownership, as is evident both from the Hebraic and from the Roman Law. Why, then, would it there not be as lawful for a People who are at their own disposal to deliver up themselves to some one person, or to several persons, and transfer the right of governing them upon him or them, retaining no vestige of that right for themselves?" See Grotius, *De iure belli ac pacis* I.3.8.1. reprinted as *The Rights of War and Peace*, Books I-III, edited and with an introduction by Richard Tuck (Indianapolis: Liberty Fund, 2005).

capitalist society, which rendered the private law analogy intellectually coherent and normatively compelling to natural law jurists like Grotius.[30] Likewise it rendered plausible systems of legal thought, like Grotius's, which were premised on a State-as-Person or State-as-Individual argument that analogized relations between sovereign states to relations between the owners of private property.[31]

The Bodian and Grotian theories of sovereignty represent contrasting normative visions of juridical order.[32] By extension, they can also be read as constitutive of a jurisprudential antinomy that reflected two distinct international regimes, one European, the other extra-European. From this dualistic perspective, the Bodinian theory of sovereignty can be understood as the constitutive principle of the Westphalian international system, a spatial structure grounded in self-contained European states with fixed borders and founded on a contract (read: treaty)

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[30] See C.B. Macpherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* (Oxford: Oxford University Press, 2011 [1962]).

[31] As Pashukanis notes, Grotius's "whole system depends on the fact the he considers relations between states to be relations between the owners of private property." Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (New Brunswick and London: Transaction Publishers, 2003), 329**.** In this way then, Grotius acknowledged, [T]hat the necessary conditions for the execution of…equivalent exchange between private owners, are the conditions for legal interaction between [sovereign] states. Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may freely dispose of its own property, but it can gain access to another state's property only by means of a contract on the basis of compensation; do ut des." This quote comes from Pashukanis's entry "International Law" from the three-volume *Encyclopedia of State and Law* published between 1925 and 1927 by the Communist Academy. It is reproduced in the Appendix of China's Mieville's *Between Equal Rights*. *A Marxist Theory of International Law* (Leiden; Boston: Brill, 2005), 321-336: at 328. For a contrasting view, which claims Grotius's system of legal thought was not premised on such analogical reasoning, see Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge: Cambridge University Press, 1989).

[32] The theoretical differences between Bodin and Grotius have been attributed to the different positions of France and Holland, their respective countries, in the modern capitalist world system: "France as a non-hegemon but a 'strong' state within the core, led Bodin to concentrate on the requirements of robust intra-state formation, yielding a textually constructed reification of political unity. Holland, as the nascent hegemon within the still crystalizing capitalist world-economy lay at the vital nexus between intra- and interstate crosscurrent. As a result, Grotius was committed to a discursive strategy of formulating the hegemonic requirements of maritime supremacy and world-market penetration within an international schema that permitted a plurality of political actors and strategems." See Eric Wilson, "'The dangerous classes': Hugo Grotius and seventeenth-century piracy as a primitive anti-Systemic movement," *The Journal of Philosophical Economics* 4, no.1 (Special Issue 2010): 153.

between formally equal sovereign states. This territorial order, broadly conceived, was characterized by juridical equality and toleration of different religions and cultures.[33] In the extra-European world, however, the international order operated in an entirely different manner. Here, the Grotian principle of divisible sovereignty held. It served as one of the primary organizing principles of colonial and imperial systems of inequality and subjugation, which characterized European-non-European relations.[34] The oft-cited example of divisible sovereignty in nineteenth-century international law is the European protectorate – a European colonial legal form in which the internal sovereignty of a protected state was left alone, while its external sovereignty was transferred to a foreign power.[35] In this nineteenth-century colonial context, the Grotian principle of divisible sovereignty was reanimated by jurists such as Maine, who claimed that, in contrast to statist theories of international law, "sovereignty has always been regarded as divisible in international law."[36] He viewed protectorates as exemplary in this

[33] See Keene, *Beyond the Anarchical Society*, 95.

[34] See, Ibid. On Grotius, see e.g., Martine Julia van Ittersum, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Powers in the East Indies 1595-1615* (Leiden; Boston: Brill, 2006). On the role of forced migration to explain how the Company coalesced into a system of intersecting fields of partial sovereignty, see Kerry Ward, *Networks of Empire: Forced Migration in the Dutch East India Company* (Cambridge: Cambridge University Press, 2009).

[35] On the internal/external division of sovereignty as it pertains to protectorates, see Hall, *International Law*, 50-51; Carlos Calvo, *Le Droit international theorique et practique* (Paris: A. Rousseau, 1880-81) § 39-41, 104, 106.

[36] Maine's theory of divisible sovereignty was a direct challenge to the positivist doctrine of absolute sovereignty, the paradigmatic English expression of which was John Austin's command-based theory of law, which was predicated on a notion of an absolute, indivisible sovereignty. As Maine put it: "It is necessary to the Austinian theory that the all-powerful portion of the community which makes laws should not be divisible, that it should not share its power with anybody else, and Austin himself speaks with some contempt of the semi-sovereign or demi-sovereign states which are recognized by the classical writers on international law. But this indivisibility of sovereignty, though it belongs to Austin's system, does not belong to international law. The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another." Henry Maine, *International Law* (New York: Henry Holt & Co., 1888), 58.

respect. This colonial practice, then, informed his Grotian conception of sovereign rights as a "bundle or collection of powers," which could be divided and transferred.[37]

In light of Bodin's and Grotius's contrasting normative visions of juridical order, it has been argued that early modern European jurists formulated a double standard of sovereignty informed by two distinct historical logics – one based on juridical equality and independence, the other based on inequality and subjugation.[38] My contention is that the historical merging of these two juridical orders during the nineteenth century, in the context of the global-cum-imperial expansion of modern international law, gave rise to new equal-unequal international legal forms – "unequal treaties," which formalized Western-non-Western customary commercial and extraterritorial relations and incorporated them in a global state-centric international order, through both coercive and non-coercive means, were the paradigmatic nineteenth-century case in point.

I.2. Historical Antecedents

During the nineteenth century modern sovereignty came to be defined in international doctrine in terms of a unified body of law administered by the state's courts, which covered all persons and things within that state's territorial boundaries. The application of sovereign state law was in this way territorially, as opposed to personally, based. A separate passage from Marshall's opinion in the aforementioned Schooner Exchange v. McFaddon case expresses in unequivocal terms the primacy of territorial law over personal law:

[37] See Ibid. Similarly, Lauterpacht claimed that sovereignty was a "delegated bundle of rights," which could be separated and divided. See Lauterpacht, "Sovereignty and Federation in International Law," in *International law: The Collected Papers of Hersch Lauterpacht*, ed. E. Lauterpacht, 4 Vols. (Cambridge: Cambridge University Press, 1970), 8.

[38] See Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

> When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which there are found, and no one motive for requiring it.[39]

Marshall's definition of the absolute nature of territorial sovereignty was fully corroborated by nineteenth century international jurists: modern state law thus became synonymous with the application of a singular body of territorial law, which was conceived of in highly abstract and impersonal terms – independent of the race, nationality, or religion of a person brought before the state's courts.[40]

As an epoch-defining moment in the doctrinal consolidation of modern absolute sovereignty, Marshall's opinion also throws light on the legal and jurisprudential context in which nineteenth century jurists came to view modern extraterritoriality as an anomalous vestige of the "personal stage" in the historical development of law. T.E. Holland, the eminent British jurist, summarized that historical stage as follows: "There is a stage in civilization at which law is addressed, not to the inhabitants of a country, but to the members of a tribe, or the followers of a religious system, irrespectively of the locality in which they may happen to be….The governments which the barbarians established on the ruins of the Roman empire did not administer one system of justice applicable throughout a given territory, but decided each case

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[39] Schooner Exchange v. McFaddon, 11 U.S. 7 (Cranch) 116 (1812).

[40] See Henry Wheaton, *Elements of International Law* 6th ed. (London: Stevens and Sons, 1929) 200; Sir Robert Phillimore, *Commentaries upon International Law* 2nd ed. 4 Vols. (London: Buttersworth, 1871), vol. 1, 376; W.E. Hall, *A Treatise on International Law* 5th ed. (Oxford: Clarendon Press, 1904), 50, 166 fn; Lassa Oppenheim, *International Law* (London; New York: Longmans, Green, and Co., 1905), vol. 1, sec. 317; T.J. Lawrence, *The Principles of International Law* 6th ed. (London: Macmillan & Co., 1915), 212.

that arose in pursuance of the personal law of the defendant."[41] Holland's point of reference here is the general principle, "actor sequitur forum rei" (the plaintiff must follow the forum of the thing in dispute), which evolved over several centuries as the guiding principle in the medieval theory of the personality of laws to regulate conflicts of law between members of different communities.[42] In this historical and theoretical context of overlapping non-territorial systems of law, then, Bishop Agobard's (779–840) oft-quoted phrase acquired its meaning: "It often happens that five men, each under a different law, would be found walking or sitting together."[43] A Roman, Lombard, Goth, Frank, and Burgundian could thus peacefully co-exist (at least in theory) in the same town under, each under his own system of law.[44]

Along similar historical lines of legal reasoning, moreover, nineteenth and twentieth-century proponents of imperial extraterritoriality, like Holland, found historical recourse to customary precedents in this personal stage of legal development to justify the retention of Western jurisdictional control over sojourning colonials in non-European lands. At one and the same time, then, modern nineteenth-century extraterritoriality could be viewed as an anomalous vestige of personal law, while also a justifiable extension of a long-standing custom and usage.[45]

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[41] T.E. Holland, *Elements of Jurisprudence* 10th ed. (Oxford: Oxford University Press, 1906), 401.

[42] For discussions of this general rule and various historical exceptions in cases of extreme crimes, see Shih Shun Liu, *Extraterritoriality. Its Rise and Decline* (New York: Longmans, Green & Co., 1925); Sir Travers Twiss, *Law of Nations considered as independent political communities*, 2 vols. (Oxford: Oxford University Press, 1861); W.E. Hall, A Treatise on the *foreign powers and jurisdiction of the British Crown* (Oxford: Clarendon Press, 1894); Charles James Tarring, *British Consular Jurisdiction in the East (London: Stevens and Haynes, 1887)*; Frank E. Hinkley, *American Consular Jurisdiction in the Orient* (Washington DC: W.H. Loudermilk, 1906).

[43] Holland, *Elements of Jurisprudence*, 401.

[44] This peaceful co-existence of different nationalities stands in marked contrast to the state of affairs in treaty port China, where a multiplicity of different Western territorial jurisdictions led to a state of judicial chaos, as each foreign legation retained its own legal and administrative orders, which frequently conflicted with one another.

[45] On this dual-sidedness of nineteenth-century extraterritoriality, see N. Wing Mah, "Foreign Jurisdiction in China," *The American Journal of International Law* 18, no. 4 (Oct. 1924).

And while there were formal similarities to be sure, political, economic, and legal differences between pre- and early modern foreign jurisdiction and modern imperial extraterritoriality were paramount. To start with the most obvious and well-documented, post-1842 differences in Sino-British extraterritorial relations included the use of gunboat diplomacy and unequal treaties, hallmarks of a non-territorial form of British imperialism, which elevated property rights as the fundamental interest and organizing principle of Sino-British relations.[46] Furthermore, as part of a global legal system of imperial governance, Sino-Western unequal treaties in China were legitimated principally in terms of the "civilizing mission" of modern international law – a superior "civilized" Europe would accordingly bring the rule of law to an inferior, "barbaric" (later revised to "semi-civilized") China. This was part and parcel of the aforesaid legal orientalist discourse. By contrast, the Company's quasi-sovereign authority at Canton was not tethered to the British/Western "civilizing mission."[47]

In stark contrast to its modern development as an imperial legal instrument and derogation of non-European sovereignty, ancient extraterritoriality was neither exploitative nor inequitable in nature. As alluded to above, it developed in the ancient world primarily for the sake of commercial interest and convenience to facilitate trade between communities with incompatible religions, laws and customs. Furthermore, whereas proponents and administrators of modern extraterritoriality drew on an Euro-American discourse of legal *rights*, ancient extraterritoriality developed over time as a body of customary legal *privileges*,[48] which rested on

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[46] See Giovanni Arrighi, *The Long Twentieth Century* (London; New York: Verso, 1994), 66-75.

[47] Scully, *Bargaining with the State from Afar*, 32.

[48] The historical supersession of privileges by rights will be examined in the next section with reference to both the development of modern European laws and norms of citizenship, and modern "contractual" treaty relations.

some type of sovereign dispensation (e.g. a treaty or grant), whereby foreigner merchants were either allowed to retain their own laws and legal institutions or were placed under a special jurisdiction.[49] On the whole, ancient extraterritoriality was mutually beneficial for both the host polity and the admitted foreign community: migratory merchant groups were allowed to self-police and foreign hosts could relieve themselves of the burden of administering justice to foreigners. Early historical examples of mutually beneficial legal-jurisdictional arrangements can be found in Ancient Egypt where Jews, Phoenicians and Greeks were permitted to both worship in specially designated regions and retain their own agents and institutions for administering law and order.[50] In ancient Greece, a more developed system of foreign jurisdiction consisting of special magistrates, Χενοδικαι (xenodikai), typically appointed or agreed upon by the national government of the foreign resident in question, was instituted in order to try cases involving foreigners.[51] Both of these examples of special foreign jurisdictions in an age of personal law underscore the "immiscibility of the alien in the ancient world."[52]

Following the precedent set by the Greeks, the Romans also created a special jurisdiction for certain categories of foreign residents. Most remarkably, they did so for the peregrini, who constituted a majority of the empire's inhabitants in the first and second centuries CE. The peregrini were not foreigners *per se*, but were rather "free inhabitants and subjects of Rome, [that] were neither citizens nor Latins," and accordingly, were not protected under the *Jus Civile*,

[49] Shalom Kassan, "Extraterritorial Jurisdiction in the Ancient World," *American Journal of International Law* 29, no. 2 (April 1935).

[50] See Travers Twiss, *Law of Nations*, vol. 1, 444; Kassan, "Extraterritorial Jurisdiction in the Ancient World," 241-42; Coleman Phillipson, *The International Law and Customs of Ancient Greece and Rome*, 2 vols. (London: Macmillan and Co., 1911), vol. 1, 193.

[51] See Phillipson, *The International Law and Customs of Ancient Greece and Rome*, vol. 1, 192.

[52] Liu, *Extraterritoriality*, 9.

Roman civil law, which applied only to Roman citizens (*cives*).[53] The peregrini were placed under the jurisdiction of a special magistrate, the *praetor peregrinus* (the Roman analogue to the xenodikai), whose competence extended to disputes between peregrines as well as between Roman citizens and peregrines.[54] He administered *jus gentium* ("the law in use among all nations") to the peregrini and is largely credited with extending Roman civil law to the *gentes* (peoples or nations).[55] The end of the judicial institute of Roman praetorian law came with Carcalla's conferment of Roman citizenship to all free subjects of the Empire's provinces in 212 CE. Thereafter, "All the inhabitants of the [Roman] civilized world were *cives*, and beyond were only *barbari* [barbarians] and *hostes* [enemies]."[56]

These ancient antecedents notwithstanding, the most commonly cited historical forerunner of modern extraterritoriality is the Western Capitulations (*ahidnames*) granted to Europeans in Ottoman lands – an early form of foreign jurisdiction dating back to the twelfth century. For several centuries prior to the downfall of the Byzantine Empire in 1453, visiting Turkish and Arab traders were allowed to settle and permitted to worship in enclaves known in

[53] Paul Girard, *Manuel élémentaire de droit romain* 6th ed. (Paris: A. Rousseau, 1918), 113.

[54] Significantly, the *praetor peregrinus* was held by a municipal officer of Rome. As such, this Roman judicial office stands in historical contrast to the modern foreign consul, whose authority over sojourning colonials was invested by his native country. See Keeton, *The Development of Extraterritoriality in China*, 2 vols. (London and New York: Longmans, Green & Co, 1928), vol. 1, 159-160.

[55] See T. Corey Brennan, *The Praetorship in the Roman Republic* (Oxford: Oxford University Press, 2000); A.B. Bozeman, *Politics and Culture in International History from the Ancient Near East to the Opening of the Modern Age* 2nd ed. (New Brunswick, NJ and London: Transaction Publishers, 2010 [1960]).

[56] See Thomas Collett Sandar's Introduction to *The Institutes of Justinian* (Chicago: Callaghan & Co, 1876), 30. Though the special jurisdictions were still part of the Roman Empire following the extension of Roman citizenship to all provinces of the Empire, as in the case of the Armenians, who were permitted to retain their own laws with respect to marriage, property, and personal status. See Liu, *Extraterritoriality*, 24-26.

Arabic as *funduq*s, and were also granted immunities from local jurisdiction.[57] By the time Constantinople fell to the Ottoman Turks in 1453, the custom of granting immunities of jurisdiction to foreigners was thus long established, both in Europe and the Levant. Accordingly, the Sultan Mahomet was only following a long-established custom when he granted judicial privileges and jurisdictional immunities to Genoa in 1453 and Venice in 1454.[58]

Despite its military connotation, the term capitulations does not mean a surrender, but rather is derived from "capitula," which refers to a chapter or heading in the deed of a grant.[59] Originally, capitulations were dispensations from the Sultan, and valid only for the life of the Sultan. In principle, then, no privilege extended beyond the reign of the grantor, though it became customary for sultans to renew capitulations granted by their predecessors. Early capitulations were aimed to reduce tariff discrimination against foreigners, and granted foreign groups judicial privileges to settle disputes in their own courts. Though there were unilateral in form (they did not require the signature of the receiving party) and were not always reciprocal in nature, these early arrangements developed out of mutual interest to encourage and stabilize inter-foreign trade relations.[60] They did not afford Europeans a special position in the Empire vis-à-vis Ottoman subjects.

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[57] See Stephen W. Reinert, "Muslim Presence in Constantinople, 9th-15th Centuries: Some Preliminary Observations" in *Studies on the Internal Diaspora of the Byzantine Empire*, eds. H. Ahrweiler and A.E. Laiou (Washington DC: Dumbarton Oaks, 1998).

[58] These early capitulations have been described elsewhere as a political instrument for the integration, rather than exclusion of, foreign merchant groups. See Suraiya N. Faroqhi, ed., *The Cambridge History of Turkey*: *The Later Ottoman Empire, 1603-1839* (Cambridge: Cambridge University Press, 2006).

[59] The term, capitulations, has become more or less synonymous with extraterritoriality. It is typically used to denote a treaty or grant whereby one state is permitted to exercise extraterritorial jurisdiction over its own nationals within a host polity.

[60] Note: While the capitulations of the eighteenth century gave Ottoman representatives in Western Europe authority over judicial matters involving their own subjects, the Ottomans had not yet begun to appoint permanent

The "modern" regime of Western capitulations is traditionally dated from the 1535 "treaty" between Francis I of France and Süleyman the Magnificent. This was not a treaty in the contemporary sense of a contract between two sovereign equals, but rather, from the standpoint of the Sultan, a grant or concession, bestowed at the zenith of the Ottoman Empire's power when it appeared militarily invincible. It allowed French merchants to establish residence in Turkey and granted them trading rights, individual and religious liberty, immunity from local jurisdiction, and the right to access their own courts. The last of these noted privileges provided for French consular jurisdiction – consuls appointed by the French king were permitted civil and criminal jurisdictional control over French subjects, who would then be judged according to French law. As one historian notes, "1535 appears as a milestone…because it put the Ottoman Empire on a slippery slope entailing increasingly generous privileges to more and more nations."[61] The historical evolution of Western capitulations from equitable dispensations to imperial legal instruments of jurisdictional control (which were not abolished in Turkey until the First World War) bears out this claim. In 1673 France obtained a new Capitulation, which granted it power to protect subjects of sovereigns who had no capitulations under her flag. The term "Franks" was thus extended to all who enjoyed these privileges of immunity. The Treaty of 1740 then confirmed this grant to France, but crucially, it extended these privileges beyond the lifetime of the Sultan, thereby permanently reconfiguring the original temporal duration of this sovereign dispensation.

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representatives. H. Liebesny, "The Development of Western Judicial Privileges," in *Law in the Middle East*, ed. M. Khadduri and H. Liebesny (Washington DC: The Middle East Institute, 1955).

[61] Timur Kuran, "The Logic of the Ottoman Capitulations," 7.

Following France's lead, other Western powers scrambled to obtain Capitulations in Turkey (an ominous foreshadowing of the scramble for unequal treaties and extraterritoriality in China during the nineteenth century).[62] The Netherlands received a Capitulation in 1609, Austria in 1615, the England in 1675, the Two Sicilies in 1740, Spain in 1782, and the U.S. in 1830. Unlike that of 1535, these subsequent capitulation agreements with the Sublime Porte were granted not from the apex of the Ottoman Empire's military power, but rather from a position of dwindling strength, often following a defeat. As foreign privileges and immunities mounted in the eighteenth century, the abuse of those privileges became rampant. Most significant in this regard was the development of a class of protégés – Ottoman subjects, typically members of Christian minorities communities, who "received protection from foreign powers either by purchase or family connection," and were thus immune from local jurisdiction. By the mid-nineteenth century, protégés in the Ottoman dominion numbered in the millions, and they constituted the lion's share of the business of foreign consular courts.[63]

The exponential growth of protégés tracks the historical evolution of Western capitulations, which, by the early nineteenth century "had metamorphosed into an instrument for providing foreign nationals and their local protégés a myriad of rights and privileges that were unavailable to most Ottoman subjects."[64] By this time, moreover, the Sublime Porte was forced to concede unequal commercial treaties to Western foreign powers. For instance, in the Anglo-

[62] See Maurits H. van den Boogert, *The Capitulations and the Ottoman legal system: qadis, consuls, and beraths in the 18th Century* (Leiden; Boston: Brill, 2005).

[63] Richard S. Horowitz, "International Law and State Transformation in China, Siam, and the Ottoman Empire in the Nineteenth Century," *Journal of World History* 15, no. 4 (2004): 461.

[64] See T. Kuran, "The Logic of the Ottoman Capitulations," 8, and Thomas Naff, "The Ottoman Empire and the European States System" in Hedley Bull, ed., *The Expansion of International Society* (Oxford: Clarendon Press, 1984).

Ottoman Commercial Convention of 1838, the Ottoman state consented to higher duties on exports than imports, a devastating blow to domestic producers.[65] The treaty also deprived the Ottoman Empire of the Black Sea, it primary economic base.

The legal and historical development of the Western capitulations was part and parcel of an epochal transformation in modern international law characterized, in part, by the legal formalization and homogenization of a plurality of customary forms of extraterritoriality into a singular juridical form, i.e. consular jurisdiction. That global historical transformation gave rise to new imperial regimes of extraterritoriality, which were codified in unequal treaty law and justified by a transnational legal orientalist discourse.[66] The core assumptions and antinomies of that emergent legal discourse will be discussed, below, in the context of late eighteenth/early nineteenth-century Sino-Western extraterritorial disputes.

I.3. Orientalizing Tendencies

Historians and legal scholars have generally approached the origins of modern extraterritoriality in China in one of two ways. The first is by taking a long-term historical perspective, such as the one adumbrated above, which traces the antecedents of Western jurisdictional control in non-European lands as far back as the ancient world.[67] This historical approach took on a distinctly ideological cast under the auspices of nineteenth and early

[65] *Parliamentary Papers*, 50 (1839), 291-95.

[66] The Westerns capitulations provided a legal template for Sino-Western/foreign "unequal" treaty relations, which, in turn, would form part of an emergent global legal constellation of European extraterritorial empires in the Korea, Siam, Japan, and the newly independent republics of Latin America.

[67] For example, Travers Twiss pointed to Arab traders admitted to Canton in the seventh, eighth and nine centuries, who were permitted to erect a Mosque and retain their own laws. See Travers Twiss, "La juridiction consulaire dans les pays de l'orient et specialement au Japon," *Revue de Droit International* (1893): 207.

twentieth-century jurists and historians, who cited the Western capitulations, *inter alia*, in order to justify the imposition of modern extraterritoriality in China and elsewhere as a necessary extension of a long-standing custom and usage. As was discussed previously, however, pre-nineteenth-century customary forms of Western foreign jurisdiction in non-European lands were equitable agreements. They were not inherently exploitative Western imperialist instruments. Hence, this long-term historical perspective on the origins of modern extraterritoriality in China provided a spurious legal justification and ideological cover and for Euro-American semi-colonialism.

The second general historical approach to modern extraterritoriality in China locates its proximate origins in Sino-Western jurisdictional disputes, beginning in the late eighteenth century and leading up to the outbreak of the first Sino-British war in 1839. Those inter-foreign disputes took place in the context of the "Canton System" – a regulatory regime for inter-foreign trade, traditionally dated from 1757, when foreign trading nations were restricted to this one Chinese port.[68] In Canton, British subjects came under the supervision of the EIC's Select Committee, whose jurisdictional authority rested on privileges (freedom to trade, jurisdiction over English servants, as well as certain exemptions from duties) obtained from the chief

[68] In 1755, the British attempted to establish trade at two other coastal ports, Xiamen and Ningbo. They were not only denied access to those ports, but were completely restricted to Canton by 1757. This traditional starting date for the "Canton system," however, has recently been challenged by Paul Van Dyke, who argues persuasively that the structure of the Canton system came into existence well before 1757. He argues that a structure of the system was put in place in the last decades of the seventeenth century following the defeat of the Taiwan-based resistance to the Manchu conquerors of China, which then allowed the Qing rulers to reopen China's maritime ports. His important study traces how a series of ad hoc arrangements evolved into a regularized system of security controls and fees through a process of negotiation between the Chinese, as well as between the Chinese and foreign merchants. See Paul Arthur Van Dyke, *The Canton Trade: Life and Enterprise on the China Coast, 1700-1845* (Hong Kong: Hong Kong University Press, 2005); Paul Arthur Van Dyke, *Merchants of Canton and Macao: Politics and Strategies in Eighteenth-Century Chinese Trade* (Hong Kong: Hong Kong University Press, 2011).

maritime customs official, known as the *Hoppo*.[69] As with that of other European chartered companies, the EIC's jurisdictional authority was circumscribed both spatially and temporally. Spatially, charter companies' jurisdictional control was restricted through a series of mid-eighteenth century imperial decrees to Chinese-built factories, situated on the banks of the Pearl River, which were rented to the foreign merchants by the Cohong.[70] The largest of the factories was rented to the EIC, indicative of the disproportionately large volume of trade (principally in tea, silk textiles, and porcelain) transacted with the British. These factories remained the center of Western trade and daily life in China until the mid-nineteenth century.[71] Temporally, European merchants were only allowed to remain in Canton during the trading season, from October to March. During the non-trading season, foreign merchants either returned home or retired to Macau.[72]

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[69] In addition to making certain that foreigners followed customs and duty regulations, the Hoppo acted as the sole intermediary to the Qing government officials since Westerners were not allowed to communicate with the Emperor directly. He was thus made responsible, on behalf of the Qing Imperial court, for the local supervision of the foreign trading community in China. See Fairbank and Goldman, *China a New History*.

[70] The Cohong, or guild, was the Chinese counterpart at Canton to monopolistic European-chartered companies. It took shape in the first half of the eighteenth century when a limited number of government-approved Chinese merchant-wholesalers, known as Hong merchants, were commissioned to act as brokers for foreign traders. (Initially there were eleven Hong merchants; two additional Hong merchants entered the guild in 1832). In 1720, the Hong merchants merged to form the Cohong. All orders and purchases had to be made through licensed members of the Cohong, at prices negotiated by Hong merchants with up-country suppliers. The Cohong, in turn, was under the jurisdictional control of the *Hoppo.* See Cheong Weng Eang, *The Hong Merchants of Canton: Chinese Merchants in Sino-Western Trade* (Richmond, VA: Curzon Press, 1997); Van Dyke, P. A. *The Canton Trade*.

[71] Note: This type of circumscribed factory jurisdictional control had an ancient lineage, dating back to ancient Egypt when King Amasis (570-526 B.C.) allowed Greeks to establish a factory at Naucratis. In the charter company era, the English (later British) EIC Britain set up its first Asian factory in a compound leased from the Chinese quarter in Bantam in 1602. In the next two decades, British factories were established in India, Siam (Thailand), Sumatra Java (Indonesia), the Spice Islands, and Japan in the next two decades. In general, see Morse, *Chronicles*. On English factory life in Japan, Anthony Farrington, ed., *The English Factory in Japan, 1613-1623* (London: British Library, 1991).

[72] See J.S. Gregory, *The West and China since 1500* (New York: Palgrave Macmillan, 2003).

As a customary norm during the era of charter company trade in China, the Chinese did not intervene in intra-foreign disputes. Only in exceptional cases of foreign crimes, usually homicide, did Chinese authorities step in and attempt to exercise jurisdictional control over foreign subjects. British authorities encountered such Chinese jurisdictional interventions in criminal cases with a steadfast resistance couched in a legal orientalist discourse of fundamental incommensurability between Occidental and Oriental law and justice – an ethnocentric, Othering discourse predicated on a civilization/barbarity opposition. That legal orientalist discourse underpinned an overdetermined British/Western imaginary of Chinese law and justice, summed up by one historian in the following way: "Rightly or wrongly, there lurked in the hidden nooks of every Western mind a vague notion that Oriental jurisprudence could not possibility be in keeping with Western ideas of justice, and that an Occidental would certainly do violence to his dignity and pride by rendering obeisance to a deficient judicial regime."[73] The underlying rationale of British resistance to Qing jurisdiction centered around those alleged "deficiencies" of Chinese judicial regime: its draconian and opaque nature, the use of torture to extract confessions, and its failure to recognize criminal intent.[74] Because Chinese notions of justice, and criminal

[73] Liu, *Extraterritoriality*, 36. On the early development of the English orientalist imaginary as a means of legitimation for commercial and political expansion in Asia, see R. Markley, "Riches, Power, Trade and Religion: The Far East and the English Imagination, 1600–1720," *Renaissance Studies* 17, no. 3 (2003).

[74] These alleged deficiencies of China's judicial system were "catalogued" and propagated by early Western observers, primarily missionaries and foreign traders. Especially significant in this regard was *The Chinese Repository*, a English-language periodical founded by Dr. Bridgeman, the first American missionary to China, and later the first President of the North China Branch of the Royal Asiatic Society. Under his stewardship the journal took an extremely unfavorable attitude towards the administration of Chinese law, especially in regards to the allegedly anti-commercial character of China and its systematic violation of propriety rights. Bridgeman denounced Chinese law as "equally opposed to the laws of God, to reason, and to commonsence…. In China, the laws, whether the fundamental ones in the imperial code, or the subsidiary rules, or the provincial and local orders of government, or the law of usage among the people. – are all more or less hostile to a free and amicable intercourse with foreigners." See *Chinese Repository*, vol. 3, 410. For purposes of the historiographic review undertaken in this chapter, the journal is noteworthy inasmuch it is commonly cited in early historical scholarship on the rise and development of extraterritoriality in China as supporting evidence for Orientalist expositions of Chinese law and justice and the incommensurability of Occidental and Oriental juridical regimes.

justice in particular, were wholly incompatible with those of the Western world, so this line of orientalist legal reasoning went, the Chinese judicial system was deemed inadequate to safeguard the liberty and rights of Western subjects.

The single most objectionable feature of Chinese criminal law was the so-called doctrine of collective responsibility.[75] It became anathametized in the context of commercial tensions at Canton, as Western authorities and observers came to view it as the underlying doctrinal rationale for general trade stoppages initiated by Chinese authorities' in the midst of criminal jurisdictional disputes.[76] They claimed, in short, that Chinese authorities effectively held all nations collectively responsible for the criminal actions of individual merchants.[77] These actions, which in contemporary English commercial jurisprudence were analogous to joint liability, were then cited as irrefutable proof of China's "arbitrary" and "indiscriminate" treatment of foreigners, and legitimate grounds for a departure from generally recognized rules of international law (i.e.

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[75] For discussions of the doctrine of collective responsibility in this vein, see G.T. Staunton, *Miscellaneous Notes Relating to China*, 2 vols. (London: John Murray, 1822), vol. 2, 109; S. Wells Williams, *The Middle Kingdom,* 2 vols. (London: W.H. Allen, 1883) vol. 1, 436, 481-482; M. Hue, *The Chinese Empire*, 2 vols. (London: Spottiswoode & Co., 1855), vol. 2, 258-260. Early-twentieth century accounts of the doctrine have toed the same line. See H.B. Morse, *The International Relations of the Chinese Empire*, 3 vols. (London; New York: Longmans, Green, and Co., 1910-18) vol. 1, 109-117;. Morse, *Chronicles*, vol. 3, 40; Keeton, *The Development of Extraterritoriality in China*, vol. 1, 119-121. Both Morse and Keeton pointed to fact that Chinese law punished relatives of a criminal convicted of high treason or multiple murders in domestic cases as evidence of collective responsibility. And more recently, see Joanna Waley-Cohen, "Collective Responsibility in Qing Criminal Law," in *The Limits of the Rule of Law in China*, eds. Karen Turner, James V. Feinerman, and R. Kent Guy (Seattle: University of Washington Press, 2000).

[76] Though it should be noted that the British also resorted at times to withdrawing from the Canton trade. See, for instance, the accounts of the *Topaze* case (1812) given by Keeton, *The Development of Extraterritoriality in China*, vol. 1, 59-61; Morse, *Chronicles*, vol. 4, 27-35; Morse, *International Relations of the Chinese Empire,* 105-06; Peter Auber, *China*: *An outline of its government, laws, and policy: and of the British and foreign embassies to, and intercourse with, that empire* (London: Parbury, Allen and Co., 1834), 288-309.

[77] See Staunton, *Miscellaneous Notes relating to China*, 407-432. For a recent discussion, see R. Randle Edwards, "Ch'ing Legal Jurisdiction over Foreigners," in *Essays on China's Legal Tradition*, ed. Jerome A. Cohen, R. Randle Edwards, and Fu-mei C. Chen (Princeton, N.J.: Princeton University Press, 1980).

sovereign equality and exclusive territorial jurisdiction) to resist Qing jurisdiction.[78] Along this line of reasoning, Dr. Robert Morrison (1782-1834), the first Protestant missionary to China and veteran interpreter for the EIC, argued that because "foreigners [in China] are not protected by the laws of the land, the necessity for [sovereign] obedience is cancelled."[79]

The two most oft-cited exceptions to Morrison's dictum – when foreign trading nations recognized Qing jurisdiction in a criminal case and surrendered a foreign national to the Chinese government for trial – involved two trading vessels, the *Lady Hughes* and the *Emily*. These two landmark cases, to quote Jonathan Spence, "made the greatest impact on Western thinking and forced a serious reconsideration of how to deal with the Qing at the international diplomatic level."[80] That historians like Spence have hewed closely to contemporary accounts of these jurisdictional disputes, and, in the process, perpetuated some of the same Orientalist distortions and myths about Chinese law, including collective responsibility, is a historiographic theme that will be addressed shortly. For present purposes, these two cases serve to underscore the emergent legal Orientalist discourse brought to bear on contemporary accounts of early Sino-Western jurisdictional conflicts.

The *Lady Hughes* was a private "country ship," licensed by the Company, belonging to an Indian merchant. The ship was captained by W. Williams, with Mr. George Smith as the

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[78] Williams, *The Middle Kingdom*, vol. 1, 453-467.

[79] Morrison was the first to translate the Christian Bible into Chinese and to compile a Chinese-English dictionary. The EIC likewise justified its resistance to Qing jurisdiction in terms of the unequal treatment of foreigners. Responding to an incident involving the public strangulation of a French seaman who belonged to the English ship, *Success*, as a punishment for the murder of a Chinese man, the Select Committee noted in their report to the Court of Directors in London: "Foreigners are not here allowed the benefit of Chinese Laws, though in this instance one of them suffers by the rigor of them; nor have they any privileges in common with the natives. It hath placed us in a worse situation than are the subjects of a Tyrannical Government – for we are liable to all the Severity [and] Injustice of Arbitrary Law, and yet do no enjoy its privilege of Protection." As quoted in Keeton, *The Development of Extraterritoriality in China*, vol. 1, 39-40, citing Morse, *The Chronicles of the East India Company*, 59-60.

[80] Jonathan Spence, *The Search for Modern China* (New York: W.W. Norton & Co., 2001), 126-27.

Supercargo. In November 1784, while at the port of Whompoa, a gunner from the ship fired a salute, which resulted in the death of two nearby Chinese boatmen. In accordance with the laws of the Empire, the Chinese authorities immediately demanded that the gunner be given up for public examination, a request British authorities promptly refused. The Council of Supercargoes at Canton, representing the EIC, did not consider the offence a capital one, and classified it instead as "an accidental homicide."[81] As such, they claimed that there was no criminal liability on the part of the gunner. On the same grounds the British also refused the request of Chinese authorities to question the suspect and witnesses either at the British factories or on the ship (where the gunner apparently hid following the incident[82]). Following the British refusal to surrender the gunner, the Chinese then detained the Supercargo, Smith, who was then at Canton, surrounded the factories with soldiers and stopped all trade. "It was though," one historian has recently remarked, "the Qing construed the Europeans as a family, despite their many rivalries; it held them all, collectively, responsible for the Lady Hughes incident."[83] This brought all the other foreign trading nations at Canton – the French, Americans, Dutch, and Danish – into common support of the Company's position. The various charter company's councils sent armed ships to Canton in collective protest and demanded the release of Smith.[84] Finally, after the commitment of the other foreign trading nations began to waiver, and the Chinese authorities

[81] This was a frequent counterclaim made by British authorities to (spuriously) absolve a British subject of criminal liability. See Morse, *Chronicles*, vol. 2, 99. For examples of British claims of "accidental" homicides, see Ibid, vol. 1: 168 (1721); 175 (1722); 231 (1735); 236 (1735); 253 (1736); 270 (1739); Vol. 2: 59 (1780); 334 (1800); Vol. 3: 40 (1807); 318 (1817); Vol. 4: 18 (1821); 232 (1830); see also Edwards, "Ch'ing Legal Jurisdiction over Foreigners," 233-243.

[82] Auber, *China*: *An outline of its government*, *laws, and policy*, 185; Morse, *Chronicles*, vol. 2, 104.

[83] Joanna Waley-Cohen, *The Sextants of Beijing. Global Current in Chinese History* (New York: W.W. Norton & Co., 1999), 100.

[84] Morse, *International Relations of the Chinese Empire*, vol. 2, 101.

threatened to cut off British merchants' food and water and suspend trade indefinitely, the British surrendered the gunner.[85] By some accounts, Chinese officials gave the Company assurances that the gunner would receive a fair trial and would be returned unharmed within sixty days.[86] In any event, it did not come to pass. The gunner was tried, convicted and imprisoned. Shortly thereafter the Emperor sentenced him to public strangulation.[87]

This was the only case that the British surrendered an accused national subject to the Chinese government for trial, and soon became a cautionary tale by Western observers and authorities on the extreme perils of submission to Chinese law and justice.[88] For example, John Francis Davis, a leading English sinologist and colonial administrator in China, invoked the Lady Hughes case in his declaration that in the case of foreigners in China, "every legal safeguard provided for the native is dispensed with…the conduct of the local government towards foreign homicide [is] so perfectly unjustifiable [that it was] not only *excusable but imperative* in Europeans to resist the execution, *not of law, but of illegality*."[89] The Council of

[85] See Keeton, *The Development of Extraterritoriality in China*, vol. 1, 34; Morse, *International Relations of the Chinese Empire*, vol. 2, 100, 106.

[86] Li Chen calls this a "vague assurance" at most, but one that has been trumped up in subsequent historical accounts as a "solemn pledge" in order to justify post-*Lady Hughes* resistance to Qing criminal jurisdiction. See Li Chen, "Clash of Empires in the Realm of law and History: A Case Study of the Sino-British Legal Dispute" (July 4, 2007): 27-29.

[87] See Keeton, *The Development of Extraterritoriality in China,* vol. 1, 40-41; Morse, *International Relations of the Chinese Empire*, vol. 2, 105; Auber, *China*: *An outline of its government, laws, and policy*, 183-187. After the *Lady Hughes* incident, the EIC prohibited the firing of salutes from all ships in Whompoa. See Morse, *International Relations of the Chinese Empire*, vol. 1, 14, 297, vol. 2, 107; Auber, *China*: *An outline of its government, laws, and policy,* 187.

[88] Samuel Wells Williams, for example, cited the *Lady Hughes* case a crucial instance of Chinese unjust, discrimination against foreigners. See Samuel Wells Williams, *The Middle Kingdom*, vol. 2, 454-59.

[89] John Francis Davis, *The Chinese: A General Description of the empire of China and its inhabitants* 2 Vols. (London: C. Knight, 1836), vol. 1, 389, 394; Morse, *Chronicles*, vol. 2, 343; Peter Auber, *China*: *An outline of its government, laws, and policy*, 207-08.

Supercargoes at Canton called the incident a national "disgrace,"[90] a position echoed by Select Committee, who vowed to never again surrender an accused British subject to Chinese authorities.[91]

Euro-American legal orientalism reached another inflection point in the 1821 Terranova affair.[92] Francis Terranova was a Sicilian sailor on the American ship, the *Emily*. He was thus a U.S. national by virtue of the fact that he was employed on an American vessel.[93] While bargaining with a Chinese woman for fruit alongside the ship, Terranova threw an earthenware jar, which hit her on the head. She fell overboard and drowned. At first, the Americans refused Chinese demands that Terranova be surrendered, though they agreed to a trial on the *Emily*. The American defense, like the British in the *Lady Hughes* case, was that the homicide was an "accident."[94] In one historian's recounting of the events, eyewitnesses of the incident cleared Terranova of any wrongdoing. The Chinese Magistrate, however, apparently refused to consider such testimony and declared, "he had himself seen the Woman and the Jar. He believed the man

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[90] Morse, *International Relations of the Chinese Empire*, vol. 2, 105; Keeton, *The Development of Extraterritoriality in China*, vol. 1, 42.

[91] See Morse, *Chronicles,* vol. 2, 100-109; R.M. Martin, *China; Political, Commercial, and Social; In An Official Report to Her Majesty's Government* (London: James Maden, 1947), vol. 2, 16-17; Peter Auber, *China*: *An outline of its government, laws, and policy*, 183-187; James B. Eames, *The English in China* (London: Pitman, 1909), 96-97.

[92] See the account of the Terranova case in Keeton, *The Development of Extraterritoriality in China,* vol. 2, Appendix IV, V (which includes Staunton's remarks on the case, as well as a translation of relevant statements made by the Viceroy of Canton, by Dr. Morrison). A more recent and balanced historical account is William J. Donahue, "The Francis Terranova Case," *The Historian* 43 (February 1981).

[93] On the complexities of the issue of nationality in the Terranova case, and Americans willing to surrender someone with "borrowed citizenship," see Scully, *Bargaining with the State from Afar*, 36-38.

[94] Fairbank, among other historians, propped up the orientalist myth that China did not take into account criminal intent in cases of accidental homicide. He claimed "the American concern for the individual has been expressed legally in the question of intent. Willfully causing a death is murder, but causing a death accidentally and without malice aforethought may be classed as homicide and deserve a different penalty. Not so in old China. Lack of intent was not a mitigating factory in judging a crime. The classic case is that of an American sailor," referring to the 1821 Terranova case. See John Fairbank, *China Watch* (Cambridge: Harvard University Press, 1987), 1.

guilty, [and] if he had judged wrongfully it was Heaven's business..."[95] He then promptly left the ship without hearing any further evidence. With that, the Chinese authorities repeated their demand that Terranova be delivered up for punishment. When the American authorities refused, the magistrate imprisoned the linguist and the security merchant, and ordered the cession of the American trade. As a result of the trade stoppage – and most likely due to the fact that the *Emily* was carrying opium and the captain wished to avoid further controversy – the Americans relented, recognized Chinese jurisdiction and handed over Terranova. He was tried again, found guilty, and then publicly strangled.[96]

In one contemporary account of the *Emily* trial, the American merchants were said to have told the Hong merchant, Howqua, who was charged with delivering up the prisoner: "We are bound to submit to your laws while we are in your waters, be they ever so unjust. We will not resist them."[97] Whether this account was apocryphal or not, for all intents and purposes it was accepted as a historical fact and propagated as another cautionary tale of Chinese legal barbarism. Leading the orientalist brigade were British authorities, who viewed the Terranova incident as a dangerous precedent in managing future Sino-Western disputes, especially in light of growing British and international commercial intercourse with China. Mr. Urmston, the President of the Select Committee of the EIC, chastised the Americans for "barbarously abandon[ing] a man serving under their flag to the sanguinary laws of this empire without an endeavor to obtain common justice for him, their conduct deserves to be held in eternal execration by every moral,

[95] Morse, *The Chronicles of the East India Company*, vol. 4, 24.

[96] Morse, *Chronicles*, vol. 4, 23-27; Morse, *International Relations of the Chinese Empire*, vol. 1, 104-105; Tyler Dennett, *Americans in Eastern Asia* (New York: The MacMillan Company, 1922), 86-89.

[97] Williams, *The Middle* Kingdom, vol. 2, 21; *Chinese Repository*, vol. 5, 227.

honourable and feeling Mind."[98] Even George Staunton, the first British sinologist, and a veteran in the EIC's service in Canton since 1800 – who valorized certain aspects of Qing law in his widely-circulated translation of the Great Qing Legal Code[99] – lambasted "the secrecy and unfairness with which the trial was conducted, and the precipitancy with which the sentence was afterwards executed, as equally a violation of the natural principles of justice, as even of the forms of Chinese law, such as it is administered in ordinary cases."[100] While Staunton's criticisms of the Chinese handling of the *Lady Hughes* gunner should not be read as an indictment of the whole of late imperial Qing law, his critique of this particular case from the standpoint of natural law had enormous purchase in contemporary British discourse on Chinese law and Anglo-Chinese relations. In a common refrain, one Company officer thus declared that the laws of China are "so arbitrary," they are "contrary to all reason and justice."[101]

The sinophobic legal orientalist discourse that crystalized in these Sino-Western jurisdictional disputes, anathematising Chinese law and its judicial administration, was a striking reversal of earlier sinophilic appraisals of Chinese culture by early European explorers and

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[98] See Keeton, *The Development of Extraterritoriality in China,* vol. 1, 59; Morse, *Chronicles*, vol. 4, 11-13, 23-27.

[99] Staunton's translation of the Great Qing law code – Ta Tsing Leu Lee [TTLL] ('Statutes and Sub-statutes of the Great Qing") – was published in 1810 as *The Fundamental Laws of China*.

[100] George Thomas Staunton, *Miscellaneous Notices Relating to China* (London: John Murray, 1822), 197-98. On the other hand, Staunton's writings on China also presented a more consensual image of China and Sino-British relations. Staunton's views illustrate how legal orientalist depictions of China could be both positive and negative. In his English translation of the Great Qing law code – Ta Tsing Leu Lee [TTLL] ('Statutes and Sub-statutes of the Great Qing") – published in 1810, he remarked that while there were many Chinese laws that were "indefensible…there are other parts of the code which, in a considerable degree, compensate these and similar defect, are altogether of a different complexion, and are perhaps not unworthy of imitation, even among the fortunate and enlightened nations of the West." See *TTLL*, 36–37, 313–315, 515–524. The secondary literature on Staunton is limited. See Glenn Henry Timmermans, "Sir George Thomas Staunton and the Translation of the Qing Legal Code," *Chinese Cross Currents* 2, no. 1 (2005). On Staunton's role in promoting a positive, benevolent image of Chinese law, and his salutary role in maintaining legal order in Canton on behalf of the EIC, see. S. P. Ong, "Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code (1810)," *Journal of the Royal Asiatic Society* 20, no. 2 (April 2010).

[101] Morse, *Chronicles*, vol. 1, 168.

missionaries.[102] As has been well documented elsewhere, European views of China and Chinese culture took a volte-face in the second half the eighteenth century in the context of the late enlightenment and the early industrial revolution.[103] French philosophes, such as Montesquieu, Diderot, d'Holbach and Helvetius, all criticized Oriental despotism, and its malevolent effects on Chinese character and its commercial relations. China's political stability, which had previously been lauded as a virtue of its political system, became increasingly viewed as inert and inanimate. Hence, the frequent invocation, in the pejorative, of the Voltairean cliché of an "immobile" Chinese civilization – "le plus ancien du monde, et le mieux policé sans doute, puisqu'il a été le plus durable."[104] – as the overriding factor in China's retrogression and decay.[105] As the French historian Nicolas Boulanger wrote prophetically in *The Origin of Despotism* (1764), "All the remains of her ancient institutions, which China now possesses, will necessarily be lost; they will

[102] During the Age of Discovery European explorers tended "to elevate China above all the civilizations that they had 'discovered.'" See Michael Adas, *Machines as the Measure of Men: Science, Technology, and Ideologies of Western Dominance* (Ithaca, NY: Cornell University Press: 1989), 22. Admiration for Chinese culture continued European Missionaries during the sixteenth century, some of whom were admitted to the Emperor's court, gave laudatory appraisals of China and Chinese culture. See S. Golden, "From the Society of Jesus to the East India Company: A Case Study in the Social History of Translation" in *Beyond the Western Tradition. Translation. Perspectives XI*, ed. M. G. Rose (Binghamton, NY: State University of New York at Binghamton, 2000); Chunjie Zhang, "From Sinophilia to Sinophobia: China, History, and Recognition," *Colloquia Germanica* 41, no. 2 (2008); Ashley Eva Miller, "Revisiting the Sinophilia/Sinophobia Dichotomy in the European Enlightenment through Adam Smith's 'Duties of Government'," *Asian Journal of Social Science* 38 (2010).

[103] Adas, *Machines as the Measure of Men,* 52; L. Zhang, "The Myth of the Other: China in the Eyes of the West" *Critical Inquiry* 15, no. 1 (Autumn 1988).

[104] Voltaire, *"Essai sur les moeurs et l'esprit des nations: et sur les principaux faits de l'histoire depuis Charlemagne jusqu'à Louis XIII"* (Geneva, 1763), 7. As cited in M. de Guignes, "Voyage à Péking," *Edinburgh Review, Or Critical Journal*, Vol. 14, 415. This pejorative connotation of China's immobility stood in marked contrast to Voltaire's generally positive view of the China's virtuous government, particularly in light of its religious tolerance. See Timothy Brook and Gregory Blue, eds., *China and Historical Capitalism. Genealogies of Sinological Knowledge* (New York: Cambridge University Press, 1999).

[105] German Sinophobia harped on the same theme. J.G. Herder, for example, expressed China's political immobility in these terms: "The [Chinese] empire is an embalmed mummy painted with hieroglyphics and wrapped in silk; its internal life is like that of animals in hibernation." See J.G. Herder, *Ideas for the Philosophy of the History of Humanity*, 4 vols. (1784-1791), XIV, 13, cited in Sriparna Basu, "Multiple Paths to Globalisation: The India-China Story" in *China and India: History, Culture, Cooperation and Competition*, eds. Paramita Mukherjee, Arnab K. Deb, and Miao Pang (Los Angeles and London: Sage, 2016),130 fn2.

disappear in the future revolutions; as what she has already lost of them vanished in former ones; and finally, as she acquires nothing new, she will always be on the losing side."[106] In sum, China came to viewed as passive and inanimate, belonging to a dead culture, and thus without progress and modernity.

Hegel's *Philosophy of History* offers us one of the most paradigmatic expressions of this orientalist historical perspective on China. His linear teleological meta-account of the historical unfolding of the world spirit towards freedom and self-consciousness begins with China and its "theocratic despotism." He writes, "The history of the world moves from East to West, for Europe is the absolute end of history, and Asia is the beginning." The historical development of Asian culture is in fact pre- or un-historical, according to Hegel, in the sense that there is no progress to freedom and self-consciousness in China, but only "the repetition of the same majestic ruin." China thus represents a primitive "childhood" stage in the historical unfolding of the world spirit: Its "fixedness of character, which recurs perpetually takes the place of what we should call the truly historical. China and India lie, as it were, still outside the World's History, as the mere presuppositions of elements whose combination must be waited for to constitute vital progress."[107] His judgment on Chinese history is bound up with his critique of Chinese state religion. Hegel understands China as occupying a "realm of theocratic despotism" in that its religion of heaven, or the *Dao*, is centered on the state religion of the Chinese Emperor. He views the conflation of political history and political theology, law and morality, in Chinese thought to be the determinative factor in retarding the free progress of spirit in Chinese culture.

[106] Nicolas Antoine Boulanger, *The Origin and Progress of Despotism in the Oriental, and Other Empires, of Africa, Europe, and America*, trans. John Wilkes (Amsterdam 1764), 260. On Boulanger's theory of Oriental despotism as related to environmental factors and state religion, see Michael Curtis, *Orientalism and Islam. European Thinkers on Oriental Despotism in the Middle East and India* (Cambridge: Cambridge University Press, 2009).

[107] G.W. Hegel, *The Philosophy of* History, trans. J. Sibree. (New York: Dover, 1956), 112, 105, 116.

"In the Eastern religions," he writes, "the first condition is that only the one substance. . . shall be true, and that the individual neither can have within himself, nor can he attain to any value in as far as he maintains himself as against the being in and for itself."[108] In this sense, Chinese thought exemplifies Hegel's oft-quoted claim that "The East knew and to the present day knows only that *One* is Free; the Greek and Roman world, that *some* are free; the German World knows that All are free."[109]

Hegel's meta-commentary on China's unhistorical nature forms part of a larger intellectual genealogy of an imperial episteme,[110] which found significant purchase in orientalist accounts of late eighteenth/nineteenth-century China and Sino-Western relations. Hegel's juxtaposition of Oriental despotism and patriarchalism, on the one hand, and Occidental individualism and freedom, on the other, became a recurrent trope in orientalist discursive undertakings to construct Chinese law and diplomacy as "barbaric" and incommensurable with modern notions of law, justice and international relations. This orientalist definition of "civilized" law excluded China categorically; while, at the same time, positing a benchmark of law that would become definitional of the British/Western civilizing mission. Since China was deemed unable to assume modernity on its own, only the West, through force if necessary, could bring it about. The civilizing pretensions of modern international law (examined more fully in the next chapter) can thus be understood as one vital iteration of this transformative mission – it laid the legal-jurisprudential grounds for the global-cum-imperial imposition of distinctly capitalist forms of property rights in China during the nineteenth century.

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[108] G.W. Hegel, *Lectures on the History of* Philosophy, trans. E.S. Haldane and F. Simson. (Lincoln: University of Nebraska/Bison, 1995), vol. 1, 118.

[109] Ibid., 110.

[110] See, e.g. Hegel George Steinmetz, *The Devil's Handwriting and the German Colonial State in Qingdao, Samao, and Southwest Africa* (Chicago: University of Chicago Press, 2007), esp. 400-403.

The foregoing discussion has described the historical rise of legal orientalism and the concomitant shift from European Sinophilia to Sinophobia. The question of the historical motivation(s) for that emergent legal discourse and discursive shift remains, however, largely unanswered. I will attempt to offer an explanation to that question, in chapter three, by comparing the legal orientalist critique of the particularistic nature of Chinese law and the English positivist critique of the particularities of English common law. Those legal discursive parallels indicate a common liberal normative standpoint of critique, which, I shall argue, relates to the determinate capitalist context of possibility that gave rise to these liberal legal discourses and rendered them plausible to social actors-cum-legal subjects. Suffice it to say here, the historical motivation for legal orientalism cannot be fully explained with reference to Western imperialism.

I.4. Critical Historiographic Interventions

Just as proponents of modern extrality in China recalled landmark Sino-Western jurisdictional disputes like the *Lady Hughes* and Terranova cases as evidence of fundamental incompatibilities between the Occidental and Oriental legal systems, much of the traditional Chinese historiography has followed suit.[111] The predominant historiographic verdict has been either that Chinese law is an oxymoron – "the rule of men," as opposed to "the rule of law;"[112] or

[111] Morse, *The International Relations of the Chinese Empire*; Keeton, *The Development of Extraterritoriality in China*; Alain Peyrefitte, *The Collision of Two Civilizations: The British Expedition to China 1792–4*, trans. Jon Rothschild (London: Harvill, 1993) 491–493; Patrick Tuck, "Law and Disorder on the China Coast: The sailors of the Neptune and an Affray at Canton, 1807", in *British Ships in China Seas: 1700 to the Present Day*, eds. Richard Harding, Adrian Jarvis and Alston Kennerley (Liverpool: National Museums, 2004); Glenn Timmermans, "Sir George Thomas Staunton and the Translation of the Qing Legal Code", *Chinese Cross Currents* 2, No. 1 (2005); R. Randle Edwards, "Ch'ing Legal Jurisdiction Over Foreigners."

[112] Another of Chief Justice John Marshall's oft-quoted opinions makes this distinction clear: "The government of the United States has been emphatically terms of government of laws, and not of men." Marbury v. Madison, 5 U.S.

that it lacks a legal tradition or a concept of law altogether.[113] In regards to the latter, China has then been cast as ontologically "lawless," a judgment that came to be inscribed in the Sino-Western unequal treaties,[114] and remains still today (especially in regards to the lack of intellectual property right protection). In effect then, orientalist scholars of Chinese history have unconsciously absorbed their historical subjects' discourse, and, in the process, lent early Western perceptions of the putative "deficiencies" of Chinese law the authority of historical fact. On these critical grounds, then, it can be argued that in their various formulations of a general thesis of Sino-Western legal incommensurability, orientalist scholars have come to appropriate the "intellectual framework of the colonizer."[115]

Legal orientalist academic writing has largely interpreted Sino-Western jurisdictional disputes in a singular historical and discursive frame – as iterations of one all-consuming colonial encounter, set against the background of an unavoidable clash of civilizations, which eventuated in the first Sino-British war.[116] This legal orientalist history can, in turn, be situated

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1 (Cranch) 137, 163 (1803). *See* Teemu Ruskola, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 *Yale Law Journal* (1994); Ruskola, "Law without Law, or Is 'Chinese Law' An Oxymoron?" *William & Mary Bill of Rights Journal* 11 (2002).

[113] See, *e.g.*, Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics with Special Relation to Ruling Cases with a Brief Excursus on the Law of Property* (London: Luzac & Co. 1899). For a more recent characterization of the "lawlessness" of China, see Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911-1927* (Washington: University of Washington Press, 2017).

[114] Article 9 of the 1843 Anglo-Chinese Treaty of Bogue, which supplemented the 1842 Treaty of Nanjing, refers to extradition procedures with respect to the "lawless natives in China."

[115] The quote comes from James Hevia, who is referring to post-Qing Chinese intellectuals and what be called their "self-orientalism." See James L. Hevia, *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793* (Durham: Duke University Press, 1995), 246.

[116] Earl Pritchard, for example, has argued that the modern imposition of extraterritoriality was not only "necessary," but "inevitable" in light of the expansion of foreign trade in China during the nineteenth century: "Extraterritoriality was not maliciously forced upon China, but grew out of the exigencies of the situation. The expansion of world culture brought together two great and widely differing civilizations. Their legal systems and political ideals were so much opposed that an extensive intercourse between them necessitated some working agreement. This working agreement as first developed through custom and practice was very indefinite and unstable. Only by a definite treaty

more broadly within a long-standing tradition of Chinese historiography, which has framed the Sino-Western colonial encounter as a clash between two essentialized cultural entities. China's inability to respond to foreign pressures, and the origins of the first opium war are then explained in terms of the "irresistable vigor of Western expansion and immovable inertia of Chinese institutions."[117] Within this historiographic perspective, Britain and other Western empires launched wars and imposed unequal treatises in the nineteenth century primarily because China, mired in its Sinocentrism and traditional diplomacy, did not ultimately understand what was at stake in these early Sino-Western encounters.[118] As evidence of this, historians have cited the failure of the Macartney Embassy,[119] which traveled to China in 1793 to persuade Emperor Qianlong to lift restrictions on trade between Britain and China and allow Britain to establish a permanent embassy in Beijing. That diplomatic failure is conventionally understood as a product of China's ignorance, isolationist foreign policy, and rigid adherence to a primitive tradition

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agreement could a satisfactory and necessary system be established. Since China was unwilling to grant this peaceably it was forced upon her through war." See Earl H. Pritchard, "The Origin of Extraterritoriality in China" *Northwest Science*, 108-114; Pritchard, *The Crucial Years of Early Anglo-Chinese Relations, 1750-1800* (New York: Routledge, 2000 [1936]); Spence, *The Search for Modern China*, 126-127.

[117] John Fairbank and Edwin Reischauer, *China: Tradition and Transformation* (Boston: Houghton Mifflin Co, 1989), 277.

[118] The *locus classicus* is the work of John Fairbank. See, in particular, Fairbank, "The Creation of the Treaty System," 232, as well as his *Trade and Diplomacy on the China Coast: The Opening of the Treaty Ports, 1842-1854*. Also see, Frederic E. Wakeman, "The Canton Trade and the Opium War," in *The Cambridge History of China: Late Ch'ing 1800-1911,* Part I, ed. John Fairbank (New York and London: Cambridge University Press, 1992). Alain Peyrefitte, *The Immobile Empire*, trans. Jon Rothschild (New York: Alfred A. Knopf, 1992); Peyrefitte, *The Collision of Two Civilizations;* Harry G. Gelber, *Opium, Soldiers and Evangelicals: Britain's 1840-42 War with China, and Its Aftermath* (New York: Palgrave Macmillan, 2004).

[119] In 1793, the British attempted to open a formal diplomatic channel with the Qing government in Beijing. Selected as an emissary of the British East India Company and King George III, Lord George Macartney traveled to the imperial court, nominally with the intention of saluting the Qianlong Emperor on his 80th birthday. When finally in the presence of the Qianlong emperor, Macartney requested diplomatic residence in Beijing, the opening of new ports, and the fixing of a fair system of tariffs on the foreign trade.

associated with the "tributary system."[120] Chinese disregard for modern international law and diplomacy, it has then been claimed, was on full display in their "humiliating" demand that Lord Macartney kowtow (kneeling and holding one's head to the ground) before the Emperor – a Guest Ritual typically equated with China's traditional tributary system, and in diametric opposition to the modern European notion of formal legal and diplomatic equality in interstate sovereign relations.[121]

Jim Hevia's work has systematically dismantled this traditional interpretation of the failure of the Macartney Embassy. Turning the tables on conventional views of China's "obsession with ritual," Hevia contends that ritual was not just a practice of China's traditional diplomacy. It was also an essential component of modern British and European diplomatic practice: "It was through ceremony that mutual recognition of sovereignty was asserted and state-to-state equality achieved."[122] Likewise he challenges the conventional understanding of China's tributary system, recontextualizing it as part of the Guest Ritual process that "organized a center relative to the peripheral kingdoms of [a multitude] other lords (e.g. Tibetans and Mongols)." Macartney was thus treated as one of those peripheral lords. That "centering process" allowed for "the differentiation and inclusion of the powers of others into the [Qing]

[120] In general, see the Fairbanks' works cited above, fn93. More recent iterations of this conventional narrative of the Macartney Embassy and Qing foreign policy can be found in *Ritual and Diplomacy. The Macartney Mission to China 1792-1794. Papers Presented at the 1992 Conference of the British Association for Chinese Studies Marking the Bicentenary of the Macartney Mission to China*, ed. Robert Bickers (London: British Association for Chinese Studies in association with Wellsweep Press, 1993). Most notably, Wang Tseng-Tsai's paper argues that "cultural differences between China and the West" caused the mission to fail. Specifically, he claims that China's Sino-centric tributary worldview accounts for why "China's response to the Western challenge was so tardy and ineffectual." See *Ritual and Diplomacy*, 121.

[121] See Peyrefitte, *The Collision of Two Civilizations*, xviii and 537-53. Note: Macartney refused to kowtow to the emperor, compromising by merely kneeling on one knee and incorporating a series of bows.

[122] Hevia, *Cherishing Men from Afar,* 75-76.

emperor's rulership as desirable superior/inferior relations."[123] More generally, Hevia argues that this Sino-British diplomatic encounter was not between two essentalized cultural entities. It was, instead, between two expansive colonial empires, each organized around two mutually incompatible sets of universalistic practices and principles.[124] Within this framework, the embassy's failure was not a case of a cultural misunderstanding per se, as the Chinese were not at all ignorant of the rules and high stakes of the game. Rather, it was the result of "competing and ultimately incompatible views of the meaning of sovereignty and the ways in which relations of power were constructed. Each attempted to impose its own views on the other; neither was successful."[125] For purposes of the limited historiographic review undertaken here, Hevia's thesis has offered critical inspiration for recent reinterpretations of Sino-Western legal and jurisdictional encounters, re-conceived of not as a culture war or clash of civilizations, but rather as a clash of empires and "sovereign thinking."[126]

Hevia's powerful reinterpretation of the Macartney Embassy and Qing foreign policy can be instructively read alongside a growing body of critical historical scholarship, whose object of critique is Chinese historiography's ideological distortions and misrepresentations of Chinese

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[123] Ibid., 123.

[124] Hevia investigates how these principles came to structure vastly different interpretations of the same event. Macartney's version of the events contributed to the emergent notion of Europe's civilizational progress and the forms of obstacles to it. Hevia demonstrates persuasively how a European discourse of scientific rationalism was brought to bear on Macartney's interpretation, and how he came to see any concession on the part of the emperor as proof that Qing rituals were only "shields against reason and argument." Ibid., 102.

[125] Ibid., 25.

[126] As Lydia Liu makes clear in the title of her Introduction: "Civilizations do not clash, empires do." See Lydia Liu, *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge: Harvard University Press, 2004), 1.

law.[127] Put in different terms, this new crop of critical legal historians has sought to expose and disabuse long-standing orientalist "myths" in Chinese historiography in one of two ways. The first line of historiographic critique seeks to rescue Chinese law from its Orientalist representations by examining the material practice of Chinese law. Motivating this line of critique is an effort to defend Chinese law as "real law," against the aforementioned orientalist claim that China lacks "law" and a legal tradition. In this way, historians have sought to rehabilitate and defend early Chinese traditions such as Legalism (*fa-jia*), which was one of the leading schools of thought in classical China during Tang Dynasty (618-907 C.E.), as well as the underappreciated Confucian tradition of constitutionalism and liberal human rights.[128] Other historians have attempted to demonstrate that, contrary to the conventional wisdom that Chinese law was exclusively penal in nature, China did in fact possess historical forms of civil law.[129]

The second line of historiographic critique, which is largely the province of post-colonial legal scholars, approaches Chinese law primarily through the lens of its Western system of representation. As noted previously, Said's powerful critique of Western production of knowledge is the main theoretical inspiration for this critical legal scholarship, whose overall

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[127] For recent criticisms of earlier scholars' ignorance and gross misrepresentation of Chinese Law, see William P. Alford, "The Inscrutable Occidental? Implications of Robert Unger's Uses and Abuses of Chinese Past," *Texas Law Review* 64, no. 5 (1986); Alford, "Law, Law, What Law? Why Western Scholars of Chinese History and Society Have not Had More to Say About Its Law," *Modern China* 23, no. 4 (1997); Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in law Imperial China," *California Law Review* 72 (1984); and Teemu Ruskola, "Law without Law, or Is 'Chinese Law' An Oxymoron?"

[128] Stephen C. Angle, *Human Rights and Chinese Thought* (Cambridge: Cambridge University Press, 2002); William Theodore de Bary and Tu Weiming eds., *Confucianism and Human Rights* (New York: Columbia University Press, 1998); William Theodore De Bary, *The Liberal Tradition in China* (Hong Kong: Chinese University Press, 1983).

[129] There have been a number of attempts to defend and/or rehabilitate Chinese civil law. See, *e.g.*, Kathryn Bernhardt & Philip C.C. Huang eds., *Civil Law in Qing and Republican China* (Stanford, CA: Stanford University Press, 1994); Phillip CC. Huang, *Civil Justice in China: Representations and Practice in the Qing* (Stanford, CA: Stanford University Press, 1996). On the tradition of Chinese corporation law, see Teemu Ruskola, "Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective," *Stanford Law Review* 52 (2000).

focus is on the historical production of a Western jurisprudence of Chinese law. Legal orientalism is then understood as a condition of Western knowledge of Chinese law, and a discursive means of "othering" by which the West has constructed its cultural identity. As such, legal orientalism is conceived of as a form of conceptual colonization and/or epistemological imperialism whereby "foreign legal cultures" are judged as [either] confirm[ing]…the (projected) universality of…[Euro-American] legal categories, or,…[used as] 'proof' of the fact that other legal cultures lack some aspect or other of [Euro-American] law."[130] Within this critical discursive framework, one of the overarching goals is to understand how both "the West" and "China" – conceived of not as determinate geographic units, but as ideal-typical discursive constructs – have been produced through the rhetoric of law.[131]

The cogency of this critical discursive approach may be shown by way of example. Consider Robert Morrison's critique of the Chinese law of homicide: "In cases of homicide….[t]he Chinese have a prejudice against all foreigners who approach them as equals, and their pride urges them to require the life of a foreigner, whenever the death of a native has been caused (no matter how) by his agency or instrumentality. The law of reason, of nature, and of nations does not admit of this. But still, the law of all civilized nations is tender of human life. From an ancient law, derived from the highest authority, in the universe, it is manifest, that man's blood, in which is his life, should not be wantonly spilt. The Chinese consider homicide as a debt; and a debt which can only be paid in kind, by the creditor. 'He that sheddeth man's

[130] See Ruskola, *Legal Orientalism*, 12. This form of conceptual conceptualization is examined in the context of British colonial administration in India, and Sir William Jones attempt to "discover" the principle of Hindu law. See Bernard S. Cohn, *Colonialism and Its Forms of Knowledge. The British in India* (Princeton: Princeton University Press, 1996), 57.

[131] See Teemu Ruskola, *Legal Orientalism* and S. Fiske, "Orientalism Reconsidered: China and the Chinese in Nineteenth-Century Literature and Victorian Studies" *Literature Compass* 8 (2011).

blood, by man shall his blood be shed.' He who will another must forfeit his own life. This is the general rule; and in Chinese law the exceptions are few."[132] Morrison makes reference here to two recurrent Orientalist perceptions of Chinese law: that criminal intent was not taken into account by its judicial system;[133] and the admission of surrogate and collective responsibility into the prosecution of crimes under Chinese law. In regards to the latter, Morrison then juxtaposes the stereotypical orientalist view that Chinese law imposed an indiscriminate and barbarous system of collective responsibility upon foreigners in homicide cases with a virtuous, humane Law of "Civilized" Nations. Here again, we find the employment of a common discursive strategy in which China is used as a placeholder of legal barbarism in order to determine what is and what is not law; and, when carried into the international realm, to mark the boundaries and exclusions of international law.[134]

Li Chen's powerful re-interpretation of the *Lady Hughes* case draws on aspects of both de-orientalizing approaches delineated above.[135] As will be recalled, proponents of modern

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[132] Robert Morrison, "The Law of Homicide in Operation, " *The Chinese Repository* vol. 3, 38-39. Also reprinted in Keeton, *The Development of Extraterritoriality in China*, vol. 2, 252-54.

[133] Charles Gutzloff, *China Opened*, 2 vols. (London: Smith, Elder & Co., 1838), vol. 2, 78; Auber, *China*: *An outline of its government, laws, and policy*, 207-208; Morse, *International Relations*, vol. 1, 110; Morse, *Chronicles*, vol. 2, 343. Staunton offered a useful corrective to this negative orientalist view: "It is altogether a mistake to suppose that the Chinese law in such cases makes no distinction, or that it invariably requires blood for blood, as the Edicts addressed by the government to foreigners insinuate….The Chinese law not only remits the punishment of death in cases of accident, but defines these cases with considerable accuracy in the following manner…. All persons who kill or wound others purely by accident, shall be permitted to redeem themselves from the punishment of killing or wounding in an affray, by the payment in each case of a fine to the family of the person deceased or wounded." He goes on to say: "In fact, the Chinese law, like ours, recognizes different degree of culpable homicide; and although it professes to punish both murder and manslaughter with death, it distinguishes between them by annexing the more ignominious sentence of beheading in the one case, and that of strangling (by which the body is not mutilated) in the other." See Keeton, *The Development of Extraterritoriality in China*, 189-90, quoting the "Law of Homicide" in Book II of the Sixth Division of *TTLL*.

[134] See generally Gong, *The Standard of 'Civilization' in International Society* (Oxford: Oxford University Press, 1984), 130-63.

[135] Li Chen, "Law, Empire, and Historiography of Modern Sino-Western Relations: A Case Study of the Lady Hughes Controversy in 1784," *Law & History Review* 27, no. 1 (Spring 2009). In addition to Chen's exceptional

extraterritoriality in China cited the *Lady Hughes* case as proof of the sanguinary, unjust nature of Chinese law and the overall incommensurability of Occidental and Oriental judicial regimes.[136] Chinese scholarship covering the origins of modern extraterritoriality in China has largely toed the same line. In relying almost exclusively on British archival sources, especially EIC records and accounts given by the Company Supercargoes, historians have tended to reproduce long-standing "myths" about Qing law and justice. Those myths, Chen argues, have stood in place of the material facts of the case. And while his meticulous reconstruction of the case does not dispense with these British "colonial archives," he cross-examines them with Chinese archives in order to, first, problematize the historical and historiographic discourse of legality brought to bear on traditional interpretations of the case, and second, to properly situate the facts of the case in both contemporary English and Chinese law.

Chen's comprehensive debunking of the "myth" that Chinese law imposed an indiscriminate and barbarous system of collective and surrogate responsibility upon foreigners in cases of foreign homicide serves as his central case in point. British and Western authorities in Canton invoked the doctrinal myth in order to justify their resistance to Qing jurisdiction in criminal cases. Historians have then lent credence to this myth by pointing to the fact that the Chinese government did punish certain relatives of a criminal convicted of high treason or multiple murders in domestic cases.[137] With respect to the Lady Hughes case, an analogy has

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study, see the historical account in Randle Edwards, "Ch'ing Legal Jurisdiction over Foreigners." Notably, Edwards' analysis of the *Lady Hughes* case is the first historical account to make use of Chinese records.

[136] See, e.g. Morse, *Chronicles*, vol. 2, 99. Frederic E. Wakeman, *Strangers at the Gate; Social Disorder in South China, 1839–1861* (Berkeley: University of California Press, 1997, 80-82. More recently, see Frederic E. Wakeman, "The Canton Trade and the Opium War," 189-190.

[137] Morse, *The International Relations of the Chinese Empire*, vol. 1, 114-117; Keeton, *The Development of Extraterritoriality*, vol. 1, 119-121; Edwards, "Ch'ing Legal Jurisdiction over Foreigners," 245.

then been made to the alleged "seizure" of the Supercargo, who, by most contemporary accounts, was detained as a surrogate for the gunner.[138] As Chen makes clear, however, neither the British nor the Chinese archival records bear out this interpretation. First of all, the Supercargo was not in fact charged with the crime, nor was he held responsible for the gunner. Rather, Chinese authorities held him responsible *only* for surrendering the gunner.[139] In this respect, the *Lady Hughes* case proved more the rule than the exception in early Anglo-Chinese relations. Reflecting overall on the period between 1635 and 1840, Chen concludes that, "no Western representative or supercargo was ever held liable or punished for a crime committed by his subordinates."[140] Hence it can be argued that the orientalist myth of the Chinese doctrine of responsibility took hold in a Western imaginary of Chinese law during this period in spite of, rather than on the basis of, corroborating material evidence.

Just as the doctrine of collective responsibility does not hold up to critical historical scrutiny, Chen argues, neither do traditional judgments of the final outcome of the case, i.e. the public strangulation of the gunner, as unjust and/or illegal. To support this thesis, Chen first points out that British negative judgments were largely predetermined from the start of the case. Specifically, he cites internal communications to the EIC Court of Directors that predate the *Lady Hughes* incident in which the Company's position of not surrendering accused murderers to Chinese authorities was laid out, and justified on the grounds that Chinese law was barbarous

[138] Morse also challenged that the Supercargo had been "seized" by Chinese authorities. See Morse, *The International Relations of the Chinese Empire,* vol. 2, 103.

[139] Chen, "Law, Empire, and Historiography of Modern Sino-Western Relations," 22.

[140] Li Chen, "Clash of Empires in the Realm of Law and History: A Case Study of the Sino-British Legal Dispute in 1784" (July 4, 2007).

and unjust.[141] In this respect, Chen notes, "the British set out an agenda for extraterritoriality long before they acquired any substantive knowledge of or experience with Chinese criminal justice."[142] His second and corresponding critique of this discourse of injustice and illegality surrounding the affair relates to the British authorities claim that the incident was an "accidental homicide." As was discussed previously, this was a typical counterclaim made by British authorities, when refusing to surrender culprits to Chinese authorities, on the (unsubstantiated) grounds that Chinese law did not take into account criminal intent. In spite of the fact that the gunner may not have had intent to kill the Chinese boatmen, Chen demonstrates persuasively, he would still be tried and convicted under both Chinese and English law.[143] By situating the gunner's criminal liability in both the English and Chinese legal contexts, Chen constructs a comparative legal framework in which to affirm the legality of the Emperor's final judgment and punishment, and, on that basis, to defend Chinese criminal law more generally as just as "rational" and no more severe than contemporary English criminal law (i.e. England's "Bloody Code")[144]

Prior to the surrender of the *Lady Hughes* gunner, British authorities resisted Qing jurisdiction and obstructed Chinese justice at every turn. With the exception, then, of this final reluctant recognition of Qing criminal jurisdiction over the gunner, the case exemplifies a

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[141] Chen, "Law, Empire, and Historiography of Modern Sino-Western Relations," 9.

[142] Chen, "Clash of Empires in the Realm of Law and History," 60.

[143] See Chen's reconstruction of criminal liability under both existing English and Chinese law, in Ibid, 12-16. On criminal liability and punishment for accidental homicide in England, see Frank J. Mclynn, *Crime and Punishment in Eighteenth-Century England* (New York & London: Routledge, 1989), 38-39. On criminal liability in Chinese law, see Jennifer M. Neighbors, "Criminal Intent and Homicide Law in Qing and Republican China (Dissertation, University of California and Los Angeles, 2004).

[144] Chen, 38. See Samuel Romilly, *Observations on the Criminal Law of England: as it relates to Capital Punishments, and on the mode in which it is administered* (London: J. M'creery, 1810), 8-23. Staunton makes a similar point with respect to the distinction between the theory and practical administration of Chinese justice: "the execution of the law is lenient in comparison to its literal and prima facie interpretation." *TTLL*, xxvii–xxviii.

general pattern of British sovereign behavior leading up to the first Sino-British war, according to Chen – namely the persistent and blatant transgression of Chinese sovereignty, and, by extension, the "hypocritical" suspension of the Law of Nations vis-à-vis China. Chen's intervention here, which articulates closely with recent critical perspectives on the development of modern "universal" international law, turns on the founding principles of the Law of Nations – sovereign equality and universal justice.[145] Early Sino-Western jurisdictional disputes exposed these founding principles of modern international relations as Euro-centric "myths."[146] Both in its conception and judicial administration prior to the imposition of modern extraterritoriality through the unequal treaties, Chen concludes, British sovereignty in China became synonymous with the retention of jurisdictional control over British subjects in China, and hence, unequal Sino-British relations. Furthermore, because British/Western authorities claims for jurisdictional control over foreign nationals in China were "inconsistent with the prevailing international law principles, [they] had to be justified by appealing to a different conceptualization of legal sovereignty and international relations." That revised conceptualization came to be articulated in

[145] This inter-state principle of sovereign equality was famously reaffirmed in the Antelope Case in 1825 in which Chief Justice Marshall of the Supreme Court of the United States asserted that "No principle of general law is more universally acknowledged than the perfect equality of nations." The Antelope, 23 U.S. 66 (1825). See online at: <http://supreme.justia.com/us/23/66/case.html>. Over a century later, the Charter of the United Nations Organization stated that it was based "on the principle of the sovereign equality of all its Members." In Article 2, online at: <http://www.un.org/en/documents/charter/chapter1.shtml>. This principle of absolute sovereignty "was more honored in the breach than the observance." Chen, 6. Chen expounds upon this claim in "Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter," *Journal of the History of International Law / Revue d'histoire du droit international* 12 (2011).

[146] This claim articulates closely with recent critical perspectives (as discussed in the introduction) on the Euro-centric nature and imperialist underpinnings of the development of modern "universal" international law. See especially, Martti Koskenniemi, *The Gentle Civilizers of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2004) and Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2007).

orientalist terms of the Law of "Civilized" Nations, which, by its very Eurocentric definition, excluded "barbaric" Chinese law because it violated "universal" principles of justice.[147]

Chen couples a critique of the founding myths of modern international law with his contention that late imperial Qing authorities were not at all ignorant of the guiding principles of modern international law. On the contrary, they had a reasonably clear understanding of "territoriality" and "territorial sovereignty." Citing another scholar of Qing foreign policy, Chen reaffirms that Chinese records provide "unmistakable indications that the Qing authorities regarded their political and military authority to be rooted in the right to control a geographic area within precisely known parameters" or within "a finite land and water areas under the exclusive control of [its] central political authority."[148] This understanding of territorial sovereignty, Chen remarks elsewhere, "largely accounted for the Chinese institutions and policies established to enhance its ability to exercise jurisdiction and control over the Europeans in South China in the sixteenth through the early nineteenth centuries."[149] Such was the Emperor's "sovereign thinking" in the *Lady Hughes* case, according to Chen. In the context of the expansion of both the illicit opium trade and an influx of Christian missionaries who were creating unrest in the provinces, the late imperial Qing court did not want to be perceived as soft on foreign crimes.[150] The Emperor's final "lawful" decision to punish the *Lady Hughes* gunner thus signaled his intention to "safeguard Chinese sovereignty and deter Western criminality."[151]

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[147] Chen, 53.

[148] Chen, "Universalism and Equal Sovereignty," 75. quoting R. Randle Edwards, "Imperial China's Border Control Law," *Journal of Chinese Law* 1, no. 33 (1987): 34-35.

[149] Chen, 82-83.

[150] Ibid, 34; Edwards, "Imperial China's Border Control Law," 241.

[151] Chen, 36.

A few critical remarks on Chen's primary claims are in order. On the one hand, his point is well taken that Chinese authorities were not simply ignorant of the British/Western legal and diplomatic rules of the game – a claim corroborated by Hevia in his aforementioned study of Qing foreign policy and the Macartney mission. On the other hand, however, an historical anachronism creeps in to Chen's interpretation of Qing sovereignty and "sovereign thinking" – terms that are only loosely defined and often conflated in Chen's study of the *Lady Hughes* case. It is one thing to argue, from the standpoint of modern international law, that Britain violated Qing sovereignty by refusing to recognize its jurisdictional control within its territorial borders. It is quite another, however, to claim that Chinese authorities effectively resorted to a principle of absolute territorial sovereignty (à la Chief Justice Marshall's doctrinal definition, cited earlier) to defend the Chinese prerogative to try and execute Western criminals – which is what Chen seems to suggest when he references the "unmistakable indications" (as quoted above) of a Qing policy based on a clear notion of territorial sovereignty beginning in the sixteenth century. Without disputing the fact that "indications" or analogues may be found in Qing policy, such indications or analogues are not equivalent to formal legal claims of sovereign rights predicated upon modern principles of international law. Chinese claims to those kinds of sovereign rights came only in the early twentieth century in the context of the universalization of international law. That global legal process as it unfolded in China involved, first, the imposition of unequal treaties and modern extraterritoriality, followed by the critical reception and re-appropriation of modern principles of international law – including what Chen characterizes as the "mythical" principle of sovereign equality – by Chinese jurists and diplomats in order to challenge the legal validity of those unequal treaties and their extraterritorial provisions. It was only then that China

transformed itself from an object into a subject of international law. In a sense, then, Chen is projecting back a form of anti-imperial legal resistance as a Qing response to pre-1842 British/Western extraterritoriality.

Chen is far from alone in his critical undertaking of debunking the "Eurocentric" myths of international law.[152] Such de-mythologizing raises a number of important questions (which Chen does not pursue),[153] but here I would like only to underscore *one* of the crucial theoretical limitations of this kind of historical undertaking as it pertains to the "Eurocentric" universalism of Western international lawyers – namely, how did this "Eurocentric" legal-jurisprudential system, and its associated legal myths, become a normatively compelling critical frame of reference for a new global class of non-Western international lawyers? What, in other words, rendered "Eurocentric" international legal norms plausible as an anti-imperial counter-discourse across geographic and linguistic boundaries? It is precisely this question – which Chen's critical history affords us no way of answering – that I shall return to in chapters four and five.

I.5. Jurisdictional Anomalies and China's "State of Nature"

In his best seller *The Middle Kingdom* (1848), one of the foremost American sinologists, Samuel Wells Williams (1812-84)[154] devoted a brief exposition of early Sino-Western

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[152] See, e.g. Krasner, *Sovereignty: Organized Hypocrisy* and Andreas Osiander, "Sovereignty, International Relations and the Westphalian Myth" *International Organization*, vol. 55, no. 2 (Spring 2001).

[153] As it pertains to the myth of absolute, indivisible sovereignty: What accounts for the tenacity of this myth, despite the overwhelming number of empirical historical examples of its divisibility? See Jens Bartelson, "On the Indivisibility of Sovereignty." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Art*s, no. 2 (June 2011).

[154] Wells was an editor of the *Chinese Repository*, the leading English-language journal published in China. In 1855, Williams was appointed Secretary of the United States Legation to China. He was also a contributor to the negotiation of the Treaty of Tientsin. For a brief biopic, see *The Far East*, New Series, vol. 1, December 1876, 140-2.

jurisdictional disputes in Canton. Through a concatenation of well-worn orientalist clichés about the sanguinary and unjust nature of Chinese law and justice, he arrived at this conclusion: "These cases are brought together to illustrate the anomalous position which foreigners once held in China. They constituted a community by themselves, subject chiefly to their own sense of honor in their mutual dealings, but their relations with the Chinese were like what lawyers call a 'state of nature.'"[155] What Wells begins to articulate here is one prevalent contemporary justification for the imposition of modern extraterritoriality in China as a necessary remedy for the "anomalous position" of Western foreign nationals in China. That anomalous position was then defined in stereotypical orientalist terms with reference to the "state of nature" – that is, in terms of the absence of law, which he claimed characterized Sino-Western relations prior to the 1842 Treaty of Nanjing. By this logic, moreover, the advent of modern Sino-Western legal and diplomatic relations following the first Sino-British war could then be seen as the historical supersession of that state of nature by a positive international legal order.

Recent historical scholarship prompts us to critically reinterpret Wells' stereotypical depiction of China's "state of nature." Rather than conceiving of pre-1842 Sino-Western relations in terms of the absence of law, those relations can more usefully be understood with reference to the pluralistic, hybrid legal nature of the aforementioned Canton system. As licit and illicit trade became increasingly intertwined at Canton around the turn of the nineteenth century, its legal order came to be characterized by both official and unofficial legal arrangements and fluid jurisdictional politics.[156] As recent scholarship has made clear, moreover,

[155] Samuel Wells Williams, *The Middle Kingdom*, vol. 1, 453, 479. For another iteration of the "anomalous" legal situation at Canton, see Pritchard, **"**The Origin of Extraterritoriality in China," 113.

[156] There is a now sizeable literature on legal and jurisdictional "borderlands." See, *e.g.* Ziad Fahmy, "Jurisdictional Borderlands: Extraterritoriality and 'Legal Chameleons' in Precolonial Alexandria, 1840-1870," *Comparative*

legal and jurisdictional fluidity in Canton was not simply an anomalous problem to be remedied.[157] It was also an exploitable opportunity seized upon by Chinese and foreign merchants.[158] Both sides defied Qing laws and official jurisdictional controls, especially in regards to the illicit opium trade, which Britain came to rely on from the late eighteenth century onwards in order to balance their trade deficit with China.[159]

Framed in this way, the crux of the EIC's commercial strategy in China can be understood as both exploiting and proliferating legal and jurisdictional anomalies at Canton, while, at the same time, paying nominal deference to Chinese sovereign authority.[160] In its

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Studies in Society and History 55, no. 2 (2012). For two excellent studies on legal borderlands in relation to the development of American sovereignty, see Mary Dudziak and Leti Volpp, "Introduction: Legal Borderlands: Law and the Construction of American Borders," American Quarterly 57, no. 3 (2005); and Allison Brownwell Tirres, "Lawyers and Legal Border-lands," *American Journal of Legal History* 50 (2010).

[157] See, S. P. Ong, "Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code (1810)" *Journal of the Royal Asiatic Society Third Series*, vol. 20, no. 2 (April 2010). On legal pluralism in colonial settings, see Lauren Benton, *Law and Colonial Cultures*. In some sense, the claim is not new. Among historians of Europe's early modern expansion, it is widely accepted that European powers wielded what Jack Greene has called a "negotiated authority." Jack P. Greene, "Negotiated Authorities. The Problem of Governance in the Extended Polities of the Early Modern Atlantic World," in his *Negotiated Authorities. Essays in Colonial Political and Constitutional History* (Charlottesville, VA: University of Virginia Press, 1994).

[158] In the case of the latter, European traders often entered China under different national flags and thus gained jurisdictional immunity by linking up with European states (James Matheson, for example, represented Copenhagen). This practice was indicative of the transferability of sovereignty in the context of multi-jurisdictional legal order at Canton. On this European practice, see Keeton, *The Development of Extraterritoriality*.

[159] The source of the Britain-China trade deficit was the high demand in Britain for Chinese goods (tea, silk, and porcelain), and China's lack of significant interest in European goods. Because of the trading disparity, Britain paid its balance of payments deficit to China through large exports of silver to China, and hence its reputation as the "silver graveyard of the world." The development of the opium trade became an "alternative means" of financing this trade and the "triangular trade" emerged: China was the creditor of England on account of the consumption of tea, silk, and porcelain; England was in turn the creditor of India for various reasons including the requirement to pay revenue and dividends on EIC stock to Britain; and India was the creditor to China because of opium. See Chapter 10, "Foreign Trade and Balance of Payments (1757-1947) in Tapan Raychaudhuri, Irfan Habib, Dharma Kumar, eds. *The Cambridge Economic History of India: Vol. 2, c. 1751-c.1970* (Cambridge: Cambridge University Press, 1983).

[160] Morse, *Chronicles*, vol. 4, 242; John Keay, *The Honourable Company: A History of the English East India Company* (New York: Macmillan Publishing Co., 1991), 349. As the London directors of the Company expressed such nominal deference: "We cannot, in fairness, deny to China the right which our own nation exercises as she sees fit, either by prohibiting, restraining, or subjecting to certain laws and regulations its commercial dealings with other countries. China must be considered free in the exercise of her affairs, without being accountable to any other

desire to maintain a good standing with Chinese authorities, the Company ended its direct involvement with the opium trade after an imperial edict prohibiting the domestic cultivation of poppy was issued in 1796.[161] Thereafter, the Company distanced itself from the trade officially and refrained from exporting opium directly to China. On the other hand, however, the Company circumvented Qing regulations by selling its opium to private "country traders" in Calcutta, who then delivered it to China for illegal sale. To aid and abet the illict trade the Company urged country traders to avoid calling the product "Company opium" so as to not alarm Chinese officials at Canton. Furthermore, the Company shielded opium smugglers (not to mention pirates and murderers[162]) from Chinese law and punishment, either by disclaiming responsibility for private opium ships or by refusing to surrender known smugglers to Chinese authorities.[163]

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nation." *Parliamentary Papers*, "East India Company Letters to Supercargoes, 1832," 8-9. Nominal deference was paired with collaboration with Hong merchants, whom they depended to preserve commercial relations. In this respect, the Company was often put in the position of being a creditor to the Hong merchants, who were perpetually in financial distress. So for example, when Hong merchants incurred millions of taels of debt between 1810 and 1815, the Company's Supercargoes intervened to provide aid and save Hong merchants from bankruptcy. This in turn, however, led to the question of Hong debt, a chronic problem that was not formally addressed until the 1842 Treaty of Nanjing.

[161] The first edict against opium was issued in 1729 by the Yongzheng emperor, prohibiting its use and enumerating punishments that ranged from wearing a cangue to death by strangulation. A similar edict prohibiting the smoking of opium was also issued by Qianlong in 1780, and then again by the Jiaqing emperor in 1810. Following the Imperial court's example, in 1799 the governor-general of Canton also officially decreed the prohibition of the opium trade. It was reiterated by the governor-general in 1809, 1822, 1823, 1831, and again in 1832. The Imperial court also echoed support of these edicts in 1817 and 1831. Even the Hoppo issued an edict prohibiting the trade of opium on May 9, 1831, and again on April 13, 1832. All of these prohibitions were systematically violated by both foreign and Chinese traders.

[162] See Keeton, *The Development of Extraterritoriality*, vol. 1, 67-68; Auber, *China*: *An outline of its government, laws, and policy*, 361-368.

[163] See Davis, *The Chinese*, vol. 1, 61, 389-393; *Chinese Repository*, vol. 2, 513-515; Keeton, *The Development of Extraterritoriality*, 52-53; Morse, *Chronicles*, vol. 3, 124-26; Auber, *China*: *An outline of its government, laws, and policy*, 237-39; Edwards, "Ch'ing Legal Jurisdiction over Foreigners," 246.

The Company's Janus-faced strategy worked, to a point. On the one hand, the opium trade was a boon to the Company, and would ultimately prove successful in reversing the balance of trade in favor of Britain. On the other hand, however, the expansion of the illicit trade also enlarged non-monopoly commercial networks in China, which soon came to supersede the Company's "legitimate" trade at Canton.[164] Relatedly, the influx of country traders brought a surge in unruliness (typically drunken rampages) and other criminal activity, which further exacerbated Sino-British tensions over jurisdictional control.[165] Only being able to issue and retract licenses for ships left the Company's Select Committee in a vulnerable position when it came to policing British subjects so as to maintain the jurisdictional status quo at Canton.[166] Caught, then, between a rock and a hard place, the Company petitioned London for additional formal legal authority to restrain private traders in China. The Select Committee's plea to London following the *Lady Hughes* case makes clear its increasingly prostrate position in China:

> As repeated experience shews the utter Impossibility of avoiding the Inconveniences to which we are constantly subject from the imprudence, or willful misconduct of Private Traders and the accidents which may happen on board their ships, it were to be wished

[164] P.J. Marshall, "The British in Asia: Trade to Dominion, 1700-1765," in *The Oxford History of the British Empire*, vol. 2, ed. P.J. Marshall (Oxford and New York: Oxford University Press, 1998).

[165] On foreign unruliness and criminal violence, see Edwards, "Ch'ing Legal Jurisdiction over Foreigners," 236; Morse, *Chronicles*, vol. 2, 37, 61-68, 409-410; Davis, *The Chinese*, vol. 1, 64.

[166] Even The Company's limited formal powers of granting and withdrawing licenses came to be challenged towards the end of its stewardship of the China trade. One such challenge in the summer of 1833 serves as a particularly telling case in point. On July 20th of 1833, representatives of the newly-formed Jardine Matheson & Company (JM&C) wrote to the Select Committee inquiring into the reason why it had withdrawn the license from the ship called the *Hercules*. The Committee responded that Captain Grant of the *Hercules* had not followed the proper regulations in re-applying for a license, and, accordingly, the license had been withdrawn. JM&C then lodged a formal protest in two separate letters to the Committee, the result of which was the Committee calling a meeting to further discuss the matter in early August. Once again, the Committee decided to uphold its original withdrawal of the license for the *Hercules*. Undeterred, JM&C lodged yet another formal protest, arguing that the Committee's rationale that Captain Grant had violated company procedure was without foundation. After the Select Committee refused to renew the ship's license for a third time, Captain Grant then decided to circumvent the Company and appealed instead to the British authorities at Singapore. Without regard for the decision of the Select Committee, and in direct contradiction with the Committee's decision, the British secretary at Singapore granted Captain Grant a license to trade. See *East India Company Factory Records:* July 20, July 29, July 31, August 1, August 12, 1833.

> that the powers of any which we really possess over them were clearly and explicitly defined, or it no law or construction of law now existing allow of such powers, how far the Absolute Commands of the Government under whose jurisdiction we are, will justify our compliance and how far in such case the Commanders and Officers of the Hon'ble Company's ships are bound to obey our orders...[167]

Admittedly, the Company's request for assistance depicts only half of the "state of nature" situation in China – the other half being that the Company was entirely complicit in the expansion of illicit non-monopoly trade at Canton, and, by extension, the evasion of official British and Chinese legal and jurisdictional controls. This, and the Company's noted reluctance to police British merchants as in the case of "accidental homicides" notwithstanding, the Company's plea to London also throws some light on the slippery slope that it embarked upon in its strategic defiance of Qing laws and highly profitable exploitation of jurisdictional ambiguities in Canton. The Company's lack of formal legal-jurisdictional authority in Canton, while providing a necessary cover for its own illegitimate trade, also became highly problematic for its officials in this jurisdictionally porous context. In an effort to address the Company's lack of formal legal controls in Canton, Parliament passed in 1787 what one historian has called the first of extraterritorial statutes relating to China, which enabled Supercargoes to "Arrest, seize, and send back to England any private ships or traders who were in Canton."[168] All told, however, this early effort to keep British merchants in check proved largely ineffectual – rampant smuggling and evasion of Qing laws and jurisdiction continued largely unabated on both sides, and ultimately, neither the Company nor the Canton system could cope with the dynamic growth of private trade in China.

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[167] See Keeton, *The Development of Extraterritoriality*, vol. 1, 41-42, quoting from *China Diary*, xlvii, 106-07.

[168] See Auber, *China*: *An outline of its government, laws, and policy*, 190-191; Keeton, *The Development of Extraterritoriality in China*, vol. 1, 44.

China's putative "state of nature" comes to appear in a very different historical light when viewed in relation to the environment of "fraud" and "violence" perpetrated by both the Company and unlicensed traders, foreign and Chinese alike, within which illicit non-monopoly trade thrived.[169] Beyond its orientalist frame of reference (i.e. Chinese lawlessness), moreover, the state of nature can also be understood and interrogated accordingly as a historical state of lawlessness actively generated by European merchant entrepreneurs, which was incredibly profitable, and, from the standpoint of the British state, needed to be stabilized and controlled in order to "save imperialism from itself."[170] It was this "lawless" realm which prompted one British official to later acknowledge: "This is a very barbarous and shocking state of things, little better on our side than on theirs, and it seems the duty of a great and civilized state, like England, to provide a remedy."[171] Though remedies would be forthcoming in the form of a unilaterally imposed British extraterritorial court system following the abolition of the EIC's monopoly on trade in 1833, and later in the form of the unequal treaties, legal anomalies and jurisdictional ambiguities would remain, and, as will be shown, proliferated with the establishment of modern British/European extraterritoriality. For more present purposes, the quote above quote highlights the twofold motivation for the various British extraterritorial remedies brought to bear in China following the abolition of the Company's monopoly on trade. On the one hand, such legal

[169] This is Palmerston's depiction of the state of the opium trade as given in his "Instructions to Sir Henry Pottinger respecting Opium," May, 1841. As quoted in S. Couling, *Encyclopedia Sinica*, (London, 1917), 406.

[170] See Scully's overview of "extraterritoriality's dynamics," *In Bargaining with the State from Afar*, 8. Compare with Douglas Howland's argument that Western extraterritoriality in China was created basically as a means to extend the law of protection to foreign nationals and diplomats. See Douglas Howland and Luise White, eds, *The State of Sovereignty: Territories, Laws, Populations* (Bloomington, IN: Indiana University Press, 2009).

[171] Davis, *The Chinese*, vol. 1, 393. Similarly, Capt. Elliot viewed the opium trade as a moral scourge not only on the British crown, but also, from the standpoint of the Family of Civilized Nations, "discreditable to the character of the Christian nations, under whose flag it is carried on." As quoted in Maurice Collis, *Foreign Mud: Being an Account of the Opium Imbroglio at Canton* (New York: New Directions, Publishing, 1947), 241.

remedies were instituted in order to protect foreign nationals from China's "barbaric" juridical regime. On the other hand, they were also put in place to create a system of juridical checks on the unruliness and criminal activities of British subjects in China hold in check the lawlessness of British subjects on the frontiers of British empire. This double character of modern British extraterritoriality will be further interrogated in the next chapter through an investigation of the early legal and historical constitution of British imperial sovereignty in China following the abolition of the Company's monopoly on the China trade in 1833/34, and leading up to the first Sino-British war in 1839.

CHAPTER II
Anomalies and Remedies: British Lawlessness and the Introduction of "Civilized" International Law in China, 1833-1839

In late April of 1833, as British merchants were starting to return to Macao for the off-season, the Company's Select Committee received a letter from the Hong merchants detailing a potentially inflammatory situation involving a prominent Scottish merchant and known opium smuggler named James Innes.[1] On the afternoon of April 25th, Innes became irritated by the sound of wood-chopping near his residence at the easternmost factory in Canton, the Creek Factory, by a Chinese coolie named Ho-a-shoo. Innes promptly notified the security merchant, Howqua, of his frustration, urging him to reprehend the man, and, should the woodcutter refuse to stop, to expel him from the factories. The security merchant then directed the Ho-a-shoo's supervisor to "end the business." Disregarding the supervisor's prohibition, Ho-a-shoo continued to billet firewood several days later. This time Innes took it upon himself to personally handle the situation. He stormed into the Customs house, along with two friends, and demanded to speak with the Hoppo (who had apparently left the premises on business) about the woodcutter.[2]

It was at this point that the episode took a turn for the dramatic. As confirmed by Innes's two accompanying friends, a Chinese man advanced from a back room and attempted to assault Innes with a woodchopper. Innes managed to escape the attack with only a minor wound to the arm. Incensed, he immediately issued an ultimatum to Howqua – either he arrange to have the culprit "seized and punished" by seven o'clock or Innes would set the Customs house ablaze.

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[1] Abridged versions of the James Innes affair recounted here can be found in Morse, Chronicles, vol. 4,.353-354; Morse, *International Relations of the Chinese Empire*, vol. 1, 108; Auber, *China*: *An outline of its government, laws, and policy* 364-366; and Keeton, *The Development of Extraterritoriality*, vol. 1, 66-67.

[2] *East India Company Factory Records* [henceforth: *EICFR*]*:* May 1, 1833.

Innes's threat, delivered at approximately 2pm, necessarily alarmed the Hong merchants, who, along with the Hoppo, were responsible for managing foreign commercial relations at Canton on behalf of the Qing court. They immediately issued an appeal to the Hoppo to apprehend Innes's assailant, who had apparently already left the Customs house for the day. This was communicated to Innes, along with the pledge that his assailant would be apprehended the following day. Innes, however, refused to wait. When no action was taken against the assailant, Innes, true to his word, climbed to the roof of the Creek Factory promptly at seven o'clock. There he "shot fire arrows and burnt the lanterns at the Canton [Customs] House." In all likelihood the Customs house would have been burned to the ground had it not been for bystanders who, upon witnessing the arson, were able to extinguish the fire before the Customs house became engulfed with flames.[3]

The next day the Chinese authorities meted out punishment to Innes's assailant: he was placed in a cangue, and publicly displayed around Canton. Once notified of his assailant's punishment, Innes considered the affair finished. The Chinese, enraged by Innes's actions, did not. After demonstrating their willingness to accord redress to Innes, the Chinese authorities then appealed to the Select Committee to punish him: "We consider that the Committee have henceforth understood what is just and right and have come to Canton to be the general superintendents of the commerce and the Heads of your Hon'ble nation's gentlemen. Therefore, we pray that you will [tend to] this business and settle it according to justice.[4] Most upsetting for the Chinese authorities was the nature of Innes's reprisal, especially given that the foreign factories, along with much of the city of Canton, had only just recently been rebuilt following the

[3] *EICFR:* May 1, 1833.

[4] Ibid.

great conflagration in 1822.[5] Had Chinese authorities elected to press the Committee for criminal jurisdiction over Innes, his punishment (had he been delivered up) would have been death by beheading, in accordance with Qing penal law.[6]

Within a couple days the Committee responded to the Hong merchants indicating that they would immediately investigate the matter.[7] They procured a letter from Innes in which he essentially depicted the same series of events, while, at the same time, maintaining the justifiability of his personal reprisal, rhetorically asking whether he "could have acted otherwise." In a blatant swipe at the Company's authority, he then suggested that it would have been the "deepest satire" to ask the Committee to intervene in the affair on his behalf as it was already suffering the "grossest public insult and injustice ever offered in any country" as a result of its conciliatory policy towards Chinese authorities.[8] That policy, in Innes's view, rendered the Committee powerless to seek redress on behalf of British subjects at Canton. Subsequent letters from Innes to the Committee toed this line of defense in which he justified his actions by calling into question the Committee's legal and jurisdictional powers at Canton, claiming it did not have "the slightest power over the Chinese."[9]

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[5] Davis, *The Chinese*, 12; Morse, *Chronicles*, vol. 4, 64-66; Betty Peh-T'i Wei, Ruan Yuan, 1764-1849. *The Life and Work of a Major Scholar-Official in Nineteenth-Century China before the Opium War* (Hong Kong: Hong Kong University Press, 2006), 161-62.

[6] Pursuant of the Qing Criminal Code, Section CCCLXXXIII "Wilful and malicious House-burning." See *Ta Tsing Leu Lee; Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China*, ed. George Thomas Staunton (Cambridge: Cambridge University Press, 2012 [1810]), 417. Hong Lu and Terance D. Miethe, *China's Death Penalty*: *History, Law, and Contemporary Practices* (New York: Routledge, 2007), 33.

[7] *EICFR:* May 1, 1833.

[8] *EICFR:* May 8, 1833.

[9] *EICFR:* May 18, 1833.

To further substantiate the justifiability of his personal war against Chinese authorities, Innes drew a comparison between English and Chinese juridical practice. In England, he noted, he would have "gone with witness and stated his case to the counsel," and, following their deliberations, he would have been "perfectly ready to accept any redress" the English arbiter deemed sufficient. And while he acknowledged that his actions were illegal in England, he nonetheless defended them as entirely justifiable in China, where no such due process was available to British subjects, and where, unlike in Europe, "seizure to prevent escape of a criminal [was not] instant[aneous]."[10] On that comparative legal basis, he insisted that his actions were not in retaliation for the assault at the Customs house. Rather, he only yielded to the violent arson after the Chinese refused to immediately apprehend his assailant. He even went so far as to place responsibility for the arson on Howqua, claiming that he "had the power of preventing the commission of the threat by simply doing justice" as Innes had initially requested.[11]

Through this comparative legal strategy of defense, Innes was, on the one hand, mobilizing a readily available legal orientalist discourse about the deficiencies of Chinese law and lack of justice in China. As will be recalled, that contemporary discourse framed the Sino-Western legal encounter in terms of the fundamental incommensurability of Occidental civilization and Oriental barbarism. This ethnocentric, othering legal discourse gained prominence in Sino-British/Sino-Western jurisdictional conflicts at the turn of the nineteenth century and informed British views of the necessity of retaining jurisdictional control in China as a precondition for the protection of the rights and liberties of British subjects. Company officials

[10] Ibid.

[11] Ibid.

justified their resistance to Chinese claims of criminal jurisdiction over British merchants along these orientalist lines of the British law of protection. On the other hand, Innes was also attempting to defend his personal war with Chinese authorities by calling into question the legal authority of the Company through the same legal orientalist rhetoric that underpinned his extraterritorial privileges and immunities in China.

The Committee was livid that Innes had called into question its legal authority, as they were by the political ramifications of loss of life and property that would have undoubtedly ensued had the arson not been foiled. That Innes did not attempt to contest the facts of the case, but nonetheless insisted his reprisal was justifiable, was a gross affront to the Committee, who found it impossible "to imagine opinions more dangerous than those maintained by Mr. Innes."[12] They communicated as much to the Hong merchants in a letter on May 10th, in which they called Innes' actions "most unjustifiable."[13] Likewise, they sent a letter of reproach to Innes the same day, the long and short of which was that, despite the fact that he had sustained a "serious personal injury," "no justification [could] be made out for setting fire to a Custom House."[14] That the incident did not escalate into a major Sino-British jurisdictional dispute can largely be attributed to the patience and leniency of the Hong merchants and Chinese authorities, and particularly the willingness of the latter to not intervene directly in the matter by claiming criminal jurisdiction over Innes. The Chinese made such an allowance despite the fact that the

[12] *EICFR:* May 8, 1833.

[13] *EICFR:* May 10, 1833.

[14] *EICFR:* May 10, 18, 1833.

punishment for Innes' act was death; and despite the fact that the committee ultimately dropped the matter, and Innes went unpunished.[15]

This failure to dispense justice should be read in the context of a long history of the Company's failure and/or inability to police British subjects and hold them accountable for lawless behavior[16] – a recurrent pattern during the charter company era, which had exacerbated Sino-British commercial and diplomatic tensions. Relatedly, the Innes affair can be viewed as indicative of the internal challenges faced by the Company (as discussed in the previous chapter), which grew exponentially with the expansion of private, non-monopoly trade and the resultant increase in criminal behavior. It should also be read, discursively, in light of our previous discussion of legal orientalism, which underpinned the legal legitimacy of the global-cum-imperial expansion of British jurisdiction, and, by extension, the exceptional extraterritorial privileges of merchants like Innes in lands "beyond the boundaries of civilized life."[17] On both accounts, the Innes affair offers a window into what contemporaries framed in terms of the "anomalous state of law" in China[18] – a global imperial problem of law and order which resolved itself into the dual-sided problem of the putative deficiencies and/or lack of Chinese law (at both the municipal and international levels) and British lawlessness.

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[15] This would not be the first time Innes would escape punishment. Soon after the woodcutter incident, Innes assaulted Select Committee President John Daniels in February 1834, after which Daniels sought to deport Innes to Britain. As there were no ships leaving for Britain at this point during the height of the trading season, the Company had to defer punishment. Fortunately for Innes, the company would lose its authority in China in April 1834, and was no longer in a position to punish him. *EICFR:* February 23, 1834.

[16] That is, when it was not providing legal cover for such criminal behavior, as in the case of "accidental homicides." See the previous chapter.

[17] See W. Ross Johnston, *Sovereignty and Protection: A Study of Jurisdictional Imperialism in the Late Nineteenth Century* (Durham N.C.: Duke University Press, 1973), 328.

[18] The phrase itself comes from the parliamentary resolutions concerning the Canton trade, as discussed below. On contemporary invocations of "the anomalous state of law" in China, see Charles Marjoribanks, *Letter to the Right Hon. Charles Grant, President of the Board of Controul, on the Present state of British Intercourse with China* (London: J. Hatchard & Son, 1833) 53; Samuel Wells Williams, *The Middle Kingdom*, vol. 1, 453 and 479.

The present chapter explores this global imperial problem of law and order on the frontiers of British empire through an investigation of the extraterritorial remedies brought to bear on, and constitutive of, this "anomalous state of law" in China in the context of a historical shift from Company to metropolitan legal control. The legal and theoretical formulation and practical application of those remedies, I argue, underscores both the dual motivations for the development of modern British extraterritoriality and the double character of the civilizing mission of British municipal and international law in China. On the one hand, the formal spread of extraterritorial jurisdiction in China was a necessary means to "civilize" lawless British subjects, like Innes, and bring them within the orbit of British law and justice. On the other hand, the modern inter-state establishment of British extraterritoriality in China presupposed the normalization of Sino-British relations, which, in turn, necessitated China's conformity to European standards of "civilized" international law and diplomacy – that is, its formal recognition of both "the independence and equality of other nations in the mutual intercourse of war and peace,"[19] as well as of the "universal" rights of their foreign nationals to trade, travel, and proselytize in China.

The relevant historical scholarship on this period in Sino-British/Western relations (1833-39) has treated that time has little more than a preamble to the first opium war (1839-42). It was this war and the subsequent Sino-British Treaty of Nanjing, so the conventional wisdom goes, that marked a decisive legal-historical break in modern Sino-Western relations. This chapter seeks to complicate and qualify this thesis by investigating the aforesaid dual motivations for the introduction of modern British extraterritoriality in China, that is, the British extraterritorial remedies brought to bear on the "anomalous state of law" in and with China. Through this

[19] See Wheaton, *Elements of International Law*, 22.

twofold investigation I aim to throw light on the origins and structure of not only modern British extraterritoriality, but also of the universalization of British municipal law and "civilized" international law in China. Modern British/European extraterritoriality stood at the crossroads of these two historical bodies of law, and, I shall argue, an investigation of its legal-historical origins and structure in China can illuminate the private law affinities between them.

II.1. Legislating a New Regime of Extraterritorial Sovereignty

Just prior to the abolition of the Company's monopoly in China in August 1833, Sir Charles Marjoribanks, the former head of the EIC in China, urged Sir Charles Grant, President of the EIC Board of Control, to "ameliorate our present condition" China. The expansion of foreign commerce had brought a surge in criminal activity in China, which had, in turn, exacerbated Sino-Western commercial and diplomatic tensions. In the absence of adequate legal-juridical machinery in China to address British wrongs (the Select Committee had no legal authority to institute a judicial inquiry and try British subjects), Marjoribanks conceded, "the Chinese had fully as much reason to complain of our injustice, as we had of theirs." As a remedy to this lawless situation, Marjoribanks urged Grant to create an extraterritorial court with criminal jurisdiction over British subjects. He acknowledged, "I am well aware that this is an apparent anomaly of the establishment, as it were of an *imperium in imperio* [a state within a state[20]]; but our situation in China is altogether an anomaly, and we must make the best of it."[21]

[20] The term is normally used to designate enclaves where foreign residents enjoyed special rights and privileges under the protection of legations and consulates (i.e. consular jurisdiction). See previous chapter on historical antecedents.

[21] See Charles Marjoribanks, *Letter to the Right Hon. Charles Grant, President of the Board of Controul, on the Present state of British Intercourse with China* (London: J. Hatchard & Son), 53. Marjoribanks's justification for this sovereign exception reads as a stereotypical orientalist account of the "nature of [Chinese] laws, customs, and institutions," which were "diametrically opposed" to Western standards of law and justice.

The juridical "establishment" in question was the generally recognized principle, "*extra territorium ius dicenti impune haud paretur*" ("One who exercises jurisdiction out of his territory is not obeyed with impunity"); the creation of an extraterritorial court in China was thus an "anomaly" or exception with respect to this established principle of legal sovereignty.[22] The legislative foundations for such a new *imperium in imperio* would begin to take shape later that year, albeit in a highly qualified form.

Parliament's decision to end the Company's monopoly on August 28th, 1833 marked the symbolic end of charter company era in China and a shift to metropolitan legal control. That decision, however, did not immediately resolve the issue of the anomalous position of British foreign nationals in China. What it did do was press Whitehall to consider a legislative remedy to the extraterritorial problem in China. Resolutions concerning the Canton trade introduced into House of Commons in 1833 described the urgency of the retention of British jurisdictional control in China in the following terms:

> …the state of the trade under the operation of the Chinese laws in respect to homicides committed by foreigners in that country, calls for the early interposition of the legislature, those laws being practically so unjust and intolerable that they have in no instance for the last forty-nine years been submitted to by British subjects, great loss and injury to their commercial interests accruing from the suspension of trade in consequence of such resistance, and the guilty as well as the innocent escape with impunity, and that it is, therefore, expedient to put an end to this *anomalous state of law* by the creation of a British naval tribunal upon the spot, with a competent authority for the trial and punishment of such offenders.[23]

Contained within this excerpt is the aforementioned dual-sided imperial problem of the injustice of Chinese law and British lawlessness. In terms of the former, the passage reads as a relatively

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[22] In *Exchange v. McFaddon,* John Marshall identified the power of exception as a core attribute of sovereignty itself. See The Schooner Exchange v. McFaddon, 11 U.S. 7 (Cranch) 116, 136-37 (1812).

[23] George Thomas Staunton, *Corrected Report of the Speech of Sir George Staunton, on Sir James Graham's Motion on the China Trade, in the House of Commons, April 7, 1840* (London: Edmund Lloyd, 1840), "Appendix," iii. Emphasis added.

straightforward legal orientalist justification for the retention of British jurisdictional control over its subjects in China. The passing reference to the 1784 Lady Hughes case – the last instance that a British subject was delivered up to Chinese authorities, and publicly strangled (in accordance with Qing law) – is par for the course in the contemporary anathematization of the draconian nature of the Chinese law of homicide. Because Chinese notions of justice, and criminal justice in particular, were wholly incompatible with those of the Western world, so this line of orientalist legal reasoning went, the Chinese judicial system was deemed inadequate to safeguard the liberty and rights of Western subjects. British resistance to China's "barbaric" juridical regime and the necessity of the retention of jurisdictional control over British subjects was justified accordingly.

Beyond the standard issue orientalization of Chinese law, the passage above also makes clear that the formal establishment of British jurisdiction in China was not simply a matter of extending the law of protection and safeguarding the rights and liberties of British subjects. It was also a matter of controlling rapacious British merchants like James Innes who threatened to destabilize Sino-British commercial and diplomatic relations. That British resistance to Chinese law had resulted in both trade stoppages and "great loss and injury to commercial interests," as well as in an "anomalous state of law" where the "guilty as well as the innocent escape with impunity," made the expansion of British criminal jurisdiction all the more necessary in order to control the lawless behavior of British merchants and seamen.[24] As will be recalled from the previous chapter, British lawlessness both thrived in and exposed the deep fault lines of the

[24] Ibid., 699. Consider, along the same line, Secretary George H.G. Aberdeen's instructions to British consuls in the Ottoman Empire vis-à-vis the capitulation agreements. He noted that while the "state of things in Turkey is an exception to the system universally observed among Christian nations," he insisted that "the maintenance of order and repression and punishment of crime are objects of the greatest importance in every civilized community, it is obligatory upon the Christian powers, standing as they do in Turkey…in the place of the territorial Sovereign to provide as far as possible for these great ends." See FO 97/497.

Canton system – a multi-centric and jurisdictionally fluid commercial regime, which was exploited for profit with impunity by European-chartered companies, as well as by private foreign and Chinese merchants. This was the case, most demonstratively, with the opium trade, which Britain came to rely on from the late eighteenth century onwards in order to balance its trade deficit with China.[25] Per the numerous Qing imperial edicts prohibiting the consumption and distribution of opium dating from the late eighteenth century, it was technically illegal to traffic in opium prior to 1858 when it became legal.[26] Both sides, however, defied Qing laws and circumvented official jurisdictional controls, one of the material results of which was the creation of "nests of pirates and smugglers" in China, as in the case of contraband trading posts, like Lintin[27] and Hong Kong, both of which had become a "thorn in the side" of British officials.[28]

Despite the fact that the illicit opium trade was a boon to the Company (and by the early nineteenth century had reversed the trade balance in favor of Britain), it also enlarged non-monopoly commercial networks in China, which soon came to supersede the Company's "legitimate" trade at Canton. The influx of country traders in China brought a surge in unruliness and criminal activity, for which the Company's Supercargoes lacked any effective means to control. For that reason, the Company petitioned London on various occasions

[25] For that reason the Select Committee of 1832 declared it "inexpedient to relinquish the revenue arising from the cultivation of opium in India, for the supply of the market of China." As quoted in Staunton, *Corrected Report of the Speech of Sir George Staunton*, 10.

[26] Prior to the arrival of the Imperial Commissioner Lin at Canton in 1839, however, the enforcement of these prohibitions on opium was sporadic at best.

[27] Lintin Island, lying in the mouth of the Pearl River Estuary northwest of Lantau Island and northeast of Macao, was known as the "outer anchorage." During the early nineteenth century, it developed as the preferred transit point for European clippers bringing opium to China on account of the fact that it was outside of Chinese jurisdiction.

[28] As quoted in Timothy Brook and Bob Tadashi Wakabayashi, eds. *Opium Regimes: China, Britain, and Japan, 1839-1952* (Berkeley and L.A.: University of California Press, 2000), 108; See also E.J. Eitel, *Europe in China* (Hong Kong: Kelly & Walsh, 1895), 202-03.

(including in the aftermath of the Lady Hughes affair) for additional formal legal authority to restrain private traders in China and bring them within the ambit of British law. All told, however, these early efforts to reign in British lawlessness were largely ineffectual. By the early nineteenth century, the expansion of foreign non-monopoly commerce had far outstripped the Company's legal and jurisdictional control in Canton. In this respect, Parliament's decision to abolish the Company's monopoly was little more than a ceremonious recognition of an existing state of non-monopoly commercial affairs in China.

The legislative remedy to this dual-sided problem of Chinese legal barbarism and British lawlessness was twofold. First, in pursuance of the "Act to regulate the trade to China and India," an Order in Council was drafted which created a court with criminal and admiralty jurisdiction to try offences committed by British subjects in China. A second Order in Council created the position of British Superintendent of Trade who was made ranking official of a new trade commission in China, to be assisted by two other Superintendents.[29] A Royal Commission was then created, which appointed Lord Napier, a peerage from Scotland and naval officer, as the first Superintendent of Trade. Upon his selection, the Royal Commission provided a set of guidelines for the Superintendent's supervisory role. Napier was instructed to "Watch over and protect the interests of [British] subjects resident at, or resorting to, the Empire of China for the purposes of trade; and to afford to them all such advice, information, and assistance, as it may be in your power to give, with a view to the safe and successful conduct of their commercial transactions; and, to the utmost of [the Superintendent's] ability, to protect them in the peaceable

[29] The appointment of the Superintendents was invited by Chinese authorities in order to manage commercial relations with the British. See Fairbank, *Trade and Diplomacy*, 78-79. The British Trade Commission was modeled on the Company's Select Committee; the Superintendent was vested with (limited) jurisdictional powers over British subjects, previously vested in the Company's Supercargoes. See Glenn Melancon, "Peaceful Intentions: The First British Trade Commission in China, 1833-5," *Historical Research* 73 (2000).

prosecution of all lawful enterprises in which they may be engaged in China."[30] At the same time as he was meant to offer protection to British subjects, Napier was also instructed to "conform to the laws and usages of the Chinese Empire." In diplomatic parlance this nominal recognition of Chinese sovereignty formed the legal basis of Britain's "quiescent policy," which entailed: "Abstain[ing] from and avoid[ing] all such conduct, language, and demeanor as might needlessly excite jealously or distrust amongst the inhabitants of China, or the officers of the Chinese Government; or as might unnecessarily irritate the feelings, or revolt the opinions or prejudices of the Chinese people or Government; and...maintain[ing] a good and friendly understanding, both with the officers, civil and military, and with the inhabitants of China, with whom you [Napier] may be brought into intercourse or communication."[31] Out of deference to Chinese sovereignty, moreover, Napier was also instructed not to commence proceedings in the newly formed extraterritorial court, "unless in the case of absolute necessity."[32] The court did not hear a case until 1839.[33]

To the extent that British Superintendents were effectively deprived of a working extraterritorial court, the new post-Company regime of British extraterritoriality fell short of a real *imperium in imperio*. Even if the court had been made available it lacked civil jurisdiction over British subjects. Moreover, while the Superintendent was given the authority to settle disputes between British subjects and between British and Chinese subjects through arbitration, without the formal consent of parties on either side, he was ultimately powerless to resolve both

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[30] *Correspondence Relating to China*: *presented to both houses of Parliament, by command of Her Majesty*. (London: T.R. Harrison, 1840), 3.

[31] Ibid.

[32] Viscount Palmerston to Lord Napier, January 25, 1834, *Correspondence Relating to China*, 3-5.

[33] Morse, *International Relations*, vol. 1, 119-120.

Sino-British and intra-British tensions. With respect to the latter, this want of legal power, as Foreign Secretary Lord Palmerston would later note, placed the Superintendents in an extremely "embarrassing position," in which they were prevented from "proposing the necessary means of controlling the conduct and proceedings of British subjects resorting to Canton for purposes of trade."[34] Hence, the legislative remedy which marked the shift from Company to metropolitan legal control in China failed to end the "anomalous state of law" in China: as was the case under Company control, British lawlessness continued to pose serious internal challenges to the newly formed, if ill-defined and certainly ill-equipped, British extraterritorial state in China; and, by extension, such lawlessness posed an immanent threat to the stability of Sino-British commercial and diplomatic relations.

The persistence of the Canton system of trade and diplomacy following the abolition of the Company's monopoly presented British administrators and diplomats with another unresolved anomaly. That point was forcefully made by H.H. Lindsay, a former Company supercargo, in a letter to Foreign Secretary Palmerston in 1836 in which he warned: "our affairs [in China] can hardly be allowed to remain in the anomalous state in which they are now placed." The immediate motivation for Lindsay's letter was Lord Napier's failed attempt in 1834 to establish direct diplomatic relations with the Chinese government, which had resulted in a trade stoppage, followed by a minor Sino-British naval skirmish.[35] Lindsay, like Napier, viewed the status quo in China as untenable: the restrictive Canton system of trade, punctuated by periodic stoppages as a result of foreign resistance, was injurious to British commercial interests; the customary mode of Sino-Western diplomacy as channeled through the Hong merchants, by

[34] Palmerston to Law Officers, May 4, 1836, FO 83/2247. On the legal and diplomatic "handicaps" placed on Superintendents of Trade, see Fairbank, *Trade and Diplomacy*, 78.

[35] I return to the "Napier affair" subsequently.

which the Company had previously abided, was highly insulting to British officials. A "change in...political relations with China" was in order. To that end, Lindsay proposed two possible modes of British "resistance" in China. The first involved "direct armed interference to demand redress for past injuries, and security for the future"; the second, the complete "withdrawal of all political relations from [China]."[36] While he saw the latter as the most prudent course of action, he nonetheless intended both to signal a departure from the Company's erstwhile conciliatory policy in China.

Both forms of post-Company British resistance assumed a legal orientalist discursive framework, as Lindsay's reference to the "civilized" principles of international law suggests: "In advocating resistance to what I cannot help considering the unjust and oppressive system adopted by the Chinese towards foreigners, I am in no way prepared to dispute the general principle, that if a stranger goes to reside in a foreign country he is bound to obey its laws and conform to its regulations; but on the other hand, it always presupposes that your intercourse is with a civilized nation, that the laws and regulations to which your compliance is required are clear and defined, and that they give a reasonable protection to life and property." Referring specifically to the "barbarous" Chinese law of homicide, he concluded, "Now in China this is not the case."[37] As discussed previously, the relevant historical precedent for this legal orientalist framework can be traced back to Sino-Western jurisdictional disputes during the charter company era. Despite its otherwise conciliatory approach towards China, the Company had steadfastly resisted Chinese claims of criminal jurisdiction over British subjects in homicide cases (excluding the aforementioned Lady Hughes case). In this respect, the Company served as

[36] Letter from Hugh Hamilton (H.H.) Lindsay to the Right Honourable Viscount Palmerston on British relations with China, *Hume Tracts* (March 1, 1836), 2, 4.

[37] Ibid.

the steward of Britain's sovereign exception to the established principle, *extra territorium ius dicenti impune haud paretur*. In the context of the historical shift to metropolitan legal rule, the civilizational qua international legal discursive basis for that jurisdictional exception emerged as the predominant British mode of legal justification for extraterritoriality in China. Lindsay's invocation of the general legal principles of "civilized nations" to justify a new, exceptional mode of British extraterritorial resistance in China was exemplary in this respect.

And yet, as we will see, this essentializing, Sinophobic legal orientalist discourse began, in the context of this shift from Company rule to metropolitan legal order, to cede ground to a reformist legal discourse that sought to normalize China's international behavior by formally including it in the domain of modern "universal" international law. The emergence of this legal reformist discourse, prior to the 1842 Sino-British Treaty of Nanjing, suggests the beginnings of a legal discursive break brought on not by Western imperial violence and domination, but rather by the "anomalous state of law," which was thrown into sharp relief by the supersession of Company rule by metropolitan law and order.

II.2. The Introduction of "Civilized" International Law in China

The orientalist presuppositions of the Law of "Civilized" Nations or "civilized" international law, which informed views like Lindsay's of the necessity of British resistance in China, comes into sharper focus when placed in the context of nineteenth-century international jurisprudence. The apposite contemporary reference is Henry Wheaton (1785-1848), the American diplomat and jurist, who authored the highly influential *Elements of International Law*

[hereafter: *Elements*] (1836).[38] In the first edition of *Elements*, he posed the question, "Is there a universal law of nations?" Reviewing major European jurists (e.g. Grotius, Bynkershoek, and Montesquieu), he observed that these early authorities did not view the law of nations as universally applicable to both "savage and civilized" societies. On that basis, he explicitly rejected the notion that international law could be considered universal in scope: "The public law [of nations], with slight exceptions, has always been, and still is, limited to the civilized and Christian people in Europe or to those of European origin." He then clarified the boundaries of "civilized" international law as follows: "The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations. Hence the international law of the civilized Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing."[39] Here, Wheaton posits a tripartite geo-cultural order composed of three distinct regimes of international law: one European, the second European-non-European, and the third inter-non-European.[40] Only the first two of these regimes concerned Wheaton, whose divided cultural geography of nineteenth-century international law rested on what historians have referred to as a metric or "standard of civilization."[41] Forgoing a

[38] First published in 1836, Wheaton's *Elements* went through 15 American and English editions in total. It was translated into Chinese in 1864. On the problems of translation of international law, see Liu, *The Clash of Empires.*
[39] Wheaton, *Elements of International Law*, 44, 15, 44-45.

[40] John Quincy Adams: "We have a separate and different Law of Nations for the regulation of our intercourse with the Indian tribes of our own Continent; another Law of Nations between us and the wooly headed natives of Africa; another with the Barbary Powers and the Sultan of the Ottoman Empire; and lastly with the Flowery Land, the Celestial Empire, the Mantchoo-Tartar Dynasty of Despotism." See "John Quincy Adams on the Opium War," *Proceedings of the Massachusetts Historical Society* 43 (February 1910): 324; and "Lecture on the War with China (1)," *Chinese Repository*, vol. 11.

[41] The classic reference remains Gong, *The Standard of "Civilization" in International Society*.

more extensive discussion of this international legal standard for now, it is sufficient to note that for nineteenth-century jurists, like Wheaton, this Eurocentric metric determined the boundaries of "civilized" international law: Non-Christian, non-European states were viewed as beyond its pale, and, accordingly, were not afforded the same rights and privileges as "civilized" Christian, European states.

In subsequent editions of *Elements*, however, Wheaton's culturally provincial, Eurocentric definition of the boundaries of international law was partially revised (in most cases, posthumously) in order to historically account for and legally justify international treaty relations between European Christian nations and non-European, non-Christian nations.[42] His recognition of China as a quasi-subject (or what would later be called a "semi-sovereign"/"semi-civilized" state) in the Law of Nations following the normalization (read: legal formalization) of Sino-Western relations serves as a case in point. By the 1846 edition of *Elements*, four years after the Treaty of Nanjing, Wheaton claimed that China had been "brought within the pale of the public law [of nations] and [inter-state] system of Europe… [since it] ha[d] been compelled to abandon its inveterate *anti-commercial* and *anti-social* principles, and [has] acknowledge[d] the independence and equality of other nations in the mutual intercourse of war and peace."[43] The precondition for international recognition of China as a quasi-subject was China's renunciation of its "peculiar international usages" and its recognition of "equal" diplomatic and commercial exchange, on the principle of "perfect equality."[44] That the Chinese had been "compelled" by

[42] See Liu, *The Clash of Empires*, 24, 108–13.

[43] Wheaton, *Elements of International Law,* 22. My emphasis.

[44] Ibid., 18. He noted, moreover, "Of the ability and capacity of China to form binding engagements there can be no doubt, but how far she has even now entered within the pale of public law is another matter." Ibid, 20. The gradual inclusion of China as a "semi-sovereign"/"semi-civilized" personality with imperfect status in the family of nations followed soon after the 1842 Treaty of Nanjing. See Gong, *The Standard of Civilization*, 26-30.

British gunboats to recognize "the independence and equality" of foreign trading nations did not invalidate the Treaty of Nanjing (nor did it invalidate subsequent "unequal treaties") since force – or "self-help" in contemporary international legal discourse – was a legitimate means of attaining the formal consent of, and building "friendships" with, other nations.

On the one hand, then, Wheaton's legal orientalist framework of international law presupposed a fundamental incompatibility between "civilized" Occidental law and "un-civilized" Oriental law. On the other hand, however, that legal orientalist framework, which fixed China as abject Other, began to give way to a reformist legal discourse following the 1842 Sino-British Treaty of Nanjing, which, for Wheaton, normalized relations with China and formally included it within pale of modern "universal" international law. China, in Wheaton's view, had to be forced to be free. Its "anti-social" and "anti-commercial" behavior could only be reformed through a commanding treaty based on "perfect equality" – one which compelled China to abandon its "peculiar international usages" and formally recognize the legal and diplomatic equality of Britain and other foreign (read: "civilized") trading nations.[45] "Social," in this legal-jurisprudential context, meant "commercial" exchange, the modern international legal language for which was treaty law. Wheaton took this language, and its naturalized and universalized private law idea of the contract as a given in his conception of "civilized" international law.

In so doing, Wheaton's international legal thought can be situated in a broader international jurisprudential trend in how nineteenth-century jurists understood the nature and significance of treaties in modern international law. While treaties of course existed prior to the

[45] Wheaton has thus been viewed as laying out the first constitutive theory of recognition, whereby non-members only became members, full sovereign states, through the renunciation of their particular customs and usages, and the adoption of Euro-American international legal and diplomatic norms family of nations. See Gong, *The Standard of Civilization*, 25-27.

nineteenth century, it was only during this period that treaty law came to be recognized by international jurists as a fundamental source of international law.[46] As an instrument of modern international law, treaty law presupposed two formally equal legal subjects. In this way, jurists likened treaty relations to a private contract relation between two formally equal property owners.[47] Juristic recognition of this formal similarity between contracts and treaties found common expression in the "private law analogy" which gained widespread doctrinal currency in modern international law and jurisprudence during this nineteenth century.[48] The paradigmatic articulation of the private law analogy in English international jurisprudence comes from T.E. Holland's treatise, *Studies in International law and Diplomacy* (1898), in which he claimed: "The Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to the relations of individuals."[49] The "legal ideas" Holland had specifically in mind were the private law ideas of contract and property. His view of these private law ideas typified a common juristic view in nineteenth-century international jurisprudence: that a contract between individuals resembles a treaty between states

[46] This is not an unprecedented claim. See Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965), 36. It can be further substantiated with reference to the nineteenth-century record keeping on British treaty relations. Most famously, the Hertslet commercial treaty series, compiled by Louis Herslet (1787–1870) and his son, Sir Edward Hertslet (1827–1885), consisted of a collection of treaties and conventions, between Great Britain and foreign powers, "and of the laws, decrees, orders in council, &c., concerning the same, so far as they relate to commerce and navigation, slavery, extradition, nationality, copyright, postal matters, &c., and to the privileges and interests of the subjects of the high contracting parties." See http://www.archive.org/details/hertsletscommer00offigoog. Another publications of treaties was compiled as Parliamentary Papers and appeared, starting in 1892, in a *Treaty Series*.

[47] See Henry Wheaton on "contracting a treaty." Wheaton, *Elements of International Law*, vol. 1, 288-89.

[48] On the recurrence of the private law analogy in modern international law, see Hersch Lauterpacht's seminal work, *Private Law Sources and Analogies of International Law (with special reference to international arbitration)* (London: Longmans, Green & Co., 1927). This study of major decisions of international tribunals effectively demonstrates that private law analogies have been used in order to determine international legal cases concerning (among other questions) the acquisition and loss of territory, servitudes, bankruptcy, mandates, leases, burden of proof, and tort responsibility.

[49] T.E. Holland, *Studies in International Law and Diplomacy*, 152.

inasmuch as both could be defined as a formal agreement between co-equals; and that the private law right of property resembles the territorial rights of a state.[50] On these generally recognized bases of resemblance then, Holland claimed that these private law ideas can be properly or legitimately applied to the Law of Nations; these private legal ideas, in other words, form the sources of the Law of Nations.

I would submit that the schema outlined in Holland's dictum points to a general process of transference in which private law ideas were analogically applied or extended to international law. What the following investigation of the introduction of "civilized" international law in China seeks to demonstrate is that this process of transference was not limited to the rarified domain of modern international jurisprudence. Rather, it is evident in British international legal and diplomatic practice on the ground in China. And it played a major role in the historical re-articulation of legal orientalism from a purely essentializing to a reformist legal discourse.

While this discursive shift in legal orientalism is evident, as noted above, in the post-1842 editions of Wheaton's *Elements*, I would nonetheless locate it earlier in the aforesaid supersession of Company rule by metropolitan legal order. On that score, it bares special notice that in revised editions of *Elements* there appears an abridged history of the introduction of international law in China – that is, the "gradual process by which the Chinese Empire has been brought to acknowledge the independence and equality of other nations." For Wheaton, that historical process predated the 1842 Treaty of Nanjing, and could be traced back to the Lord Macartney mission, which traveled to China in 1793 to persuade Emperor Qianlong to lift restrictions on trade and allow Britain to establish a permanent embassy in Beijing. He then cited the 1816 Amherst mission and the subsequent appointment of British Superintendents of

[50] In this way, positivist international jurists defined sovereignty, in its most basic sense, as control over a bounded territory. See Holland, *The Principles of International Law*, 136.

Trade at Canton as early precedents on the road to the normalization of Sino-Western relations.[51] The orientalist subtext of Wheaton's brief historical account can be summarized as follows: British diplomatic failures leading up to the 1842 Treaty of Nanjing were the result of China's ignorance of modern international law and diplomacy, as well as its Sinocentric, isolationist, and anti-commercial foreign policy.

Wheaton's short history of the introduction of international law to China can be critically elaborated upon with respect to the British Superintendents of Trade at Canton. What Wheaton most likely had in mind in this passing reference was Lord Napier's infamously failed initiative to compel Chinese authorities to conform to European standards of international law and diplomacy.[52] By Napier's own account, his mission in China represented a departure from the "gradual propositions" of the Macartney and Amherst embassies in favor of more "vigorous measure[s]."[53] The immediate historical precedent for such measures was "the remarkable Mr. Innes," whose personal reprisal (as discussed in the introduction) confirmed for Napier that the Chinese would only respond to "a commanding attitude...with the power of following the threat

[51] See Wheaton, *Elements of International Law*, 19-20.

[52] What follows is an abridged version of Napier's brief diplomatic tenure, which has been detailed more fully elsewhere. Conspicuously absent from such accounts is the orientalist international legal discourse Napier appealed to in order to justify what, from the Qing perspective, was a lawless mission which systematically violated the long-established modes of Sino-Western diplomatic communication. See, e.g., James Goddard's account of the Napier affair in, *Remarks on the Late Lord Napier's Mission to Canton: in reference to the present state of our relations with China* (London, 1836); R. Montgomery Martin, *China: Political, Commercial, and Social, in an Official Report to Her Majesty's Government* (London: James Madden, 1847), vol. 2, 32-35; Demetrius Charles de Kavaanagh Boulger, *A Short History of China: Being an Account for the General Reader of an Ancient Empire and People* (London: W.H. Allen & Co, 1893), 204-206; Henry Charles Sirr, *China and the Chinese: their religion, character, customs, and manufactures: The Evils Arising from the Opium Trade* (London: William & Orr & Co, 1849), vol. 2, 282-290; Eitel, *Europe in China*, pp. 30; Fairbank, *Trade and Diplomacy*, 78-79; Peter Ward Fay, *The Opium War, 1840-1842: Barbarians in the Celestial Empire in the Early Part of the Nineteenth Century and the War by Which They Forced Her Gates Ajar* (Chapel Hill, NC: University of North Carolina Press, 1997), 67-69.

[53] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7.

with execution."[54] Anything less would be an "idle waste of time."[55] The stated, if thin, pretext for his campaign to normalize international relations with China was Foreign Secretary Palmerston's letter sent to Lord Napier on January 25, 1834, which instructed Napier to "announce [his] arrival at Canton by letters to the viceroy…to ascertain, whether it may not be practicable to extend that trade to other parts of the Chinese dominions [and] … with a view to the attainment of this object, [to] establish…direct communication with the imperial court at Peking [which] would be most desirable."[56] Napier's literal interpretation of Palmerston's instructions, and his blatant disregard for the Royal Commission's instructions to "conform to the laws and usages of the Chinese empire," led to a series of diplomatic omissions and blunders, and ultimately to a minor Sino-British naval battle at the Bogue.

In his first act as Superintendent, Napier made what Staunton would later refer to as the "fatal error" of violating the Chinese law that passports are required by all foreigners traveling from Macao to Canton, which, according to Staunton, placed Britain "entirely in the wrong."[57] Napier's first breach of diplomatic protocol begot his second: Upon his arrival at Canton on July

[54] Ibid. Napier also made brief reference to Captain Waddell's first encounter with the Chinese. Captain John Weddell, who commanded a fleet commissioned by King Charles I of England (1600–49), had little patience with either China's regulations of foreign trade or bureaucratic procrastinations. In a desperate attempt to force the Chinese to accept the British offer of "Friendship and Free Commerce," he moved his ships up the Pearl River against the local laws and in the resulting conflicts, dismantled two Chinese military forts, burned a number of Chinese naval ships, and set "a small town" on fire. In a blatant piece of revisionist history, Napier omits to mention that Weddell was eventually compelled to apologize to the Chinese authorities and promised never to violate Chinese law again.

[55] Lord Napier to Lord Earl Grey, August 21, 1834, FO 677/3, no. 11.

[56] *Correspondence Relating to China*, 4-5.

[57] Staunton, *Corrected Report of the Speech of Sir George Staunton*, 9. Napier arrived at Macau on July 15, 1834. When Viceroy Lu was subsequently notified of Napier's arrival, he ordered the Hong Merchants to immediately travel to Macao in order to ascertain exactly why Napier had come to China, and to remind him of the existing Trade Regulations governing Sino-foreign relations. Moreover, the Hong messengers were ordered to instruct Napier that, with the exceptions of merchants and the taipans, no foreign government officer was permitted to enter Canton until he petitioned for a permit, whereby a report was made on the matter to the emperor who would then authorize entry into the port.

15, 1834, some three months after the expiration of the Company's charter, Napier took up residence without a permit.[58] From there, he wasted little time in breaching the customary diplomatic protocol by circumventing the Cohong and attempting to communicate directly with the imperial representative at Canton, Viceroy Lu. His brief communiqué to the Viceroy announced his arrival and requested a personal interview, the intention of which was to reestablish Sino-British diplomatic relations on a new footing of formal equality. The content itself, however, was far less significant for Chinese authorities than the mode of its presentation. The document, translated into Chinese by Dr. Morrison, was headed "Letter," rather than "Petition," as customarily required of the Select Committee when it had addressed communications to the Viceroy through the Cohong. On both accounts, then, it violated the customary method of Sino-Western diplomacy, and accordingly, the Hong merchants refused to deliver the letter to the Viceroy.[59]

As a result of his cavalier insistence on direct communication with the Chinese government, Canton officials placed an embargo on British trade in August of 1834. Initially the Governor agreed to lift the embargo if Napier obeyed his edicts to follow existing procedures regulating diplomatic protocol, and immediately depart from Canton. Determined to stay the course, Napier refused to yield to Lu's request and decided that the best plan of action was a display of armed force. In early September, in direct violation of Chinese law banning military ships from entering the Pearl River, he dispatched two British frigates to Whompoa, which sailed into the Pearl River, where they provoked a minor row at a Chinese fort on the Bogue, with

[58] Hsin-pao Chang, *Commissioner Lin and the Opium War* (Cambridge, MA: Harvard University Press, 1964), 53.
[59] See Napier's account, "Present state of relations between China and Great Britain," August, 26, 1834, FO 677/3; and Napier to Palmerston, August 9, 1834, FO 677/3 no. 1; Goddard, *Remarks on the Late Lord Napier's Mission to Canton*, 3-4.

fatalities resulting on both sides. Napier's attempt to use force to open up a direct line of communication and establish diplomatic equality with the Qing court proved to be an ignominious failure. In the end, Napier retreated and returned to Macao, where he died shortly thereafter.[60] While his attempt at intimidation "gave [him] a crown of martyrdom and intensified the drive [by free traders] for wider concessions,"[61] it also "invariably produce[d] …some disparagement to [British] national character at Canton."[62]

This minor naval action undertaken by Napier was significant, not for what it accomplished, but rather for the crucial precedent it set in Sino-Western relations: the Battle of the Bogue was the first armed clash between China and the West, and it signaled a clear departure from the Company's erstwhile conciliatory approach towards China. Whereas the Company's Supercargoes did not view themselves as representative of the British nation per se, Napier did, and he insisted upon his equal rights as an official representative of the British crown.[63] He viewed the Viceroy's diplomatic rebuff, and the continuation of indirect diplomatic relations with the Qing court as an unwarranted assumption of superiority and thus "an outrage on the British Crown."[64] Along these lines, Napier presented his dispute with the Viceroy and the unprecedented measures he took to compel Chinese recognition of British diplomatic equality as a necessary means to vindicate British honor and national interests. And while the

[60] Keeton, *The Development of Extraterritoriality in China*, 142.

[61] See Earl Cranston, "The Rise and Decline of Occidental Intervention in China," *Pacific Historical Review*, vol. 12, no. 1 (March 1943): 24.

[62] George Thomas Staunton, "Remarks on the British Relations with China, and the proposed places for improving them," *Hume Tracts* (London, 1836), 3.

[63] See Morse, *Chronicles*, vol. 2, 105; Morse, *International Relations of the Chinese Empire*, vol. 1, 102; Keeton, *The Development of Extraterritoriality*, vol. 1, 42.

[64] Napier to Palmerston, August 14, 1834, FO 677/3. Napier viewed Viceroy Lu as "presumptuous savage," who should be punished accordingly, "as the Mandarin did the wood-cutter fro Mr. Innes." See Ibid.

Home Government "was not yet prepared yet to redeem the honour of the British flag in China," Napier's invocation of insult and national honor foreshadowed one of the principal British justifications for the necessity and "justness" of the first Sino-British war.[65]

The imperial portent of Napier's discourse of insult and honor has been well covered in the existing scholarship on British trade and diplomacy in China.[66] The imperial significance of his appeal to international law to justify his campaign of intimidation has, by contrast, amounted to little more than a historiographic sidelight.[67] With that omission as a point of departure, I shall focus on the largely underappreciated historical novelty of Napier's legal orientalist and reformist approach to Chinese law and diplomacy, and to China's putative "anti-social" and "anti-commercial" policy in particular. In terms of the latter he argued that China's restrictive foreign trade policy was more than just injurious to British commercial interests. It was also a gross violation of the customary (long-standing) rights of "civilized nations," and, as such, was an actionable offence under international law. As for Wheaton, "civilized" international law was, for Napier, the vehicle for the transformation of China's "anti-social" and "anti-commercial"

[65] Eitel, *Europe in China*, 74.

[66] See, e.g. See Glenn Melancon, "Honour in Opium? The British Declaration of War on China, 1839-1840," *The International History Review* 21, no. 4 (Dec. 1999).

[67] Recently, however, scholars have brought a comparative linguistic approach turn to Sino-Western relations, and to the Napier affair in particular. A growing body of engaged scholarship, among which the writings of Lydia Liu must be given special prominence, shows that translation has played a crucial, biopolitical role in the transition from ancient imperial realms to a single, global world divided into a geocultural system of sovereign nation-States. According to Liu, Napier's place in this "semiotic turn in International Politics" was that he launched a war of words to compel the Chinese to recognize the equality of foreigners. Until the time of Napier's visit, no one had ever complained about the term yi in Chinese documents; prior to the 19th century, yi had been equated with "foreigner" or "stranger" in English. Following the disastrous Napier mission in 1834, however, Morrison chose a very different, ethnicized translation of yi. He began equating it with the English word "barbarian," despite objections from contemporaries that yi was not in fact an opprobrious epithet. See *Quarterly Review*, January, 1834, vol. 1, 458. The new translation led directly to an unnecessary "war over words" that poisoned attitudes among both British and Chinese authorities. As part of the series of "unequal treaties" imposed upon the Qing, usage of the term *yi* was banned from currency in official Qing documents by Article 51 of the Treaty of Tianjin (1858). British banned the use of the character yi because in their opinion it was translated as "barbarian," and thus insulting. As Lydia Liu has convincingly argued, the British manufactured the issue to both assert control over the Chinese language and thus assert sovereignty over the Qing dynasty. See Liu, *The Clash of Empires*, 46-52.

behavior as well as for the normalization of Sino-British relations. What Napier's particular legal orientalist approach brings to light, I argue, is an early moment in the universalization of nineteenth-century international law in China – that is, the (failed) imposition of a coerced, commanding treaty to reform China's "un-civilized" international behavior and bring it within the fold of modern inter-state international law. By the same token, his legal orientalist approach also underscores the significance of a naturalized-cum-universalized idea of contract law in the global-cum-imperial expansion of "civilized" international law in China.

Napier pleaded his case for British intervention and the imposition of "civilized" international law in China to Palmerston just prior to the Battle of the Bogue, in the midst of the trade stoppage at Canton. On the one hand, he argued that the British government should not "be ruled by the ordinary forms prescribed among civilized people." His line of reasoning was as follows: "the Tartar Government, being in the extreme degree of mental imbecility and moral degradation, deeming themselves to be the only people on earth, being entirely ignorant of the theory and practice of international law; that Government is not in a position to be dealt with or treated by civilized nations, according to the same rules as are acknowledged and practised among themselves."[68] And yet despite the fact that he viewed China as outside the pale of international law, he claimed nonetheless that China could and should be held accountable for violating international legal and diplomatic norms. In and apart from denying British diplomats their equal rights as official representatives of the British crown, the Chinese government, through its anti-commercial policy, was also in breach of the customary sovereign trading rights

[68] Lord Napier to Lord Earl Grey, August 21, 1834, FO 677/3, no. 11.

of Britain and other foreign nations represented at Canton.[69] According to Napier, those customary commercial rights had been previously recognized by China prior to the mid-eighteenth century, at which point they were unjustly curtailed by the Qing court, and geographically restricted to the port of Canton. That highly restrictive trading policy then became entirely prohibitive when Chinese authorities resorted to trade stoppages, which, in Napier's view, effectively denied foreign trading rights altogether. In this way, he viewed Viceroy Lu's current recourse to a trade stoppage as an "injustice to merchants," and "a cruel and *criminal* measure on the part of a petty tyrant to annoy the merchants, on the score of a dispute which does not immediately effect them…"[70] A coercive remedy to the Viceroy's criminal actions was thus necessary in order to "assert Britain's ancient rights of commerce and enforce the same respect to our country as is received from other states."[71]

China's anti-commercial policy was not only a violation of Britain's sovereign rights to trade, according to Napier. It was also a denigration of the natural individual rights of the Chinese people. The implied source of those innate rights was, to quote from Adam Smith's *Wealth of Nations*, man's natural "propensity to truck, barter, and exchange."[72] In this Smithian vein, Napier observed that "Every [Chinese] man is at work; nobody seen loitering about and idle; and, in fact, every man is a merchant." Despite the restrictive nature of the Canton system,

[69] This was the general claim made during and as justification for the first Sino-British war by John Quincy Adams "[T]he fundamental principle of the Chinese Empire is *anti-commercial*… admits no obligation to hold commercial intercourse with others… [and] utterly denies the *equality* of other nations with itself – and even their *independence."* John Quincy Adams, "Lecture on the War with China," 281.

[70] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7. My emphasis.

[71] Lord Napier to Lord Earl Grey, August 21, 1834, FO 677/3, no. 11.

[72] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: The Modern Library, 2000 [1776]) 17.

moreover, trade with China had flourished, which Napier credited to both British merchants, as well as the industrious Chinese people.[73] What this confirmed in his view was a fundamental disconnect between Chinese state and society: "That the Chinese people are most anxious for our trade...the Tartar Government alone being anti-commercial."[74]

While Napier's appeal to the "civilized" principles of international law did not directly call on the jurists of his day, his claim regarding a state-society disconnect in China implicitly drew on Wheaton's definition of a ("civilized") sovereign state. In *Elements*, Wheaton argued that a sovereign state was the historical embodiment of "civil society." It attained its sovereign freedom, equality, and independence *only* if its citizens had voluntarily entered into a social contract with the state.[75] To the extent that the Chinese government's reputed anti-commercial policy denied its own people their innate rights, the claim could then plausibly be made that no such social contract existed between the Chinese government and its subjects. On that implicit legal theoretical basis, Napier framed his campaign to bring an end to China's anti-commercial and (in Wheaton's words) "anti-social" policy as a struggle over universal – rather than exclusively Christian, European – "civilized" rights. Britain's fight for equality and freedom in China would thus also "emancipate" Chinese subjects from "a most arbitrary system of oppression."[76]

In effect, then, Napier was arguing that China was in violation of two kinds of contracts: the first a customary one that China had implicitly made with Britain and other trading nations, which, in his view, possessed "natural" sovereign rights to trade in China; and the second, a

[73] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7.

[74] Lord Napier to Lord Earl Grey, August 21, 1834, FO 677/3, no. 11.

[75] Wheaton, *Elements of International Law*, 28.

[76] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7.

social contract between the Chinese state and its people. On both fronts, then, we find a pattern of naturalizing and universalizing contract law. As it pertains to the universalization of "civilized" international law, it was from this naturalized-cum-universalized contractual legal standpoint of critique that China was cast as an enemy not just of Britain, but of the whole "civilized" world. China's putative breach of contract with Britain and other "civilized" trading Nations, moreover, begot the prescriptive international remedy proposed by Napier – namely, to contractualize Sino-British/Western commercial, legal, and diplomatic relations.

The civilizing mission of British law and commerce in China, as conceived of by Napier, would thus bring universal equality and freedom to both foreign trading nations in China, as well as to the "oppressed" Chinese people. International law would be its emancipatory vehicle. With that in mind, Napier urged Palmerston to "extort" a "commanding commercial treaty.... which shall secure mutual advantages to China and to Europe." The object of such a commercial treaty should not be territorial annexation, but rather to "secure the just rights, and embrace the interests, public and private, of all Europeans, - not of British alone, but all civilized people coming to trade according to the principles of international law." Napier's universalist legal orientalist discourse prefigured one of the principle international legal justifications made by the British, on behalf of the "whole civilized world," for both the first Sino-British war and the Treaty of Nanjing which concluded it.[77] His proposal for a commanding commercial treaty, moreover, prefigured the (iniquitous) terms of the Treaty of Nanjing – the first of the unequal treaties with China, which was praised by the erstwhile President of the United States John

[77] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7.

Quincy Adams (1767-1848) for ensuring that "future commerce [with China] shall be carried on upon terms of equality and reciprocity."[78]

The grounds for Napier's claim that China's anti-commercial foreign policy amounted to an actionable breach of international law could be directly supported by the theories of nineteenth-century international jurists, Henry Wheaton being a prime example. Such jurisprudential support, however, would not have been as forthcoming had Napier consulted some of the proverbial fathers of international law. Consider Vattel. While he did argue that commerce was a "general obligation incumbent on nations," it was not the primary principle of international legal obligation in his theoretical framework of the Law of Nations. On the contrary, he maintained that self-defense and self-preservation took legal precedence over commercial rights and obligations; accordingly, a nation had a basic natural right to regulate and prohibit trade for reasons of self-defense and self-preservation. He laid out this hierarchical ordering of primary and secondary principles of the law of nations in the following way: "Nations as well as individuals are obliged to trade together for the common benefit of the human race, because mankind stands in need of each other's assistance! Still, however, each nation remains at liberty to consider whether it be convenient for her to encourage or permit commerce, and as our own duty to ourselves is paramount to our duty to others, it one nation finds herself in such circumstances that she things foreign commerce dangerous to the state, she may renounce and prohibit it."[79] In this respect, then, it can be argued that Napier's view of a

[78] John Quincy Adams, "Lecture on the War with China," 281.
[79] Emmerich de Vattel, *The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. Joseph Chitty (London: Stevens & Sons, 1834 [1758]), 39–40.

sovereign's commercial rights and obligations as the first and fundamental principle of "civilized" international law prioritized what in Vattel's theory had been a secondary principle.[80]

Napier's implicit theoretical inversion of Vattel's hierarchy of first and secondary principles of international law was then made explicit in James Matheson's (1796–1878) widely-circulated pamphlet in 1836 entitled, *The Present Position and Prospects of the British Trade with China*.[81] Emboldened by Napier's campaign of intimidation, Matheson, a leading taipan,[82] appealed to London to compel China to lift the "grievous" trading restrictions at Canton and force the Chinese government to adhere to a more "equitable" commercial intercourse.[83] In making his case for an aggressive British foreign policy in China Matheson offered his version

[80] On Commisioner Lin's invocation of Vattel, see Immanuel C. Y. Hsu, *China's Entrance into the Family of Nations* (Cambridge: Harvard University Press, 1960), 123–25; Liu, *Clash of Empires*, 118–20.

[81] On Matheson's misreading of Vattel, see Chen, "Universalism and Sovereignty as Contested Myths," 106-07.

[82] On his significance in shaping British policy in China, see Alain Le Pichon, ed., *China Trade and Empire: Jardine, Matheson & Co. and the Origins of British Rule in Hong Kong, 1827–1843* (Oxford: Oxford University Press, 2007). On Napier's ties with Jardine Matheson, see Michael Greenberg, *British Trade and the Opening of China, 1800-1842* (Cambridge: Cambridge University Press, 1969), 191-93.

[83] James Matheson, *The Present Position and Prospects of the British Trade with China* (London: Smith, Elder, and Co., 1836), 45, 50-51. British merchants' grievances, as they pertain to restrictions on trade and travel in China, can be found in "Petition to King's Majesty in Council" (December 9, 1834), *Correspondence Related to China*, no. 27, 68-72. In the metropole, the London East India Company Association (LEICA), had established a new scale and effectiveness of the China lobby by the 1830s. Under the auspices of prominent London firms like Baring Brothers and Barclay Brothers, the LEICA served as an informal chamber of commerce in London. By 1840, over 100 London merchants subscribed to the LEICA. Through its associations with both the business community and its connections with Parliament (its first chairman, Sir George Larpent, was an M.P.), the LEICA exerted considerable pressure on the British government to intervene in the Chinese economy. See Anthony Webster, "The Strategies and limits of gentlemanly capitalism: The London East India agency house, provincial commercial interests, and the evolution of British economic policy in South and South East Asia 1800-50." In the Committee's first report presented on January 3, 1837, it stated its demands: "First, the expediency of having a Consul at Canton: Second, obtaining a domicile at Canton, not only for the individual merchant but also for his family; Third permission to erect and possess Warehouses for the depot and security of goods: Fourth, permission to trade with the Chinese generally: Fifth, direct communications with the Authorities: Sixth, the privilege of trading at Amoy, as formally, also with Ningpo, and a third port to the northward: Seventh, the occupancy or possession by negotiation, (or purchase, if necessary) of an island on the eastern coast of China where a British Factory might peaceably reside, subject to the laws of its Government, and removed from all collision or disputes with the Chinese subjects or authorities." These demands, all of which would be recognized and exceeded in the Treaty of Nanjing, supposed the use of force to open China's economy. See "London, East India and China Association: reports (printed and MS); and including a copy letter from the Association to Sir Robert Peel, 2 Apr. ... (1841,1844-1845)," FO 705/42. The Committee was quoting here from page nine of their first Report, presented on January 3, 1837.

of a universalist theory of international law, wherein China was accorded a nominal place as an independent sovereign nation. That nominal recognition of China as an international legal subject then allowed him to claim that China was not "exempt from the obligations of the Law [of Nations]." Citing Vattel, he argued that the principle obligation in question was "the [natural law] duty of nations to fulfil their engagements whether express *or tacit*." The fact that trade had been permitted in China for centuries implied, for Matheson, "a tacit agreement on the part of the Chinese, to carry on trade with [Britain] on equitable principles." On that basis, and in light of the most recent trade stoppage during Lord Napier's short-lived tenure as Superintendent at Canton, Matheson then argued that China's anti-commercial policy "amount[ed] to a gross violation of the implied contract between two nations;-one based [quoting Vattel] 'on a tacit consent or convention of the nations that observe it towards each other.'"[84]

Having appropriated part of Vattel's theory to argue that China's restrictive trade policy amounted to an actionable breach of natural principles of international law, Matheson then alluded to Vattel's principle limitation on the "general obligation incumbent on nations, reciprocally to cultivate commerce" as a consequence of a nation's natural right to defend itself in whatever manner it saw fit.[85] He did so by way of referencing Peter Auber, the former EIC secretary, who argued in favor of a pacific course of British policy towards the Chinese. For whatever misgivings the British might have about the Chinese government and the "barbarous" nature of its laws, Auber maintained:

> "Each nation has a right to be governed as she may think proper. No state has a right to interfere with another as independent as herself, or to set herself up as a judge of the conduct of the sovereign, or to constrain him to alter such conduct because it may not

[84] Matheson, *The Present Position*, xxi, 49-50, 32, 41. He referred specifically to the insult and dishonor shown to Napier by Viceroy Lu.

[85] Ibid., 35, quoting Vattel, Book II, Chap 2., Section 21.

> accord with the views of those who voluntarily resort to his dominions. A nation may permit another to trade with her under such conditions only as she may think proper; and where no treaty exists, nothing prevent her at any time she pleases from withdrawing, restraining, or modifying such permission."

As Matheson noted, Auber's view of China's sovereign rights as an independent nation echoed Vattel's position that unless a nation was in violation of its treaty obligations, it could proscribe any restrictions it deemed necessary on foreign trade. Vattel's phrasing was, "if one nation finds herself in such circumstances that she thinks foreign commerce dangerous to the state, she may renounce and prohibit it."[86] China's tacit agreement to carry on commerce with Britain, in Auber's opinion, gave "no perfect right to that commerce."

Matheson's response to Auber's Vattelian objection to a coercive British policy towards China was to change the temporal terms of the debate. China's "original rights… as an independent nation" were not the relevant issue, according to Matheson. Rather, the immediate legal question was "what are the rights of China, *now*; whether her own acts have not restricted and limited those rights and imposed upon her certain obligations[?]" Given the long-standing history of Sino-British commercial relations, Matheson insisted that "China has *long since surrendered such rights*, and is no longer in a position to enforce them, as against the British nation; that her conduct, during the last century or two, has amounted, not merely to a simple permission to us to carry on our trade with her, but has conferred upon us *perfect* rights, such as are accompanied by the right of *compelling* the fulfillment of the corresponding obligations."[87] In this way, Vattel's aforesaid limitation on the general commercial obligation of all nations

[86] Vattel, *The Law of* Nations, 39–40.
[87] Matheson, 33, 35-36. All original emphasis. China had had certain obligations in accordance with "natural principles of justice and the Law of Nations," a natural law principle which held not only for the Law of Nations, but for British municipal law as well – "It is a reasonable and salutary rule of our municipal law, that a party shall always be bound by his admissions, when they have been such as have induced a third party to alter his conduct." Here Matheson is citing, Hearne v. Rogers, 9 B&C. 577. See Ibid., 37.

could be disregarded. Since China refused to acknowledge her present "prescriptive obligation" based on a customary tacit agreement to trade "on equitable principles," Britain had the right to compel her to do so. For Matheson, moreover, Britain's legal right corresponded with its sovereign obligation to protect its foreign nationals trading in China. In short, Britain had "arrived [at] the time when our Sovereign would be bound – bound by the duty he owes his subjects, and authorized by the law of nations – to interfere on their behalf, and protect them from such grievous injuries." [88]

Similar to Napier's general approach to British intervention in China, Matheson's universalist theory of international law was predicated on naturalized ideas of British trading rights in China, on the one hand, and Sino-British contractual commerce, on the other. In this respect, I take his theory to be one normative expression of the contractualization of nineteenth-century international law. What it underscores is the primacy of this private law construct in nineteenth-century international legal thought and practice as a mode of judging state actors and prescribing international legal remedies. That international legal remedy, i.e. the contractualization of Sino-British relations, was becoming all the more urgent, as we will see below, in the context of the "anomalous state of law" which followed the shift from Company rule to metropolitan legal control.

II.3. Towards a Modern Regime of British Extraterritoriality in China. Case Histories in British Lawlessness

For British lawyers and colonial administrators, the issue of British foreign jurisdiction in non-European lands resolved itself into a dual-sided problem of law and order. The first problem

[88] Matheson, 50-51. The Chinese were legally bound, according to Matheson, to continue trading with the British "on terms consistent with the honor of the British nation."

concerned the law of protection – that is, the government's ability to safeguard the life and liberties of British subjects in the "uncivilized" world.[89] This, by contemporary British lawyers' standards, was one of the fundamental duties of the sovereign, as embodied in the oft-quoted constitutional maxim: "wherever an Englishman goes he carries with him as much of the English law and liberty as the nature of his situation will allow."[90] The second problem concerned the criminal behavior of British subjects who, in absence of juridical restraints, could engage in lawlessness on the imperial borderlands with impunity. Such was the opinion of Lord Glenelg, British secretary of state for the colonies (1835-39), who characterized imperial lawlessness in these terms: "Opportunities of uncontrolled self-indulgence and freedom from the restraints of law and settled society, are, it would appear, in all countries, irresistible temptations to the inhabitants of the border land of civilization."[91]

As will be recalled, the British government, in the 1833 Resolutions concerning the Canton trade, recognized both problems of British foreign jurisdiction in terms of the "anomalous state of law" in China. The creation of the Superintendent of Trade and the first British extraterritorial court in China were introduced accordingly as legislative remedies to this dual-sided imperial problem of law and order in China. The two extraterritorial cases discussed below throw light on the inadequacies of that legislative remedy, as well as the contested nature

[89] In 1850, while defending the interventionist foreign policy of his government before the House of Commons, Lord Palmerston offered the following summation of the law of protection, "Just as the Roman in days of old held himself free from indignity, when he could say *Civis Romanus Sum;* so also a British subject in whatever land he may be shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong." As quoted in Giovanni Arrighi and Beverly J. Silver, *Chaos and Governance in the Modern World System* (Minneapolis: University of Minnesota Press, 1999), 235.

[90] Alexander James, *Reports of Cases Argued and Determined in the Supreme Court of Nova Scotia*, vol. 1 (Halifax, Nova Scotia: James Barnes, 1855), 299.

[91] As quoted in W. Ross Johnston, *Sovereignty and Protection: A Study of Jurisdictional Imperialism in the Late Nineteenth Century* (Durham N.C.: Duke University Press, 1973), 14.

of the early post-company regime of British extraterritoriality in China. They also illuminate the interrelationship between the universalization of British municipal law and "civilized" international law in China, which has been papered over in the existing scholarship on Sino-Western relations during this period.

These extraterritorial cases also merit investigation for another historiographic reason. The existing scholarship on British trade and diplomacy during this period has focused almost exclusively on *inter-foreign* tensions and disputes, the culmination of which was the first opium war. My investigation of these two cases seeks to broaden that historical focus in order to draw attention to the inter-related significance of *intra-British* conflicts and tensions in the early constitution of modern British extraterritoriality in China. Those intra-British tensions played out in an ambiguous juridical space – marked by the absence of a contractualized inter-state framework for extraterritorial relations – in which the rights and duties of British foreign nationals, as well as the legal authority and jurisdictional competence of the Superintendents charged with protecting them, was highly uncertain, and vigorously negotiated.

II.3.1 The Innes Case

The first British extraterritorial case under consideration reacquaints us with the British merchant and vigilante, Mr. James Innes. In September of 1836, Chinese Custom-house officers seized one of Innes's cargoes, near the Bocca Tigris, while under the supervision of a Chinese pilot named Acha. They claimed that the cargo in question was in breach of Chinese revenue laws, and that Innes, through Acha, was attempting to smuggle the goods into Canton. Upon the seizure of his merchandise, Innes petitioned the Governor of Canton for the restitution of his

property. Following notification that the Governor would not restitute his loss, Innes gave notice to the Hong merchants that he would reprise the loss himself.[92]

Once apprized of the situation, the British trade Commission in China immediately condemned Innes threat of reprisal against the Chinese government as "fatal and lawless." An internal debate in the Commission then ensued over the proper legal course of action by which to restrain Innes, which pitted the ranking Superintendent, G.B. Robinson, against his deputy, Captain Charles Elliot.[93] Legal matters were complicated for the Commission, in the first instance, by the fact that Innes was currently residing in Macao, the Portuguese settlement, which was beyond the jurisdictional control of the British (which did not extend beyond Canton). The irony of the situation was that the Superintendents themselves were currently residing in Macao, having been denied residence in Canton following Napier's botched campaign to establish direct diplomatic relations with Chinese authorities. Elliot viewed Innes's threat of a personal war against the Chinese government as a piratical act "according to the principles of International Law." He therefore insisted that that a request be made to the Governor of Macao to have Innes arrested on "the ground that Mr. Innes had menaced from and was probably making preparations...for the perpetration of a deed tantamount to 'piracy.'" Further, Elliot recommended that upon his arrest, Innes should be delivered to British officials, at which point he should "be called upon to give sufficient pledges to keep the Peace…or failing to do so,...[he should be] take[n]...away from this Country, and...sent to England, as a person arrogating to himself the Royal functions, first by declaring, and the persisting in the determination to wage

[92] These events recounted in letter from James Innes to G.B. Robinson, First Superintendent, July 23, 1835, FO 230/71; Viscount Palmerston to G.B. Robinson, June 6, 1836, FO 230/71.

[93] On the recurrent conflict between Elliot and Robinson, and within the Commission of Superintendents more generally, see Glenn Melancon, *Britain's China Policy and the Opium Crisis: Balancing Drugs, Violence, and National Honour, 1833-1840* (Burlington, VT: Ashgate, 2003).

war with the Chinese government and people, to the great hazard of the lives and properties of the King's Subjects in this Country."[94] In effect, then, Elliot was arguing that Innes, as a result of his piratical threat should be forcibly denied the right to trade in China.

The implications of declaring Innes a pirate went well beyond the jurisdictional scope of British legal authority in China. He would, in effect, be recognized as a universal criminal – a *hostis humani generis* (an enemy of all mankind), whose violation of international norms permitted (at least theoretically) any nation to seize and punish him according to their own respective municipal laws against piracy. What Captain Elliot's legal argument against Innes presupposed, then, was a formal understanding of war as between two sovereign states; personal war and private reprisals were, within this inter-state legal framework, illegal. Hence, Innes's piratical threat was not just a violation of the implicit extraterritorial contract between the British state and its subjects, which would render him an enemy of the state. It was also a violation of the recognized norms of international law, which would render him a universal enemy of the whole "civilized" world.

Robinson, however, opted for greater forbearance. Seeking to avert the coercive, preemptive measures recommended by Captain Elliot, Robinson appealed instead to Innes's allegiance to the Crown. He notified Innes that "the line of proceeding you propose to adopt is in the last degree unlawful, dangerous, and fraught with probable consequences of the most disastrous description not merely to yourself, but to the lives and properties of the King's Subjects in this Country, and I must…enjoin you in the most solemn and formal manner, upon

[94] Captain Charles Elliot "Minute," August 1, 1835, FO 230/71. Palmerston would later inform Elliot that British Superintendents did not in fact have the authority to expel British subjects from China, a power previously possessed by the Company's Supercargoes who could remove unlicensed traders from China. Since licenses were no longer used by the British Crown Palmerston argued that the power of expulsion no longer existed. See Viscount Palmerston to Captain Elliot, November 8, 1836, in *Correspondence Related to China*, 129.

your allegiance to the King...to refrain and desist..." He then made the case to Innes that since his "violent and illegal action" may lead to a "loss of life," it would be viewed as an offense "of the highest and most criminal nature" under "the Law of the Land of which you are a Citizen." Without specifying the criminal nature of such a lawless reprisal, he requested that Innes pledge to "keep the peace," and promised to submit Innes's case for restitution to the home government.[95]

Innes did not take the impugnation of his loyalty and allegiance to the King lightly. He countered Robinson by insisting "there is not a Subject of His Majesty's now in China more loyal, or who will go greater lengths to prove it than myself." With that said, he proceeded to mobilize this British discourse of loyalty and allegiance to make the case for the justifiability of his personal war with Chinese authorities in order to protect his property rights: "I do not hold it an Act of loyalty to His Majesty to surrender (without the severest struggle) the goods of His Majesty's Subjects to His Majesty's Enemies." Innes's fight for justice, as he framed his threat of reprisal, was on two fronts in China – one commercial, the other diplomatic – but with the same enemy. Because Sino-Western commercial and diplomatic relations were regulated by "the ring of Hong Merchants, and venal under Officers," redress was impossible, in Innes's estimation. He declared: "I am done with the Chinese government! and I am resolute in a line of recovery perilous and of bad consequences! Can you His Majesty's Servant point out a mode (consistent with preservation of property) by which this is to be avoided?" As to Robinson's pledge to "lay the whole affair before the Home Government[,]" Innes countered, "It is too distant![96] My money affairs will not permit it!!" And yet for all his blustering rhetoric, he promised to abstain

[95] Sir George Robinson to James Innes, July, 30 1835, FO 230/71.

[96] At the time it took about six months for dispatches to travel from China to London and back again.

from any act of reprisal if Robinson agreed to make his case for restitution "a subject of *demand* on the Chinese Government the first time you legally approach them."[97]

Innes made good his promise, and finally withdraw his threat of reprisal, once Robinson notified him that the recovery of his property would, per Innes's request, be made "a subject of *demand*" on the Chinese authorities.[98] Wishing to avoid the diplomatic missteps of Napier, Robinson elected to communicate Innes's claim for restitution in a petition through what he called "the Old Channel" – by which he meant the appointed Chinese intermediary for foreign communications at Macao, Keun-Min-Foo. His petition first assured Keun-Min-Foo that Innes would "abstain from those further measures (which he may have it in his power to take) for reimbursing himself" and that neither Britain nor its subjects "wish[ed] to infringe the laws of the Empire or evade [its] legal duties…" That formal recognition of Chinese sovereignty notwithstanding, Robinson pleaded Innes's case that "a British Subject has been injured and aggrieved, and has appealed in vain for justice and redress to the Officers of the Imperial Government."[99] This and subsequent petitions for restitution on behalf of Innes did not come of anything, which Robinson, echoing Innes's diatribe of the available diplomatic channels in China, blamed on the Chinese "custom" to "evade all inquiry, equivocate and procrastinate."[100]

Robinson's condemnation of Innes's fatal threat notwithstanding, he ultimately sided with Innes regarding the "unjustifiable seizure" of his property. By the same token he argued

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[97] James Innes to G.B. Robinson, July 31, 1835, FO 230/71.

[98] G.B. Robinson to James Innes, August 7, 1835, FO 230/71. Original emphasis.

[99] G.B. Robinson to Keun-Min-Foo, August 1835, FO 230/71.

[100] Sir G.B. Robinson to Viscount Palmerston, November 20, 1835, in *Correspondence Relating to China*, no. 44, 102. Charles Elliot and Third Superintendent, A.R. Johnston, of the opinion that Keun-Min-Foo deliberately misrepresented the facts of the case to the Viceroy. Also consult their (undated) opinions in FO 230/71.

that Innes's plight highlighted the imperative of greater protective measures to safeguard British commercial interests in China against what he considered to be the "customary" lawless actions of Hong merchants and Chinese officials. Those protective measures were especially crucial, in Robinson's view, with respect to the thriving Lintin trade (Innes had been transporting good, through Acha, from Lintin to Canton).[101] By the 1830s, Lintin Island, which lay outside of Chinese jurisdiction, had become a pivotal trading base for the British in Southern China, and, more specifically, a base of operations for British/European opium smuggling.[102] In spite of the fact that trafficking in the drug was illegal according to Qing law, the long-standing existence of the illicit trade had established it as a de facto custom for British officials. Without any mention of the opium trade in particular, Robinson explained to Palmerston the general significance of the Lintin trade in these terms: since it is "connected with the safety and facilities of transshipment of goods outside the port [i.e. Canton], *a system now carried on to a vast extent, and so universally practised, that it may well be considered an established custom*. It is, indeed, of most vital importance to cherish and protect this privilege, if it can so be termed, and to check the lawless outrages of a set of [Chinese] miscreants, from circumstances daily increasing in strength and numbers, who are perhaps in the pay of Mandarins…"[103] Following from our

[101] Note: Robinson subsequently moved the British Trade Commission's base of operations, in early December 1835, to a cutter called "Louisa," which was anchored just off Lintin.

[102] Hunt Janin, *The India-China Opium Trade in the Nineteenth Century* (Jefferson, N.C.: McFarland & Comp., 1999), 24, 50.

[103] Sir G.B. Robinson to Viscount Palmerston, November 20, 1835, in *Correspondence Relating to China*, no. 44, 102-103. My emphasis. Elliot to Palmerston January 2, 1839: Elliot: "It had been clear to me, from the origin of this peculiar branch of the opium traffic, that is must grow to be more and more mischievous to every branch of the trade, and certainly to none more than to that of opium itself. As the danger and the same of its pursuit increased, it was obvious that it would fall, by degrees, into the hands of more and more desperate men, and that it would stain the foreign character in the sight of the whole of the better portion of this people; and lastly that it would connect itself more and more intimately with our lawful commercial intercourse, to the great peril of vast public and private interests." As quoted in *Mirror of Parliament*, vol. 3, 2412. Captain Elliot viewed the opium trade as a moral scourge not only on the British crown, but also, from the standpoint of the Family of Civilized Nations,

previous discussion of nineteenth-century "civilized" international law, the implication of Robinson's statement concerning this "established [trade] custom" was twofold: first, as a recognized legal custom, it could then be viewed as a valid source of international (i.e. Sino-British) law; and second, and following from Robinson's formal recognition of Chinese sovereignty, China, as a (nominal) subject of international law, could be held accountable for violating customary international trade law. On those customary legal grounds, then, he urged Palmerston to deliver a "prompt and vigorous" response to the "unjustifiable seizure" of Innes's property.[104]

In the wake of Napier's diplomatic imbroglio, however, Palmerston was not prepared to authorize any type of "vigorous" British measure to deliver justice to Innes. And while he withheld his final judgment on the affair until the home judiciary had reviewed the case, he issued the following provisional instructions to the Commission. With respect to Innes's claim for restitution, a claim fraught with "considerable difficulty," Palmerston advised Robinson to "avail [himself] of any suitable opportunity to press upon the Chinese Authorities, the restoration of the property in question, unless those Authorities can show that the goods were seizable by the Custom-house regulations, in consequence of being found in the place where they were seized."[105] Furthermore, he instructed Robinson "to endeavor to prevail upon them to put a stop

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"discreditable to the character of the Christian nations, under whose flag it is carried on." As quoted in Maurice Collis, *Foreign Mud*, 230. Elliot also remarked: "And all these desperate hazards have been incurred…for the scrambling and, comparatively considered, insignificant gains of a few reckless individuals, unquestionably founding their conduct upon the belief that they were exempt from the operation of all law, British or Chinese." *Mirror of Parliament*, vol. 3, 2412.

[104] Sir G.B. Robinson to Viscount Palmerston, November 20, 1835, in *Correspondence Relating to China*, no. 44, 102-103. My emphasis.

[105] Viscount Palmerston to G.B. Robinson, June 6, 1836, FO 230/71. The archival records do not indicate any kind of resolution in Innes's claim for restitution from Chinese authorities, despite petitions by Robinson and other Superintendents made on his behalf. Those petitions and communications with Innes are contained in FO 677/4.

to such acts of extortion, by causing their own regulations to be strictly enforced." Having said that, Palmerston noted, "I cannot abstain from expressing to you the surprise with which His Majesty's Government learned Mr. Innes's intentions, - intentions which cannot be too strongly condemned; and which, if carried into execution, would have rendered Mr. Innes liable to the penalties of piracy. If Mr. Innes alone were concerned, he might be left to abide by the consequences of his own violence, but the proceedings which he threatens to adopt, would expose to inconvenience and danger the British subjects resident at Canton." In this way, Palmerston took Captain Elliot's view of Innes's threat of reprisal as an act of piracy, which, according to Palmerston, must be "prevent[ed]…by all legal means."[106]

Upon reviewing the Innes case, the home judiciary essentially confirmed Palmerston's view: The Law Officers considered Innes's threat of reprisal, were he to go through with it, as an act of piracy.[107] Palmerston then advised Captain Elliot to notify Innes of the Law Officers' opinion on the criminal nature of his threat, such that "if he should persist in carrying his former intentions into execution, he will be abandoned by the British Government to the fate which such a course will probably bring upon him; and further, that the commander of any of His Majesty's ships which may fall in with him, will be bound to act towards him as the Naval Instructions require commanders of His Majesty's ships of war to act towards pirates whom they may

[106] Viscount Palmerston to G.B. Robinson, June 6, 1836, FO 230/71.

[107] Law Officers (Dodson, J. Campbell, R.M. Rolfe), September 17, 1836, FO 83/2247. Prior to the late nineteenth century, the Foreign Office did not have its own legal advisors. Law Officers comprised of the Attorney-General and the Solicitor-General of England. Attorney-General and solicitor-general were the two principal Law Officers, but there was also a Queen's advocate up until 1872, the Law Officer who specialized in questions concerning international law. Appointments changed with each new government, went to top barristers of the governing party. For a general overview, see Ross, *Sovereignty and Protection*, 297-99. Note: British Law Officers did not originate extraterritorial rules and regulations, nor did they advise on matter of pure policy. For a general historical background of the Law Officers, see J. Edwards, *Law Officers of the Crown* (London: Sweet & Maxwell, 1964).

meet."[108] And while Palmerston differed with Elliot over the issue of preempting Innes's act of reprisal by expelling him from China, both viewed the law of protection (i.e. extraterritoriality), not as a necessary right, but as a privilege, which could be denied to British subjects under extenuating circumstances.

For all the critical attention paid in the existing literature to the Western imperial instrumentalization of extraterritoriality in China (and other non-European lands) as a means to protect foreign nationals and commercial interests, the British remedy to Innes's personal war with Chinese authorities throws lights on another dimension of this modern imperial legal instrument – namely, that it could be deployed by British authorities to control lawless merchants and bring them with the province of British and/or international "civilized" law. And while British officials in China would hear from Innes again under different unlawful circumstances, Palmerston's threat of removing his protective rights and extraterritorial privileges ultimately worked in this instance, as Innes resigned himself to petitioning the Chinese government for restitution through the customary diplomatic channels.[109]

II.3.2. Keating v. MT&Co.

The second case under consideration involves a commercial dispute between Mr. Arthur Saunders Keating, a British merchant of Canton, and Messrs. Turner & Co. (MT&Co.), a British firm out of Canton. In early January of 1835, the latter submitted a claim to the British Trade Commission in China against Keating in the amount of $300. MT&Co., owners of a vessel

[108] Viscount Palmerston to Captain Elliot, November 8, 1836, *Correspondence Relating to China*, 126.

[109] Note: The archives indicate that despite such petitions made on behalf of Innes, Innes never did receive restitution for the seized property. See FO 677/4.

called the "Planter," claimed the aforesaid $300 to be the balance owed to them on the time of delivery for freight on a cargo of rice consigned to Keating.[110]

Keating acknowledged that the Planter had duly delivered the cargo in question, and that he had in fact retained $300 from the amount of freight. In his defense, he claimed that his rice, after having been landed at Canton, was secured by the Hong merchant Mowqua for the sum of $900, which Keating paid. Subsequent to that payment Keating's rice was then illegally made subject by Mowqua (into whose godown Keating had deposited the cargo) to a charge of $300 for port charges and "Linguists and Compradores Fees."[111] Mowqua refused to let Keating remove his rice until he paid that further sum of $300, which Keating resisted. He claimed that $900 was the only sum lawfully demandable by the Chinese authorities, and that he was the victim of an act of extortion from Mowqua. Keating then proceeded to argue that, on the one hand, the additional port charges and "Linguists and Compradores Fees were illegal, on both ship and cargo, citing an imperial edict in June of 1833, which abolished the port duties in the case of rice ships was exempt from tax, and an imperial edict in the same month, which abolished the Linguists and Compradores Fees.[112] On the other hand, he also argued that if one party was to

[110] Law Officers opinion, September 17, 1836, FO 83/2247, no. 11.

[111] It is not entirely clear from the records of the case how the port charges and Linguists and Compradores Fees respectively made up the $300 in question. On the one hand, Keating stated, "Messrs. Turner and Co. state that they have made 'a bargain' with a Hong merchant to secure their ship for $900, given that the going rate was $1200 (for port charges). $300 was thus not paid to the Hong Merchant securing the ship for the "Linguists and Compradores Fees." When the Mowqua was applied to, to make up the deficiency on the port dues between the amount bargained for and that which was required from the Hong merchant securing the ship, he claimed from Keating the difference. Keating then argued that "Rice, an article notoriously favoured and free, is liable to the deficiency between the amount which must be paid on all rice ships as port charges, and that in my case, "bargained for" by the Agents of the Ships. See Keating to MT&Co., January 10, 1835; Keating to Deputy Superintendent, A.R. Johnston, February, 17, 1835, FO 230/70.

[112] Both Imperial edicts are translated and reprinted in Keating's correspondence to Deputy Superintendent A.R. Johnston, March, 2, 1835, FO 230/70, no. 1 & 2. Also proclamations of illegality of extortion by the Hoppo, no. 2, July 5, 1833. See also, the Imperial edict abolishing all "outer port Fees," which is reproduced in *The Canton Register*, June 14 and 15, 1833.

bear those illegal charges, it should by the owners of the ship, rather than the consignee of the "free" rice.[113]

Keating concluded his initial plea to the Commission by placing his dispute with MT&Co. in the broader context of the lack of British extraterritorial safeguards for "free" commercial enterprise in China. "There is," Keating lamented, "unfortunately no public authority representing Great Britain, in Canton, through whom I might make my complaint to the evasion of the laws by the Hong Merchants, certain that, by so doing, I should arrive at protection and justice. In the absence of such, I beg respectfully to represent that I am borne out, in the course by me adopted, as the only one by which I can protect my property, and that of others consigned to me, from a charge to which, neither in law or in justice, can it be deemed liable."[114] This was more than just a description of what was then referred to as the "irregular" or "anomalous" state of Sino-British relations prior to the establishment of modern consular jurisdiction in China in 1842. It was also an implicit swipe at the Commission's inability to protect British property rights – an inability, which, in Keating's view, made his personal struggle against Chinese injustice a justifiable imperative that took precedence over the claim against him by MT&Co. Following much deliberation, the Commission acknowledged that the extortion on the part of the Hong merchant as a clear injustice done to Keating. And yet, the Commission's acting Secretary, Edward Elmslie, stated to Keating in no uncertain terms that that injustice was "a wrong done to you by the Chinese, and it is to be remedied by the Chinese, not by the English." Though Keating had "strong ground to complain against the Chinese in this matter" the Commission

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[113] Keating to MT&Co., January 10, 1835, FO 230/70; Keating to Deputy Superintendent, A.R. Johnston, February, 17, 1835, FO 230/70.

[114] Keating to A.R. Johnston, March, 2, 1835, FO 230/70.

insisted that MT&Co. had made a "perfectly fair claim upon [him]." According to the terms of the contract between MT&Co. and Keating, the former had "performed all that it was contracted they should perform," and Keating had no "just ground for the detention of part of the freight" due to MT&Co.[115] That Keating had suffered a "great injustice" did not change the fact that he was, in the Commission's view, in breach of contract. His refusal to pay his debt, Elmslie told Keating, was "a much more gross degree of injustice…than is now done to you by the Chinese authorities if they refuse to give your redress." After handing down its judgment on the dispute, the Commission then formally enjoined Keating either to submit the case to further arbitration at Canton ("by Mercantile Gentlemen on the Spot"), or forthwith to pay the Balance of the freight due to MT&Co. Separately, he was advised to petition the Chinese government "in the usual manner" i.e. as channeled through the Hong merchants.[116]

Keating's responded by rejecting the Commission's proposed mode of adjustment,[117] and insisting upon his "just right" to resist the unlawful charges to which his "free" rice had been subjected. As to the Commission's suggestion that Keating should petition the Chinese government, he insisted upon the uselessness of such recourse "[i]n the state in which we are with the Chinese." Inasmuch as Sino-Western diplomatic and commercial channels were both regulated by Hong merchants, Keating declared: "I need not again point to you the utter inexpediency and futility of all appeal to the local officers of Canton, the very men whose object it is to continue the present wretched and unjust system. The evidences in the case must be the

[115] A.R. Johnston to Keating, March 22, 1835, FO 230/70.

[116] Edward Elmslie to Keating, April 8, 1835, FO 230/70.

[117] Keating did, however, offer to refer the dispute to the framers of the Charter between him and Turner & Co. in Batavia (the de facto capital of the Dutch East Indies). This proposal was subsequently rejected by the Commission on the grounds that it was the most inexpedient option; that there were as complete means of determining the dispute in China as there could by any possibility be in Batavia; and lastly the Superintendents felt it would be at once disrespectful to the British Mercantile Community in Canton. See Elmslie to MT&Co., July 1, 1835, FO 230/71.

culprits themselves, the Hong Merchants, who connive at the plunder which in fact they cannot oppose, and I think I need not add that we do not now require proof of the duplicity of these people, in all cases in which foreigners can be injured and the Chinese officer shielded and protected in their extortions."[118] Having ruled out the possibility of a Chinese remedy in the matter, and with the Commission decidedly in favor of MT&Co's claim against him, Keating was left to fend for himself.

With no formal power to compel Keating to submit to arbitration, the Commission resorted to two lines of "gentle" persuasion. First, they notified Keating that if he continued to refuse any mode of adjustment, they would pay his debt, at which point he would become a "Debtor to the Crown." In addition, they declared that they would "give Public Notice, that any Persons thinking fit to have any commercial transactions with you [Keating]…must conform to the understanding that the Superintendents will afford no facilities for the adjustment of any disputes, which may take place with you in the course of such transactions, until…your debts to the Crown are liquidated."[119] Without denying Keating the right to trade in China as such, the Commission, by withdrawing any means of recourse for parties entering into a business transaction with Keating in the event of a dispute, was essentially threatening to ostracize him from the mercantile community until he paid his debts in full. In this respect, the Commission stated its intention to take its case to the British/European mercantile court of public opinion in China.

Upon receiving notification of the Commission's planned interventions on behalf of MT&Co., Keating became increasingly indignant. Whereas he had previously justified his

[118] Keating to Elmslie, May 29 1835, FO 230/70.

[119] Elmslie to Keating, May 1835, FO 230/70.

actions on account of the lawlessness of the Hong merchants, he now protested that it was the Superintendents who were acting unlawfully, claiming they possessed no legal authority to interpose upon the behalf of British subjects. He first pointed to the fact that the British Legislature had only given the Superintendents powers appertaining to criminal and admiralty jurisdiction. Because the case in question was a civil dispute, the Commission had no "juridical power…of any kind" in the matter. Setting the Superintendents' lack of civil jurisdiction aside, he then argued that had the civil dispute originated in England, he would have been granted legal counsel or assistance of some kind – a "fair presumption" in cases of civil arbitration, which was not made available to British subjects in China. In regards to the Commission's threat of making public the circumstances surrounding his case, Keating claimed that neither the British Crown nor the constitution sanctioned such interference. As such it amounted to an "arbitrary and tyrannical" exercise of powers, which would render the Commission a "Star Chamber." On these various legal grounds, then, he pleaded with the Commission to "reflect…[on] how far you can be justified to yourselves, or your country, in arrogating to yourselves powers of so awful, overwhelming, and unheard of kind as those you now threaten me with."[120]

That the Commission's lacked civil jurisdiction over British subjects was not the only relevant legal issue for Keating. He also challenged the Commission's public legal authority in China on international legal grounds. First, he protested against its assumption of legal and jurisdictional powers in light of the Superintendents current residence in the Portuguese Settlement of Macao. The fact that the Commission had addressed letters to Keating from its base of operations in Macao, rather than from Canton where they were granted criminal jurisdiction, invalidated the Superintendents' authority inasmuch as the Portuguese government

[120] Keating to G.B. Robinson, Captain Elliot, and A.R. Johnston, June 11, 1835, FO 230/71.

only recognized them "as individuals" rather than "in any official or public character." Second, and in tension with this first claim, Keating argued that the Superintendents' authority was "unrecognized by the Government of China in whose dominions the Superintendents *should* reside", and, as such, they had no jurisdictional authority in Canton to begin with. Either through convenient disregard or ignorance of the fact that Chinese authorities had requested that the British appoint an official to manage trade following the abolition of the Company's monopoly, the premise of Keating's second protest was the international legal principle of consent[121] – without which, Keating claimed, British Superintendents could only be viewed as an "unlicensed power" in China.[122]

For fear that Keating would publicly challenge its authority as officers of the Crown, the Commission ultimately backed down from its threat to make public the circumstances surrounding his dispute with MT&Co. It followed through, however, with its threat to make Keating a debtor of the Crown.[123] Upon doing so, Robinson then acknowledged to Palmerston that the Commission had adopted a legally controversial course of action. He proceeded to defend it as necessary on the grounds that abandoning the Superintendent's "right to interfere" would mean "seriously jeopardising *national interests* of considerable importance." In elaborating that position to Palmerston, Robinson first noted that the guiding laissez-faire principle of the Commission's policy vis-à-vis British subjects was to deliver "the least degree of interference that may be requisite for the ends of needful justice and security." The

[121] The apposite contemporary reference was Chief Justice Marshall's opinion in the Mcfaddon case: "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136-37 (1812).

[122] Keating to G.B. Robinson, Captain Elliot, and A.R. Johnston, June 11, 1835, FO 230/71.

[123] Elmslie to Keating, June 17, 1835, FO 230/71.

Commission's relaxation of this general rule to "fix the principle of liability" on behalf of MT&Co. was intended to "set aside the mischievous impression that every British subject at Canton is at full liberty, in the case of a commercial dispute, either to concede or to refuse to submit his right to detain a sum of money claimed by another, to fair means of inquiry and determination." Inaction on the part of the Commission, according to Robinson, would have set an extremely dangerous precedent in British trade relations in China:

> If the idea were to get abroad, that in the actual state of things there were no certain means at hand to constrain an unwilling party wither to submit a commercial dispute to equitable means of inquiry and adjustment upon the spot, or to furnish reasonable security that the matter should be subjected to adjudication in another place …. there would be much reason to apprehend a serious shock to the vast confidence which has hitherto been reposed in the faith and honour of the British trader. And upon the maintenance of that confidence the very existence of this commerce may be thought to depend; for if the native merchant be brought to think that the justice and fairness of the foreigner had failed, it is too probable he would also feel, that all had passed away upon which he could place any dependence."[124]

Controlling the "extensive abuse of confidence" in China by lawless British subjects like Keating was thus imperative, in Robinson's view, in maintaining both the "faith and honor" of British traders, as well as Chinese trust that the Superintendents could actually deliver "justice and fairness" to native merchants. By the same token, he argued that the Commission's ability to protect British commercial interests in China necessitated the right to interfere in private disputes to ensure that British merchants kept their promises.[125] The enforcement of British fidelity in commercial relations was especially crucial in China "in the present conjuncture [i.e. following the abolition of the Company's monopoly]…when an immense trade is thrown open to general

[124] G.B. Robinson to Viscount Palmerston, July 1, 1835, FO 230/71.

[125] Robinson's take on the necessity of making and keeping promises to ensure the Canton trade rested on the notion that modern commercial society cannot function properly without a well-functioning legal mechanism for making, keeping, and trusting promises. Such an interpretation of the foundations of modern commercial society can be found in Hume, conventions of property, exchange, and promises; in David Hume, *A Treatise of Human Nature* ed. David Fate Norton and Mary J. Norton (Oxford: Oxford University Press, 2000).

speculation and adventure." In sum, the implications of the dispute between Keating and MT&Co. went far beyond the relatively insignificant sum of money owed to the latter. For Robinson, the case amounted to a litmus test for British authorities and their management of the confidence economy at Canton.

Robinson's justification of the Commission's right to interfere in MT&Co.'s dispute with Keating was followed by an appeal to Palmerston to establish the necessary "means to oblige a British subject to comply with the demand of another to submit a commercial dispute involving the retention of funds to an equitable mode of adjustment here or elsewhere." In the absence of a British extraterritorial court with civil powers to resolve disputes between British subjects, Robinson called on Palmerston to grant Superintendents "authority to promulgate some provisional scheme of arbitration (in cases of need) by compulsory process."[126] Keating's case was presented as a cautionary tale of British "cases of contumacious resistance to submit to inquiry or adjustment," and Robinson concluded from it that "powers [must]…be given to declare to the British and Native commercial bodies, that subsequently to the date of that modification, no facilities existed for the adjustment of any disputes which might arise in the transaction of business with the recusant parties."[127] This was essentially a plea for Palmerston to retroactively validate the Commission's aforesaid threat to Keating that they would go public

[126] In March of 1835, Captain Elliot recommended a systematic mode for the adjustment of any commercial disputes at Canton. His laissez faire approach was intended to "secure substantial justice between disputants, with the least possible degree of delay, the least possible degree of expense, and the least possible degree of interference upon the part of this Commission." Captain Elliot's "Minute," March 17, 1835, FO 230/71; See also his proposal in March, 3, 1835, FO 677/3, no. 22.

[127] G.B. Robinson to Viscount Palmerston, July 1, 1835, FO 230/71. Keeton, *The Development of Extraterritoriality*, 219.

with the circumstances surrounding his dispute with MT&Co.[128] It should also be read, in tandem with the Innes case, as Robinson's interpretation of the British law of protection whereby extraterritorial privileges could be suspended for bad behavior, only to be restored after the resisting disputant duly submitted to the accepted rules of the game.

The case was submitted for consideration to the home judiciary, and upon review, the Law Officers broke it down into four distinct questions, which corresponded to four sets of legal relations: 1) between Keating and MT&Co.; 2) between Keating and the Hong merchant; 3) between the Superintendents and Keating; and 4) between two "sovereign countries," Britain and China (this fourth question was only considered material, however, if it could be proven that Keating had been a victim of an act of extortion on the part of the Chinese security merchants, and that it was connived at by the local Chinese authorities). The Law Officer's determination that the case was one of "private right" informed their overall handling of the case. On the first question, they ruled that MT&Co. had fully performed their contract and consequently was entitled to receive the whole of the sum due for freight. Keating's refusal to pay the $300 balance thus put him in breach of contract. On the second question, and in clear tension with their ruling in favor of MT&Co., it was judged that the Hong merchant Mowqua, into whose godown Keating had deposited the cargo, was guilty of an act of extortion as he had unjustly demanded from the principal charge a sum ($300) to which he was not entitled. On the third question, it was judged that the Commission had no juridical authority to intervene and make Keating a debtor of the Crown. Since the dispute in question involved a private right, it could not be made subject to public interference in the manner carried out by the Superintendent. The fourth question became a moot point, as it was determined that the private nature of the

[128] Palmerston did not respond directly to this request, and he ultimately withheld his final judgment until the case was submitted to the home judiciary.

commercial transaction, and the lack of evidence of the complicity of the Chinese authorities in the extortion, did not "give any just ground of demand against the Chinese government."[129]

Palmerston, in his role as the final arbiter of the case, hewed closely to the home judiciary's opinion. In his correspondence with Captain Elliot, he acknowledged Keating was in breach of contract, but made clear that since the commercial transaction in question involved a private right, Superintendent Robinson had overstepped his public juridical authority in making Keating a debtor to the Crown.[130] Whereas Palmerston viewed Innes's personal war with Chinese authorities as an immanent threat to the safety of British subjects residing at Canton, and the Commission was instructed accordingly to restrain Innes "by all legal means," Keating's unlawful actions were not of the same order. Nor did his civil disobedience towards the Commission pose a clear and present danger to British commercial interests in China, as Robinson had claimed. As opposed to his decision in the Innes case, then, Palmerston's final verdict was ultimately that Keating's aforesaid unlawful act was of secondary significance with respect to the Commission's unlawful public interference in the matter.

II.4. Contractualizing Sino-British Extraterritorial Relations and the Importance of Chinese Consent

For British officials in China, the Innes and Keating cases exposed the inadequacies of the existing state of British foreign jurisdiction in China.[131] For the home judiciary, those legal

[129] Law Officers opinion, September 17, 1836, FO 83/2247, no. 11.

[130] Viscount Palmerston to Captain Elliot, November 8, 1836, FO 230/71.

[131] Prior to the Foreign Jurisdiction Act of 1843, British extraterritoriality lacked any kind of systematic legal and theoretical framework. This Act, which was prompted by the Law Officers view of the Ottoman situation, attempted to systematize a patchwork individual extraterritorial legal rules and regulations.

inadequacies stemmed from the limited jurisdictional competence of the British Criminal Court in China.[132] Because that extraterritorial court lacked civil jurisdictional authority, there effectively existed no legal clearinghouse for resolving intra-British civil disputes (aside from the most inexpedient remedy of sending a British subject to England to be tried for wrongs committed in China).[133] Furthermore, to the extent that the commercial activities of British merchants and seamen in China were not solely confined to this one Chinese port, the Law Officers recommended the creation of an extraterritorial court with both criminal and civil jurisdictional powers, and broader jurisdictional scope: "The only course which has occurred to us as at all practicable is to establish a Court in China with power to sit in any part of the territories of the Emperor in China in which the local authorities may allow them to sit or within 100 miles of the coast and to give that Court power to adjudicate on all questions civil and criminal arising among British subjects within its jurisdiction subject to an appeal to the King in Council."[134] The consensus here was that a court established in China would be much better suited than metropolitan lawyers in defining British authorities' effective jurisdiction over foreign nationals in China and to make the necessary "alterations or modifications of English law it may be expedient to introduce." Their reasoning was less legal than pragmatic – that it was "a

[132] Law Officer's opinion, FO 83/2247.

[133] Only two cases tried from China were ever tried in England. The first was R. v. Depardo (1807) tried at Old Bailey by a special commission in October 1807. Depardo, a Spaniard, was charged with murdering William Burne with a knife. The second was R. v. Allen (1837). Allen was a sailor of the *Aurora*. He was charged at the Central Criminal Court in November 1836 with stealing three chests of tea while at Whompoa. His defense stated that because he was not on the High Seas at the time, he was not within the jurisdiction of the Court. He was tried and ultimately convicted according to statutes 4 & 5 Will. IV, c. 36, s. 32, where jurisdiction was given to the Central Criminal Court to try offences committed by British subjects on the high seas, and in areas under the jurisdiction of the Admiralty. See Keeton, *The Development of Extraterritoriality*, 71.

[134] Opinion of Law Officers, FO 83/2247.

matter on which persons acquainted with the wants and feelings of the British community in that part of the world [we]re alone competent to offer advice."[135]

The question of the international legality of a British extraterritorial court with civil and criminal jurisdiction in China admitted a separate discussion in the home judiciary of contemporary precedents of European extraterritorial courts in non-European lands. Here the Law Officers pointed to existing European consular courts in the Ottoman dominions, which had been established first through customary usage, and then through formal treaty relations. In both respects, consent for had been established prior to the creation of those consular courts. Following this Ottoman precedent, the Law Officers argued that the establishment of British foreign jurisdiction in non-European lands necessarily required the consent of the non-European polity in question. Previously, Chinese authorities had requested that the British appoint an official to manage trade and exercise control over merchants following the abolition of the Company's monopoly and the dissolution of the Company Supercargoes. This, in the Law Officers view, was sufficient evidence of consent for the passage of the 1833 "Act to Regulate British the trade in China."[136]

That the British had not obtained additional consent for the establishment of a court with civil jurisdiction was prohibitive, for both British lawyers, as well as British politicians. In point of fact, the absence of such consent proved the major stumbling block in the passage of a Bill introduced in the House of Commons in 1838 for the purpose of creating a court with civil, criminal, and admiralty jurisdiction. Opponents of the bill expressed grave doubts as to the international legal basis of such a court in China. In this vein, Benjamin Hawes, a Whig MP,

[135] Ibid.
[136] Ibid. See also, Lord Napier's "Present state of relations between China and Great Britain," August, 26, 1834, FO 677/3.

opposed the bill on the grounds that it "would be most inexpedient and dangerous to our commercial relations with that country, that such a measure… should [not] be allowed to pass the Legislature without having first obtained the ascent of the Chinese authorities."[137] Similarly, James Graham, a Whig MP, opposed the bill on these terms: "International law, past experience, and prudence, in the present state of our relations with China, combine to influence me in refusing my consent to the bill."[138]

In the same year that bill was defeated, and on the same legal grounds, the Law Officers shot down a proposal made by Captain Elliot, the acting First Superintendent, to control "the conduct of lawless British subjects" through a set of police regulations applicable to British-owned vessels and crews in Whampoa (a small anchorage twelve miles downstream from Canton, which served as an intermediate way station between Macau and Canton). Elliot's proposal was precipitated by a disturbance on board the British ship "Abercromby Robertson" at Whampoa, in which, to quote Elliot, "the commander and the officers had been obliged to arm themselves for their own protection, and for the suppression of the disorder."[139] Putting that disorder in perspective, he observed that recurrent conflicts had taken place at the port between crews of British vessels and the Chinese, such that: "Every season since the opening of the trade has been marked by constant scenes of disgraceful and dangerous riot at Whampoa." Acting on what he thought to be the powers vested to him by the Order in Council which had originally

[137] See *Mirror of Parliament*, vol. 7, 5898.

[138] Ibid., 5900.

[139] Captain Elliot to Viscount Palmerston, April 18, 1838, FO 677/3.

created the position of Superintendent of Trade, Elliot attempted to institute the Whampoa regulations "for the preservation of the peace on board the British shipping at Whampoa."[140]

At the request of Palmerston, the question of the legality of Elliot's proposed regulations was then directed to the Law Officers. They concluded that the regulations were not at variance with the laws of England (per Act 3 and 4 Will IV c. 93 sec. 6), but insisted that Elliot himself did not have the authority to establish them. Moreover, they stated in no uncertain terms that such regulations, without prior Chinese consent, were a clear violation of the sovereign rights of China: "We are of opinion that the Regulations….[which would establish] a system of police at Whampoa, within the Dominions of the Emperor of China, would be an interference with the absolute right of Sovereignty enjoyed by independent states, which can only be justified by positive treaty, or implied permission from usage. Under these circumstances, I have to instruct you [referring to Lord Palmerston,] to endeavor to obtain the written approval of the governor of Canton for these regulations…."[141] To the extent that the Law Officers viewed China as an independent sovereign state, British rules and regulations to control merchants and seamen in Chinese territory had to be consistent not only with English law. They also had to be consistent with the territorial rights of China, which only consent from the Chinese government could validate.[142]

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[140] Ibid.

[141] Law Officer's opinion, December 31, 1838, FO 83/2247.

[142] In light of the pervasiveness of the orientalist character of Euro-American legal-jurisdictional discourse of Sino-Western relations – which shaped British views of the necessary retention of jurisdictional control over its foreign nationals in "uncivilized" non-European lands like China – the Law Officers view of China as an independent sovereign state with territorial rights is especially striking. So, too, is the consistency of this particular British jurisprudential view of China. While Law Officers, with different political affiliations, came and went with each new government, the legal-jurisprudential universalism of the Law Officers remained intact, pre- and post-1842. A case, referred to the Law Officers in December of 1858 concerning a question about the law by which contracts entered into by a British subject in China with a Chinese subjects should be regulated, bares out this exceptional jurisprudential consistency. In said case, a Chinese subject sought to eject a British subject from a household

The possibility of obtaining such consent, however, had greatly diminished by the late 1830s, as Sino-British tensions over the illicit opium trade were escalating. By the time Elliot received word of the Law Officers opinion in March of 1839, the issue was a moot point: British trade had already been driven out of Canton.[143] Consent would ultimately have to be manufactured by the British through war and a commanding treaty.

II.5. The Contested Grounds of Britain's "Just War"

Insofar as Sino-Western relations were resting on a powderkeg, fused by the exponential growth of the illicit opium trade, Britain's quiescent policy would not ultimately last long. What

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property in Canton held under the condition of a Chinese lease on the grounds that the lease in question did not fulfill one of the conditions of English law – namely, determination of time of tenure. Mr. Bridges, acting Attorney-General at Hong Kong, adjudicated the case and upheld the eviction on the grounds that: "the Chinese were to be considered beyond the pale of civilized nations, and that therefore such contracts were to be regulated by the law of England. On the one hand, the Chinese property owner's claim demonstrates how English law could, in the context of British imperial jurisdiction in China, be appropriated by native Chinese subjects in order to protect their rights and liberties. On the other hand – and what is crucial for present purposes – is that Mr. Bridge's orientalist decision at one and the same time both denied the international legal personality of China, while recognizing the legal personality and property rights of one of it subjects, by virtue of the applicability of the English law of real property in China. The case was then referred to the Law Officers who took a diametrically opposed view of China's international legal status and the applicability of English property law in China:

> We do not concur in the conclusion of the acting Attorney-General, that the Chinese are to be considered beyond the pale of civilization. In all questions that may come before any British Tribunal in China relating to the ownership or occupation of houses or lands, lying within the dominions of the Emperor of China, the law and custom of China, if they can be ascertained, must govern the decision, unless by the terms of the contract the law or usage or some other country be imported into it; and if in any such case the Chinese law cannot be ascertained, the decision must be governed by the principles of nature justice. There is no pretence for the introduction of the English law of real property.

In effect, the Law Officers were countering the marked tendency to exclude China from the Law of Civilized nations. Now the Law Officers were admittedly silent on the real law; but countered a orientalist system of representation of Chinese law; claiming that the introduction of English law of real property could only be viewed as a violation of said principle. English law, then, did not supersede the territorial law of China (so long as it could be ascertained), and as such, it could not be legally claimed by the Chinese subject to evict the British subject. "It is an universal principle of Law in Europe, that in all questions respecting immovable property, the 'lex loci rei sitae' [the law of the place where the property is situated] prevail; and we think it both right and useful that the same rule should be acted on in the administration of justice in China." Law Officers opinion (A.J.E. Cockburn, Attorney-General, and Sir Richard Bethell, Solicitor-General) to Early Clarendon, December 28, 1855, FO 83/2249.

[143] Viscount Palmerston to Captain Elliot, in China: A Collection of Correspondence Relating to Chinese Affairs, F.O. March, 23, 1839, no. 127. See Ernest John Eitel, *Europe in China: The History of Hongkong from the Beginning to the Year 1882*, 63.

had begun as a trade imbalance favoring China, had changed drastically as a result of the opium trade. To put that change in context: exports of the drug rose from 200 chests per annum in 1729 to 23,570 in 1839, resulting in a crippling outflow of silver. By 1834 the annual silver outflow had reached 30 million taels, which, in a silver-based monetary system, posed dire consequence to the balance of China's domestic economy.[144] Equally troubling for Qing officials was the "social problem" of opium – a growing number of opium addicts were exacting an enormous toll upon the fabric of Chinese society.[145] Following a debate over the best course of action to eradicate the illicit drug traffic – between Qing officials who advocated the legalization and regulation of the trade, on the one hand, and those who advocated suppression, on the other – Emperor Daoguang (1821-50) opted for the latter course of action. He then dispatched the "incorruptible" Lin Zexu to Canton as Imperial Commissioner to suppress the illicit trade and ensure that Qing Imperial law was upheld.[146]

Lin's campaign to eradicate the trade addressed both supply and demand of the illicit drug. Having begun by punishing corrupt officials, and confiscating pipes and opium, Lin ordered the British to surrender all opium in foreign compounds and demanded that Western authorities sign a bond promising to abandon opium trafficking under penalty of death.[147] Captain Elliot, now the First British Superintendent, refused to sign the bond on the grounds that

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[144] Hsu, *The Rise of Modern China*, 172; Spence, *The Search for Modern China*, 151.

[145] Carl A Trocki, *Opium, Empire and the Global Political Economy: a Study of the Asian Opium Trade* (New York: Routledge, 1999), 6. *Both* exogenous and endogenous forces contributed to the popularization and naturalization of opium smoking in China. For an excellent study on the endogenous forces which transformed opium from a medicine to a luxury commodity, see Yangwen Zheng, "The Social Life of Opium in China, 1483-1999," *Modern Asian Studies* 37, no. 1 (Feb. 2003).

[146] Harry G. Gelber. *Opium, Soldiers and Evangelicals: Britain's 1840-42 War With China, and Its Aftermath* (New York: Palgrave MacMillan, 2004), 60-61.

[147] Keeton, *The Development of Extraterritoriality in China*, 166-72.

the punishment was contrary to British justice. To make a long story (told elsewhere[148]) short, Lin's subsequent move to place foreign traders in the Canton factories under house arrest, confiscate and then publicly destroy foreign-held opium in Canton (over 20,000 chests of opium, generally estimated to be worth over $13,000,000), proved to be one of the crucial moment in bringing about the war.[149]

Sino-British tensions, already heated by Commissioner Lin's anti-opium campaign, then escalated over an incident that occurred near Hong Kong in early July of 1839. To relieve the boredom of sitting at anchor, American and British ships docked at the Hong Kong Roads routinely gave their crews shore leave. In Kowloon (a provisioning point located near Hong Kong at the mouth of the Canton estuary), a drunken brawl between six unruly English and American sailors and a group of villagers resulted in the desecration of a Buddhist temple and the death of a Canton resident named Lin Weixi. [150] When Elliot first learned of the tragedy, he went to great lengths to quiet the affair, knowing full well that Chinese authorities would claim jurisdiction and demand the guilty seamen be delivered up for punishment. He convened the Court of Criminal and Admiralty Jurisdiction for the first time, and tried the six suspects aboard

[148] There is an extensive history on the origins of the first and second opium wars in China. For a sampling, see Collis, *Foreign Mud*; Greenberg, *British Trade and the Opening of China 1800–42*; Chang Hsin-pao, *Commissioner Lin and the opium war* (Cambridge MA: Harvard University Press, 1964); Jack Beeching, *The Chinese opium wars* (New York: Harcourt, 1977); Peter W. Fay, *The opium war 1840–1842*; Tan Chung, *China and the brave new world* (Durham NC: Carolina Academic Press, 1978); James M. Polachek, *The inner opium war* (Cambridge MA: Harvard University Asia Center, 1992); John Y. Wong, *Yeh Ming-ch'en: viceroy of liang kuang, 1852–1858* (Cambridge: Cambridge University Press, 1976) and *Deadly Dreams: Opium, Imperialism and the* Arrow *War (1856–1860)* (Cambridge: Cambridge University Press, 1998); and Timothy Brook and Bob Tadashi Wakabayash, eds., *Opium regimes: China, Britain, and Japan, 1839–1952* (Berkeley: University of California Press, 2000).

[149] Nathan Allen M.D., *The Opium Trade: Including A Sketch of Its History, Extent, Effect, etc. as Carried on in India and China* 2nd ed. (Lowell, Mass.: James P. Walker, 1853), 61-62; Glenn Melancon, "Honor in Opium? The British Declaration of War on China, 1839-1840," *International History Review* 21, no. 4 (1999): 859.

[150] Morse, *International Relations*, vol. 1, 237-238, 243-246; Keeton, *The Development of Extraterritoriality*, vol. 1, 143 et passim; *Chinese Repository*, vol. 8, 180-181. Davis, *The Chinese*, vol. 3, 229; Peter Ward Fay, *The Opium War*, 71.

the merchant ship *Fort William* anchored off Hong Kong. Five Seamen were found guilty of participation in the riot – two of them were fined £15 and sentenced to three months hard labor in England, and three were fined £25 and sentenced to six month's imprisonment. The last sailor, Thomas Tidder, was charged with Lin Weixi's murder. The jury, however, decided there was insufficient evidence to convict him, and Tidder was acquitted. (On their return to England, the British Admiralty Court ruled that Elliot had no authority to try them in the first place and all six men went unpunished.)[151]

When Commissioner Lin was apprised of the acquittal, he disavowed it and ordered that food and water be cut off to English merchants in order to force Elliot to surrender the culprit. This proved to be the tipping point for Palmerston. These "violent outrages" against British residents living "peaceably" at Canton, coupled with the "indignity" with which Chinese officers treated Elliot, motivated Palmerston's move to war.[152] On his orders, the Home government sent an expedition to China with three objectives: 1) "to obtain reparations for the insults and injuries offered to Her Majesty's Superintendent and Her Majesty's subjects by the Chinese government"; 2) "to obtain for the merchants trading with China an indemnification for the loss of their property"; and 3) to obtain security that the persons and property of those trading with China, should in future be protected from insult or injury."[153] The British then initiated hostilities in early November 1839, when the Royal Navy sank a number of Chinese vessels in the vicinity of Canton.

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[151] See Opinion of Law Officers, FO 83/2247.

[152] Lord Palmerston to the Minister of the Emperor of China. F.O., London, February 20, 1840. As quoted in Morse. *International Relations of the Chinese Empire*, vol. 1, 870-71.

[153] Note: These objectives were unstated at the time and only subsequently revealed by Lord John Russell, the leader of the House of Commons, in March 1840, following pressure by the Tory opposition. See Glenn Melancon, *Britain's China Policy and the Opium Crisis*, 123.

Unconfirmed reports of Sino-British clashes began to be reported in London in early 1840, and, by early March, Palmerston admitted to the expedition under repeated queries from the Tory opposition.[154] Sensing the vulnerability of the Melbourne ministry on its secretive foreign policy aims in China, the opposition pounced. In March, it initiated a parliamentary debate about the causes and (mis)management of the ministry's war in China. Sir Robert Peel, the leader of the opposition, moved to censure the Melbourne government for its military expedition. That motion failed by a close vote of 271 to 261.[155] A month later, Sir James Graham, who had only recently crossed the floor of the House of Common to sit with the Tories, then moved that the House withdraw its confidence in the ministry as a result of the government's mishandling of military preparations. After three days of debate, his motion was narrowly defeated by nine votes.[156]

Over the course of the three-day parliamentary debate the Whig majority advanced two main lines of justification for military action in China, both of which hued closely to the aforesaid objectives of Palmerston's expedition. The first, that it was Britain's patriotic duty to defend its honor and national dignity against the insults and injuries perpetrated by the Chinese government to British authorities and merchants.[157] The flag, Macaulay argued, "should be the protection of an Englishman, however, remote."[158] The second can broadly be categorized as the

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[154] Harry G. Gelber. *Opium, Soldiers and Evangelicals: Britain's 1840-42 War With China, and Its Aftermath* (New York: Palgrave MacMillan, 2004), 91.

[155] See John Newsinger, "Britain's Opium Wars," *Monthly Review* (October 1997): 38.

[156] Melancon, *Britain's China Policy and the Opium Crisis,* 872-73.

[157] Ibid. Peter Ward Fay, *The Opium War, 1840-1842: Barbarians in the Celestial Empire in the Early Part of the Nineteenth Century and the War by Which They Forced Her Gates Ajar* (New York: Norton, 1976), 160.

[158] As quoted in Melancon, 872.

free trade argument – that is, the economic necessity of the opium trade, which had proved successful in reversing the trade imbalance between Britain and China; without any other alternative means of facilitating "free trade" between the two countries, a ban on opium would have been a devastating blow to the British trading empire, and to Indian trade revenue in particular, which depended on those exports to sustain its economy. Furthermore, as even Graham acknowledged, Britain's disengagement from the trade would only mean that other foreign merchants would move in to take Britain's market share.[159] Shifting the moral responsibility from British supply to Chinese demand, free trade hawks also claimed that Britain could not be held morally accountable for Chinese consumption of the illicit drug (nor for that matter for the Chinese government's inability to put down the trade).[160]

On the other side of the aisle, the Tory minority excoriated the Government for allowing British trade in China to become so dependent on opium and impugned the honor of a war waged to defend the illicit trade. In this vein, Tory MP Sidney Herbert called it a "war without just cause," and that "to maintain a trade resting on unsound principles, and to justify proceedings which [were] a disgrace to the British flag."[161] The young conservative politician and future Prime Minister, William Gladstone, amplified these remarks in his "career-defining" speech on the moral and legal implications of prosecuting a war to defend a contraband trade in a country that forbade its importation.[162] He accused both British merchants and officials of being

[159] *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 691.

[160] Ibid.

[161] *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 748.

[162] Gladstone's zealousness concerning the destructiveness of the drug came from his personal acquaintance with the drug's harmful effects on his sister, who had been prescribed laudanum to help her cope with a painful illness and had become addicted to it. See Hanes, W. Travis III and Frank Sanello, *Opium Wars* (Naperville, IL: Sourcebooks Inc., 2002), 78.

complicit in trafficking the drug, rhetorically asking: "Does the Minister not know that the opium smuggled into China comes exclusively from British ports, that it is from Bengal and through Bombay?" All that was required of the British to "put down this illegal traffic [was]…to stop the sailings of the smuggling vessels." Neither British unlawfulness in persisting in the illicit trade nor the lawfulness of Chinese officials in attempting to halt the trade were in dispute, according to Staunton. Since Commissioner Lin had given the British due notice to put an end to the opium trade, the Chinese government "had the right to drive [the British] from their coasts on account of [our] obstinacy in persisting with this infamous and atrocious traffic…justice in my opinion, is with [the Chinese]; and whilst they, the Pagans, the semi-civilized barbarians have it on their side, we, the enlightened and civilized Christians are pursuing objects at variance with both justice and with religion." On that basis, he claimed, "a war more unjust in its origin, a war calculated in its progress to cover this country with a permanent disgrace, I do not know and I have not read of." Britain's decision to embark on such an immoral and criminal war had rendered the Union Jack "a pirate flag, to protect an infamous traffic."[163]

Just as both sides claimed to be acting in defense of British honor, both hawks and doves invoked international law in their competing claims about the justness of the war. Speaking on behalf of the opposition, Sir William Follet, expressed his "grave doubts whether, considering the peculiar manners of the Chinese, we can apply the conventional rules of European nations to that country, when we, in all our intercourse with China, proceed on the footing that they are not subject to that international law." His reference here was to the anomalous state of Sino-British relations, and specifically to British resistance to Chinese criminal jurisdiction over British

[163] *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 673-948. Fairbank famously called the opium trade "the most long-continued systematic international crime of modern times." See John K. Fairbank, "The Creation of the Treaty System," 213.

subjects, which constituted an exception to the established principle, "*extra territorium ius dicenti impune haud paretur*." British extraterritoriality in China meant, *ipso facto*, that Britain did not recognize China as a subject of international law: "There is no maxim of international law better understood than this, - that foreigners residing in a country are subject to the laws of that country. But you [the Melbourne government] will not recognize that law; and, if you refuse to allow a European to be tried by the Chinese laws,…the Chinese then take steps which, by the laws of Europe, may not be strictly justifiable, such as imprisoning an innocent person." British appeals to international law to vindicate the just grounds of the war in China in light of such unjustifiable acts by Chinese authorities were undermined, Follet argued, to the extent that the British were perpetually in violation of European norms of international law in China (Britain's flouting of Chinese anti-opium laws being the prime example of this violation of Chinese territorial sovereignty): "Although we are violating, continually, the laws of that empire, yet we say that the violation, on the part of the Chinese, of any branch of international law, is a just reason for war." In light of what he considered to be Britain's contradictory international legal position vis-à-vis China, Follet concluded his speech by reiterating his "grave doubts…whether a war, commenced on such grounds, [could] be considered a just one."[164]

In response to Follet, George Staunton, Whig MP, eminent Sinologist, and resident expert on Chinese law, first stated his long-held belief that "whatever opinions we might form of the vexatious or embarrassing character of the laws of [China], we had no right directly to impugn or oppose them." He then admitted that the conduct of British subjects involved in the opium trade had provided "a provocation to the Chinese government, as to deprive us, as a nation, of any right to resent any subsequent proceedings of the Chinese authorities, however unjust and

[164] *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 669-748.

atrocious."[165] Having said then, he then proceeded to argue that the war with China was "perfectly just." His legal reasoning rested on a clear division between law and morality: "the question between us and the Chinese… has nothing to do with the immorality or the impolicy of the [opium] trade; but simply depends on the question how far a breach has been committed of international rights and international law." The framing of the question suggested his view of the contradictory, if not highly ambiguous, position of China in modern international law, which he clarified in the following way: "Though the Chinese are no parties to the specific usages of international law amongst European nations, they cannot but be bound by that law of nations, which is founded on the law of nature and of common-sense."[166] As a nominally recognized subject of a universal(ist), rather than specifically European, Law of Nations, China could then be held accountable for breaches of international law.

The breach in question concerned Commissioner Lin's enforcement of a "new" imperial prohibition on opium. Prior to Lin's arrival at Canton, the lack of Chinese enforcement of "the laws against the importation of opium into China" effectively meant that said laws "were in a state…of abeyance." In a similar vein, Stanton claimed that, given the complicity of corruptible Chinese authorities in conveying opium, it could not be expected that opium traders would respect Chinese laws when those laws "were so little respected by the Chinese authorities themselves." Following an assessment of what the laws in China actually were at the time of the crisis, Staunton concluded that when Lin arrived at Canton, "there was absolutely no law

[165] Staunton, *Corrected Report of the Speech of Sir George Staunton*. 9, 10. Staunton denounced the "immorality" of the opium trade, and hoped for its eventual suppression altogether, along with the "evils…which have occurred in the prosecution of the opium traffic." To that end he argued that the suppression of opium trade could only come about through co-operation between China and Britain, the necessary basis of which was a national treaty between the two Governments; otherwise the opium trade will, in fact, only flourish, and "become every day more and more piratical and buccaneering in its character." Ibid., 10, 15.

[166] Ibid., 6-7, 11.

authorizing the confiscation of goods, under any circumstances, outside the port." In this way, China's recent and unexpected enforcement of its anti-opium laws infringed on the rights of foreign merchants, who had placed "faith in the old laws" and their customary lack of enforcement. That Lin had threatened death to any merchant belonging to an opium ship, and forced foreign merchants to sign a bond subjecting themselves to this new law of terror constituted a "flagrant injustice, the extreme atrocity of the country.[167] This breach of the international rights of foreign merchants then entitled the British government, in Staunton's view, to seek "reparation for the outrages" committed against its subjects and to resort to "hostilities in case that reparation is refused."[168]

Staunton's justification of the "justness" of military intervention in China articulated a natural law framework of international law to a distinctly legal positivist framework that separated the moral issue of the illicit opium trade from the formal issue of China's putative breach of British traders' customary rights to trade in China. Within that eclectic legal

[167] "The measures of the Imperial Commissioner Lin, were so totally unprecedented in the history of our Chinese commerce." See John Slade, "Narrative of the late proceedings and events in China," Canton Register Press (Bristol Selected Papers), 1839. Palmerston acknowledged: Because Lin had "put down the opium trade by acts of arbitrary authority against British merchants – a course totally at variance with British law, totally at variance with international law." Thomas Macaulay, the Secretary of State for War, acknowledged, on the one hand, that the Chinese government "had a right to keep out opium, to keep in silver, and to enforce their prohibitory laws, by whatever means which they might possess, consistently with the principles of public morality, and of international law; and if, after having given fair notice of their intention, to seize all contraband goods introduced into their dominions; their seized our opium, we had no right to complain." On the other hand, however, "when the government, finding, that by just and lawful means, they could not carry out their prohibition, resorted to measures unjust and unlawful, confined our innocent countrymen, and insulted the Sovereign in the person of her representative, then…the time had arrived when it was fit that we should interfere." See *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 718-720. .

[168] Staunton, *Corrected Report of the Speech of Sir George Staunton*, 12-14. According to Staunton, the failure to hold China accountable to its breach of international law also set a dangerous precedent in other parts of British empire: "Let it finally be recollected that our high position throughout the eastern world is mainly founded on the moral force of public opinion. If we submit to such outrage and commercial degradation in China, without any attempt at vindication, the day is not far distant when the consequences will be visited on our great empire in India, and our political ascendency there will be fatally undermined." Parliament should remember that the entire British Empire was founded on prestige. If they submitted to insults from China, British political ascendancy would collapse." Ibid., 14-15.

framework, opium could be cast as legal property, rather than contraband; and British opium traders could be cast as injured subjects, rather than pirates. The universalist quality of Staunton's legal framework accorded a nominal place to China as an independent nation with sovereign rights and obligations, which then allowed him to claim that Commission Lin's anti-opium campaign amounted to an actionable breach of international law – one that could be remedied only through a treaty accompanied by "a competent physical force."[169]

Viewed alongside the universalist legal arguments for an aggressive British foreign policy in China, as articulated by Lord Napier and James Matheson, what we see, then, is a pattern of legal justification premised on a naturalized idea of customary British trading rights in China, in particular, and the contractual nature of "civilized" international commerce, more generally. It was this "privatized" pattern of legal justification that Lord Melbourne implicitly expressed when he confirmed, in April of 1840, the British government's decision to "demand reparation for the injury done to the property of British subjects."[170] And it was this "privatized" pattern of legal justification, I have argued, that characterized the pre-treaty universalization of "civilized" international law in China.

[169] Ibid.

[170] *Parliamentary Debates*, 3rd ser., vol. 53 (1840), col. 718-720.

Chapter III
The Liberal Grounds of Legal Orientalism-Positivism

This chapter offers a critical investigation of the discursive affinities between the British legal orientalist critique of Chinese law and the English legal positivist critique of the English common law tradition. These critical legal discourses mobilized the same tropes about the putative deficiencies of Chinese law, on the one hand, and those of the English common law tradition, on the other: both were cast as "arbitrary," "irregular," "uncertain," "corrupt," and "despotic" in order to deny each the status of law, and, on those common legal grounds, to prescribe congruent domestic and international "universal" legal remedies. As discussed in previous chapters, this legal orientalist discourse was borne out in British appeals to justify the retention of British jurisdiction over British foreign nationals in China; following the shift from Company rule to metropolitan legal order (1832/33) and leading up to the first Sino-British opium war (1839-42), legal orientalism underpinned British appeals to normalize the "anomalous state" of Sino-British/Western commercial and extraterritorial relations through the international remedy of treaty law. In the historically concurrent context of England, this critical legal discourse was borne out most paradigmatically in the practical and theoretical works of Jeremy Bentham (1748-1832), who prescribed an all-comprehensive code, the Pannomion, in order to remedy the deficiencies of the English common law.

My investigation of these legal-jurisprudential discursive affinities – which I collectively term, *legal orientalism-positivism* – discloses a common liberal standpoint for critique. This was the formal and normative grounds upon which a variety of European and non-European laws and legal traditions could be cast as "particularistic," and, accordingly, be made subject to a "universal"-cum-"civilized" law and its attendant normative projects of liberal legal and

jurisprudential reform. I shall argue that the historical conditions of possibility for this liberal normative underpinning – and its constitutive liberal assumptions and core conceptual antinomies – must be understood in relation to the determinate capitalist context that gave rise to these critical legal reformist discourses and rendered them intellectually coherent and normatively compelling to an array of municipal and international law practitioners, both European and non-European. In my view, moreover, an adequate investigation of the normative grounds of legal orientalism-positivism requires a social theory of law that can grasp the historically specific form of liberal abstraction underpinning the discursive production and global proliferation of this polyvalent legal-jurisprudential discursive phenomenon. By liberal abstraction is meant a socially specific form of conceptual abstraction bound, historically and normatively, to commodity-mediated exchange relations. In this chapter I shall make the case that a non-traditional Marxian social theory of legal forms is best suited to explain this historical specific movement towards liberal abstraction, and the contradictory forms of legal and jurisprudential argumentative practice it made available and rendered normatively meaningful to its discursive practitioners.

Despite the overabundance of studies on orientalism, scholars have been slow to consider the distinctly legal dimensions of this normative discourse. More recently, however, a small contingent of Saidian/Foucauldian historians and legal scholars has begun to paint a genealogical picture of this discursive phenomena by critically tracing its historical and contemporary instantiations in various bodies of domestic, international, and global law and legal jurisprudence. And while such genealogical accounts have undoubtedly advanced our understanding of the global historical consequences of legal orientalism, they have also tended to frame it as an exclusively imperial and/or colonial legal discourse that justified Western domination of non-

Western societies. The goal of this chapter is to problematize this imperial frame through a comparative legal historical analysis of the points of articulation between the British legal orientalist critique of Chinese law and Bentham's legal positivist critique of the English common law tradition. Coming to terms with these legal-jurisprudential discursive affinities – which have not previously been the subject of historical investigation – affords a clearer understanding of the capitalist context of possibility for the historical emergence and global proliferation of legal orientalism-positivism. And as we will see in chapters four and five, this normative discourse found contradictory instantiations in the context of the universalization of "civilized" nineteenth-century international law: it underwrote both British imperial international law and Chinese anti-imperial international law.

The structure of this chapter is as follows. First I delineate the British legal orientalist critique of the alleged deficiencies of Chinese law. Next, I delineate Bentham's legal positivist critique of the alleged deficiencies of the English Common Law. I then theorize these discursive affinities between legal orientalism and legal positivism – and their normative grounding in a liberal standpoint of critique – through a critical reading of Foucault's genealogical account of the "Great Reformers" (e.g. Beccaria, Servan, Duport, Pastoret) and their role and significance in the historical transition to a modern "disciplinary" society in his famed *Discipline and Punish*. I find Foucault's account of that historical transformation descriptively useful on two fronts. First, he delineates the principle characteristics of the Enlightenment Reformers' utilitarian critique of the old customs – as "arbitrary," "irregular," "uncertain," "despotic," and "inhumane" – associated with sovereign law in the ancien regime. Second and relatedly, Foucault offers an instructive schematization of the core features of a transnational movement towards abstraction in Euro-American domestic and international law and legal jurisprudence: its formalizing and

normalizing tendencies; its capacity to produce new legal subjects; and the centrality of private economic law (i.e. contract, property, legal personhood). As such, Foucault provides a crucial theoretical point of departure for the historicization of this transnational movement towards abstraction in law and legal jurisprudence, as well as of the juridical agents whose liberal reformist projects, implemented (with varying degrees of success) in both the metropole and the periphery, gave that movement concrete doctrinal expression.

And yet, I shall argue, Foucault offers no real explanation as to what the historical impulse was behind this movement towards abstraction in law. It is to this unanswered question that I submit, in the final section of this chapter, a Marxian social theory of legal forms which purports to relate the abstract character of modern law to historically determinate commodity exchange practices that were readily generalizable to all formalized social relations (public and private, domestic and international, civil and criminal, etc). Such a critical social theory moves beyond orthodox Marxian understandings of law as a superstructural reflex of an economic base and/or an ideological reflection of particular set of class interests (or, in the case of "bourgeois" international law, the national interests of the state). My aim in delineating such a non-orthodox Marxian theory of law is twofold. First, I contend that such a theory can historically explain the discursive affinities between legal orientalism and legal positivism by illuminating their common liberal normative underpinnings. Second – and with an eye towards the overarching argument advanced in chapters four and five – I contend that a non-orthodox Marxian theory of law can elucidate the liberal legal and jurisprudential forms (contracts, treaties, legal personhood, legal orientalism-positivism) through which "civilized" international law was universalized in China. In this way such a theory affords an account of the global historical context of possibility that

gave rise to these emergent liberal legal forms and rendered their attendant normative discourses meaningful to *both European and non-European* practitioners of law.

III.1. Legal Orientalism and Chinese Law

Building on our discussion in the previous two chapters, what follows is a further cataloging of the pre-1842 British legal orientalist critique of the "deficiencies" of Chinese law as being, on the one hand, "arbitrary," "irregular," "uncertain," "corrupt," and "despotic." This Sinophobic critique of the form of Chinese law was frequently coupled with a liberal humanitarian "discourse of the heart" which criticized the draconian nature of Chinese law and its administration (e.g. the law of homicide, the use of torture to extract confessions).[1] These two liberal strands of legal orientalist discourse crystalized in Sino-Western jurisdictional disputes at the turn of the eighteenth century. Both were mobilized by an array of legal orientalists – Company officials, British imperial agents, Sinologists, merchants, jurists, missionaries– to cast Chinese criminal law and its administration as deficient and "un-civilized" in order to justify resistance to Qing jurisdiction and the retention of British extraterritoriality.[2] Because foreigners

[1] Consider, for example, John Davis's condemnation of Chinese criminal law as "oppression, accompanied with infliction of barbarous punishment, which offend the eye and distress the feelings of the most hurried traveller in other Asiatic countries…" Davis, *The Chinese*, 249. Or John Phipps's remarks: "In all countries, indeed, where arbitrary governments prevail, and where the liberties of the subject are always at the disposal of some tyrannical despot, the punishments awarded for the commission of the most trivial offences, are almost uniformly characterized by their extreme barbarism and cruelty. Death and mutilation are the punishments in every part of Cochin China; and in the case of the enactment against the importation of opium, it would appear that the " rulers of the land" are more anxious to gratify their thirst for human blood, than to prevent the morals of their subjects from being corrupted by the unrestricted use of that pernicious drug." John Phipps, *A Practical Treatise on the China and Eastern Trade* (London: William H. Allen & Co., 1836), 288.

[2] These alleged deficiencies of China's judicial system were "catalogued" and propagated by early Western observers, primarily missionaries and foreign traders. Especially significant in this regard was *The Chinese Repository*, a English language periodical founded by Dr. Bridgeman, the first American missionary to China, and later the first President of the North China Branch of the Royal Asiatic Society. Under his stewardship the journal took an extremely unfavorable attitude towards the administration of Chinese law, especially in regards to the allegedly anti-commercial character of China and its systematic violation of propriety rights. Bridgeman denounced

were not granted equal protection and Chinese law and justice were wholly incompatible with those of the Western world, so this line of orientalist legal reasoning went, the Chinese judicial system was deemed inadequate to safeguard the rights and liberties of Western subjects to trade, travel, and proselytize. On that score, the Company's Select Committee, in responding to an incident involving the public strangulation of a French seaman who belonged to the English ship, *Success*, as a punishment for the murder of a Chinese man, noted in their report to the Court of Directors in London: "Foreigners are not here allowed the benefit of Chinese Laws, though in this instance one of them suffers by the rigor of them; nor have they any privileges in common with the natives. It hath placed us in a worse situation than are the subjects of a Tyrannical Government – for we are liable to all the Severity [and] Injustice of Arbitrary Law, and yet do no enjoy its privilege of Protection."[3]

It was on these legal orientalist grounds that Britain's departure from generally recognized rules of "civilized" international law – sovereign equality and exclusive territorial jurisdiction – to resist Qing jurisdiction was justified.[4] Consider, for instance, George Thomas

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Chinese law as "equally opposed to the laws of God, to reason, and to common sence…. In China, the laws, whether the fundamental ones in the imperial code, or the subsidiary rules, or the provincial and local orders of government, or the law of usage among the people. – are all more or less hostile to a free and amicable intercourse with foreigners." *Chinese Repository*, vol. 3, 410.

[3] As quoted in Keeton, *The Development of Extraterritoriality*, vol. 1, 39-40, citing Morse, *Chronicles,* 59-60. There is no shortage of evidence of this legal orientalist discourse on the "arbitrary nature of the Chinese government," and the "arbitrary" and "irregular" exactions to which Foreign traders in China were subject from the "monopoly" of Hong merchants. Consider, for example, the testimony of Captain Daniel Ross to Parliament in 1821: "What is the nature of the government of China, is it arbitrary?" He answered, "Very despotic; so much so, that I believe no man can say he holds any property but what may be taken from him." Select Committee on the Foreign Trade of the Country, *Minutes of Evidence*, vol. 183 (London, 1821), 246.

[4] Along this line of reasoning, Dr. Robert Morrison (1782-1834), the first Protestant missionary to China and veteran interpreter for the EIC, argued that because "foreigners [in China] are not protected by the laws of the land, the necessity for [sovereign] obedience is cancelled. See, *e.g.*, Wells, *The Middle Kingdom*, vol. 1, 453-467**.** Morrison was the first to translate the Christian Bible into Chinese and to compile a Chinese-English dictionary. See Morrison, "The Law of Homicide in Operation." Other contemporary justifications of Britain's rightful refusal to recognize Qing jurisdiction, i.e. Chinese sovereignty, see Davis, *The Chinese,* 306-307.

Staunton (1781-1859) – the eminent Sinologist and famed translator of the Great Qing legal code (*Ta Tsing Leu Lee*) – who, in his *Miscellaneous notices relating to China* (1822), cast the Chinese imperial government as "the most jealous, arbitrary, and despotic government on the face of the globe."[5] In this oft-cited orientalist work, Staunton laid out "the grounds of…opposition to arbitrary acts of the provincial government, or…non-compliance with any of its unjust decrees." However, and in notable contrast to other contemporary legal orientalists, Staunton resisted classifying China as wholly "un-civilized" and "lawless," as he did classifying Chinese criminal law and justice as "barbarous," imploring his audience that "a more careful inspection will lead to a discovery of many grounds of mitigation."[6] That note of caution aside, he largely reiterated the principle tenets of the legal orientalist justification for resistance to Qing jurisdiction on the basis that "the laws and institutions concerning foreign traders, and the terms and conditions imposed upon foreign trade in China, had [*not*] been unequivocally declared, and irreversibly determined by the government of China." Had this in fact been the case, he argued, Britain would necessarily have to:

> submit to all the terms and conditions which the Chinese government has, in its wisdom deemed proper to annex to our admission…. But the contrary is the fact; the regulations under which we are supposed to act in China, are, in many respects, not only equivocal in terms, but doubtful and contradictory in fact; and the gradual improvement which has long been taking place in the practical application of these regulations, renders it pretty obvious that they are very far from being unchangeable or irreversible. The written laws

[5] Staunton, *Miscellaneous notices relating to China,* 161. With reference to proprietary rights in China, He observed that: "[T]he penal code clearly evinces that there are considerable deductions to be made…[including] that the proprietorship of the landholder is of a very qualified nature, and subject to a degree of interference and controul on the part of the government, not known or endured under the most despotic of the monarchies of Europe." On the other hand, he also offered any number of qualifications to this characterization of oriental despotism, such as: "Yet it must be admitted, as an excuse for some of the despotic restrictions imposed by the Chinese government upon foreigners, that the extreme contrariety of manners, habits, and language, renders some such controul over the intercourse between the Europeans and the natives, as that which now subsists, absolutely indispensable, as well as conducive to the interests of both parties." Ibid., 114, 78.

[6] Ibid., 308, 57.

> and edicts which were originally promulgated upon the first opening of the port of Canton to European traders, were so harsh, oppressive, and degrading, that they could not, even at the very outset, be strictly enforced, and they have since insensibly either become entirely obsolete, or in practice have been so modified or evaded, as at length to produce that strange and anomalous arrangement which at present subsists.[7]

Staunton then immediately qualified these critical remarks on the deficiencies of Chinese law, by noting that, "however vague, uncertain, and precarious, [the written laws and edicts] cannot be condemned altogether to us, since it in fact permits us to carry on, from year to year, with considerable ease and facility, one of the most important and profitable branches of British commerce." This partial qualification, articulated in essentially economic utilitarian terms, was typical of his relatively ambivalent legal orientalist approach to China. On the one hand, then, he noted, "After all, it is far from being intended to insinuate that there are not great defects in the administration of the government in China; that the tribunals of justice are not too often venal and corrupt, and their retainers rapacious and extortionate. But it is inferred from the general prosperity of the country, that these vices of the system, thought they undoubtedly exist, have been generally exaggerated." On that score, he pointed to the hyperbole which tended to inhere in portrayals of Chinese criminal law. Cautioning against such reductive treatment, Staunton argued: "[C]orporal punishments, are [not] in such universal use, or administered with such undistinguishing severity, as has sometimes been imagined."[8]

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[7] Ibid., 307. John Davis provided a similar justification: "The propriety, and indeed necessity, of non-submission to the Chinese law, as suspended or perverted, and not administered towards strangers, is easily made out. Though it be a principle obviously founded in natural justice, and has therefore been universally acknowledged as an established maxim of the law of nations, 'that foreigners shall be amenable to the laws of the country in which they happen to reside,' still this rule (not to mention that China subscribes to no international code whatever) must always have its conditions. Protection from, and submission to, local laws must, like every other right and obligation, be strictly reciprocal; and the state that denies to strangers an equal administration of its laws with natives, seems to forfeit its claim on their submission." Davis, *The Chinese*,. 360-61.

[8] Staunton, *Miscellaneous notices relating to China*, 306-07, 275, 56.

Given his more nuanced criticisms of the Chinese government and imperial law, his criticisms of the Hong merchants operating at the port of Canton and the local government's anti-commercial behavior: "[T]he port of Canton is one of the least advantageous in the Chinese dominion, either for exports or for imports, that the trade, instead of being regulated by treaty and under the protection of public functionaries and the capital, is wholly abandoned to the arbitrary control of the Chinese local authorities and is by them subjected, to many severe and vexatious burdens, and to various personal restriction and privations of the most galling and oppressive nature."[9] What Staunton is referencing here was the de facto trade monopoly of the Co-hong, which, as will be recalled from the previous chapter, were made wholly responsible for foreign traders' observance of all the Chinese laws and regulations (e.g. the exaction of duties, diplomatic communications).[10] Read alongside his criticisms of the deficiencies of the Chinese government, Staunton was, in effect, equating China's despotic government with its despotic, monopolistic Cantonese commercial agents. In the quote above, moreover, Staunton gestured towards the assumed legal remedy to this "anomalous" situation in China – namely, to regularize Sino-British relations through treaty law. In this way, international law, was posited as the

[9] Quoted in *Chinese Repository*, vol. 3, 130.

[10] Quoting J.B. Urmston, who was head of British Factory in China from 1819-1820, Phipps wrote: "He again says, 'neither our trade nor general intercourse with the Chinese is carried on under those established and reasonable regulations such as usually attend our commerce in other parts of the world; but, on the contrary, such laws and regulations as do exist, (if the arbitrary system of the Chinese can be so termed) touching the foreign trade at Canton, are altogether vague and undefined consequence is, that our valuable and important Chinese commerce is, at all times and seasons, at the mercy of the caprice and rapacity of the local authorities, and their subordinates. It cannot but be deeply lamented and deplored, that our intercourse with China remains on its present footing, and that a trade of such magnitude and Importance should continue, to be carried on under such disadvantageous and discouraging circumstances, subject, as it is at all times, to sudden interruptions, either from the capricious conduct of the Chinese government, or from accidents, such as no caution, vigilance or judgment on the part of Europeans, can avert or prevent." Phipps, *A Practical Treatise*, 20. For other contemporaneous criticisms on the Hong monopoly, see, Staunton, *Miscellaneous notices relating to China*, 169; Auber: A*n Outline of Its Government, Laws, and Policy*, 277, 325; R.B. Forbes, *Remarks on China and the China Trade* (Boston: Samuel Dickinson, 1844), 39-56.

"universal" legal remedy to the particularistic (read: deficient) nature of Chinese law and its administration – its despotic, arbitrary, uncertain, irregular, and inhumane nature.

We can begin to discern, in Staunton's *Miscellaneous notices relating to China,* the makings of a two pronged anti-monopoly legal orientalist discourse which, with some notable revisions, would gain widespread British currency following the shift from Company control to metropolitan legal order in 1833/34.[11] That anti-monopoly discursive strategy challenged the Hong merchants' control of the China trade, on the one hand, and the provincial government's control of the judicial system (and Chinese imperial law more generally), on the other. It is to this historical strand of legal orientalism that we now turn our attention insofar as there were striking legal-jurisprudential discursive parallels – which have been greatly underappreciated in the relevant secondary scholarship – between legal orientalism and classical legal positivism. Both legal discourses, it will be argued, sought to particularize certain forms of law in order to prescribe certain "universal" legal remedies: in the case of Bentham's legal positivist critique of the Common law tradition that remedy was a Pannomion, a universal code; in the case of the legal orientalist critique of Chinese law that remedy was treaty law and the introduction of "civilized" international law. (As we will see in the next chapter, this prescribed legal remedy of treaty law was accompanied, following the 1842 Sino-British Treaty of Nanjing, with a demand that China reform its domestic legal system; such reform included, but was not limited to, the codification of Chinese law and jurisprudence.)

In his 1833 Letter to Charles Grant, President of the Board of Controul (the government official responsible for overseeing The Company), "On the present state of British Intercourse with China," Charles Majoribanks, who had been president of the Select Committee of

[11] See Staunton *Miscellaneous notices relating to China*, 197; Forbes*, Remarks on China and the China Trade*, 11-12.

Supercargoes at the Company's Canton Factory, portrayed the aforesaid Chinese monopolies on trade and law in a legal orientalist frame that hewed closely to that of Staunton's. Similar to Staunton, Majoribanks framed the history of Sino-British relations as a highly iniquitous one: "The fact is simply this, that foreigners have, for a long succession of years, pursued a system of tame submission to the despotism of China, which, like all other despotisms, trampling upon abject submission, has gone on multiplying its restrictions." Such despotism entailed "arbitrary exactions and oppressions of the local government." Like Staunton, moreover, Majoribanks argued that the Hong merchants themselves operated under severe imperial constraints; they were subject to the "arbitrary" impositions of "corrupt" government officials, who themselves, were incentivized to be corrupt and to evade "what is called the law" in order to remunerate themselves as compensation for their "inadequate salaries."[12] Majoribanks, like Staunton, also acknowledged that despite the fact that Hong merchants' existence depended upon foreign trade, because they were made responsible for foreigners' observance of Chinese law, they were also incentivized "to keep foreigners within the severest restrictions, and to prevent any enlargement of their privileges which may infringe on the rights of their own monopoly." It was against this background that Majoribanks cast the Canton system of trade in this very dim light: "A more wretched instrument for the conduct of a great trade than a body composed of the materials above mentioned can scarcely be imagined. It is well adapted, however for the purposes of a corrupt despotism, as it affords a much readier means of arbitrary impost than were the privilege

[12] Charles Majoribanks, "Letter to the Right Hon. Charles Grant...on the present state of British Intercourse with China (London: J. Hatchard and Son, 1833), 5, 6, 7, 14. This became one dominant argument to justify the opium trade. Whereas other British legal orientalist emphasized the Hong merchants' own agency in maintaining their monopoly on the China trade: "[T]he conduct and disposition of the Chinese government for some time past had been such as to prove that the commercial interests of the nation in China were exposed to the utmost hazard from the chance of perpetual interruption at the will of a capricious and despotic set of delegates, who kept the court of Peking in profound ignorance of their own oppressive and arbitrary conduct towards the company's trade. See Davis, *The Chinese,* 95; Phipps, *A Practical Treatise*, 288.

of trading possessed by the general community…. Such is part of the system to which British merchants are compelled to submit in China."[13]

What course of action should the British pursue vis-à-vis China? More specifically, what was the appropriate legal remedy to the putatively despotic, monopolistic Chinese system of commerce and law? It was on these questions that Staunton and Majoribanks fundamentally differed. The former urged a more cautious approach "a spirit of conciliation, …[a] circumspectness of behaviour, [and…an] exemption from prejudice" in British dealings with the Chinese.[14] Staunton's insistence on British forbearance articulated closely to Britain's so-called "quiescent policy" that prevailed, albeit tenuously, from 1833 to 1839. Whereas for Majoribanks, conciliation and quiescence were neither sustainable nor honorable policy pursuits for Britain. On the question of the appropriate British policy to most effectively secure the commercial rights and interests of British merchants in China, he argued against forbearance in these terms: "This will not be done by pursuing a system of wretched subserviency to a corrupt and despotic government; but by acting in strict accordance with those sound principles of national honour which we apply to our intercourse with most other nations, but which, for some ill-defined reason, we have never yet adopted for the regulation of our connexion, either political or commercial, with China."[15] While Majoribanks never explicitly laid out a clear prescriptive British policy in China, his relatively hard line and truculent tone, in contrast to Staunton, gestured towards the legal remedy *du jour* in the years leading up to the first Sino-British opium

[13] Majoribanks, "Letter to the Right Hon. Charles Grant," 11-12. In the context of criticizing Hong merchants' "corrupt despotism," Majoribanks also claimed that they "used every endeavor and at length succeeded in preventing the access of Europeans to the officers of Government, finding that by that means they could exercise their impositions on *both* with greater success and impunity." In so doing, they had "put the trade of this place upon such a footing as without redress [that] renders to impracticable to Europeans." Ibid., 57.
[14] Staunton, *Miscellaneous notices relating to China*, 301.

[15] Majoribanks, "Letter to the Right Hon. Charles Grant," 4.

war – namely, a commanding treaty which would establish, in the words of one of Majoribanks's contemporaries, a "well-regulated system of commerce" to guard against "the arbitrary and irregular exactions to which it [the British trading community] is exposed, either directly, or not less severely because indirectly, through the medium of a very limited number of merchants licensed to deal with foreigners."[16]

This was the legal remedy that Lord Napier had tried and failed to suade Lord Palmerston to implement in 1834. His misinformed and misguided campaign was the subject of the previous chapter and will not be retold here. What is crucial to recall is the overarching logic of Napier's argument for the imposition of a "commanding treaty," and, more broadly, for the introduction of "civilized" international law in China: Britain was to serve as a legal vehicle for the "universal" interest of the whole "civilized" world; in so doing, Britain would bring universal equality and freedom to foreign trading nations in China, as well as to the "oppressed" Chinese people.[17] On these legal orientalist grounds, then, Napier assumed the principles and practices of modern "civilized" international law to be necessary and universal in character; as such, the norms of

[16] Phipps, *A Practical Treatise*, xxvii. British calls for a treaty with China antedated the shift from Company control to metropolitan legal order in 1833/34. Peter Auber, the former Secretary to the Court of Directors of the EIC, recounted earlier attempts by Foreign governments "to establish, upon the basis of a formal treaty, a regular intercourse with that singular people." He specifically cited the Amherst Mission to China: "The objects were, a removal of the grievances which had been experienced, and an exemption from them and others of the like nature for the time to come, with the establishment of the Company's trade upon a secure, solid, equitable footing, from capricious, arbitrary aggressions of the local authorities, and under the protection of the Emperor, and the sanction of regulations to be appointed by himself." Auber: A*n Outline of Its Government, Laws, and Policy,* vi, 256-57.

[17] Along similar argumentative lines, Phipps reasoned: "China is not a free country. That the empire is independent, and that the authority of the Body politic, which is concentrated in one man, is complete and supreme, are points which none perhaps will dispute. But what are the constituent parts of this great nation, and how has it been formed? Two centuries have not yet elapsed since the ancient provinces were over-run by foreigners, who conquered the inhabitants, subjected them to the disgraceful tonsure, and to this day hold them in bondage. The conquerors have indeed framed a code of laws for the government of their subjects; but both the one and the other, are entirely the creatures of a despot's will. The emperor is supreme; and neither law nor subject can control him. In many respects, the laws are good; but in others, they infringe the laws of nature—the laws of God; for they deprive men of those rights which render him a free agent, and contribute in the highest possible degree to personal happiness." Phipps, *A Practical* Treatise, 16.

modern international law superseded the particular indigenous laws of China (e.g. China's anti-opium laws). With this in mind, we recall that Napier urged Palmerston to "extort" a "commanding commercial treaty.... which shall secure mutual advantages to China and to Europe." The object of such a commercial treaty should not be territorial annexation, but rather to "secure the just rights, and embrace the interests, public and private, of all Europeans, - not of British alone, but all civilized people coming to trade according to the principles of international law."[18] To the extent that the Chinese government's reputed anti-commercial policy denied its own people their innate rights, he could then plausibly claim that no such social contract existed between the Chinese government and its subjects. On that implicit legal theoretical basis, Napier framed his campaign to bring an end to China's anti-commercial and (in Henry Wheaton's words) "anti-social" policy as a struggle over universal – rather than exclusively Christian, European – "civilized" rights. Britain's fight for equality and freedom in China would thus also "emancipate" Chinese subjects from "a most arbitrary system of oppression."[19] While Napier's campaign failed ignominiously, resulting in a trade stoppage for nearly a month, it nonetheless portended, as did his legal and normative justifications for pursuing it, the first Sino-British opium war (1839-42) and the first "modern" Sino-Western Treaty, the 1842 Sino-British Treaty of Peace, Friendship and Commerce, which followed it.

In the years leading up to this war, the Napier affair became a constant point of reference for British imperial authorities, merchants, politicians, and lawyers, for the "indignities" and "wrongs" inflicted by the Chinese government on Britain and British subjects. On that front it is worth reconsidering James Matheson's widely-circulated 1836 pamphlet on the conditions of the

[18] Lord Napier to Viscount Palmerston, August 14, 1834, FO 677/3, no. 7.

[19] Ibid.

Canton trade, "The Present Position and Prospects of the British Trade with China." Matheson's eighty-page propaganda tract, penned to pressure the Whig cabinet to reform Britain's "anomalous" commercial and legal relationship with China, advanced the general claim that "British property is daily in jeopardy; our countrymen daily subjected to insult." That "insult" was directed not only at British merchants, but also "at our Sovereign, in the person of His Representative, the late Lord Napier, [who] ha[d] been subjected to indignity….[and] speedily destroyed. " His death, Matheson boldly announced, was "YET UNREVENGED."[20] It was in this truculent tone that Matheson's short treatise made the case for the British government to intervene in the China trade and impose law and order by formalizing and regularizing Sino-British relations.

Matheson began his treatise with a highly unflattering portrayal of the inscrutability of the Chinese people. "It has been the policy of this extraordinary people," he argued, "to shroud themselves, and all belonging to them, in mystery impenetrable,-to monopolize all the advantages of their situation. They consequently exhibit a spirit of exclusiveness on a grand scale." Voicing a common legal orientalist refrain of the Chinese Sino-centric view of the world (as elaborated upon in previous chapters), he framed this "exclusive" character in terms of China's contempt for foreign "barbarians": "This truculent, vain-glorious people have been pleased to consider all other inhabitants of the earth…as BARBARIANS,- destitute of all pretensions to civil, political, or moral excellence. They will not permit themselves to be polluted by those 'barbarians' intermingling with them – except to such an extent, and in such a manner,

[20] James Matheson, "The Present Position and Prospects of the British Trade with China," 123, 51. For a refutation of Matheson's portrayal of the general Chinese conduct, see Peter Perring Thoms, *The Emperor of China v the queen of England: a refutation of the arguments contained in seven official documents transmitted by Her Majesty's Government at Hong Kong* (London: P.P. Thoms, 1853).

as affords them opportunity for extracting from them a great revenue, by the means of the most unblushing extortion." Matheson then linked the inscrutable and "exclusive" character of the Chinese people to the "evils" associated with the Canton trade.[21] In respect to the latter, he adduced Company reports, parliamentary committee reports, memorials from British merchants and manufacturers in Manchester, Liverpool, and Glasgow to the Prime Minister, Lord Melbourne, and contemporaneous accounts on Sino-Western relations and the China trade in order to highlight: the "administrative corruption" of Cantonese officials and their "monopoly" to persecute foreign merchants, which led to their "unequal," "irregular," and "arbitrary" legal treatment[22]; the "total and entire absence of truth, justice, or mercy from Chinese tribunals"[23]; the lack of legal recourse of British merchants in cases of disputes concerning "overcharge of duties, stoppage of trade, or [any] other grievance," other than to the Hong merchants with whom those disputes occurred.[24] These "daily" insults and wrongs to which the British were subject persisted despite the fact that the Company's monopoly on trade in China had been abolished, in 1833, which had allowed, in Matheson's view, for the possibility of a new equal "footing" for British merchants in China. He attributed such persistence to the fact that British merchants remained without a commercial treaty with China, and, consequently, had to deal with the Cohong

[21] This lack of a fixed tariff was frequently cited as one of the major "evils" of the Canton system. In his "Remarks on the Canton duties," Phipps remarked: "The impossibility of obtaining from the government any fixed tariff of duties has been, for many years, one of the most prominent evils in the commercial system of Canton; and it being the policy of all parties, government, Hong merchants, and the linguists to keep foreigners in a perfect state of ignorance of the mode and rate of duties levied on foreign trade; this may in a great measure account for the circumstance, that the scarcely two any two persons who have endeavor end to gain information on these points, could arrive at the same result....the multifarious list of irregular and illegal charges..." Phipps, *A Practical Treatise*, 149-150.

[22] This was Matheson's summary of the comments of the President of the Select Committee at Canton, who wrote to the Chairman of the Court of Directors (Feb. 23, 1815). See Matheson, *The Present Position*, 1-15.

[23] Ibid., 24, quoting the Select Committee at Canton, Jan. 16, 1815.

[24] Ibid., 15-16, 22.

monopoly individually; this left "our merchants…in the most precarious and defenceless position with reference not only to their commercial interests, but even their personal safety, -that was ever witnessed in China."[25]

It bears notice that in making his case for British intervention in China Matheson often employed a comparative legal orientalist approach to Chinese law, as evidenced most clearly in his juxtaposition of the radical "insecurity" of property rights in China under the "monopoly" of the Hong merchants with the security and sanctity of property rights in England. So whereas British commercial rights were systematically violated by Chinese authorities, the English have, by contrast, – and here Matheson quoted Montesquieu – "made the protection of foreign merchants one of the articles of their national liberties; it being provided by Magna Carta, that all foreign merchants, unless publicly prohibited beforehand, shall have safe conduct to depart from, to come into, to tarry in, and to go through England for the exercise of merchandize,-without any unreasonable imposts, except in time of war."[26] This was a common legal orientalist discursive strategy that posited Occidental law as universal and Chinese law as particular in order to determine what is and what is not law.[27]

In addition to this comparative legal orientalist approach, Matheson also incorporated commonly used historical analogies that likened Chinese law and diplomacy to European feudal law and diplomacy. That type of analogical reasoning was expressed most clearly in his characterization of the Chinese Emperor's treatment of Britain as a "submissive tributary," or, as he put it, as a "barbarian" nation. These were, for Matheson, the "only terms on which they will

[25] Ibid., 1, 2, 15.
[26] Ibid., 21.

[27] See the first chapter of this dissertation, as well as Teemu Ruskola, *Legal Orientalism*.

suffer a commercial intercourse to be carried on with the frontiers are an implicit acknowledgement of its springing from the 'amazing and unmerited condescension' of the Emperor of China towards 'his reverently-submissive tributary' the King of England, and his 'barbarian and profligate subjects."[28] We encountered this feudal characterization of China's Sino-centrism, previously, with respect to the kowtow – that is, in the words of John Davis, "the form by which the feudal tenant in capite did homage to his liege lord." This feudal analogy permeated British Sinophobic attitudes towards China's foreign policy in general, and the kowtow, in particular. With respect to the latter, British legal orientalists cast this traditional Guest Ritual in diametric opposition to the modern European idea of formal legal and diplomatic equality in interstate sovereign relations. "Every country," Davis reasoned from this legal orientalist perspective, "that…has professed to be independent, has declined performing it."[29]

These analogies between China and feudal Europe were reified in legal orientalist discourse during the second half of the nineteenth and early twentieth centuries. They were rehearsed in, among other notable works on Sino-Western relations, those of H.B. Morse, the British-American scholar, who served in the Chinese Imperial Maritime Custom Service from 1874 to 1908. Most significantly, his *The International Relations of the Chinese Empire* cataloged the "financial and administrative corruption" he associated with the "irregular exactions" and "arbitrary duties" assessed to British and foreign merchants at Canton prior to the 1842 Treaty of Nanjing. Such "corruption" was, for Morse, not a function of venal Cantonese officials, but rather it was "the underlying principle upon which the Chinese system is based." In

[28] Matheson, *The Present Position*, 15-17.
[29] Davis, *The Chinese,* 98. In the section, "Traces of feudalism," Davis remarked: "These turbulent portions of the Chinese annals, which were now soon to give way to a settled oriental despotism, bear many features of a feudal cast about them." Ibid., 179.

his view, moreover, the Occidental "student of history," in surveying "the mass of…gross irregularity" associated with such "administrative and financial corruption….will recall the administrative system of Europe of, say, three or four centuries ago, and, if he has any knowledge of China, will find many points of resemblance in matters which we to-day have come to reprobate." Morse then elaborated upon the analogy between China and feudal Europe this way: "What is this but the system which, in the seventeenth and eighteenth centuries, furnished the bloated fortunes of the farmers-general of France? The administration of justice in China creates no charge upon the official revenues, but maintains itself from fees and exactions….Every Chinese official takes for himself, without question, the interest on his official balances ; so did the English Paymasters of the Forces up to the time of Pitt, and probably for many years after his time…"[30] The full significance of such historical analogies between China and feudal Europe will become apparent in our subsequent discussion of Bentham's legal positivist critique of the Common law tradition as feudal and despotic in nature. Suffice it to say here, such historical analogies were not specific to the legal orientalist critique of Chinese law and diplomacy. Nor were they directed exclusively at non-European societies.

What did Matheson propose by way of a legal remedy for dealing with China's monopoly on trade and the "deficient" nature of its law and "corrupt" administration? The status quo was

[30] Morse, *The International Relations of the Chinese Empire*, 6, 27. Morse compares and contrasts China with America this way: "Even modern America, with the foundations of its government freed from all feudal substructure, in some of its legitimate and legalised practices, furnishes a moderate example of what, in China, is immoderate. Up to a very few years ago, the office of the Sheriff of the County of New York was maintained on the principles inherited from the England of the eighteenth century; he received a salary ($5000) and fees (averaging $60,000), and himself paid the salaries of his deputies, and provided for the expenses of his office. This is the Chinese system, except that, in China, the fees are taken and the work not done. Outside legitimate American practice we have in " Tammany " a word which recalls practices known to exist, in a greater or less degree, in all occidental countries, and reaching, in the Occident, their most perfected development in certain of the great cities of he Newer West; these are but crude attempts, punished when' detected and subjected to legal proof, of what, in China, is the ordinary practice, of everyday occurrence, and never punished, because it is a part of the system of government." Ibid., 27.

untenable for him. Britain's forbearance in diplomatic relations with China – which he equated to "credulity and imbecility" – had allowed China to profit at the expense of Britain's honor and commercial interests. And because Chinese authorities continued to assume such forbearance, "They will," in Matheson's view, "make us feel, at every point, in every transaction, – social and commercial – our abject dependence upon their sovereign will and pleasure." Nor were negotiations with the Hong merchants a viable policy option for securing an "equitable" commercial intercourse since "the establishment of the Hong merchants is one of the most artful and successful engines of oppression and extortion ever devised."[31] Drawing on a number of memorials from British merchants and manufacturers (some of which he reproduced at the end of the treatise), Matheson instead recommended doubling down on Lord Napier's (failed) campaign, with the aims of establishing a British plenipotentiary in order to negotiate directly with the Peking imperial government, and thereby sidestepping the provincial government of the Hong merchants, Hoppos, and Viceroys; securing reparations for the most recent trade stoppage that followed the Lord Napier affair; ensuring that full protection of Chinese law be extended to British subjects at Canton; and terminating "arbitrary" extortions and the fixing of tariff rates. These measures should be codified in a formal arrangement, i.e. a treaty of amity and commerce, in order to secure the continuance of commercial intercourse with China and place it "permanent and advantageous footing."[32] According to Matheson, such a treaty should, if necessary, be concluded by force of arms insofar as China had violated universally recognized principles of international commerce and contract law, which obligated China to "carry on trade with us on equitable principles." Because the Sino-British (tacit) contract was essentially "broken" during

[31] Matheson, *The Present Position*, 77, 15, 91.

[32] Ibid., 8.

the aforementioned trade stoppage following the Napier imbroglio, it then "warrant[s] us in compelling an obedience of good faith."[33] Moreover, the establishment of a new positive international legal order in and with China was not just in Britain's interest. It was also in the interest of all "civilized" nations adhering to the Law of Nations. As one British memorialist would later put it: "Great Britain owes it, not only to justice and her own reputation, but to the interests of her merchants, and of commerce generally, and also true policy, to chastise the folly of China, and to teach the rulers of that country the necessity of observing those reciprocal duties which are recognised in the Family of Nations."[34]

In sum, Matheson's argument, like Napier's, mobilized a common legal orientalist discursive strategy that sought to particularize Chinese law in order to then prescribe the "universal" remedy of positive international treaty law. Legal orientalism served, in this historical context, to determine what was and what was not law; likewise it served to discredit Chinese law qua law by "creat[ing] a fiction of the Chinese legal system as irrational, instrumentalist, arbitrary,…and then compar[ing] it with another fiction: idealized European positive law."[35] This distinctly imperial function of legal orientalism – the construction of legal fictions that fixed and essentialized Chinese law – has been well-documented by Teemu Ruskola in *Legal Orientalism*, which is, to my mind, the most sophisticated critical analysis of the production and global circulation of a Western jurisprudence of Chinese law. Drawing on Said's powerful critique of the Western production of knowledge, Ruskola approaches Chinese law

[33] Ibid., 32. The fact that trade had been permitted in China for centuries implied, for Matheson, "a tacit agreement on the part of the Chinese, to carry on trade with [Britain] on equitable principles." Ibid., 33.

[34] Andrew Henderson to Mr. G.G. de Larpent, Liverpool, Oct. 21, 1839, in *Memorials addressed to H. M.'s government, by British merchants interested in the Trade with China* (London: T.R. Harrison, 1840).

[35] Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), 162.

primarily through the lens of its Western system of representation. Within this critical discursive framework, he argues that legal orientalism was a condition of Western knowledge of Chinese law and a discursive means of "othering" through which the West constructed its legal and cultural identity. It is on these critical discursive grounds, then, that Ruskola holds legal orientalism to be a form of "epistemological imperialism" whereby "foreign legal cultures are judged as [either] confirm[ing]…the (projected) universality of…[Euro-American] legal categories, or,…[used as] 'proof' of the fact that other legal cultures lack some aspect or other of [Euro-American] law."[36]

In my view, Ruskola's imperial framing of legal orientalism posits a *static* relationship between colonizer and colonized, the West and China. Relatedly, his critical exposition of legal orientalism *fixes* this universal-particular/civilized-uncivilized opposition in terms of a Sino-Western (U.S.-China) one. As we saw in the previous chapter, however, legal orientalism served not only to fix and essentialize Chinese law. It also provided the legal and normative grounds, following the shift from Company control to British metropolitan legal order in China, to *reform* China's international legal, diplomatic, and commercial behavior. Before problematizing this imperial framing and fixation from the standpoint of Chinese anti-imperial legal resistance, in chapter five, I shall first complicate and qualify it, below, through a comparative legal historical analysis of the points of articulation between the British legal orientalist critique of the particularistic nature of Chinese law and Bentham's legal positivist critique of the particularistic nature of the English common law tradition.

[36] See Teemu Ruskola, *Legal Orientalism*, 12. See also, S. Fiske, "Orientalism Reconsidered: China and the Chinese in Nineteenth-Century Literature and Victorian Studies," *Literature Compass* 8 (2011). This form of conceptual colonization has also been examined in the context of British colonial administration in India, and attempts to "discover" the principle of Hindu law. See Cohn, *Colonialism and Its Forms of Knowledge*, 57.

Those legal-jurisprudential affinities speak directly to the pivotal question remaining from the previous chapter, which concerned the historical conditions of possibility for the legal orientalist critique of Chinese law. Taking into account its imperial historical context – as I have attempted to do through an analysis of the fraught Sino-Western extraterritorial encounters which multiplied at the turn of the nineteenth century as a result of licit and illicit commercial expansion in China – is of course crucial in understanding the emergence and proliferation of this transnational normative discourse on Chinese law. And yet it is my argument that only taking into account this imperial context – which has been the overwhelming tendency in critical scholarship pertaining to legal orientalism – is insufficient to fully grasp the rise and transnational social significance of legal orientalism. For this, we must also come to terms with the tendentially global capitalist context of possibility that generated and rendered normatively compelling a "universal" legal-historical standpoint for critique of the particularities *both* European and non-European law. Only then can we move beyond a critical historical analysis of law that merely exposes the fallacies of the aforesaid legal fictions of Chinese law in order to also account for their social standing – that is, to explain the conditions of possibility for their historical emergence and why they became normatively compelling to social actors, in the metropole and imperial periphery.

III.2. Bentham, Classical Legal Positivism, and the Common Law Tradition

The word law presents a conceptual ambiguity, which, as the eminent English jurist Sir Frederick Pollock (1845-1937) remarked, "seems peculiar to English among chief Western

languages."[37] In other Europeans languages, there are two words for law – one to express its abstract, immaterial referent (the ethical signification of law), another to express its concrete, empirical referent (the juridical signification of law). In Latin, jus is used in the abstract, lex in the concrete; in French, droit and loi; in German, recht and gesetz; in Italian, diritto and legge; in Spanish, derecho and ley.[38] In contrast to the dual abstract/concrete significations of law in these European languages, the English word law has only a concrete, juridical signification: it is used to denote any particular law, whether an Act of Parliament, a judicial decision, etc.[39]

The singular, concrete signification of the word law in the English language, in contrast to the dual abstract/concrete significations in other European languages, points to a familiar opposition between English common law and European civil law famously delineated by Max Weber in his analysis of modern forms of the legal rationalization.[40] In Weber's ideal-typical schema, common law is depicted as non-formal and empiricistic; European civil law, by contrast, is depicted as abstract and systematic. In terms of the former, Weber's characterization of English legal thought as "essentially an empirical art"[41] was descriptively consonant with the general view of common law practitioners, prior to the nineteenth century,[42] of the experience-

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[37] See Frederick Pollock, *A First Book of Jurisprudence For Students of the Common Law* (London: Macmillan and Co., 1911 [1896]), 17. On this English peculiarity, see Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 2005), 294-295.

[38] See Ibid., 294.

[39] Sir John William Salmond, *Jurisprudence; or The theory of the Law* (London: Stevens and Haynes, 1907), 9-10.

[40] Max Weber, *Economy and Society*, 2 vols., eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), vol. 2, 855.

[41] Ibid., 890.

[42] The legal historian Michael Lobban argues in this vein: "By the eighteenth century, common-law thinking…had come to be particularistic and in itself untheoretical." See Michael Lobban, "Blackstone and the Science of Law," *The Historical Journal* 30, no. 2 (June 1987): 315. As will be discussed shortly, however, this particularist and untheoretical state of the English common law began to change in the late eighteenth and nineteenth centuries as

based, informal nature of the English legal tradition.[43] At the level of adjudication, common law empiricism assumes the form of judicial reasoning through precedent and analogy (i.e. stare decisis), as opposed to the deductive reasoning associated with Continental jurists working in the Roman legal science tradition.[44] Historically speaking, common law empiricism was also reflected in pre-nineteenth century English legal literature, the bulk of which lacked any formal systematicity and was characteristically compiled in undigested form as lists of case law. The Common Law, it could then be argued, was only collected and described prior to the nineteenth century; it was not, and, from the standpoint of most common law practitioners, could not be, defined and subsumed in a set of general rules and abstract principles.

Weber contrasted the "irrational" empiricism of English common law with the formally rational, systematic character of modern European law and abstract legal jurisprudence. That formal rationality, according to Weber, was at the core of modern European civil law, which was based on general legal principles and codes, the origins of which can be traced to the laws and legal system of the Roman Empire. At both the practical and theoretical levels, the Romans provided Europeans with modern forms of legal systematization, which Weber defined in terms of the "integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules, under which, it is implied, all conceivable fact situations must be capable of being logically subsumed

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reflected in programmatic attempts to "scientize" and systematize English law. See Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991).

[43] The view is best summed up in the American jurist Oliver Wendell Holmes, Jr.'s (1841-1935) maxim on the common law: "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* (London: Macmillan, 1881), 1.

[44] Precedents were not absolute. On the difficulties in extracting the *ratio decidendi* of the case, see A.L. Goodhart, "Determining the Ratio Decidendi of a Case," in his *Essays in Jurisprudence and the Common Law* (Cambridge: Cambridge University Press, 1931).

lest their order lack an effective guarantee."[45] The Napoleonic Code was, in his view, the paradigmatic expression of modern legal systematization. The Romans also provided Europeans with the basis for an abstract legal science, which Weber defined as an "abstract method which employs the logical interpretation of meaning [and] allows the execution of the specifically systematic task, i.e. the collection and rationalization by logical means of the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions."[46] This Roman-based scientific approach to law was reflected above all in the primary form of civilian legal literature – the Institute, a legal tradition based on the Justinian structure, and preserved by the Pandectists, the great expositors of Roman law.

Weber narrated the rise and consolidation of modern European law in terms of the progressive, teleological ascent of formally rational legal systems, on the one hand, and the demise of legal particularisms associated historically with legal systems based on forms of substantive law, on the other. For Weber, the historical development of modern law in Europe "eliminate[d] both obsolete traditions and arbitrariness" and established a formal legal order "in which rights can have their source exclusively in general objective norms." The driving forces behind the formal rationalization of modern legal life lay, according to Weber, in a historical alliance or unity of interest between market-oriented actors (the bourgeoisie), bureaucratizing political elites, and the intrinsic intellectual needs (e.g. clarity, logic) of legal specialists. Of these historical forces, he singled out capitalist actors and their interest in the calcuability and predictability of law as being the decisive factor in the historical formation of an abstract,

[45] Weber, *Economy and Society*, vol. 2, 656.

[46] Ibid., 657.

formally rational legal system in Europe.[47] The historical relation of modern law and economy, which is relatively straightforward in Weber's analysis of formal legal rationalization in Europe, becomes problematic for Weber when he turned to consider English law. "Modern," in the case of the English law, turned out to be a misnomer from the standpoint of formally rational modern (European) law: in light of the retention of the traditional, nonformal, and empiricistic common law, Weber judged English law to be less rational on the whole than continental European law. He is then left to conclude that economic modernization in England developed in spite of the common law tradition and its judicial system.[48]

Weber's ideal-typical opposition between European law and English law, and his valuation of the "irrationalities" of the latter, reiterated an earlier English legal-jurisprudential critique of the Common law tradition. It was most forcefully articulated by Bentham, the patriarch of classical legal positivism, in his scathing critique of the deficiencies of the Common law – as being "arbitrary," "irregular," "uncertain," "corrupt," and "despotic." He proposed the Pannomion – a comprehensive "universal" code, as the necessary remedy to those deficiencies.[49]

This opposition between abstract, universal code law and concrete, common law particularism, which Bentham and to a lesser extent John Austin (1790-1859) posited at the historical founding of classical English legal positivism, has been vastly underappreciated by legal scholars who have most characteristically defined this late eighteenth/nineteenth-century legal-jurisprudential school of thought in terms of another intimately related opposition – namely,

[47] Ibid., 814.

[48] Ibid., 814.

[49] See Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986); David Lieberman, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1989); Michael Lobban, *The Common Law and English Jurisprudence*; Schofield, "Jeremy Bentham and nineteenth-century English jurisprudence."

that between positive law secularism and natural law universalism. Along these conventional ideal-typical lines of opposition: naturalists posited a set of transcendental principles that had universal application – all human activity, both individual and sovereign, was bound by an overarching natural law. For naturalist jurists, law emanated from a state of nature and could be accessed through the use of reason. The principles of natural law did not owe their validity to any specific enactment by a secular authority, but rather to their own immanent quality. As distinct from such transcendental universalism, Bentham and Austin claimed that the binding force of all positive law issued from a secular source.[50] For both positivist jurists, that source was a sovereign. It, alone, determined the validity of law.[51] So whereas naturalist lawyers posited an overarching morality independent of and prior to human law, Bentham and Austin made a sharp distinction between law as a formal system of sovereign commands and morality.[52] For both, moreover, there was a non-descriptive reason to separate law from morality – to facilitate the reform of law and legal education. This was especially the case for Bentham, who

[50] See Bentham, *Fragment on Government*, 62, 70-71.

[51] Bentham exalted the will of the sovereign as expressed through clearly perceived forms and symbols: "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question." See Jeremy Bentham, *Of Laws in General*. Austin's more succinct formulation of "sovereignty" is as follows: "Laws properly so called are a species of commands. But, being a command, every law properly so called flows from a determinate source." Austin, *PJD*, 101.

[52] In their systematic jurisprudential division between law and morality, nineteenth and early twentieth century Anglo-American legal positivists took their primary instruction from Austin. Hart observed that after the separation thesis "was propounded to the world by Austin it dominated English jurisprudence." See Hart, "Positivism and the Separation of Law and Morals," in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1998), 55. Bentham never published his major treatise on law*, Of Laws in General*. It remained unknown until it was discovered by Professor Charles Warren Everett among the Bentham manuscripts] at University College London in 1939. As H.L.A. Hart remarked, had Bentham published his treatise on law during his lifetime, "it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence." See H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982), 108.

sought to reform the whole structure of not only the English legal system but that of the whole "civilized" world.[53]

This division – between positive law secularism and natural law universalism – has cast a long shadow over the history of late-eighteenth and nineteenth-century modern English jurisprudence, which is conventionally understood as having underwent a fundamental transformation from naturalist to positivist jurisprudence as the dominant approach to law and method of legal inquiry. My contention is that in starting with this fixed conventional definition of the core structure of positivist jurisprudence, legal scholars have often tended to overlook the interrelated legal-jurisprudential opposition between abstract, universal law and common law particularism. Below, I delineate that legal-jurisprudential opposition through an examination of Bentham's critique of and prescriptive "universal" remedy for the common law, which, in significant ways, mirrored the legal orientalist critique of and "universal" remedy for Chinese law. I shall account for this discursive mirroring by situating both critical legal reformist discourses in the context of an emergent global liberal legal modernity that encompassed both the British metropole and imperial peripheries. That legal modernity was characterized in the main by a historically specific movement towards abstraction, which entailed the centering of the abstract "private" legal subject in both domestic and international forms of "universal" law and legal jurisprudence.[54]

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[53] While Austin enthusiastically supported codification, he did not believe, as Bentham did, that judicial legislation could be removed all together. In point of fact, he thought it "highly beneficial and every absolutely necessary." Moreover, Austin thought that codification should consolidate and clarify *existing* legal principles, rather than starting from scratch, as Bentham did, and replace the common law in its entirety with legislation. In contrast to Bentham, then, Austin, while a committed utilitarian, nonetheless took a more conservative, formalisitic approach to codification and legal reform. His main interest in the latter was in legal education, not in the wholesale transformation of the common law. See Lobban, *The Common Law and English Jurisprudence*, 222-223.

[54] See Lindsay Farmar, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45," *Law and History Review* 18, no. 2 (Summer 2000).

Bentham's critique of the Common law was articulated, in part, through his relentless attacks on William Blackstone (1723-1780), who Bentham viewed as a "corrupt defender" of English law and "indiscriminate apologist" for the status quo.[55] Blackstone was an English academic at Oxford University, a practicing barrister, a Member of Parliament, a Justice at the Court of King's Bench, and then at the Court of Common Pleas. His professional and financial success was largely due to his series of lectures at Oxford on the common law (which Bentham attended as student), parts of which were published, between 1765 and 1769, as the four-volume treatise *Commentaries on the Laws of England*. It is typically credited with providing the first "modern" systematic treatise of the common law,[56] and, at the time, it became standard reading for young lawyers in England as well as in pre- and post-revolutionary America. Among its many notable praises from eighteenth-century legal personalities, Lord Mansfield (1705-1793) recommended it as a text wherein the student "will find analytical reasoning diffused in a pleased and perspicuous style," which laid out "the first principles on which our excellent laws are founded."[57]

As is widely recognized, the *Commentaries* offered a deeply Whiggish history of the English government and common law, venerating both forms as the most optimal, just and rational. Blackstone's praise for the English legal system as a historical triumph of reason was

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[55] Bentham, *A Comment on the Commentaries*, 398-400, 202.

[56] Other institutional writers had also given synthetic accounts of English law, but they did not focus specifically on the common law, as Blackstone did. Instead, they tended to argue for the importance of civil law within the English legal system. See J. Cairns, "Blackstone, An English Institutionalist: Legal Literature and the Rise of the Nation State" *Oxford Journal of Legal Studies* 4 (1984); Duncan Kennedy, "The Structure of Blackstone's Commentaries," Buffalo Law Review 28 (1979); A. Watson, "The Structure of Blackstone's Commentaries," *The Yale Law Journal* 97, no. 5 (Apr. 1988).

[57] As quoted in John Holliday, *The Life of William Late Earl of Mansfield* (London: P. Elmsly, 1797), 89. See R.A. Posner, "Blackstone and Bentham," in *Journal of Law and Economics* 19, no. 3, (1976).

based on a deep reverence for tradition and "the goodness of a custom [which] depends upon having been used time out of mind." Furthermoire, "it is one of the characteristic marks of English liberty," he argued, "that our common law depends upon custom; which carries the internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people." And "[h]ow are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws." Their judgment were fair and impartial, he argued, because "it is an established rule to abide by former precedents, where the same points come again in litigation…it is not in the breast of any subsequent judge to alter or vary from [a permanent rule], according to his private sentiment: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expand the old one." Judges, then, did not create the law as such, but rather were the "oracles" of law, independent of politicians and statesmen.[58] Through his glorification of the common law tradition and his defense of the professional caste, Blackstone promoted a highly conservative vision of English law as a necessary force to protect people and guarantee their liberty and property.

Bentham's denunciation of Blackstone was most fully elaborated in his *Comment on the Commentaries*, which was only published in 1928; what was published, albeit anonymously, in 1776, was part of the *Comment*, entitled *A Fragment on Government*.[59] The "grand and

[58] William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), vol. 1, 67, 74, 69

[59] The latter began as a general criticism of Blackstone's *Commentaries*, which he took over from his friend John Lind, though it ultimately became a much narrower critique of Blackstone's work. The principle historical and threotical significance of *Fragment* is that it was the first attempt to apply the principle of utility in a systematic manner to the theory of government. Utility, for Bentham, was a matter of "future fact—the probability of certain future contingencies." If debate about laws and government were placed on utilitarian grounds, he insisted, men

fundamental" fault of the *Commentaries*, according to Bentham, in *Fragment*, was Blackstone's antipathy to major reform.[60] Whereas Blackstone preferred a gradualist approach to legal reform based on common law interstitial lawmaking (particularly as it pertained to English criminal law), Bentham advocated comprehensive statutory change.[61] Such radical legal change required, among other things, breaking-up the monopoly of law possessed by "Judges & Co" (i.e. common law lawyers). In Bentham's view, English judges had far too much discretionary (read: "arbitrary") power, which resulted in an "inbred and incurable corruption."[62] This was the result of the fact that, in common law nations, a Judge was exempt "from the controul of a superior, – from the obligation of assigning reasons for his acts, – and from the superintending scrutiny of the public eye."[63] Given that lack of legislative control, which left Judges with "the faculty of acting corruptly for ever in their hands," Bentham queried: "[C]onsidering the nature of man on the one hand, and the state of law on the other, I do not see how it is possible that corruption – corruption of this necessarily unpunishable kind – should not, in every country, to the extent of the dominion exercised by Common Law, be in no inconsiderable degree frequent."[64]

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would either come to an agreement or else they would "see clearly and explicitly the point on which the disagreement turned." Bentham, *A Fragment on Government*, 491, 226-227. We shall return to the principle of utility with reference to his metric for "good" law subsequently.

[60] John Austin could not find "a single particle of original and discriminating thought" in the *Commentaries*. See Austin, *The Province of Jurisprudence Determined*, lxiii. For A.V. Dicey, Blackstone "perpetually plays the part of the apologist" and is so intent on "fix[ing] a reasonable ground for the pettiest customs" that he "occasionally … forget[s] the common-sense characteristic of his time." A.V. Dicey, "Blackstone's Commentaries," *Cambridge Law Journal* 4 (1932).

[61] Richard A. Posner, *The Problems of Jurisprudence* (Cambridge MA: Harvard University Press, 1990), 11-14.

[62] Philip Schofield and Jonathan Harris, eds., *Legislator of the World: Writings on Codification, Law, and Education* (Oxford: Clarendon Press, 1998), 21

[63] Jeremy Bentham, *The Works of Jeremy Bentham* IV [hereafter: *Works*], ed. John Bowring, 11 vols. (Edinburgh: William Tait, 1838- 1843), vol. 1, 556.

[64] Bentham, *Legislator of the World*, 135.

Blackstone's "idolatry" of "the depositories of law" served, in effect, to legitimize their vested "sinister interests" in maintaining a form of law, which, in addition to being "corrupt," was "arbitrary" "uncertain," "inconsistent," and "insecure." Those deficiencies of common law (read: judge-made law) stemmed in the main from its retroactive nature. Judges made ex-post-facto law, or what Bentham called "dog law." That is, judges made the common law in the same way that "a man makes laws for his dog. When your dog does anything you want to break him of, you wait til he does it, and then beat him for it."[65] According to Bentham, people's rights and obligations cannot, in common law, be clarified until judgments are given. For that reason, judge-made law could not offer clear and intelligible guidance of conduct, nor could it protect and secure the basic interests of individuals, i.e. their person and property. "From th[is] *uncertainty*, Bentham argued, comes not only *insecurity* but *corruption*: *insecurity*, in the situation of the *Lawyer*, and in particular in that of the *Judge*."[66] In other words, because the common law did not provide determinate, predictable legal standards, it necessarily failed to provide security for social expectations; such security was, for Bentham, the *sine qua non* of "good" law.[67] And so bad law, that is to day, common law, was born through "a course of successive acts of arbitrary power, productive…of a correspondent succession of particular *disappointments*, followed, each of them in proportion…by those more extensively spreading *apprehensions of insecurity*…"[68]

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[65] Bentham, *Works*, vol. 5, 235.

[66] Bentham, *Legislator of the World*, 134.

[67] Security was basic condition of human happiness in Bentham's utilitarian philosophy, and it was the sine qua non of good law. See Postema, *Bentham and the Common Law Tradition*, 171-173.

[68] Bentham, *Legislator of the World*, 20.

The monopoly of law by Judges & Co. was also secured by "lock[ing] up… [a] large portion of the body of the Law…in an illegible character, and in a foreign tongue."[69] That monopoly of legal language, along with the convoluted and Byzantine rules of procedure of the Common law rules of procedure, kept English law inaccessible to the layman. As a matter of historical context, when Bentham was writing the common law was couched in an "arcane terminology" derived from Latin and Norman French.[70] Much to the displeasure of Bentham, Blackstone venerated the Law-Latin language despite the fact that "about one man in a thousand" could understand it.[71] The "immeasurable" and "incomprehensible" nature of common law, which was preserved through its inaccessible foreign language, thus precluded the possibility of a legal subject (i.e. citizen) from ever fully knowing the law, and, by extension, from realizing Bentham's radically democratic ideal of "Every man his own lawyer!"[72]

The deficiencies of the common law – its inaccessibility, its conservatism, its excessive complexity, its inherent corruption, its arbitrary and indeterminate nature – are thus laid out by Bentham, in part, through his criticisms of Blackstone. In effect then, Bentham took Blackstone to "personify a corrupt and discredited Old Order"[73] – one which maintained a "superstitious respect for antiquity" and a "relentless tyranny of the dead."[74] Such criticisms of Blackstone, in

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[69] Bentham, *Fragment*, 113fn.

[70] See Robert A, Yelle, "Bentham's Fictions: Canon and Idolatry in the Genealogy of Law," *Yale Journal of Law and the Humanities* 17, no. 2 (2005).

[71] Bentham, *Fragment*, 113n.

[72] Bentham, *Legislator of the World*, 123.

[73] Richard A. Posner, "Blackstone and Bentham," *The Journal of Law & Economics* 19, no. 3, 1776, 569. Bentham's valuation of common law aside, his depiction of the feudal vestiges of English common law in late eighteenth century articulated closely with other contemporaneous critical accounts of the common law tradition.

[74] Bentham, *Works*, vol. 1, 324.

particular, and the traditional form of common law, in general, distinguished Bentham as an Enlightenment philosopher and polemicist whose lifework involved demystifying the nature and sources of authority of the common law; or, in his words "pluck[ing] the mask of mystery from the face of [Common law] jurisprudence."[75] Bentham's command (positivist) theory of law was brought to bear on his multifaceted critique of legal and linguistic fictions,[76] which he sought to expose and expel from the common law. He likened such fictions to an infectious disease, which tainted every thing and every person with which it came into contact. In the case of "English law, fiction is a syphilis, which runs in every vein and carries into every part of the system the principle of rottenness."[77]

This infectious English disease was readily apparent in the *Commentaries*, Bentham insisted, in the form of a Lockean appeal to the fictive idea of the State of nature, which Blackstone drew on to support his contractual theory of government. For Bentham, Blackstone's recourse to this natural law idea revealed the inadequacy of his analysis of the nature and sources of legal obligation. On that same naturalist front, Blackstone aligned the laws of nature with the common law, arguing that nothing contrary to reason could be accepted into the law.[78] For

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[75] Bentham, *Fragment*, 113.

[76] See Bernard Jackson, "Bentham, Truth and the Semiotics of Law," 51 *Current Legal Problems* 493 (1998); Gerald Postema, "Fact, Fictions and the Law: Bentham on the Foundations of Evidence," in *Facts in Law*, William Twining ed., (Wiesbaden: Steiner, 1983); Nomi Maya Stolzenberg, "Bentham's Theory of Fictions: A 'Curious Double Language," *Cardozo Journal of Law & Literature* 11 (1999).

[77] Bentham, *Works*, V, 92. This was not the only time Bentham invoked the spectre of disease to discredit the common law. Elsewhere he remarked: "un-certainty is the inherent disease of that wretched substitute to law, which is called unwritten law, and which, in plain truth, is not law at all." Bentham, *Works*, IV, 527. On Bentham's theory of real and fictitious entities, see Philip Schofield, *Utility and Democracy* (Oxford University Press, 2006), 2fn.

[78] Blackstone's equation of the common law with natural law was largely unrepresentative of common law theory at the time. The majority of "orthodox" common law "practitioners ignored or rejected the notion that the law was a set of rational rules which could be set out in a systematic way from the law of nature." On the eighteenth-century English legal and theoretical universe to which Bentham resisted and ultimately rejected, see Lieberman, *The Province of Legislation Determined.*

Blackstone, laws derived their validity from their conformity to the law of nature, or law of God: "No human laws are of any validity if contrary to this."[79] Whereas for Bentham, natural law and natural rights did not exist in any empirical reality; the latter were, in his oft-quoted phrase, "nonsense on stilts."[80] Only positive (i.e. enacted) law, according to Bentham, brought into existence an individual's rights and obligations. And the only legitimate basis for such positive law was a sovereign's command. This was "real" law, according to Bentham, in that it had a determinate source.

It was on these same positivist grounds that Bentham sought to discredit common law qua law because it did not emanate from a sovereign. "To be known," he argued, "an object must have an existence. But not to have existence – to be a mere non-entity [is]…the largest portion…of that which is passed upon you for law. I speak of Common Law, as the phrase is ….In these words you have a name, pretended to be the name of a really existing object – look for any such existing object – look for it till doomsday, no such object will you find."[81] For Bentham, the un-definability of the phrase itself – the Common law – was indicative of its sourceless and indeterminate nature. For that reason he cast it as "imaginary," a "pretended rule of law," which he contrasted with "real law," this is, statute law (a written law passed by a legislative body).[82] As opposed to the former, the latter was an actually existing object with an empirical reality:

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[79] Blackstone, *Commentaries*, vol. 1, 41.

[80] Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution," reprinted in *Nonsense on Stilts: Bentham, Burke, and Marx on the Rights of Man*, ed. Jeremy Waldon (London: Methuen, 1987).

[81] Bentham, *Legislator of the World*, 123.

[82] Ibid., 127, 136-37.

> The Statute Law is a body composed of members we are acquainted with. Those members are familiar to us: the idea of each one of them has a fixed and accurate termination in our minds. We see, we hear, we touch; in short, we handle them. The idea of each one and of the whole together is positive….We see in every instance who made it: when, where and how they made it: we call for and have produced to us at any time the very thing they made. With the Common Law it is, in every particular that has been instanced, different….What [is the Common Law] but an assemblage of fictitious regulations feigned after then image of these real ones that compose the Statute Law?

Whereas one can readily identify the source and content of a statute law, the common law, Bentham argued, was a "fictitious composition which has no known person for its author, [and] no known assemblage of words for it substance."[83] From that legal positivist standpoint for critique, statute law was superior to common law because is "produced obedience by command," rather than producing obedience by punishment as the latter did.[84]

Bentham's opposition between "pretend" common law and "real" statute law can be further understood with reference to the opposition between common law reasoning and classical legal positivist reasoning. Traditionally speaking, "orthodox" common law practitioners conceived of the common law as an endogenous legal framework drawn from a repository of immemorial customs, norms, and values accumulated over time. The apposite historical reference is Sir Edward Coke (1552-1634), the Chief Justice of England, who conceived of the common law as a historical body of doctrines constructed by judges and founded on a species of "artificial reason," which only trained lawyers were capable of exercising.[85] For the vast majority of common law practitioners during the eighteenth century, the Common law was

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[83] Bentham, *Introduction to the Principles of Morals and Legislation*, 8.

[84] Lieberman, *The Province of Legislation Determined*, 232. It bears mentioning that Bentham did not worry about "the monopoly of political power" in the legislature as he did about all other monopolies. See Richard Posner, "Blackstone and Bentham," 606.

[85] Posner, *The Problems of Jurisprudence*, 10.

understood along similar lines as the product of social and historical processes, and the preserve of a professional caste. It can be characterized, accordingly, by a conservatism and reliance on past experience; it emphasized continuity over time (though also flexibility through common law adjudication). Because common law was located within the living body of law of the historical community, moreover, it could not, then, be traced back to a priori first principles. Hence, there existed no external form of reason against which the Common law could be judged.

By contrast, Bentham viewed law as an exogenous matrix of social life. From this perspective, law reasoning stood apart from society. As opposed to the inductive approach characteristic of the common law tradition, Bentham's legal positivism propounded a deductive, a priori approach to law that sought to grasp law as a whole – as a complete, consistent, rational body of law. Such legal reasoning, in Bentham's legal-jurisprudential thought, was understood to be conceptually autonomous from society. It was something imposed from the outside; it did not, then, purport to be organic, that is, embedded in historical and social processes, unlike the orthodox view of common law reasoning.[86] Moreover, as opposed to the concrete, particularistic nature of the common law, Bentham sought to outline an abstract, impersonal, and systematic method of law and legal inquiry based on scientific calculation. At the heart of this abstract legal method was an epistemic appeal to a positive "science of law"[87] – that is, broadly speaking, the

[86] G.J. Postema, "The Expositor, the Censor, and the Common Law," in *Jeremy Bentham: Critical Assessments*, ed. Bhikhu C. Parekh (London and New York: Routledge, 1993), vol. 3, 240.

[87] This epistemic appeal is also front and center in John Austin's definition of general jurisprudence, which he defined as "the science concerned with the exposition of the principles, notions, and distinctions which are common to [modern or "mature"] systems of law." See Austin, "On the Uses of Jurisprudence" in *The Province of Jurisprudence Determined*, 367. Furthermore, this epistemic appeal was wholly embodied in the common style or mode of presentation of positivist jurists – the treatise, which became the standard form of legal writing in England during the nineteenth century. Positivist jurists conceived of their treatises as "scientific" codes of law: just as a code sets forth both general rules and principles as well as a rationale for those principles and rules, positivist jurists aimed to establish general legal principles, notions, and distinctions, as well as a logical rationale for those positivist principles, notions, and distinctions. See A.W.B. Simpson, "The Rise and Fall of the Legal Treatise, Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48 (1981).

founding appeal to study "facts" rather than "values" for the purpose of eliminating evaluative and/or normative statements from descriptive exposition. Bentham referred to this "science of law" as "expository jurisprudence," which he distinguished from "censorial jurisprudence" (or the "science of legislation).[88] The former aims to describe an actual law or legal system; the latter is driven by normative considerations and aims to change it. Bentham argued that natural law jurists failed to distinguish between the two, and, as a result, they failed to identify "bad law." Such natural law reasoning was anti-reformist, according to Bentham, because it did not view "bad law" as law; whereas Bentham insisted on exposing bad law – as judged by the principle of utility (see below) – in order to then reform it.

Bentham's legal positivist critique of the common law demanded fixed and secured rules and a determinate authority. The normative dimension of that formal, "scientific" critique of English law was supplied by Bentham's utilitarianism.[89] The principle of utility, in Bentham's jurisprudence, was synonymous with "the objective approval of those actions undertaken in fulfillment of the dictates of the principle of self-preference." In his appeal to "self-preference," Bentham sought to grasp what he considered to be "an axiomatic truth about human nature" – that "every human being is led to pursue that line of conduct which according to his view of the case, taken by him at the moment, will be in the highest degree contributory to his own greatest

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[88] Bentham, *Introduction to the Principles of Morals and Legislation*, 294. It was in this general sense of the term that "classical" English positivist jurists described their "positive legal science." They often did so, moreover, by comparing their legal science to other formal sciences. Bentham, for example, compared his book, *Introduction to the Principles of Morals and Legislation* to Adam Smith's *Wealth of Nations*, which, as Bentham noted, exposed the general principles of political economy. See Bentham, *Legislator of the World*, 328. Bentham also analogized the "science of jurisprudence" and the "science of grammar" in "Fragments on Universal Grammar," as reprinted in *Works*, vol. 8.

[89] On the contradictions between Bentham's positivism, which demanded fixed, stable rules and a determinate authority and his utilitarianism, which demanded flexibility in adjudication, see Postema, *Bentham and the Common Law Tradition*.

happiness, whatsoever be the effect of it, in relation to the happiness of other similar beings, any or all of them taken together." In this way also, Bentham aligned the "scientific" principle of utility with substantive rationality: "It is the greatest happiness of the greatest number that is the measure of right and wrong."[90] This, then, was Bentham's normative standard in determining the merits and demerits of all institutions – that is, in determining which institutions represented "universal interests" and which institutions reflected "particular interests." From this substantive standpoint for critique, Bentham argued that the common law failed the utilitarian test since it did not ensure the "universal" interest of legal subjects in securing their persons and property. On the contrary, it reflected the particular "sinister interests" of Judges & Co's monopoly on English law.

Bentham sought to remedy the manifold deficiencies of the Common law through what he termed "codification" – a change in the form of law that reduced law to a set of rational utilitarian statutes which exhibited "[c]learness, correctness, completeness, compactness, consistency in design, and uniformity of expression."[91] These were the properties of a good scientific code, whose ultimate goal, Bentham thought, should be to grasp law as a whole by simplifying it and making it more efficient, intelligible and accessible to laymen. This involved, first and foremost, expelling the "infectious" linguistic fictions from the common law and creating an unambiguous language for law by fixing the meaning of its terminology such that each legal idea would be expressed in one word and only one word. "Identity of nomenclature," Bentham argued, "is certificate of identity of nature: diversity of diversity: - how absurd, how

[90] Bentham, *Fragment,* 93.

[91] Bentham, *Legislator of the World*, 144.

inconsistent to make the certificate a false one!"[92] By creating a uniform legal terminology, Bentham sought to void the technical language of the common law, which was only accessible to Judges & Co. As such, codification represented a clear and present threat to legal specialists and judicial authorities. In Bentham's radical Enlightenment vision of law, these "corrupt" legal intermediaries, who maintained their monopoly on the common law by ensuring its uncertainty and unpublicity, would become redundant and unnecessary, such that "Every man [could become] his own lawyer."[93]

A good code, Bentham believed, would promote the compliance of the legal subject (citizen) with formally rational legal rules. These abstract, impersonal rules would then be applied, rather than made by the courts. In this way also, Bentham argued that codification would curb the discretionary (read: "arbitrary") power of judges and their ex post facto applications of the law.[94] Bentham's criticism of judge-made law was particularly relevant in the context of the eighteenth-century English criminal justice system, which "was shot through with discretionary powers."[95] In this highly punitive sphere of eighteenth-century law – whose

[92] Bentham, *Works*, vol. 11, 73. Bentham viewed language as entirely referential and "transparent to reality." See Posner, *Problems in Jurisprudence*, 13.

[93] It is for this reason that analogies between Bentham and Martin Luther have been made. Just as Luther sought to remove priests as intermediaries between man and God, Bentham sought to remove lawyers as intermediaries between man and law. See Robert A Yelle, "Bentham's Fictions: Canon and Idolatry in the Genealogy of Law," 156-158. Elsewhere, Bentham argued: "The priests of Athens had their goddess of wisdom: it was *Minerva*. The lawyers of the English school have her twin-sister, their Goddess of reason. *The law* (meaning the *Common Law*) '*The Law*' (says one of her chief priests, Blackstone) '*is the perfection of reason*'…for between lawyercraft and priestscraft there has always been the closest alliance." Bentham, *Legislator of the World*, 124.

[94] Bentham's idea of a systematic utilitarian code would provide certainty and security by mapping the general utilitarian ends of law, but it would also provide for flexibility in allowing for judicial adjudication to fill in the gaps of particular needs. That is also to say that while the code would establish the method for adjudication, it was not meant to cover every particular case. So, while Bentham recognized the inevitable need for some judicial discretion, he nonetheless wanted to limit it and force judges to obey strict utilitarian rules in the exercise of such discretion. In this respect, as Postema argues, he did not think of judges as mechanical automatons. See Postema, *Bentham and the Common Law Tradition*.

[95] John Beattie, *Crime and the Courts in England 1600-1800* (Princeton: Princeton University Press 1986), 404.

excessive use of capital punishment (especially in relation to property crimes) subsequently earned it the name, the "Bloody Code"[96] – Bentham sought to replace the existing patchwork of customary common law with a principled system of criminal law, combined with rational, "proportionate" punishments, in which offenses would be proscribed in advance by clear and concise formal legal rules, so as to provide, in contrast to the aforesaid English "dog law," certainty and "security" for citizens. (I shall return to the utilitarian reform of eighteenth-century criminal law subsequently.)

Bentham's totalizing legal ideal was an all-comprehensive, utilitarian code that would cover all aspects of social life. This he termed the "Pannomion."[97] As he envisioned it, the Pannomion would fully encompass the codes of substantive law; its logical order of composition would be the penal, the civil, and the constitutional, followed by the codes of adjectival law, including the code of judicial procedure. It was to be derived from the will of the legislator, with its primary utilitarian object to secure "the greatest happiness of the greatest number; namely, of the individuals, of whom, the political community, or state, of which it is the constitution, is composed."[98] So conceived, Bentham's Pannomion was radically different from a digest of the law or previous historical compilations of law (e.g. Justinian's compilations of the Roman law, 534 AD), which drew their authority from past legal materials and normative sources.[99] As

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[96] Whereas, in 1688, there existed 50 offences in statutory law punishable by death, by the end of the eighteenth century, there were 220 offences. Stephen Wade, *Britain's Most Notorious Hangmen* (Barnsley, South Yorkshire: Wharncliffe Books, 2009), 9.

[97] A good deal of ink has been spilt on the impracticality of the Pannomion. See, in particular, Lobban, *The Common Law and English Jurisprudence 1760-1850*.

[98] Bentham, *Works*, vol. 9, 150.

[99] The nature of Bentham's codification project, as described above, was qualitatively different from earlier attempts to systematize English law, which can be traced back to the Henry VIII, whose advisor Reginald Pole attempted to remedy the morass of uncertain rules of conduct that was applied by Justinian to the Roman law.

opposed to the common law tradition, which relied on past precedent for its authority, the Pannomion was to based on a preconceived "scientific" principle of utility so as to ensure that law secured the "universal interest." In this respect, Bentham's Pannomion purported to make a clear break with the past – to construct an entirely new legal positivist-utilitarian world *ex novo*. This brave new legal world could only be achieved through the conversion of the whole common law, by way of utilitarian legislation, into codified statute law. Such a radical departure with the common law tradition essentially followed the Enlightenment spirit of Voltaire's dictum: "If you want good laws, burn those that you have and make new ones."[100]

Bentham viewed himself as a universal codifier, a "legislator of the world," who sought to organize modern legal communities along rationalized positivist-utilitarian lines. This required not only a practical remedy (i.e. codification) to the "evils" of common law, but also a theoretical and methodological remedy to support that novel practice. Bentham termed that latter remedy, "universal jurisprudence." Its objective "was to provide the conceptual framework, the terminology, and the technical machinery required by the Censor…who is engaged in the project of drawing up a complete code of laws."[101] Through his universal jurisprudence, Bentham's sought to "map" the whole body of law in a uniform, principled, and logically consistent manner such that "there are no terrae incognitae, no blank spaces; nothing is at least omitted, nothing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at a moment's warning can traverse in all imaginable directions." That jurisprudential mapping, moreover, was not only intended as a

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[100] Voltaire, "Laws" in *Political Writings*, ed. and trans. David Williams (Cambridge: Cambridge University Press, 1994), 20.

[101] Postema, "The Expositor, the Censor, and the Common Law," 243; Bentham, *Introduction to the Principles of Morals and Legislation*, eds., J.H. Burns and H.L.A. Hart (Oxford: Clarendon Press, 2005): 6-7, 293-296.

guide for the censors of individual nations. It was also intended as a guide to determine – on the basis of the principle of utility – what *should be* common to the legal systems of all modern "civilized" nations. And while he acknowledged, "That which *is* Law, is, in different countries, widely different," he nonetheless maintained his utilitarian legal-jurisprudential universalism by arguing, "that which *ought to be* [law], is in in all countries to a great degree the same."[102] By the same universalist logic, he insisted that while it was "not possible to foresee (discrete events) individually," such legal events could nonetheless "be foreseen in their species;…With a good method, we go before events, instead of following them; we govern them instead of being their sport."[103] And whereas "[a] narrow-minded and timid legislature waits till particular evils have arisen, before it prepares a remedy; an enlightened legislature foresees and prevents them by general propositions."[104]

Thus far, we have shown that Bentham's positivist-utilitarian critique of the Common law tradition mobilized the same tropes we saw earlier in the legal orientalist critique of Chinese law. Both common law and Chinese law were cast as "arbitrary," "uncertain," "inconsistent," "corrupt," and "despotic"; both were viewed as inauthentic and "spurious" in contrast to "real" positive law; both were diagnosed, in all of these ways, as particularistic as opposed to the prescribed forms of "universal" law (the Pannomion and the "Civilized" Law of Nations, respectively); and both critiques were strategically mobilized as anti-monopoly discourses in their respective legal contexts. What we have yet to show, however, is their discursive affinity in

[102] Bentham, *Fragment*, 99.

[103] Bentham, *Works*, vol. 3, 205. In arguing that it could be made adequate to local conditions, Bentham sought to allay fears of the universalizing and homogenizing properties of the Pannomion.

[104] Ibid.

terms of the civilization/barbarism idiom.[105] With respect to Bentham's critique of the common law, that historical idiom was articulated most forcefully in his codification proposals to foreign governments, written during the 1810s and 1820s, in which he cast the aforesaid deficiencies of the common law as abject "evils," while proposing the Pannomion as the "sole remedy" for those "evils."[106] It is through these proposals, and specifically those written for an American readership, that we can take stock of not only the legal-jurisprudential discursive affinities between the legal orientalist critique of Chinese law and Bentham's positivist-utilitarian critique of the Common law, but also one crucial historical difference – whereas the former possessed an imperial character, the latter possessed an anti-imperial character.

It was this anti-imperial quality of the Pannomion that Bentham stressed in his letters to persuade Americans, both statesmen and the public, of the advantages of codification.[107] Let us consider, first, Bentham's lengthy Letter to James Madison, the President of the United States (1809-17), in October 1811, in which he couched his anti-imperial argument for the adoption of a Pannomion by the US government in a civilizational idiom. On the one hand, he

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[105] While it is beyond the purview of this chapter, these discursive affinities can be further elaborated with reference to contemporaneous imperial utilitarians, who posited the principle of utility as the criterion by which to judge cultures and measure their degree of "civilization." So, for example, James Mill wrote in his *History of British India*: "In looking at the pursuits of nay nation, with a view to draw from them indications of the state of civilization, no mark is so important as the nature of the End to which they are directed. Exactly in proportion as Utility is the object of every pursuit, may we regard a nation as civilized. Exactly in proportion as its ingenuity is wasted on contemptible or mischievous objects, though it may be, in itself, an ingenuity of no ordinary kind, the nation may be safely denominated barbarous." James Mill, *The History of British India* (London: Baldwin, Cradock and Joy [1817]), vol. 2, 134.

[106] Bentham, *Legislator of the World*, 21. Bentham's first codification proposal was aimed at the Russian Empress, Catherine II, for whom he wrote a draft of an introduction to a penal code (in French) The draft of the introduction was later published in 1789, in English, as "Introduction." See "Letter 1" in *The Correspondence of Jeremy Bentham*, vol. 3, ed. Ian R. Christie (London: The Athlone Press, 1971).

[107] Bentham took an interest in the United States prior to the War for independence was complete, as attested to by his letters to Benjamin Franklin, in 1780, and John Jay, the first Chief Justice of the United States, in 1795, attest. It was only in the early nineteenth century, however, that Bentham focused his intellectual energies on codification, and, more specifically, to persuade Americans, both statesman and the public, of the utility of codification.

acknowledged that the importation of English common law in America had not been wholesale – that much of "the prodigious mass of rubbish" of the English common law had been discarded, including religiously persecuting laws, manorial rights, tithes, ecclesiastical courts. On the other hand, the English common law continued to be "*imported*: imported from a foreign country, whose yoke the American nation has, to all other purposes, to happily for both nations, shaken off."[108] Taking stock of that continued importation, he asked Madison: "As matters of law stand at present, in your country, Sir, (not to speak of *ours*) on what sort of basis is it that every man's dearest and most important interests stand, or rather fluctuate? – On some random decision, or string of frequently contradictory decisions, pronounced in this or that *barbarous* age, almost always without any intelligible reason, under the impulse of some private and sinister interest, perceptible or not perceptible, without thought or possibility of thought, of any such circumstances or exigencies,…"[109] This, then, was the anti-democratic and "despotic" nature of the English common law - "Law which, having had for its *authors*, not the *people* themselves, nor any persons chosen by the people, but the creatures, the ever removable and compleatly and perpetually dependent creatures of the *King alone*." And these "dependent creatures" were none other than Judge & Co. whose "sinister interests" were maintained through their monopoly on the "uncomposed and unenacted" common law, which stood diametrically opposed to the "the greatest happiness of the greatest number."[110]

To demonstrate the validity of his approach and the utility of the Pannomion, Bentham addressed, in his letter to Madison, presumed objections to his proposal. Of greatest concern, for

[108] Bentham, *Legislator of the World*, 21.

[109] Ibid., 11, my emphasis.

[110] Ibid., 19.

Bentham, was to disabuse Madison that a Pannomion would amount a "*[d]isturbance to property, and other existing rights*." Limiting his comments to the law of private rights, Bentham offered a utilitarian defense of codification on the grounds that it secured "*existing expectations*" and prevented "*disappointment, productive of the painful sense of loss*." By contrast, unwritten judiciary law was far more likely to harm private rights insofar as it lacked a "cognoscible rule of action," which led, according to Bentham, to all manner of uncertainty and insecurity to the law of private rights. The Pannomion, so presented to Madison, was intended to remedy this common law deficit by providing comprehensive definitions and explanations to all "species of private property," such as efficient causes of titles, which meant delineating the rights to determinate services.[111] In this respect, then, the Pannomion, while it would mark America's break from a feudal past, was not intended to "revolutionize" private property relations.

It was along these positivist-utilitarian lines of argumentation that Bentham framed the modern, scientific qualities of the Pannomion in contrast with the "barbaric" nature of the Common law. To modernize the "form" of law by codifying it was, Bentham insisted, the only means to fully cure the infectious disease of the English common law and to remove the "mass of foreign law, the yoke of which, in the *wordless*, as well as boundless, and shapeless shape of *common*, alias *unwritten* law, remains still about your necks." By extension, Bentham argued that the Pannomion was the only adequate means to make American law "correspondent to the progress made, in these our times, in every other line of useful science: to the end that, neither in the whole nor in any part, – in matters of law any more than in matters dependent on mechanical or chemical science, – shall the lot of the inhabitants of your part of the globe, be, in future,

[111] Ibid., 18, 180.

determined by the unexperienced and ill-considered imagination of *primeval barbarism*."[112] In this respect, he sought to highlight the feudal and anachronistic character of a form of law, which belonged to a previous age whose arts and sciences were "universally acknowledged [as being] inferio[r] in comparison of the present age." The Pannomion, by contrast, belonged to "a new era in legislation." It was "only at this advanced stage in the career of civilization and mental culture…[that] the idea of any such work [could] have been brought to view." It was, by extension, only at this "advanced stage" that a comprehensive legal remedy could be prescribed for the litany of evils inherent to the common law tradition.[113]

Along similar argumentative lines, Bentham, through a series of letters written in 1817, brought his impassioned anti-imperial case for a Pannomion, as the "sole remedy" to the "evils" of the common law, to the American public. The historical crossroads confronting them, as he framed it, was between two diametrically opposed forms of law – a determinate, secure, democratic, Statute law, which was the "only genuine sort of law," versus an indeterminate, insecure, and anti-democratic Common law, which he viewed as "spurious" "mock law." Given that opposition, he asked:

> [W]hich of the two, their respective sources considered, afforded, generally speaking, the fairest promise of being most conducive to the universal interest? – that, which, at the present time, in contemplation of the exigencies of the present time, would have for its authors Citizens of the State, mostly natives of the country, - chosen by the rest of the

[112] Ibid., 5, 11 (emphasis added). This language of the "barbarism" of the English common law was frequently invoked by American codifiers. To take but one example: William Sampson, an Irish refugee and early supporter of codification, wrote: "[w]e should have had laws suited to our condition and high destinies ....No longer forced into the degrading paths of Norman subtleties, nor to copy from models of Saxon barbarity, but taught to resolve every argument into principles of natural reason, universal justice, and present convenience, truth would [be] the constant object of [lawyers'] search; chicane and pettifogging would have... no dark crevices to lurk in... good sense would not be shocked with the failures of right, upon execution of idle and unmeaning form; and Justice would not be seen forever traveling upon bypaths. See William Sampson, "Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law," Anniversary Discourse Before the Historical Society of New York (Dec. 6,1823), in Perry Miller ed., *The Legal Mind in America: From Independence to the Civil War* (New York: Doubleday, 1962), 119, 123, 126.

[113] Bentham, *Legislator of the World*, 181, 168.

> Citizens in like manner mostly natives,- or that which in the course of several hundred years, was made at different times by from one to five persons, every one of them appointed by a Monarch – by a Monarch, under a constitution, of which, even in its most improved state, the yoke was found by you to be so grievous, that, at the imminent peril of your lives and fortunes, and, by the actual sacrifice of them to no small extent, you resolved to shake if off, and shook it off accordingly.

Bentham's articulation of the abstract juridical subject, that is, the modern citizen, to the "universal interest" was indicative of the radical egalitarian character of his positivist-utilitarian universal jurisprudence. That universal jurisprudence underwrote the modern democratic properties of the Pannomion – its "*[u]tility, notoriety, completeness, manifested reasonableness*," which, to Bentham, were wholly consonant with popular sovereignty. Whereas the aforesaid "barbaric" qualities of the Common law served only to preserve America's "natural and implacable enemies and oppressors." In this respect, then, the American war of independence had been only partially successful. On the one hand, it had managed to cast off "[t]he yoke of English Monarchy – the yoke of English Aristocracy – the yoke of English Prelacy – all these [mutually interwoven"] galling yokes." On the other hand, however, what remained was "the yoke of the English Eithersides, exalted into Judges: the Common Law – that tissue of imposture, to which you continue to still yield your necks – to be pinched and galled, under the hands of one class among you, for whom, while they are confronted, all others are tormented." It was this remaining "foreign yoke" that rendered Americans "slaves" of the "wisdom of ancestors" – "that wisdom, which…is neither more nor less than the weakness of the cradle: that wisdom, the worship of which is so readily and extensively joined in by fools and knaves."[114]

Just as America's colonial status could not be fully "shaken off" under the continued dominion of the English common law, so too could the security of the American citizen never be fully assured within that foreign dominion. On that score he argued, in the first instance, that it

[114] Ibid., 21, 129, 20, 128, 168, 35, 165-166.

was impossible to fully know the common law without a "complete law library." But the underlying problem, which rendered the common law unknowable, was not its "*voluminousness and want of compactness*." These were but symptoms of the general "uncertainty" and "indeterminateness" of the rule of action in judiciary law "by which it is rendered impossible, as so much as any one particle of it, to know, whether it *is* or is *not* law; whether it is or is not a rule, or part and parcel of a rule, by which the decisions of the *judiciary*, and with them the fate of those individuals whose case comes before the *judiciary*, will be determined." So then, even if a well-informed citizen had amassed a complete common law library, it would still be impossible to fully know the common law because it was, by its personal, arbitrary, and indeterminate nature, uncertain and thus unknowable. For these reasons – in addition to the unpublicity of the common law – American citizens had to rely on lawyers, "whose profession it is to know it, and who, on pretense of knowing it, take payment of you for communicating to you what they thus pretend to know…. Their monopoly on law, and more broadly, the monopoly possessed by Judges and Co., kept America, and all common law nations, in a "perpetual state of insecurity." It was therefore incumbent on the American citizen – if he valued his security, his person and property – to reject the despotism of the common law, as well as the monopoly of Judges and Co. and their "bigoted" venerators. Invoking, once again, his preferred metaphor of the common law as an infectious disease, Bentham implored American citizens, in no uncertain terms: "[I]f you love one another – if you love each one of you his own security – shut your ports against our Common Law, as you would shut them against the plague."[115]

Just as Bentham viewed common law as a disease tainting everything in its path, so too he thought that the Pannomion, once it took root in America, would eventually "conquer" not

[115] Ibid., 133, 167, 134, 165.

only that particular common law nation, but *all* un-codified national legal systems worldwide. Such "conquest" would unfold not through "violence and destruction." Rather, it would be carried out "with the pen," this is, peacefully, by dint of rational argument. As it pertained specifically to America, Bentham argued, "[L]et but *one* of your *twenty* States give acceptance to a body of laws endowed with all these *qualities*, – by that *one*, sooner or later, will it be forced upon the *others*: forced upon them *all*, through by the gentlest of all pressures…. In America thus will *Reason* spread her conquests." One of the ways we can read this statement is in terms of Bentham's grasp of America's constitutional system, which left much of the common law's jurisdiction to the states rather than the federal government. It can also be read in terms of Bentham's political understanding of the factional interests – between "*northern and southern*" and "*democrat and federalist*" – that divided the United States and posed a major obstacle to the codification of the common law. Such factional interests, Bentham suggested, would and should ultimately give way to the universal interest through "reason and beneficence."[116]

As Bentham presented it to the American citizenry, this progressive Enlightenment narrative of the conquest of reason and good law would have global ramifications. The Pannomion was thus intended – to borrow Koskenniemi's phrase for nineteenth-century international law – to be the "gentle civilizer of nations." By extension, Americans were "invited" to be enlightened conquerors of a radically different sort than their "barbaric" English imperialist forerunners. The new universal law, Americans were asked to help establish for the rest of the "habitable globe," was not intended "[t]o force new laws upon a reluctant and abhorring people, [which was…] in addition to unpunishable degradation – the object and effect

[116] Ibid., 170, 169, 25, his emphasis. Bentham discussed these factional interests more explicitly in his aforementioned letter to Madison.

of vulgar conquest."[117] Rather, America's new codified law, since it would necessarily align with the universal interest, would "not only [be] accepted but sought after – sought after by an admiring people." As America's "dominion spreads,… smiles, and blessings, will attend [its]conquest..." For those "quarter(s) of the world from which shame is banished…[and] the *subsistence* of the *subject* is *many"*, the spread of America's conquests would, in Bentham's progressive narrative, "disturb" unenlightened governments predicated not on utilitarian principles, but rather on a "system of *regulated pillage*" that served *"*the *luxury of the ruling few*."[118] And that disturbance, he hoped, would provide occasion for codification and good government to take hold.

Let us take note here of the abstract universalism of Bentham's Pannomion before moving on to properly theorizing it. Recall that he designed the Pannomion to be readily applicable to all legal fields – the penal, the civil, the constitutional, and the adjectival. This transposable institutional design for modern codified law was predicated upon the "universal interest" of egoistic individuals-cum-abstract juridical subjects (citizens). That abstract universalism provided the formal, positivist and normative, utilitarian standpoint for his critique of the particularities (read: "evils" and "deficiencies") of the common law tradition. It also provided the formal and normative grounds for both his anti-monopoly and anti-imperial legal critique, which he presented to American statesmen and the public in order to make the case for the Pannomion as the "sole remedy" to freeing that common law nation from that "despotic," "barbarous" "foreign law," and securing the "universal interest" of its citizenry.

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[117] Ibid., 170. On Bentham's utilitarian criticisms of empire, see Jennifer Pitts, "Legislator of the World? A Rereading of Bentham on Colonies," *Political Theory* 31, no. 2 (Apr. 2003).

[118] Bentham, *Legislator of the World*, 170, 169. Original emphasis.

In sum, we find both similarities and differences between Bentham's critique of the common law tradition and the legal orientalist critique of Chinese law. On the one hand, these critical legal discourses mobilized the same tropes about the putative particularities (deficiencies) of Chinese law and the English common law, respectively: both were cast as "arbitrary," "irregular," "uncertain," "corrupt," "despotic," and "barbaric" in order to deny each the status of law, and, on those common legal and normative grounds, to prescribe congruent domestic and international "universal" legal remedies. Furthermore, both historical discourses possessed an anti-monopoly character: the legal orientalist critique challenged the Hong merchants' monopoly on the China trade, as well as the provincial government's control of the judicial system; Bentham's critique took aim at the monopoly on the common law possessed by English judges and lawyers. On the other hand, there also existed a clear difference in the historical application of these discourses: whereas the legal orientalist critique of Chinese law was used for imperial ends, Bentham's legal positivist-utilitarian critique was used for anti-imperial ends.

III.3. Foucault and Pashukanis on Modern Criminal Law and the Legal Form

Having delineated the central features of Bentham's positivist-utilitarian critique of the common law tradition, we are now in a position to interrogate the legal-jurisprudential discursive affinities between it and the legal orientalist critique of Chinese law. Below, I theorize those affinities through a critical reading of Foucault's genealogical account of the Enlightenment juridical reformers, i.e. the "Great Reformers" (Beccaria, Servan, Duport, Pastoret, Lacretelle, Target, Bergasse, the compilers of the Cahiers, and the Constituent Assembly), and their role and significance in the historical transition to a modern "disciplinary" society in his famed *Discipline and Punish*. Coming to terms with these legal-jurisprudential discursive affinities – which have

not previously been the subject of historical investigation – shall afford us a more robust understanding of the historical context of possibility for the emergence and global proliferation of legal orientalism-positivism. As we will then see in chapters four and five, this normative legal discourse found contradictory instantiations in the context of the universalization of "civilized" nineteenth-century international law: it underwrote both British imperial international law and Chinese anti-imperial international law.

Foucault accounted for the rise and consolidation of the modern penal system, in *Discipline and Punish*, by charting the reorganization of the power to punish alongside the development of new bodies of knowledge (the human sciences), which were embedded in and reinforced that power. In so doing, he tracked a number of historical shifts that coalesced to give rise to the modern disciplinary society – characterized in the main by diffuse "strategies" of power and knowledge based on hierarchical observation, normalizing judgment, and examination, which operated throughout the social body (hospitals, asylums, prisons, army barracks, schools) to produce the individual and control his movements and social experience of space and time. Discipline, as defined by Foucault, is the method or "technique" by which power operated to control and coerce bodies – to create "docile bodies" which were designed to function in modern industrial factories, military regiments, prisons, and classrooms.[119]

Foucault introduced these historical shifts by way of a comparison of the horror of the public execution of Damiens the regicide, in 1757, with an account of Léon Faucher's prison rules from 1837. During this 80 year period Europe, by and large, witnessed the disappearance of punishment as public spectacle: the exhibition of prisoners, the pillory and the public

[119] Michel Foucault, *Discipline and Punish. The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books 1995 [1977]), 136-141.

execution ended, and along with it, the body of the criminal was removed from view. Such corporal punishment, in the ancien regime, was ceremonial, spectacular, and was directed at the prisoner's body; it served to re-establish social order and reinforce the authority of the king. Whereas, by 1837, when Faucher drew up his aforementioned rules "for the House of young prisoners in Paris," the body was no longer immediately affected by corporal punishment: the body was arranged, regulated and supervised rather than tortured.[120] Concurrently, the central aim of the modern penal process, as Foucault theorized it, became the reform of the "soul" (which the modern disciplines constructed), as opposed to punishment of the body. This shift from body to soul marked a shift from the public to the private: whereas the body was tortured in public, the soul was an entirely private affair. Instead of public ceremonial punishment, moreover, new systematic codes of law, timetables, and prison rules were formulated with the intention of making punishment certain – by deterring crime through fixed and certain rules, rather than spectacular horror.

The aforesaid Enlightenment juridical reformers proved crucial to the historical transition to the modern disciplinary society. They were, in Foucault's view, the historical architects of a new "economy of punishment." In constructing the principles of a new penality, these juridical reformers attacked "traditional justice" not simply for "the excessive nature of the punishments; but an excess that was bound up with an irregularity even more than with an abuse of the power to punish." It was this "irregularity" that Thouret, in his opening arguments for a "new organization of juridical power" to the Constituent Assembly, in 1790, made reference to three ways in which power had become "denatured": the first concerned the "private appropriation" of judgeships which could be bought and sold, as well as being hereditary; the second concerned

[120] Ibid., 3-122. There are, of course, a number of counterexamples, including the continuation during the nineteenth century, in England, of flogging for theft and plundering – to name but one.

the lack of distinction between the creation of law and the dispensation of justice; the third concerned the litany of "privileges" which granted various exemptions to courts, procedures, litigants, and offences, all of which made the law "inconsistent." The denaturation of power and irregular justice were inextricably bound; it rendered the law "incomplete," riddled with gaps and "loopholes." Likewise, the fact that the monarch and his representatives fell outside of any regular legal procedures, and that that the monarch could intervene in the juridical process to pardon and commute sentences rendered the law personal and "arbitrary." This excessive sovereign power "paralyzed normal justice, rendered it sometimes lenient and inconsistent, but sometimes over-hasty and severe." Monarchical law or "super-power" was associated, in sum, with "spectacular, unlimited, personal, irregular, and discontinuous power."[121]

For many of the reformers under Foucault's purview, the struggle to delimit the monarch's power to punish was closely articulated to the need to suppress popular illegality. In attacking the irregularity of monarchical power, they were also attacking popular illegality surrounding the seizure of goods. These customary illegalities, characteristic of the European underclasses in the ancien regime, were often ignored and/or tolerated. In Foucault's reading, the eighteenth century underwent a "crisis of popular illegality" – an upheaval in the traditional economy of illegalities marked by a shift from an illegality of rights to an illegality of goods. Its end result entailed greater intolerance for property offences accompanied by more systematic, intensive penal interventions, and greater surveillance of the population. In all these respects, then, there was an attempt to adjust and refine the techniques of power that control (read:

[121] Ibid., 75, 78-79, 80, 88. It was in this vein, Foucault argued, that Le Trosne struggled to delimit sovereign power and "demanded that the prerogatives of the Crown by reduced, that the accused be regarded as innocent until proven guilty, that the judge be a just arbiter between them and society, that laws be 'fixed, constant, determined in the most precise way,' so that subjects know 'to what they are exposed' and that magistrates be nothing more than the 'organ of the law.'" Ibid., 88.

discipline) the everyday lives of individuals. Taking stock of these historical developments, Foucault argued that there existed a "strategic coincidence" between the struggle to delimit monarchical sovereign power, on the one hand, and appeals to subject popular illegalities to stricter control. Hence, "penal reform was born at the point of junction between the struggle against the super-power of the sovereign and that against the infra-power of acquired and tolerated illegalities." It was this "strategic coincidence" that imparted eighteenth century penal reform with such great significance as "it was the form in which, in the most visible way, the unlimited power of the sovereign and the ever-active illegality of the people came together."[122]

Against the unrestrained monarchical power to punish, Enlightenment reformers posited the indeterminate yet "insuperable" principle of "humanity" as an all-encompassing measure for the new economy of power and punishment. "Humanity in the sentences," Foucault argued, "was the rule given to a system of punishment that must fix their limits on both. The 'man' that must be respected in the sentence was the juridical and moral form given to this double delimitation." At first blush, then, penal reform seemed to be motivated by "a discourse of the heart." But "[b]eneath the humanization of the penalties, what one finds are all those rules that authorize, or rather demand, 'leniency', as a calculated economy of the power to punish." The reformers' appeal was not, then, for more humane punishment *per se*, but rather for a more fully regulated and efficient distribution of power, which had previously been bound to the unlimited and irregular "monarchical super-power." Narrating the history of penal reform in this way, Foucault sought to undercut any straightforward Enlightenment narrative of penal reform as motivated by a purely humanitarian impulse. Instead, what Foucault thought was that the critical

[122] Ibid., 84, 78, 87, 89.

discourse of the reformers "was directed not so much as the weakness of cruelty of those in authority, as a bad economy of power."[123]

Crucially for Foucault, the modern economy of power and punishment imagined by the Great Reformers was underwritten by the theory of the contract. The apposite references, according to Foucault, can be found in eighteenth-century thinkers such as Pufendorf and Rousseau, as well as in the utilitarian thought of Beccaria.[124] Within this contractual social schema, the citizen was presumed to have agreed to the law by which he may be punished. It was for this reason that "the criminal appears as a juridically paradoxical being" in that he participates in his own punishment. Moreover, because all citizens came together to form a state and to punish those who broke society's laws, an immense power, whether in the political form of a monarchy or a republic, came into existence. And because the whole of society was present in the punishment – as "the right to punish…shifted from the vengeance of the sovereign to the defense of society" (90) – the question of the degree of punishment came to the fore. This, in Foucault's reading, created the need to establish a principle of moderation, which was first articulated as a humanitarian discourse. But lurking beneath this "discourse of the heart" was a cold-blooded utilitarian principle of calculation, which militated against the application of "inhumane" punishments not because of the criminal's humanity, but rather in the interest of the economic (read: efficient) regulation of power in society.[125]

This underlying utilitarian principle was most paradigmatically expressed in code law – the Great Reformers' prescriptive remedy for the traditional (i.e. "arbitrary" and "irregular")

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[123] Ibid., 75, 89, 91, 101, 80, 79.

[124] Not all utilitarians subscribed to such contractarianism. Most notably, Bentham rejected social contract theory as a juridical fiction. See Bentham's "Anarchical Fallacies."

[125] Foucault, *Discipline and Punish*, 90, 79.

economy of power and punishment. As Foucault framed this penal reform project, code law consisted of new legislation to cover, that is to say, define, the whole field of offences. This was nothing short of a new "penal semiotics" comprised of "obstacle-signs" that were meant to "classif[y] and collec[t] [all offences] into species from which none of them can escape." For that reason, "a code [wa]s therefore necessary and this code must be sufficiently precise for each type of offense to be clearly present in it. The silence of the code must not harbor the hope of impunity. An exhaustive, explicit code [wa]s required, defining crimes and fixing penalties." For the Great Reformers (Bentham included), code law was meant to create a stable link between the sign of the crime and the sign of the punishment. The stability of this link provided "an advantage for the calculation of the proportions between crime and punishment and the quantitative reading of interests; it also has the advantage that, by assuming the form of a natural sequence, punishment does not appear as the arbitrary effect of a human power." In this way, code law was underwritten and naturalized by a "rational…penal arithmetic" – a form of "'economic' rationality that must calculate the penality and prescribe the appropriate techniques." Punishment, as imagined by the juridical reformers, was thus no longer concerned with re-establishing order and authority. Rather, it was meant to be related to future effect on the social order so as to prevent recurrence of the crime. To do so most effectively, criminal laws required an economy of publicity so that everyone had access to them. Whereas the traditional penal economy was "known" only to a privileged few, the modern penal economy would eliminate any such customary monopoly on law. The means of doing so were straightforward: "Only printing," Cesare Beccaria (1738-1794) insisted, "can make the public as a whole and not just a few persons depositories of the sacred code of the laws."[126]

[126] Ibid., 98, 105, 91, 92, 96. It was in this context, Foucault argued, that the Great Reformers proposed a theater of

How does Foucault account for the historical transformation in criminality from "the attack of bodies to the…direct seizure of goods," and the concurrent emergence of a new codified economy of punishment. He does so with reference to changing socio-economic circumstances during the eighteenth century. Specifically, he cited "[t]he way in which wealth tended to be invested, on a much larger scale than ever before, in commodities and machines presupposed a systematic, armed intolerance of illegality. The phenomenon was obviously very evident where economic development was most intense." It is in this eighteenth-century context that Foucault referenced the emergence of new forms of capital accumulation and the rise of the bourgeoisie as the dominant class – developments which led to "a higher juridical and moral value [was] placed on property relations…. [and]a consequent need for security." As new forms of production and capital accumulation emerged, a redistribution of illegalities followed – popular practices relating to an illegality of rights became transformed into an illegality of property.[127]

Foucault was no Marxist, however. Despite the primary significance he imparted to the rise of modern industrial capitalist forms of production, this far-reaching economic development did not, in his view, singularly determine the new "political economy" of the power to punish. Rather, Foucault argued there existed a confluence of interests that ushered in the "crisis" of popular illegalities and the reforms of this new penal economy. That is to say, as it pertains specifically to property offences, it was not only in the material interests of an emergent bourgeoisie to protect private property relations. It was also through the interested appeals of

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punishment, a "punitive city," in which a complex system of representations and signs would be displayed publicly. Punishments were to be related obviously to their crimes, and, in this way, they served as an obstacle to lawbreaking. The "ritual recoding" of the law was to occur when a crime was committed. This would "enac[t] the discourse of the law and sho[w] that the code, which links ideals, also link realities." Ibid., 110-111.

[127] Ibid., 76, 85, 77, 76.

juridical reformers like Beccaria Anglicus (Richard Wright, 1764-1836), who linked the security of property with the abolition of corporal punishment in the following way: "If the peace and good order of society could not be preserved and property not be protected, in a word, if all the ends of human justice could not be secured without the infliction of capital punishments, not a single argument ought to be advanced against their continuance."[128]

The Great reformers' critical juridical discourse, as Foucault theorized it, interacted with and was expressive of these socio-economic developments. The fact that the reformers called for a new utilitarian economy of punishment as these deep shifts played out was not simply a temporal coincidence, according to Foucault. Rather, it was a "strategic coincidence," which entailed a radical change in the way power operated in and through society. In formulating a new utilitarian economy of punishment, "the reformers thought they were giving to the power to punish an economic, effective instrument that could be made general throughout the entire social body, capable of coding all its behaviour and consequently of reducing the whole diffuse domain of illegalities." In order for power to operate most efficiently, it had to be uniformly divided into "homogenous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body", without loopholes, inconsistencies, loopholes, and arbitrariness. The new penal economy, as envisioned by the reformers, was meant not "to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity." And that "universality" entailed regularity, constancy, uniformity, and impersonality. It was these modern penal principles of "continuity and permanence" that would maximize the efficiency of the whole operation and "reduce its economic and political

[128] Beccaria Anglicus, *In Letters on Capital Punishment addressed to the English Judges* (London: J. Johnson, 1807), 19. See Foucault's discussion on the contingent convergence of "many different interests" in the formation of a new economy of power. Foucault, *Discipline and Punish*, 81.

cost by increasing its effectiveness and by multiplying its circuits." Those modern principles stood in direct opposition to the principles of the traditional penal economy, which were "based on…the confused and inadequate multiplicity of authorities, the distribution and concentration of power correlative with actual inertia and inevitable tolerance, punishments that were spectacular in their manifestations and haphazard in this application."[129]

Foucault's account of the rise of modern disciplinary society is useful on several major theoretical fronts. First, he delineates the principle characteristics of the Enlightenment Reformers' liberal utilitarian critique of the old customs – as "arbitrary," "irregular," "uncertain," "despotic," "barbaric," and "inhumane" – associated with sovereign law in the ancien regime. It was this same reformist critical discourse that we encountered in both legal orientalist critiques of Chinese law and Bentham's legal positivist-utilitarian critique of the common law. Second and relatedly, Foucault linked this eighteenth-century juridical critique to the rise of modern codified criminal law. He did so by illuminating the discursive centrality of the modern free and equal legal subject to this emergent body of law and legal jurisprudence. In this way also, Foucault implicitly uncovered a historical movement or logic towards liberal abstraction, which, I shall argue, underwrote the formal and normative premises of modern capitalist law in general, and modern criminal law in particular.

It was precisely this abstract, rights-bearing liberal legal subject that Pashukanis, in *The General Theory of Law and Marxism*, sought to relate to the real, practical abstraction of labor in modern capitalist society. As will be recalled, this historically limited form of liberal abstraction – the egoistic, rights-bearing legal subject – is a product and core feature of modern capitalist society, which Marx analyzed, in *Capital*, with reference to a peculiar form of social practice he

[129] Ibid., 94, 80, 82, 87, 89, 87.

called, "abstract labor." It refers to the basic historical condition in modern capitalist society that people do not produce goods for their own means of subsistence (as had been the case in pre-capitalist societies), but rather as a means to buy goods and services from others through exchange. In this way, Marx reasoned, labor in capitalism assumes a general social function: it mediates how individuals relate to each other and to nature, and, as such, it constitutes a unique, historically specific form of impersonal social interdependence.[130] The real, practical abstraction of human labor that creates commodities lies at the core of a historical logic of equivalent exchange – a constitutive exchange principle, which Marx calls "value," that establishes a commonality among people abstracted from the qualitative specificities of particular persons. It does so by reducing qualitatively distinct forms of concrete laboring activity (e.g. handloom and powerloom weaving) into an abstract, homogenous quantum of socially average labor time.

For Marx, the realization of value in the act of exchange presupposes a conscious act of will on the part of the commodity owner. And it is this judicially constituted will, generated in the sphere of exchange relations, which makes commodity owners "free" and "equal" to other owners of commodities. In this transactional context, legal personality – man's "will" (which resides in the commodity) and formal capacity to be a subject of rights – is simply an abstraction of the value relation. Hence, these guardians of commodities "appear on the economic stage [as] merely personifications of economic relations." By that same reasoning Marx argued that commodity exchange requires a socially specific form of legal regulation – the contract – which regulates conflicts between two formally equal and autonomous wills who mutually recognize and defend their rights and interests in this legal form. Hence, "the juridical relation mirrors the economic relation": just as value abstracts from the concrete, particular qualities of disparate

[130] My reading of Marx is highly indebted to Postone's *Time, Labor, and Social*.

laboring activities to render them commensurable by virtue of their common social substance (abstract labor), the legal form, as a relation between two bearers of rights, abstracts from the qualitative differences and inequalities of particular individuals to render them formally equal under the law.[131]

Drawing on Marx's critique of bourgeois law and legal abstractions, Pashukanis argued that the constant exchange of commodities in the sphere of circulation gives rise to these three phenomenal forms of appearance – equality, free will and private ownership interest. The formation of the bourgeois egoistic legal subject – the abstract, undifferentiated bearer of these rights and interests – represents the crystallization of these three phenomenal forms in one "fetishized" legal form. The effect of that legal fetishization is to objectify and transhistoricize legal concepts and structures specific to capitalism.[132] Hence, "legal fetishism compliments commodity fetishism." So construed, the bourgeois legal subject comes to logically approximate the commodity *only* form in that "all concrete peculiarities which distinguish one representative

[131] Marx, *Capital*, 179.

[132] Marx also makes reference to the fetish in order to explain how, for example, political economists like Adam Smith could misrecognize the historical specificity of the value form (abstract labor) and conflate it with human labor in general – broadly conceived as an objective mediation of humans and nature, which is operative in all societies, pre-capitalist and capitalist. Marx argues: "Although Adam Smith determines the value of the commodity by the labour-time it embodies, he then transfers the real validity of this determination of value to pre-adamite times. In other words, what he regards as evident when considering the simple commodity becomes unclear to him as soon as he examines the higher and more complex forms of capital, wage-labour, rent, etc." This is Postone's amended translation of Marx, *A Contribution to the Critique of Political Economy*, trans. S.W. Ryazanskaya (Moscow: Progress Publishers, 1970), 59. See *Time, Labor, and Social Domination*, 131. Likewise Marx argued, in *Capital*, that while Bentham's utilitarian doctrine may in fact be historically valid for a particular historical epoch marked by egotistic individuals driven by self pursuit, it does not have transhistorical validity: "Bentham is a purely English phenomenon….[But] [t]he principle of utility was no discovery made by Bentham. He simply reproduced in his dull way what Helveticus and other Frenchmen had said with wit and ingenuity in the eighteenth century. To know what is useful for a dog, one must investigate the nature of dogs. This nature is itself not deducible from the principle of utility. Applying this to man, he that would judge all human acts, movements, relations, etc. according to the principle of utility would first have to deal with human nature in general, and then with human nature as historically modified in each epoch. Bentham does not trouble himself with this. With the driest naivete he assumes that the modern petty bourgeois, especially the English petty bourgeois, is the normal man. Whatever is useful to this peculiar kind of normal man, and to his world, is useful in and for itself. He applies this yardstick to the past, present, and future." Marx, *Capital*, 758, fn.51.

of the genus homo species from another dissolve into the abstraction of man in general, man as a legal subject."[133] Man's capacity to act as a "bearer" of private rights and interests thereby becomes entirely "separated from the living concrete personality," and, as a result, the legal subject "ceas[es] to be to be a function of its effective conscious will and becom[es] a purely social function."[134]

Pashukanis's argument, in *The General Theory of Law and Marxism*, was that the abstract, free and equal legal subject constitutes the cell form of modern capitalist society and the controlling premise of bourgeois law and legal theory. This liberal abstraction of legal personhood, in other words, only became theoretically conceivable once capitalism had become the predominant social form of organization. Hence, this intellectual process of abstraction underlying the juristic formulation of general concepts of law, like legal personhood, mirrors the social process of abstraction inherent in modern commodity exchange relations; jurists are only able to make use of abstract categories, such as the "legal subject," because of this socially specific form of practical abstraction bound to commodity exchange. Prior to the rise and generalization of commodity exchange relations, this "free and equal" abstract legal subject was *a priori* inconceivable. In the feudal world, man was viewed *not* as a bearer of abstract rights, but rather in terms of various privileges associated with concrete distinctions established by birth, social rank, education, and occupation. Within this context of organic patriarchal relations, "every right was a privilege": "all rights were considered as appertaining exclusively to a given concrete subject or limited group of subjects." As such, equality was assumed only "in a narrow legal sphere," on the periphery of ancient and feudal society; legal personality possessed no

[133] Pashukanis, *GTLM*, 117, 153.

[134] Marx, *Capital*, 179.

"constant element," no homogenous meaning, in an epoch in which labor did not function as a social means, and, as a result, lacked any notion of "universal" formal equality between men.[135]

The legal form – the juridical principle of equivalence – attained "universal significance" *only* under generalized conditions of commodity production, that is to say, when all types of socially useful labor are reduced to labor in the abstract. By this Pashukanis meant that whereas the legal form had only limited application in pre-capitalist social formations, in modern capitalist society it becomes readily generalizable, that is to say, universally transposable to all legalized spheres of social and political life: civil law and criminal law, public law and private law, domestic law and international law, etc.[136] Likewise, under conditions of generalized commodity production and exchange, the abstract and impersonal "idea of the subject as the bearer of every imaginable legal claim" (whether as claimant or debtor, renter or owner, vendor or distributor, etc.) becomes universally transposable to all social relations and their respective fields of law. In the domain of bourgeois jurisprudence, such universal transposability was reflected, according to Pashukanis, in the juristic formulation of a "generic concept" of the rights-bearing legal subject – one which abstracts from the concrete differences of particular legal subjects to accommodate them within one uniform concept that holds irrespective of the particular sphere of law in question (civil, criminal, public, private, domestic, international, etc.).[137]

It is through this Marxian social theory of legal forms that we can advance – in a much more historically determinate fashion – Foucault's analysis of the Great Reformers' critical

[135] Pashukanis, *GTLM*, 119.

[136] Ibid., 109-33.

[137] Ibid., 118.

juridical discourse, on the one hand, and the relationship between the emergence of capitalism as the dominant social form and the rise of modern criminal law, on the other. We shall do so by interrogating the legal forms of abstract equivalence in Foucault's "disciplinary society." Following his point of analysis, our immediate focus shall be on the instantiations of this principle of equivalence in modern criminal law. Reading with Marx and Pashsukanis, moreover, we can make sense of how this modern juridical form was fetishized through the critical discourse of the Great Reformers – that is, how it assumed a natural, transhistorical veillance in and through their discursive practices. This, in turn, will allow us to come to terms with an historically emergent liberal legal modernity characterized by the normative primacy of the subjective, egoistic abstract legal subject and a wave of codification projects during the late eighteenth and nineteenth centuries.[138]

III.3.1 Abstract Individualism and Contractarianism

As discussed above, Foucault argued that the modern political economy of power and punishment imagined by the Great Reformers was underwritten by the general theory of the contract. By this general theory Foucault was referring specifically to social contract theory, which took, as its conceptual starting point an original state of nature out of which individuals contracted to form civil society. And while there was a diversity of social contact theories amongst the Great Reformers under Foucault's purview (e.g. Beccaria, Lacretelle), all of them

[138] Lindsay Farmer has argued that this historical wave of codification constituted a new "legal modernity." It found it paradigmatic expression in the Napoleonic code, based on the revolutionary idea of legal equality (i.e. the abrogation of privileges associated with the ancien regime), which Farmer distinguishes from the previous codes of Enlightened Despotism. Significantly, she equates that legal modernity with an abstract form of law and legal subject: "These codes mark the transition to the modern legal and political order: the abstract juridical subject is moved to the center of the law and the relationship between the juridical individual and the constitutional state is coded as a finite and self-contained rendering of possibilities." See L. Farmar, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45," *Law and History Review* 18 (2000): 4, 5.

supposed an abstract individual(ism). They did so in several interrelated ways: their methodological individualism held that the laws governing society could be inferred from the laws which govern individuals prior to the creation of society; the individual was understood as prior to and constituent of society; and political obligation was understood to be based on the voluntary consent of individuals.

In light of the abstract individualism of social contract theory, some critical legal scholars have characterized such contractarianism "as a form of bourgeois ideology [which] has served to provide a rational justification for liberal democratic capitalism as the ideal politico-economic system."[139] Historically framed in these terms, the social function of social contract theory has been to conceal a particular set of class interests, as well as class domination and exploitation which operate in and through the "democratic" bourgeois state. These are the "real" political and economic relations, in liberal democracies, which lie behind the façade of its formal equalities and freedoms; those "real," "material" relations have been obscured and reinforced by bourgeois juridical fictions like the social contract.[140] This is essentially an orthodox Marxian perspective on law – one that articulates closely, at points, to Foucault's critical account of the rise of the bourgeoisie as the dominant political and economic class in the eighteenth century, on the one hand, and the establishment of a codified egalitarian juridical framework which was made possible by the creation of a representative government, on the other. For Foucault, the introduction and generalization of disciplinary mechanisms constituted "the other, dark side" of these nominally progressive politico-legal developments.[141] The juridical form of equivalence

[139] See, e.g., Stephen C. Ferguson, "Social Contract as Bourgeois Ideology," *Cultural Logic*: *An Electronic Journal of Marxist Theory and Practice* (2007): 2.

[140] See Ibid., 2-4
[141] Foucault, *Discipline and Punish*, 222.

that guaranteed modern systems of citizenship rights was underpinned by these micro-logical, everyday mechanisms of power (i.e. the disciplines) that were, at their core, non-egalitarian and asymmetrical. Formal equality, in other (Marxian) words, veiled substantive inequality. Furthermore, the class dimension of Foucault's account of the restructuring of the traditional economy of illegalities (particularly in regards to illicit commerce, theft, and counterfeiting) is textbook orthodox Marxism: the normative content of law directly reflected the material interests of the bourgeoisie.[142] Their concerted attempts to suppress the popular illegality of property offenses stemmed, according to Foucault, from their investments, "on a much larger scale than ever before, in commodities and machines [which] presupposed a systematic, armed intolerance of illegality."[143] Such investments necessitated a "need for security," which, for reformers like Bentham, was the *sine qua non* of "good" law.

Orthodox Marxian critiques of social contract theory as bourgeois ideology – which Foucault's account of the new political economy of power and punishment approaches, at least at times – are essentially functionalist in nature.[144] And while they well explain the social function and ideological instrumentalization of juridical fictions like the state of nature and the social contract, they do not, or rather cannot, address the logically prior question of the conditions of possibility for the rise and historical reception of such juridical fictions. "For the conscious exploitation of ideological forms," Pashukanis insisted, "is of course something separate from their emergence, which usually occurs independently of people's will." Nor can such critiques focused on class ideology explain why these juridical fictions were historically served by the

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[142] See, e.g., Piotr I. Stuchka, *Selected Writings on Soviet Law and Marxism*, eds., Robert Sharlet, Peter B. Maggs, and Piers Beirne (New York and London: M.E. Sharpe, 1988).

[143] Foucault, *Discipline and Punish*, 85.

[144] See Neal Brenner, "Foucault's New Functionalism," *Theory and Society* 23 (1994).

specific *form* of law they assumed. Which is also to argue that because these kinds of critiques focus primarily on the *content* of law, they leave unexamined the social and historical character of its legal form. It is on these critical theoretical fronts, then, that Pashukanis enables us to move beyond the functionalism/instrumentalism of both Foucault and orthodox Marxian critiques of law by examining how socially specific forms of exchange implied by value generate abstract legal forms and render their attendant normative discourses plausible to social actors.

Pashukanis held the modern abstract bourgeois legal subject to be the cell form of modern capitalist society and the controlling premise of bourgeois legal theory. It only became historically accessible to bourgeois (liberal) jurists – and here we can rightly include the Great Reformers – with the rise and generalization of commodity production and exchange, which replaced traditional hierarchies as the dominant form of social relations. Under those historical conditions of generalized commodity-mediated relations – which Foucault implicitly referenced in his account of the rise of new modern of capital accumulation and the concomitant redistribution of illegalities in the second half of the eighteenth century – the abstract and impersonal idea of the rights-bearing legal subject became universally transposable to all social relations and their associated fields of law. In this way, then, Pashukanis's invocation of "bourgeois law" was not limited to economic law insofar as the principle of equivalence underpinning the abstract legal subject came to permeate all spheres of law. This included modern criminal law, which presupposed this abstract concept of the human being as a moral and legal subject – a subject formally equal to all others and one personally responsible for his

choices and actions. The normative content of modern criminal law, therefore, consisted of violations of the duties that arise between morally free subjects.[145]

Those "free" and "equal" legal subjects, in their "private" capacity as property owners, contracted with each other in civil society; in their "public" capacity as formally and morally "free" and "equal" citizens, they also (implicitly) contracted with the state. It was this latter contractual relation which Foucault honed in on in his examination of the juridical discourse of the Great Reformers: the citizen voluntarily consented, through the social contract, to sacrifice his freedom for security in order to constitute the state; in this way, he agreed to the law by which he may be punished. The formal equality of the citizen concealed real substantive inequality and power differentials, which Foucault elaborated in terms of the everyday mechanisms of disciplinary control and coercion that permeated the social body. The techniques that controlled the criminal (hierarchical observation, normalizing judgment, and examination), he argued, also controlled the citizen in the modern disciplinary society.

While Pashukanis agreed that formal equality and substantive inequality were inextricably linked in modern society, he, unlike Foucault, provided a theoretical framework through which to interrogate the socio-historic conditions of possibility for the paradoxical features of modern abstract juridical forms. This is borne out through Pashukanis's analysis of the modern citizen and the formal principle of universal equality that underwrote it. There is, he argued, a homology between the value form and the modern juridical idea of the citizen, which makes a legal abstraction of human beings in a way homologous to the real abstraction of human

[145] Whereas the law of antiquity "was permeated by the principle of collective liability….[i]n modern criminal law, the concept of strict personal liability corresponds to the radical individualism of bourgeois society." Pashukanis, *GTLM*, 178.

labor incorporated into commodities.[146] Following Marx, Pashukanis argued that the value form – understood as a constitutive exchange principle – governed the modern production *and* exchange of commodities in the sphere of circulation. It was in this latter social sphere (i.e. civil society), that this historically determinate logic of equivalent exchange brought forth "the innate rights of man….Freedom, Equality, Property, and Bentham."[147] In the modern capitalist sphere of circulation, then, man was a "free," "equal," egoistic subject who related to other subjects as a commodity owner. In the modern capitalist sphere of production, however, the formal freedom and equality of the commodity-owning individual subject, that is the wage laborer, were contradicted insofar as he became an "object," a use value, of the production process (in addition to being subjected to direct forms of domination and exploitation, which would include the manifold disciplinary techniques Foucault delineated).[148] Hence the twofold character of the modern individual and legal subject/citizen. The peculiar form of conceptual abstraction underpinning this modern paradoxical juridical idea of the free/unfree, equal/unequal commodity-owning citizen was therefore historically and normatively bound to value relations. This abstract concept and the universal human equality/inequality implied by it, Pashukanis reiterated with Marx, were rendered historically plausible and normatively compelling only in the context of the real abstraction of human labor characteristic of modern capitalist society.[149]

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[146] Isaac Balbus made a similar argument about the homology between the commodity form and legal form: "If, in a capitalist mode of production, products take on the form of individual commodities, people take on the form of individual citizens; the exchange of commodities is paralleled by the exchange of citizens." See Isaac Balbus: "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law & Society Review* 11, no. 3 (Winter 1977): 576.

[147] Marx, *Capital*, 280.

[148] See Postone, *Time, Labor, and Social Domination*, 272-277.

[149] The paradigmatic expression is the modern idea of the formally equal citizen, which "makes an abstraction of real men in a way homologous to the abstraction of commodities from 'real products." See Balbus: "Commodity Form and Legal Form," 576.

Whereas in pre-capitalist feudal society, wherein custom or tradition served as the basis for legal claims, right and equality were "thought of merely as an attribute of a specific concrete subject or of a group of subjects." Hence, "[t]he [abstract] idea of a formal legal status, common to all citizens, general for all people, was absent in this period."[150]

Utilizing Pashukanis's commodity form theory of law enables us to historically grasp the normative underpinnings of the Great Reformers' legal imaginary – which abstracted from concrete human beings to create, through a social contract, a civil society of formally free and equal moral and legal subjects (i.e. citizens). Recall that for Foucault, this legal imaginary, and its attendant juridical fictions (e.g. state of nature, social contract), only gained currency in criminal law discourse during the second half of the eighteenth century in the context of the rise of modern capitalism. As we have seen, moreover, Foucault specified this economic development in contingent terms of the rise of the bourgeoisie and large-scale private property. That modern property-owning society emerged in conjunction with what Pashukanis called a "contract society," which he related to modern capitalism, in a much more determinate fashion, as follows: "In as much as the wealth of capitalist society appears as 'an immense collection of commodities', so this society itself appears as an endless chain of legal relations."[151] These capitalist social relations are comprised of abstract legal subjects, who serve as "representative[s] and addressee[s] of every possible claim…[and who are] linked together by claims on each other", that is, through a "dialectical relationship of right and obligation" bound to the

[150] Pashukanis, *GTLM*, 119.

[151] Ibid., 85, quoting Marx, *Capital*, 125.

commodity form.[152] Collectively, they constitute a "contract society," which Pashukanis framed in terms of "an endless chain of legal relations" between abstract legal subjects (buyer and seller, renter and owner, creditor and debtor, etc.) "who are linked together by claims on each other."[153] The contract society attains "universal significance" only under generalized conditions of commodity production – when all types of socially useful labor are reduced to labor in the abstract. It was precisely this "universal significance" that Foucault gestured towards in his analysis of the disciplinary society whose legal techniques of coercion and control were generalizable – that is to say, universally transposable throughout the whole codified social body (in hospitals, asylums, prisons, army barracks, schools).[154] While thick on description of that disciplinary transposability, Foucault offers no real explanation for it. I return to this criticism subsequently.

III.3.2 Code Law and Equivalent Recompense

"In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen," Beccaria argued, "it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances *proportionate* to the crime, and determined by law."[155] In a similar vein, Le Peletier, while introducing his new criminal

[152] And those rights, Pashukanis insisted, correspond to subjective obligations. This, every property owner knows: "that the *right to which he is entitled* as a property-owner has only so much in common with obligation: that is its polar opposite." So then, the right of a creditor is an obligation from the debtor's standpoint**.** At this very high level of abstraction, Pashsukanis argued that obligation does not stem from the command of an external norm-setting authority. Rather, in its "simplest form," obligation is a "reflection and correlate" of a subjective right. Pashukanis, *GTLM,* 99.

[153] Ibid., 85.

[154] See my subsequent discussion of Foucault's analysis of Bentham's "polyvalent" panoptic schema.

[155] C. Beccaria, *On Crimes and Punishments*, ed. R Bellamy (Cambridge: Cambridge University Press, 1995) 113. Emphasis added.

legislation to the Constituent Assembly in 1791, argued: "Exact relations are required between the nature of the offence and the nature of the punishment."[156] As formulated by juridical reformers like Beccaria and Le Peletier, the economistic law of proportionality between crime and punishment was necessary, according to Foucault, in order for the "obstacle signs" of modern criminal law to appear as "unarbitrary" and "natural" as possible. This would enable any citizen, should he think about committing a crime, to immediately connect the punishment and the crime. The stability of this link was, in turn, necessary for the social functioning of the "new arsenal of penalties" characteristic of the reformed political economy of power that took juridical shape in the second half of the eighteenth century.[157]

The law of proportionality in modern criminal law, as described above by Foucault, articulated closely to the juridical idea of equivalent recompense, which Pashukanis related to the practical equalization of commodities in the modern sphere of circulation. The commercial character of equivalent recompense, however, antedated modern capitalist society, according to Pashkukanis. His brief history of the development of criminal law begins with the "custom" of blood vengeance in clan-based societies. In these pre-capitalist societies, "[c]lan strife is passed on from generation to generation. Every offence, even that perpetuated in revenge, forms grounds for a new blood vengeance." Blood vengeance was transformed into a juridical institution once the "the biological" became linked with forms of equivalent exchange. It is in this frame that Pashukanis understood archaic penal law, which equated both injury to person and damage done to property with the body. Hence, in ancient Roman law, debts could be settled through body parts *in partes secare* [cut into quarters], and, likewise, a person found guilt

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[156] As quoted in Foucault, *Discipline and Punish*, 105.
[157] Ibid., 104-105.

of injuring another person could pay for it with his property. In its modern capitalist form, however, equivalent recompense in criminal law was divested of "the biological." It was governed instead, Pashukanis maintained, by the law of value and found its paradigmatic expression in "fines and sentences" – "proportionate" deprivations of money and time.[158] The historical drive to convert all things and persons into quantifiable commodities, he argued, paralleled the historical drive to convert criminal wrongdoing into proportionate fines and sentences.

With the codification of modern criminal law in the eighteenth and nineteenth century, we come to see, from Pashukanis's perspective, the full permeation of this emergent body of law by the juridical principle of equivalent recompense. He related this juridical principle to the abstract character of economic relations in modern capitalist society. Modern criminal law came to embody this principle of equivalent recompense insofar as the institution of punishment – as a proportionate deprivation of time or money – became a currency of criminal justice that abstracted from the particular wrong done by any one particular offender and equalized the state's response to it. On that score, Pashukanis argued:

> In principle, punishment in keeping with the guilt represents the same form as retaliation in proportion to the injury. Its most characteristic feature is the arithmetical expression of the severity of the sentence: so and so many days, weeks, and so forth, deprivation of freedom, so and so high a fine, loss of these or those rights. Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense. This form is unconsciously yet deeply linked with the conception of man in the abstract, and abstract human labour measurable in time.[159]

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[158] Pashukanis, *GTLM*, 168-170.

[159] Ibid., 180-81. Pashukanis unfolded his theory of legal forms, it should be noted, alongside a more traditional class-based analysis of law. That class dimension is plain and clear in statements like: "the bourgeoisie maintains its class rule and suppresses the exploited classes by means of its system of criminal law….Criminal justice in the bourgeois state is organised class terror." Ibid., 173.

Modern criminal punishment, so conceived, instantiated a distinctly bourgeois idea of justice – an exchange of equals.[160] This juridical idea presupposed a conception of human beings in the abstract – as individuals who are formally equal in their freedom, as distinct from the pre-capitalist hierarchical social order based on status and privilege. Considered of formally equal moral worth, therefore, the subjects of criminal law could be punished only if they were at fault for their wrongdoing. And that punishment must proportionately fit the crime. The necessary grounds for that law of proportionality or equivalence recompense "for an offence with a piece of abstract freedom determined in advance," Pashukanis argued, was that "all concrete forms of social wealth…be reduced to the most abstract and simple form, to human labour measured in time." This real, practical abstraction found its most adequate legal expression in the penal code, which, as previously discussed with reference to Bentham, requires a certain economy of publicity such that, to quote Pashukanis, "[t]he offender must…know in advance, *what he is up for*, and what is coming to him: *nullum crimen, nulla poena*, *sine lege* [no crime, no punishment, without law]….He must know what quantity of his freedom he will have to pay as a result of the transaction concluded before the court. He must know in advance the conditions under which payment will be demanded of him." Such "payment" put "the individual who is subjected to influence [of criminal law]…in the position of a debtor settling his debt."[161]

It was in this theoretical light, then, that Pashukanis argued for the conceptual and normative primacy of "private" economic law in modern "public" criminal law. The abstract concept of the human being as a free and equal moral and legal subject – a subject personally responsible for his own choices and actions – "does not exist in books and theories alone, but in

[160] In this way also, "felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties. The ratio between offence and retribution is likewise reduced to this exchange ratio." Ibid., 168-69.
[161] Ibid., 181, 183-84, 187.

life itself, in juridical practice, in the very structure of society." That structure and structuring of modern society was determined, in Pashukanis's view, by a set of abstract practices bound to commodity production and exchange. In this way, then, we can understand the fundamental connection between the modern codified disciplines and the modern contract society – both were conceptually and normatively bound to a commodity-mediated principle of equivalence which was "first clearly realized at [the] level of economic development where this form[al principle] becomes common as equalisation in exchange."[162]

Crucially for Pashukanis, it is this structured and structuring contractual relationship between commodity owners, *rather than an external norm-setting authority*, which lends the normative ideals of freedom, equality, and the autonomy of personality, their specific social meaning and significance. Hence, the normative content of modern criminal law consisted of violations of the duties that arise between free and equal legal subjects. This critical insight is particularly instructive with respect to the development of modern criminal law insofar as one customarily thinks of the state as imposing these norms on individuals. While Pashukanis did *not* deny that legal norms can be imposed by an external authoritative command, he nonetheless insisted that such state imposition does not change the fact that "the economic relation of exchange must be present" for the principle of equivalence to operate in criminal law. By that same logic he reasoned, "The state authority introduces clarity and stability into the structure of law, but does create the [normative] premises for it." These normative premises, as we have shown, are rooted instead in historically specific relations of production, which, in its modern capitalist form, means social production *for the sake of exchange*.[163]

[162] Ibid., 182, 170.

[163] Pashukanis, *GTLM*, 93, 89, 96.

Pashukanis's theory can account not only for the socially specific codified form of criminal law that emerged in the second half of the eighteenth century. It can also explain why this codified principle of equivalent recompense could appear as "natural" to social actors. The law of proportionality, in Foucault's analysis of the Great Reformers, imparted a natural (read: "unarbitrary") property to punishment, which allowed citizens to immediately read the "obstacle signs" of the modern penal economy. It was in this way, he argued, that "[t]he reformers proposed a whole panoply of penalties that were natural by institution and which represented in their form the content of the crime." Moreover, Foucault thought this "whole technology of representation….c[ould] succeed only if it form[ed] part of a natural mechanics." This was the modern "art of punishing," whose aim was to "forg[e]…stable connections that defy time."[164]

Reading with Pashukanis, what Foucault's analysis suggests is that lurking beneath the Great Reformers' juridical discourse was a social ontology, which naturalized a socially specific principle of equivalence. This is one dimension of legal fetishism, which paralleled commodity fetishism.[165] Viewed through this theoretical lens, the reason why such legal forms and their attendant "obstacle signs" could appear as "natural" to social actors is the same reason that the salient forms and features of capitalist social relations could appear as natural and transhistorical: both were historically bound to a peculiar form of abstract laboring activity that generated phenomenal forms of appearance (exchange value, money, capital). Those "fetishized" or "mystified" forms of appearance both expressed and concealed the social essence of modern

[164] Foucault, *Discipline and Punish*, 105, 104.

[165] Legal fetishism can assume a variety of different forms. It can be found, for example, in restitution theories, which fetishize the principle of equivalent recompense. It can also be found in natural law theories that transhistoricize man and his "innate rights"; whereas Marx and Pashukanis argued that these so-called "natural rights" were in fact a socially specific set of rights that only gained general historical currency with the rise of commodity-mediated social relations. Legal fetishism can also be found in Bentham's utilitarian doctrine, which took egoistic man and projected him onto all societies.

capitalist relations – that is, the historically specific function of labor as a social medium in capitalism.[166]

Following Marx's social critique of capitalism, the function of Pashukanis's critique was to demystify or defetishize modern law and legal relations. This entailed, most fundamentally, an analysis of modern capitalist law as a fetishistic form of social domination, which abstracted individuals – as formally free and equal legal subjects – from their concrete social existence. Those individuals, he argued, then come to be dominated by their own practical creations. As such, Pashukanis's theory of legal fetishism conceived of modern capitalist social domination not only in personal (class) terms, but also, and more fundamentally, in impersonal and abstract terms. Considered in this theoretical frame, legal fetishistic forms of appearance, like the naturalized egoistic, property-owning legal subject, do not simply mask a social reality of power differentials and personal domination. They of course do this, Pashukanis acknowledged. But these phenomenal forms of appearance in modern law also express the real practical abstraction of labor, as a social medium, which distinguishes laboring activity in capitalism from pre-capitalist forms of labor.

III.3.3. A Movement Towards Abstraction

Foucault's account of the historical shifts that gave rise to a new political economy of power and punishment highlighted a movement towards abstraction in modern criminal law and jurisprudence. And yet Foucault offered no real explanation as to what the historical impulse was behind this movement towards abstraction. It is to this question that Pashukanis's theory

[166] On the relationship between abstract labor and commodity fetishism, see Postone, *Time, Labor, and Social Domination*, 166-171.

affords us critical insight by historical grounding the abstract principle of equivalence inherent in modern law in general, and modern criminal law in particular, in commodity exchange practices.

These historically determinate social practices gave rise to an abstract principle of universal equality, which found juridical instantiation in, for example, the modern concept of the citizen. It was also juridically instantiated in the Great Reformers' codification projects. This is most clearly shown in the paradigmatic case of Bentham's Pannomion – the all-comprehensive utilitarian code of directive laws overseen and enacted by an "omnicompetent" legislature. As discussed earlier, Bentham's utilitarian code was designed to cover all legal spheres of social life. That is to say, he imagined it to be readily applicable to all legal fields – the penal, the civil, the constitutional, and the adjectival. His transposable institutional design for codified law was predicated upon the "universal interest" of egoistic individuals-cum-abstract juridical subjects (citizens). That abstract universalism provided the formal, positivist and normative, utilitarian standpoint for his critique of the particularities (read: "evils" and "deficiencies") of the common law tradition. It also provided the formal and normative grounds for both an anti-monopoly and anti-imperial legal critique, which, as we have seen, Bentham presented to American statesmen and the public in order to make the case for the Pannomion as the "sole remedy" to freeing that common law nation from that "despotic," "barbarous" "foreign law," and securing the "universal interest" of its citizenry. Pashukanis's theory, I have argued, throws this abstract universalism into critical relief by relating it, historically and normatively, to the rise and generalization of commodity exchange relations. It was only in this modern capitalist context – marked by the unceasing drive to convert all things and persons into exchangeable commodities – that the Pannomion, as a generalizable schema applicable to all spheres of law, even became thinkable. In this way, then, Pashukanis's theory encourages us not to dismiss this abstract universalism as

false, nor to limit our analysis of it, in instrumentalist fashion, to show how it could be mobilized as a bourgeois ideology of legal legitimation. Rather, he sought to ground this conceptual movement towards abstract universalism in modern law and jurisprudence – as expressed, for example, in the modern juridical idea of the citizen as well as in forms of equivalent recompense in criminal law – in the real, practical abstraction of labor in modern capitalist society.

Pashukanis's theory can, by extension, also ground the normative imaginary of Bentham's Panopticon, which was, for Foucault, the paradigmatic architectural model of modern disciplinary power.[167] This institutional design offered a totalizing utilitarian schema for, in Bentham's words, a "new mode of obtaining power of mind over mind, in a quantity hitherto without example."[168] It was the panopticon prison to which he devoted considerable energies (though none was constructed in his lifetime). The concept of the architectural design was such that each inmate was separated from and invisible to all other inmates (in separate "cells"); and every inmate was always visible to a watchman situated in a central tower ("inspection house"). While this continuous inspection was a practical impossibility, Bentham nonetheless thought that because the inmates would be led to and, at least in his theory, would come to believe they were being constantly watched, they would ultimately come to constantly control their own behavior. More significant than the details of Bentham's institutional design for a penitentiary house, however, was the fact that the panoptic schema was readily generalizable – it could be applied not only to prisons, but to any codified system of disciplinary power (factories, hospitals, schools,

[167] See, Foucault, *Discipline and Punish*, 200-09.

[168] Bentham, *The Works*, vol. 4, 39.

asylums) that arranged and distributed bodies in space.[169] Foucault explained the "polyvalent" applications of the panoptic schema as follows: "It is the diagram of a mechanism of power reduced to its ideal form; its functioning abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and optical system: it is in fact a figure of political technology that may and must be detached from any specific use." Given its abstract social function in arranging bodies in space and "defining power relations in terms of the everyday life of men," Foucault thought the panoptic schema "was destined to spread throughout the social body; its vocation was to become a generalized function."[170]

Both Bentham's Pannomion and his Panopticon presupposed a universally transposable principle of equivalence. While Foucault acknowledged this transposable principle in his analysis of the Panopticon and the emergent political economy of codified power and punishment for which it was an ideal architectural expression, his theoretical framework, I have suggested, is ill equipped to account for its historical conditions of possibility. To understand this transposable property of modern codified disciplinary power, we must, in my view, interrogate more fully what Foucault radically under-theorized in *Discipline and Punish* – namely, the historical emergence of capitalism as the predominant social form of organization. The non-traditional Marxian social theory of legal forms employed above purports to do just that by relating the conceptually abstract character of modern law and legal subjectivity to the "real abstraction" of modern social relations inherent in a commodity-mediated economy. It is in this critical theoretical light, then, that we can account for the historical grounds or conditions of possibility for a transnational movement towards abstraction in modern liberal law and

[169] Bentham held the panoptic schema applicable "to all establishments whatsoever, in which, within a space not too large to be covered or commanded by buildings, a number of persons are meant to be kept under inspection." As quoted in Foucault, *Discipline and Punish*, 206.
[170] Ibid., 205, 207.

jurisprudence with reference to a historically determinate principle of equivalence that was readily generalizable to all formalized social relations (public and private, civil and criminal, and domestic and international, etc.).

In addition to providing a theoretical framework to historically ground the Great Reformers' critical juridical discourse and the new political economy of power and punishment it underwrote, the Marxian social theory of legal forms proposed here also allows us to interrogate the distinctly liberal grounds of legal orientalism-positivism. It does so by casting new light on the discursive affinities between legal orientalism and legal positivism and historically grounding their common liberal normative underpinnings in the determinate capitalist context that gave rise to these critical legal reformist discourses and rendered them normatively compelling to an array of domestic and international law practitioners, both in the metropole and in the imperial peripheries. Such a critical theory can also, by extension, make sense of how this principle of equivalence could be fetishized in the form of a liberal abstract legal universalism, which provided the normative standpoint for eighteenth and nineteenth-century juridical critiques of particularistic forms of law, *both European and non-European*. It is in this respect, then, that we can understand these distinct historical discourses – legal orientalism and legal positivism – as liberal insofar as they were normatively premised on an abstract principle of equivalence bound to commodity exchange relations. This common liberal discursive underpinning links these two discourses, despite readily apparent differences in their historical applications – namely, that the legal orientalist critique of Chinese law was mobilized for imperial aims and the legal positivist critique of the common law was mobilized for anti-imperial aims.

The contradictory instantiations of this liberal abstract universalism in legal orientalism-positivism were paralleled, as we will see in the following chapters, in modern international legal

discourse: liberal abstract universalism underwrote both British imperial international law and Chinese anti-imperial international law. Building on this non-orthodox Marxian theory of socio-legal forms, we shall attempt to elucidate the liberal abstract legal and jurisprudential forms (contracts, treaties, legal personhood, legal orientalism-positivism) through which "civilized" international law was universalized in China. In so doing, we shall come to further terms with the global historical context of possibility that gave rise to these emergent liberal legal forms and rendered their attendant normative discourses meaningful to *both European and non-European* practitioners of law.

Chapter IV:
Rethinking the History and Theory of *Jus Publicum Universal*: The Formation of China as a "Semi-Civilized" Legal Subject

This chapter investigates *one* dimension of the universalization of "civilized" international law discourse in China – a paradoxical juridico-political process that played out over course of the unequal "Treaty Century"/"Century of Humiliation" (1842-1943).[1] On the one hand, this legal orientalist[2] discourse – which structured British/Euro-American ideas of what counted as "civilized" law and what did not, as well as who was included as a "civilized" legal subject and who was not – underwrote British/European legal legitimations of the post-1842 unequal treaty order in China, the legal centerpiece of which was modern extraterritoriality. Those legitimations accompanied and reinforced the global-cum-imperial expansion of Euro-American treaty law and extraterritoriality; they were codified in nineteenth-century international law and legal jurisprudence, which produced China as an object/"semi-civilized" international legal subject. On the other hand, this legal orientalist discourse also underwrote an anti-imperial critique of the legal legitimacy of Sino-foreign unequal treaties and extraterritoriality, as articulated by a new class of professional Chinese international lawyers in the early decades of the twentieth century. That anti-imperial critique worked to juridically transform China from a "semi-civilized" object/quasi-sovereign subject to a fully "civilized" sovereign subject of international law.

My investigation of the universalization of "civilized" international law in China, in the present chapter, is centered around the juridical production of China as a "semi-civilized" legal

[1] "Treaty Century" is John Fairbank's phrase. See Fairbank and Merle Goldman, *China: A New History*, 2nd ed. (Cambridge: Belknap Press, 2006), 204; "Century of Humiliation" was the common Chinese pejorative designation for this Treaty Century, which gained currency in the early twentieth century.

[2] For an excellent recent study on the history of this global legal discourse, see Teemu Ruskola, *Legal Orientalism.*

subject. I shall examine this novel form of juridical production through an exposition of the constituent elements of nineteenth-century international law – legal positivism, absolute sovereignty, international society, and the standard of civilization. I delineate these elements by analyzing the major treatises of a new professional class of Euro-American international lawyers, with special attention paid to the British cohort of James Lorimer (1818-1890),[3] John Westlake (1828-1913),[4] William Edward Hall (1835-1894),[5] T.E. Holland (1835-1926),[6] Thomas Lawrence (1849-1920),[7] and Lassa Oppenheim (1858-1919).[8]

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[3] James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 vols. (Edinburgh: William Blackwood and Sons, 1883). Lorimer was a Scottish advocate and Regis Professor of Public Law at the University of Edinburgh. He was a natural law adherent, and a member of *the Institut de Droit International.*

[4] John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894); *The Collected Papers* of *John Westlake on Public International Law*, ed. Lassa Oppenheim (Cambridge: Cambridge University Press, 1914); *International Law*, 2 vols. (Cambridge: Cambridge University Press, 1904). Westlake was trained as an equity and conveyance lawyer and was one of the founders of *the Institut de Droit International* in 1873. He was a liberal member of Parliament for the Romford Division of Essex (1885–86) and became Whewell professor of international law at the University of Cambridge (1888–1908). Between 1900-1906 he was a member for Great Britain of the International Court of Arbitration at The Hague.

[5] William Edward Hall, *A Treatise on International* Law; A *Treatise on the foreign powers and jurisdiction of the British Crown*, 2nd ed. (Oxford: Clarendon Press, 1917). Hall was called to the bar in 1861 at Lincoln's Inn and was elected to the *Institut de Droit international* as *associe* in 1875; he became a member in 1882. His principal contribution to the field was his magnum opus, *A Treatise on International Law*, which T.E. Holland claimed was "unquestionably the best book upon the subject in the English language." See T.E. Holland, "In memoriam, W. E. Hall," *Law Quarterly Review* 11 (1895): 113.

[6] T.E. Holland, *Elements of Jurisprudence*, 12th ed. (Oxford: Oxford University Press, 1917); *Lectures on International Law*, ed. Thomas Alfred Walker and Wyndham Legh Walker (London: Sweet and Maxwell, 1933); *Studies in International Law and Diplomacy* (Oxford: Clarendon Press, 1898). Holland practiced law as a barrister before replacing William Blackstone as Vinerian Reader at Oxford. He later became professor of international law as All Souls College. He became an *associe de L' Institut de Droit international* in 1877, a full member in 1880. His principal fame came from *Elements*, which underwent 13 editions from 1880 to 1924, during which time Holland held the Chichele Chair of International Law and Diplomacy at Oxford (1874-1910). In 1885 he helped to found the *Law Quarterly Review.* He also drafted the *Admiralty Manual of Naval Prize Law* and the 1894 Prize Courts Act. The war office employed him in preparing orders for troops in the field, which informed his *Laws and Customs of War on Land* and *Laws of War on Land*. He was British plenipotentiary at the Geneva Conference of 1906.

[7] Thomas Lawrence, *A Handbook of Public International Law* (London: Macmillan and Co., 1909); *The Principles of International Law* (London: Macmillan and Co., 1895). Lawrence was a professor international law.

[8] Lassa Oppenheim, *International Law: A Treatise*, 2 vols. (London: Longmans, Green, & Co., 1905). Oppenheim was born and educated in Germany; he was formally trained in criminal law at the University of Göttingen. He only

Having outlined the constituent elements, I then examine the distinctly *liberal* legal reasoning that underpinned the historical formation of "civilized" international law discourse in general, and China's "semi-civilized" legal status in particular. The formal origins of that quasi-legal international status were bound historically to the introduction, that is, imposition of modern European treaty law and extraterritoriality in China: Euro-American jurists first recognized China as a "semi-sovereign"/"semi-civilized" legal personality following the 1842 Sino-British Treaty of Nanjing, which concluded the first Sino-British opium war (1839-42). Its signing, under Britain's threat of naval bombardment, marks the formal culmination of a historical shift from a legally and jurisdictionally pluralistic extraterritorial space in China occupied by various quasi-sovereign entities (European charter companies, Hong merchants) to a state-centric legal-jurisdictional system, within which only a particular type of rights-bearing sovereign state was recognized as a legitimate, "civilized" subject of international law. At a minimum, I argue, China's "semi-sovereign"/"semi-civilized" legal status reflected the historical fact that, to quote the American jurist and diplomat Henry Wheaton (1785-1848), "China has been compelled to abandon its inveterate anti-commercial and anti-social principles" and formalize its relations with Britain and the Western "civilized" world.[9] By that same reasoning, recognition of China's quasi-legal personality also denoted its treaty-making capacity; whereas "un-civilized" African kingdoms, whose lands were deemed *terra nullius* by nineteenth-century European international lawyers, were denied any such quasi-legal personality.

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began his study of international law, however, when he moved to the United Kingdom in 1895, where he obtained citizenship in 1900. He then followed Westlake as Whewell Professor of International Law at Cambridge in 1908. His *Treatise* went through nine editions and was, at the time, generally recognized as a standard text of international law.

[9] Wheaton, *Elements of International Law*, 19.

These legal distinctions between "civilized," "semi-civilized," and "un-civilized" constituted the hierarchical divisions of an emergent global "international society." With some notable exceptions,[10] the predominant juristic articulation of that hierarchical "international society" was couched in a legal-jurisprudential schema within which "civilized," "semi-civilized," and "un-civilized" were *not* geographically fixed, but rather understood along a universal historical continuum. Such legal developmentalism paved the way for the juridical transformation of "semi-civilized" states like China into fully sovereign, "civilized" states – once they had reformed their domestic and international legal behavior to conform to the "civilized" norms and abstract legal forms of "international society." From this developmentalist perspective, Chinese inferiority was not immutable, but conditional, and thus remediable. I shall trace the developmentalist logic of "civilized" international law through a comparative historical analysis of the stadial histories of civilization written by nineteenth-century British/Euro-American international lawyers, on the one hand, and Adam Smith's political economic history of civilization in *The Wealth of Nations*, on the other. I shall argue that the developmentalist logic of these stadial histories was bound to an abstract liberal form of commercial society that was being globalized during the nineteenth century. "Civilized" international legal discourse served as its ambivalent universalizing vehicle. Through a Marxian social theory of legal forms, I shall relate this universalizing legal vehicle – and the novel form of "semi-civilized" international legal personhood it legitimized – to the global-cum-imperial spread of commodity exchange relations.

[10] James Lorimer's racialized natural law hierarchy of civilization is the most significant British case in point. See James Lorimer, *Institutes of the Law of Nations*, 12-13, 93-101.

IV.1. The Colonial Origins of Modern "Universal" International Law

The critical re-framing of the universalization of "civilized" nineteenth-century international law in China, proposed in this chapter, throws into relief the historically one-sided character of much of the existing critical scholarship on both the "colonial" origins of modern international law and its subsequent "universalization" in the nineteenth century. Those colonial origins, it is commonly argued, lie in an earlier turn to empire – and specifically in Spanish imperial expansion in the New World. This global historical event provided the colonial context of articulation for a historically novel "universal" conception of international law and concomitant legal legitimation of European domination of non-European societies, as articulated most paradigmatically in the natural law jurisprudence of the sixteenth-century Dominican theologian and jurist, Francisco de Vitoria (1492-1546). Viewed in this historical frame, the mid-nineteenth-century global turn to extraterritorial empire, and its attendant universalist international law discourse, can then be situated in a much longer, cyclical history of modern "legal imperialism," which can be traced from Vitoria's natural law jurisprudence to nineteenth-century "civilized" positivist jurisprudence through contemporary pragmatic jurisprudence: these three historically successive hegemonic jurisprudential paradigms have all served to legitimate various types of Western intervention in non-Western societies.

One of the most powerful statements is Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law.*[11] His critique of the relationship between imperialism and international law, which spans from Vitoria's natural law jurisprudence through contemporary

[11] This work has become a standard reference for critical international legal histories of European legal domination of non-European societies. It forms part of a broader critical project undertaken jurists involved in Third World Approaches to International Law (TWAIL). As part of the second generation of TWAIL, Anghie is engaged in a political project to resist and reform the structure of domination implied by modern international law's claim to universality. See also, Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

pragmatic jurisprudence, raises some fundamental historical, theoretical and methodological questions relative to the present discussion. I organize those questions around one of the dominant trends in histories of international legal imperialism, which Anghie's work typifies – to locate empire in the realm of politics and the state, i.e. public law. Legal imperial domination is understood, accordingly, with reference to "formal empire," that is, in terms of "powerful Western states exercising their political domination in the non-European world."[12]

My contention is that this "traditional" public law framework has profoundly underestimated the significance of capitalism and private (economic) law in the historical structuring and restructuring of modern universal international law.[13] That historical structuring was dual in character; it pertains to a socially specific logic or movement towards liberal abstraction, which I define, below, with reference to commodity exchange practices. Such abstraction underpinned the historical production of antinomic discursive forms of "universal" law and legal jurisprudence, and their attendant normative projects of legal and jurisprudential reform, both in the metropole and in the periphery. The circulation of these liberal forms of law and jurisprudence operated in and through *the global nomos of capitalism's empire*. My argument, pace Anghie, is that it is this global imperial realm – constituted during the nineteenth century, in juridical form, not by any one particular imperial state or concrete institution lending it ideological support, but rather by the abstract principles and practices of commodity-mediated exchange relations – within which the development of modern European extraterritoriality and the universalization of nineteenth-century international law must be situated if we are to fully

[12] Martti Koskenniemi "Empire and International Law: The Real Spanish Contribution," *University of Toronto Law Journal* 61 (2011): 2.

[13] Anghie claims that "[t]he association between international law and universality is so ingrained that pointing to this connection appears tautological." See Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40 (1999): 1.

come to terms with the paradoxical historical trajectories of the latter and the rise and decline of the former.

Taking this as my polemical point of departure, I elaborate upon the theoretical and methodological ramifications of historians' underestimation of the significance of capitalism and private law through a brief review of *Imperialism, Sovereignty, and the Making of International Law*. Anghie's theoretical limitations underscore the need for an alternative theoretical framework – one that can grasp the determinate capitalist context that gave rise to and rendered "civilized"-cum-"universal" international legal principles and practices coherent and meaningful to international law practitioners, both European and non-European. I propose such a theoretical framework by constructing a critical dialogue – centered around the *abstract character* of modern "universal" law and legal personhood – between Anghie, Martti Koskenniemi, the eminent contemporary jurist, and Evgeny Pashukanis (1891-1937), the Russian Marxist jurist.

Anghie's analysis of the colonial origins and logic of international law focuses in the main on Vitoria's famous public lectures (*relectiones theologicae*) delivered at the University of Salamanca, *De Indis Noviter Inventis* ("On the Indians Lately Discovered" (1538)) and *De Jure Bellis Hispanorum in Barbaros* ("On the Law of War Made by the Spaniards on the Barbarians" (1539)), where he addressed the novel legal problems arising from the discovery of the New World.[14] Crucially for Anghie, and contrary to traditional interpretations of Vitoria's account and justification of Spanish colonization of the New World, those questions concerning Spanish-

[14] These lectures were delivered at Salamanca in 1538 and 1539. Both lectures appear in Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* [henceforth: *De Indis*], ed. Ernest Nys, trans. John Pawley Bate (Washington, DC: Carnegie Institution of Washington, 1917). Following Anghie, I adopt the common usage of Vitoria, rather than Victoria. On Vitoria's importance to international law, see Carl Schmitt, "The Land Appropriation of a New World," *Telos* 109 (1996); Koskenniemi "Empire and International Law."

Indian relations did *not* revolve around how to create order among equal sovereign states.[15] Rather, Vitoria's jurisprudence addressed a different kind of relationship altogether – a colonial relationship between two different cultures, the legal nature of which raised a prior set of questions concerning the legal status of the Indians. He famously commenced his inquiry by posing the question as to whether Indians could own property (*dominion*). His short answer is yes, the historical and jurisprudential significance of which, for Anghie, concerns Vitoria's theoretical departure from what Anghie calls the "traditional framework," which is his shorthand for the *respublica Christiana* model of inter-polity law. Under this medieval inter-polity schema, human relations were understood to be governed by divine law, which was held above natural and human law; the Pope, as its administrator, exercised universal jurisdiction over the whole world, Christian and non-Christian. Accordingly then, Europe sovereign powers sought out the Church's legitimation in their colonial appropriation of the non-Christian "heathen" world, as exemplified most clearly in Pope Alexander VI's Papal Bull (1493) which divided the non-Christian world into Spanish and Portuguese spheres.[16] Unbelievers (Saracens and Jews) and heretics were necessarily deprived of property rights and thus could rightly be dispossessed of their lands (dominion) under this traditional framework, which typically depicted the natives as "savages," "barbarians," and "infidels," so as "to place them outside the law and to make their land free for appropriation."[17]

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[15] For a sampling of such "traditional" interpretations of Vitoria, see Pace Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International* Law (Leyden: A.W. Sythoff, 1964); Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford: Oxford University Press, 1990); Pekka Niemelä, "A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations," *Max Planck Yearbook of United Nations Law* 12 (2008).

[16] This demarcation of colonial domains was then formalized in the 1494 Spanish-Portuguese Treaty of Tordesillas.

[17] Schmitt, *Nomos*, 45.

Vitoria refuted the traditional legal bases for Spanish title in the non-European world and defended the Indians rights along two interconnected lines of universalist legal argumentation, according to Anghie. The first involved Vitoria's recovery of the Roman law concept of *dominion*, the essence of which was that all rational human beings have a natural right, "over not only their private property, their goods, but also over their actions, their liberty and even – with certain important qualifications – their own bodies."[18] In laying out his theory of subjective rights in the *relectiones*, Vitoria theoretically removed questions of property and ownership (dominion) from the realm of divine papal law and placed them in the realm of a universal natural secular law, which he prioritized over and above divine law, and within which Christians and infidels and heretics all possessed private dominion rights. He also departed from the traditional *respublica Christiana* framework by counting the Indians as fully human and rational subjects, and insisting upon their "humanity." Their status as unbelievers, Vitoria claimed, "does not destroy either within natural law or human law; but ownership and dominion are based either on natural or human law; therefore there are not destroyed by want of faith." On that basis then, he reasoned they had "true dominion in both public and private matters [i.e. public law jurisdiction, *dominium iurisdictionis,* and private ownership, *dominium proprietatis*], just like Christians, and that neither their princes nor private persons could be despoiled of their property [by either the Pope or the Emperor, Charles V] on the ground of their not being true owners."[19] So from this jurisprudential standpoint, there was *formal* equality between Christians and non-Christians. Second and relatedly, Vitoria rejected the notion that the Pope had universal

[18] Anthony Padgen, *Spanish Imperialism and the Political Imagination. Studies in European and Spanish-American Social and Political Theory 1513-183*0 (New Haven: Yale University Press, 1990), 16. For a rigorous delineation of the dual meanings of dominion – as both public law jurisdiction and the private individual's right of property over things lawfully acquired, see Koskenniemi, "Empire and International Law."

[19] Vitoria, *De Indis*, 123, 128.

jurisdiction over human relations. Divine papal law, Vitoria argued, did not provide a legitimate basis for temporal authority. As such, "the pope has no dominion in the lands of the infidel, since he has power only within the Church."[20]

This challenge to the Pope's authority resulted in a novel problem of jurisdiction: what was the basis of legal authority governing relations between the Spanish and the Indians – that is, between two different cultural orders – if not divine law? Vitoria's attempt to resolve this historical problem led him to formulate, according to Anghie, a new legal vocabulary to justify colonialism. It was based on a new jurisprudential framework, which replaced "the Universal system of divine law administered by the Pope" with "the universal natural law system of *jus gentium* [the law of nature and of nations], whose rules may be ascertained through the use of reason."[21] And rather than depicting Indians as inherently inferior and thus excluded from the realm of law, Vitoria (nominally) accorded them a legal personality within his universal jurisprudential schema insofar as they had the capacity for reason, and thus also to understand the universal validity of the rules and norms of *jus gentium*. As evidence of this use of reason in American Indian society, Vitoria pointed to "a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and *a system of exchange*, all of which call for the use of reason…"[22] And because Indians had the capacity for reason, he reasoned, they were bound to the universal *jus gentium*. This then, in Anghie's view, was Vitoria's solution to the novel problem of jurisdiction

[20] Vitoria, "On the Power of the Church," in *Vitoria: Political Writings*, eds. Anthony Padgen and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 84.

[21] Anghie, *Imperialism*, 20

[22] Vitoria, *De Indis*, 127. As quoted in Anghie, *Imperialism*, 20. My emphasis.

raised by the Spanish-Indian colonial encounter: by formulating a common natural law framework, which, Vitoria claimed, was universally binding.

What were the historical and normative bases of this legal universalism in Vitoria's jurisprudence? Anghie's critique of Vitoria's universalism suggests that its normative character was bound historically to the "universal realm of commerce." Honing in more specifically on Vitoria's recognition of the Indians' "system of exchange," Anghie argues that, at first blush, "the Indians seem to participate in this system [of universal *jus gentium*] as equals." The appearance of equality, he argues, relates directly to Vitoria's use of a commercial language that depicted "the Indian who enters the universal realm of commerce [with] all the acumen and independence of market man."[23] This portrayal of equality was coupled with Vitoria's assertion that there existed formal reciprocity between the Spanish and the Indians, who had the universal freedom to trade in Spain and claim their natural rights of settlement, just as the Spaniards did in the New World. It is this "language of liberality and…equality" which other scholars have recruited as evidence of the "humanitarian" qualities of Vitoria's jurisprudence.[24] And it is precisely this universalistic language (alongside Vitoria's appeal to "neutrality" and "objectivity") that Anghie finds so "insidious" because it serves to simultaneously legitimate and conceal the historical imposition of "particular" European practices, norms and values.[25] On this score, Anghie argues that Vitoria's jurisprudence universalized a particular set of European cultural practices, and specifically the natural right under *jus gentium* to travel and sojourn. This

[23] Anghie, *Imperialism*, 21-22.

[24] It is on this light that Vitoria has been portrayed as a liberal, humanitarian thinker. See Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947), 63. It was James Brown Scott (1866-1943) who was most responsible for the rehabilitation of Vitoria as the humanitarian founder of international law, see James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez.* (Washington: Carnegie Endowment for Peace, 1934).

[25] Anghie, *Imperialism*, 21, 28.

legal universalization was accomplished through some clever rhetorical maneovering on the part of Vitoria whereby "an idealized version of the particular, cultural practices of the Spanish [i.e. commercial practices and norms] assume the guise of universality as a result of appearing to derive from the sphere of natural law." Here is Anghie's first pass at a critique of the Eurocentric universalism of modern international law, which in the historically "original" case of Vitoria's universal jurisprudence, "naturalize[d] and legitimate[d] a system of commerce and Spanish penetration." Which is also to say, for Anghie, that Vitoria articulated a set of "particular" Spanish principles and norms into a "universal" natural law system, *jus gentium*, which the Indian could then rightly be made subject to and sanctioned by.[26]

The crux of Anghie's argument concerning Vitoria's "universalist" justification for Spanish *Conquista* is twofold. First, he, cites Vitoria's naturalist theory of human sociability (without naming it as such) alongside the centrality of *liberum commercium* in Vitoria's jurisprudence (though without any in-depth analysis of its theoretical derivation from the Roman

[26] In "Empire and International Law," Koskenniemi historically complicates Anghie's critique of the Eurocentric nature of Vitoria's legal universalism by investigating, in a much more rigorous fashion, the global *commercial* context of articulation for Vitoria's concepts of *dominion* and *jus gentium*. This "twin vocabulary" of *dominion* (understood by Koskenniemi in both its senses as public law jurisdiction and private ownership) and *jus gentium* allowed Vitoria to analyze not only questions pertaining to Spanish title in the New world, "but also, and above all, the rights and duties of Spanish and foreign travellers and traders engaging in manifold commercial activities everywhere in the world." Hence, Vitoria's legitimation of the Spanish *Conquista*, and the questions of cultural difference raised by it, was only *part* of his jurisprudential account of "a worldwide system of dominion," which he and the Salamancans articulated in terms of a universal *jus gentium*. For that reason, it would be shortsighted to dismiss Vitoria's legal universalism as "Eurocentric," just as it would be to singularly define the origins and nature of modern international law in colonial terms. For Koskenniemi, Vitoria's legal universalism gave historical expression to the emergence/rise of a global system of international commercial relations based on private property "that was transforming the cultural and economic milieu around the Dominicans out of recognition." And it is against this historical background that Koskeniemi views the lasting legacy of the School of Salamanca: "the Spanish theologians and jurists of the sixteenth and seventeenth centuries appear not so much as reluctant advocates of a formal Spanish lordship over distant peoples but as articulators and ideologists of a global structure of horizontal relationships between holders of the subjective rights of dominium – a structure of human relationships that we have been accustomed to label '*capitalism*.'" *This*, according to Koskenniemi, is what makes the Salamancans so quintessentially "modern": Their vocabulary provided a historical novel imperial ordering of international relations, and it "continues to give a distinctly imperial structure to the most significant global laws and practices of the present age"…because, like our contemporary world, "The[ir] world was an empire, but an empire of private rights." Koskenniemi, "Empire and International Law," 11, 32, 12.

law concepts of dominion) as evidence of how Vitoria mobilized a "universal" standard, and its derivative rights to travel and sojourn, to claim that the Indians, by causing the Spanish injury, were in violation of Spanish rights. The second and related part of Anghie's argument concerns his reading of Vitoria's recourse to the "traditional framework" of *respublica Christiana* wherein only Christian European sovereigns had the right to wage war, and thus "only Christian subjectivity is recognized by the laws of war." Moreover, because Vitoria defined "sovereignty" in terms of a sovereign's right to wage war, Anghie argues, the Indians, as a result of their "culturally different practices," i.e. that they were not Christian, were determined to be "inherently incapable of waging a just war." Full metropolitan sovereignty thus remained, in Vitoria's jurisprudence, the exclusive province of European sovereign states. So then, despite Vitoria's nominal inclusion of the Indian into *jus gentium* on the basis of his theory of dominion, ultimately, the Indian only exists in this "universal" natural law framework as a partial legal subject; its legal subjectivity recognized only insofar as it was a "violator of the law."). For Anghie, Vitoria's reintroduction of "particular" Christian norms, which he had initially considered inapplicable to the Indians, "is achieved simply by recharacterizing these rules as originating in the realm of universal *jus gentium*."[27]

Anghie concludes that Vitoria advanced these universalistic legal arguments in order to legitimate and maintain European colonial violence and domination; and in this way both are prototypical doctrinal expressions of modern international law's imperial appeal to a set of "universal" rules and norms, which, Anghie argues, presupposes that "Europe is the subject of sovereignty and non-Europe is the object of it." This subject-object/sovereign-non-sovereign/European-non-European dichotomous relationship, which was borne out of the

[27] Anghie, *Imperialism*, 21-22, 23, 26.

colonial encounter, lies at the heart of the "deep structure" of modern international law, or what Anghie alternatively calls the "dynamic of [cultural] difference", which he defines as "the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society." This cultural dynamic finds its original expression in Vitoria's "sovereignty doctrine," which Anghie defines as "the complex of rules deciding what entities are sovereign, and the powers and limits of sovereignty."[28] It established that certain non-European societies can legitimately be excluded from the "sphere of sovereignty," and thus not afforded the same international legal rights as European polities, because they are culturally different. Hence the historical incorporation of Indians into the "universal" pale of *jus gentium* did not translate into a truly equal status under in Vitoria's jurisprudence. Rather, it went hand-in-hand with the disempowerment, domination, and ultimately the transformation of the Indian into a legitimate "object" of European sovereignty and its universal "civilizing mission"[29]; war, Anghie argues, then became the necessary and "just" means by which this civilizing project was to be accomplished.

The remainder of *Imperialism, Sovereignty, and the Making of International Law* seeks to demonstrate how the deep structure of international law is reproduced throughout the history of colonial and post-colonial encounters between the West and non-West. What is of most significance here is Anghie's reading of the universalization of nineteenth-century "civilized" international law, which he unfolds as another cycle of the colonial "dynamic of difference."

[28] Ibid., 102, 4, 25.

[29] Anghie defines the civilizing mission as "the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe." Ibid., 3.

That this "Euro-centric" cultural dynamic of difference was mediated by new legal instruments (i.e. unequal treaties, extraterritoriality) and underwritten by a new European professional discipline of "positive" international law is of secondary importance for Anghie. He insists, rather, on the fundamental colonial continuity between Vitoria's natural law jurisprudence and nineteenth-century international lawyers' positivist jurisprudence: both were formulated during "colonial" encounters in order to justify European domination of non-European societies.

Anghie does add one caveat though, in claiming that the only thing that really distinguishes these two jurisprudential systems is that positive international law "explicitly adopted the civilizing mission and reflected its goals in its very vocabulary."[30] The civilizational idiom to which Anghie is referring is what I, and others, have called "legal orientalism." And while Anghie's analysis implicitly demonstrates the instantiation of this legal discursive phenomenon in nineteenth-century international law, he fails to distinguish between its two historical strands – one essentializing/naturalizing, the other reformist/developmentalist.[31] Both of these historical strands found doctrinal instantiation in "civilized" international legal discourse. Crucially, it was this reformist/developmentalist strand – which underwrote liberal imperial projects to normalize China's domestic and international legal and jurisprudential behavior – that distinguishes nineteenth-century "civilized" international law from earlier imperial legal discourses, such as Vitoria's natural jurisprudence which posited certain *essential* cultural differences between European and non-European societies. In contrast to Vitoria's purely

[30] Ibid., 114.

[31] The British legal orientalist critique of Chinese law took rhetorical shape, as a predominantly essentializing discourse, in and around Sino-British/Western commercial and jurisdictional disputes at the turn of the eighteenth century. It underwent a historical re-articulation – from an essentializing discourse into a reformist-developmentalist discourse that aimed to "normalize" Sino-British relations through treaty law – in the context of a shift from The Company's quasi-sovereign control to British metropolitan legal control in 1833. See the first and second chapters of this dissertation.

essentializing Othering discourse of the Amer-Indians, nineteenth-century European international lawyers articulated a developmentalist narrative that situated China (and other quasi-sovereign/"semi-civilized" states) along a historical continuum, thus leaving open the possibility – once China had reformed its domestic and international legal behavior and satisfied the "universal" standard of civilization – for its eventual inclusion as a fully "civilized" rights-bearing subject in the Family of Nations. No such possibility existed for Ameri-Indians in Vitoria's natural law jurisprudence.

Anghie's instrumentalist analysis papers over these historical and theoretical distinctions and focuses instead on how nineteenth-century international lawyers mobilized the universalist "standard of civilization" to justify imperial expansion and domination.[32] Per his fairly straightforward account of the "colonial" structure of modern international law: this legal orientalist normative standard underpinned an international jurisprudential system of analytical classification which sought to categorize the juridical status of all non-sovereign entities encountered through European expansion on the basis of general socio-political criteria.[33] Only by satisfying those criteria could a non-Western state gain full admission into the "family of civilized nations." In this way, Anghie argues, the standard of civilization justified various forms of European legal domination by denying non-European societies international rights and excluding them from the Family of Nations.[34] From this critical perspective, moreover, this international standard also provided a universalist justificatory discourse for the co-existence of

[32] The classic reference is still Gong, *The Standard of Civilization in International Society*. But also see: Georg Schwarzenberger, "The Standard of Civilisation in International Law," *Current Legal Problems* 8 (1955); Anghie, *Imperialism*, 84-87.

[33] For a summary, see Gong, *The Standard of Civilization*, 54-80. I return to these criteria subsequently.

[34] Ibid.; Anghie, *Imperialism*, 84-87.

two diametrically opposed models of sovereignty – one European, the other extra-European.[35] In the case of the former, sovereignty was principally defined in terms of juridical autonomy and equality, i.e. "*Westphalian sovereignty*." The extra-European juridical order was, in contrast, defined by the absence of "civilized" sovereignty; this world was characterized as culturally different and inferior, as "semi-civilized" or "uncivilized," and thus in need of Western civilizing.[36]

Anghie's critique of nineteenth-century appeals to a "universal" standard of civilization reiterates his critique of Vitoria's natural law universalism – such appeals reflected a set of parochial European values and norms. As such, those legal universals were inauthentic and false, according to Anghie.[37] Just as Vitoria's universal jurisprudence provided legal cover for Spanish colonization of Amer-Indians, nineteenth-century Euro-American invocations of legal universality worked, in an analogous manner, to manufacture sites of cultural difference, exclusion and exception in order to justify the West's civilizing mission.

One of the overarching goals of this chapter is to complicate and qualify Anghie's monochromatic view of nineteenth-century international law and its universalization, as well as the over-determined conception of (colonial) legal structure upon which that view is predicated. The historical and theoretical limitations of Anghie's analysis stem from his under-theorization of the dual significance of capitalism and private economic law in the formation of a modern

[35] The tension between the traditional view of sovereignty as absolute and indivisible and its actual divisibility and dispersion of political power and legal authority – that is, the tension between *de jure* and *de facto* sovereignty – has preoccupied a great many scholars interested in debunking the "myth" of Westphalian sovereignty. See, e.g. Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); Jacques Lezra, "Phares, or Divisible Sovereignty," *Religion and Literature* 38 (2006); Stephen D. Krasner, "Compromising Westphalia," *International Society* 20 (1995/96).
[36] Anghie, *Imperialism*, 102.

[37] Ibid., 104-108.

universal international law. I seek to move beyond these limitations by drawing on a non-orthodox Marxian social theory of *law in capitalism* in order to grasp the historical significance of the abstract, free and equal legal subject, which constituted the essential form of modern capitalist society and the controlling premise of bourgeois legal theory.[38] Building on Pashukanis's commodity exchange theory of law, I shall argue that this liberal abstraction of legal personhood constituted the cell form of an emergent global imperial order of capitalism which took juridical shape through the universalization of nineteenth-century international law; this liberal idea of legal personhood also constituted the controlling and contradictory premise of that global imperial order's "civilized" international legal discourse. It rendered plausible a positivist conception of a universal international law (*jus publicum universal*), on the one hand, and a Eurocentric international law, on the other. Viewed in this theoretical light, the abstract universalism at the heart of the modern "civilized" international law did not simply conceal Eurocentric values or particular Western state interests for purposes of ideological justification, as Anghie alleges. It also expressed the essential abstract and universalizing logic of a global capitalist economy which sought to commodify all things and all persons. "Civilized" international law provided an ambivalent universalizing vehicle for this historical logic.

[38] Such a critical social theory thus moves beyond orthodox Marxian understandings of law as a superstructural reflex of an economic base and/or an ideological reflection of particular set of class interests (or, in the case of "bourgeois" international law, the national interests of the state) in order to investigate the *liberal legal and jurisprudential forms* – treaties, legal personhood, legal positivism – through which "civilized" law was universalized in China. For an orthodox Marxian view of law as ideology/state-mediated form of coercion, see, Piotr I. Stuchka, *Selected Writings on Soviet Law and Marxism*, ed and trans. Robert Sharlet, Peter B. Maggs, and Piers Beirne (Armonk, New York: M.E. Sharpe, 1988). For an orthodox Marxian analysis of international law as class domination, see B.S. Chimni, "Marxism and International Law. A Contemporary Analysis," *Economic and Political Weekly* 34 (1999).

IV.2. Elements of Nineteenth-Century "Civilized" International Law

The following discussion delineates the *ideal-typical* constituent elements of nineteenth-century international law – legal positivism, abstract sovereignty, international society, and the standard of civilization. My aim is threefold. First, I shall demonstrate the suffusion of legal orientalism in this nineteenth-century body of law and legal jurisprudence. Second, I complicate this ideal-typical sketch by highlighting a fundamental tension in "civilized" international law discourse between "ascending" and "descending" justificatory arguments about the sources of international law: the former traced the source of legal authority to a concrete, "factual" sovereign will; the latter traced the source of legal authority to an abstract, normative "universal" international order. Third, I throw light on the liberal analogical reasoning employed by positivist international jurists to resolve this tension. We will then see these constituent elements of "civilized" international legal discourse in operation, in all their tensions and contradictions, through an investigation of the formation of China as a "semi-civilized" international legal person.

IV.2.1. Legal Positivism

In the English context the question, what is international law, was thrown into sharp relief during the second half of the nineteenth century – the "age of imperialism" – as reflected in the rise of the "modern" academic discipline of international law.[39] By modern is generally meant

[39] On the modern development of English international law, see D.H.N. Johnson, "The English Tradition in International Law," *The International and Comparative Law Quarterly* 11 (1962); D.S. Bell, "Empire and International Relations in Victorian Political Thought," *Historical Journal* 49 (2006); Jennifer Pitts, "Boundaries of Victorian International Law," in *Victorian Visions of Global Order*: *Empire and International Relations in Nineteenth-Century Political Thought*, ed. Duncan Bell (Cambridge: Cambridge University Press, 2007); Casper Sylvest, "The Foundations of Victorian International Law" in Ibid.; Sandra den Otter, "'A Legislating Empire': Victorian Political Theorists, Codes of Law, and Empire" in Ibid.

the study of positive (i.e. posited or enacted) law, as separate from the study of natural law, philosophy, or diplomacy. By discipline is meant the modern academic study of law. In the case of international law, the modern English discipline – so defined here in its positivist character as positivist international jurisprudence – was incorporated into the legal curriculum of English universities starting in the second half of the nineteenth century.[40] The chief architects were the aforementioned international jurists: Westlake, Hall, Holland, Lawrence, and Oppenheim. Viewed together, their treatises formed an emergent English international jurisprudence, which took as its positive, scientific object of study the whole international legal system.

Positivist jurisprudence reached its apogee in English legal thought during the second half of the nineteenth century following the posthumous re-publication in 1861 of John Austin's (1790-1859) seminal work, *The Province of Jurisprudence Determined* (hereafter, *PJD*).[41] In this way, Austin is viewed as the proverbial father of positivist jurisprudence and *PJD* as its controlling text. The hold of this method on English jurisprudential thought is generally considered to have been hegemonic, crowding out naturalist and other contemporaneous schools of jurisprudential thought such as the comparative and historical schools associated in the

[40] On the rise of the modern discipline of international law, see Koskenniemi, *The Gentle Civilizer of Nations*. His work focuses in the main on the professionalization of international law through the *Institut de Droit international*. The *Institut* was the first organization of international lawyers and established the idea of international law as a profession, rather than a sideline pursued by diplomats and civil lawyers. It was founded in 1873 as a reaction to the failure to respect the Geneva Convention during the Franco-Prussian War. It was established by prominent liberals, including the Belgian politician and lawyer Gustave Rolin-Jaequemyns (1835–1902), the Swiss jurist and political theorist Johann Kaspar Bluntschli (1808–1881), and Gustave Moynier (1826–1910). For Koskenniemi, the "modernness" of the international lawyers associated with the *Institut* came from their new professional "self-consciousness" and their *l'esprit d'internationalite* – "a new spirit that taught nations and races to follow certain common principles not only in their mutual relations but also in their domestic legislation." See Ibid., 13.

[41] PJD was first published in 1832, then again posthumously in 1861 by his wife, Sarah Austin (1793-1867). Austin conceived of PJD it as a "prefatory though necessary part" of the Lectures he gave as professor of jurisprudence at the University of London between 1828 and 1832.

English context with Frederick Pollock (1783-1870) and Henry Sumner Maine (1822-1888), respectively.[42]

At the heart of Anglo-American legal positivism was the "separation thesis," which holds that there is no necessary connection between law and morality.[43] The origins of this conceptual separation are normally traced backed to the writings of Bentham and Austin: Bentham is typically credited with founding the modern English positive science of legislation, and Austin with founding the modern English positive science of law.[44] In their systematic jurisprudential division between law and morality, nineteenth and early twentieth century Anglo-American legal positivists took their primary instruction from Austin[45]; they viewed this systematic division as his crowning doctrinal achievement.[46]

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[42] This received understanding of the hegemonic status of legal positivism in nineteenth-century jurisprudence has been challenged on several critical fronts. Casper Sylvest argues persuasively that naturalism was never fully superseded by positivism, and, in point of fact, the two co-existed – sometimes easily, sometimes in tension – within nineteenth-century British international law. See Sylvest, "International Law in Nineteenth-Century Britain," *British Yearbook of International Law* 75 (2005). At a higher level of theoretical abstraction, Koskenniemi argues that the naturalist/positivist distinction has been greatly overdrawn and that elements of each were and are frequently combined in professional legal argument wherein "initially 'positivistic' points about consent turn regularly (though silently) into naturalist ones…" Koskenniemi, *FATU*, 132. I shall build on Koskenniemi's theoretical framework subsequently.

[43] H.L.A. Hart, arguably Austin's most significant positivist interlocutor, observed that after the separation thesis "was propounded to the world by Austin it dominated English jurisprudence." See Hart, ""Positivism and the Separation of Law and Morals," in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 55.

[44] By "positive science" is meant, broadly speaking, the founding appeal to study "facts" rather than "values" for the purpose of eliminating evaluative and/or normative statements from descriptive exposition. It was in this general sense of the term that nineteenth and early twentieth century English positivist jurists described their "positive legal science."

[45] Here is Austin's oft-quoted "separation thesis": "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it…" Austin, *PJD*, 184.

[46] The American property law scholar, John Chipman Gray (1839-1915) noted: "The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State…is not an ideal, but something which actually exists….[I]t is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished." Gray, *The Nature and Sources of Law* (New York: Columbia University Press, 1909), §213.

Along these standard lines of separation, then, Anglo-American positivist international jurisprudence has most characteristically been defined through an ideal-typical distinction between positive law and natural law – a distinction English international jurists made in their own professional self-definitions. Fleshing out this ideal-typical distinction: the naturalist predecessors of English positivist jurists posited a set of transcendental principles that had universal application – all human activity, both individual and sovereign, was bound by an overarching natural law. For naturalist jurists, law emanated from a state of nature and could be accessed through the use of reason. The principles of natural law did not owe their validity to any specific enactment by a secular authority, but rather to their own immanent quality. Within a naturalist framework, the sovereign only administered a system of *a priori* laws which, theoretically, governed the relations between states. It was in this vein that Vitoria distinguished between "human law" (law created by secular authorities) and natural law. He identified *jus gentium* with the latter; its binding force originated not in sovereign authority, but in a universal morality to which sovereign states were bound.[47]

In contrast to this transcendental jurisprudential framework of natural law jurists, positivist international jurists claimed to be offering descriptive exposition of the general principles, notions, and distinctions of an international order on an amoral, scientific basis. Consider, for example, Lawrence, who characterized the science of international law in this way: "[It is] not as an instrument for the discovery and interpretation of a transcendental rule of right binding upon states as moral beings whether they observe it or not in practice, but as a science whose chief business it is to find out by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain

[47] Vitoria, *De Indis*, 351.

fundamental principles on which they are based."[48] For legal positivists like Lawrence, naturalist jurists ultimately conflated law and morality. As a result, they failed to properly account for the content of international law, which, for legal positivists, was reflected and verifiable in an actual system of laws and rules between sovereign states, as opposed to a set of *a priori* and transcendental principles that existed independently of secular sovereignty.[49] Methodologically, then, English positivist international jurists adopted Austin's formalist conception – the rules of international law were identified through an examination of actual state practices. Hence, shared customs ("a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior")[50] and legal conventions (i.e. treaties) constituted the actual bases of rules of conduct, for positivist international lawyers.

Austin's command theory of law also issued a direct jurisprudential challenge to international lawyers. Westlake articulated that challenge this way: "The denial of the name of law to our subject is principally connected in England with the name of John Austin, who taught that law is a general command given by a superior, individual or composite, to the persons who habitually obey him."[51] As Austin defined it, "positive law" or "law properly so called" was "a species of commands." By "command" Austin meant a desire or order issued by a determinate "superior" person who possessed the power to inflict a punishment or evil if his instruction is disobeyed. He defined a "sovereign" as a determinate "superior" who is habitually obeyed by members of an "independent political society" and who habitually obeyed no other "superior"

[48] Lawrence, *The Principles of International Law*, 2.

[49] See, for example, Westlake's description of international law as part of the modern "sciences" in *Chapters on the Principles of International Law,* vi.

[50] This is John Austin's definition of "custom." Ausin, *PJD*, 21.

[51] Westlake, *International Law*, 8.

person; "positive laws" or "laws properly so-called" in Austin's jurisprudence are, in short, commands which "flow from a determinate sovereign source." For Austin the notion of command was, in his own words, the "key" to the "science of jurisprudence."[52] Austin's command-based definition of positive law excluded international law from the province of scientific jurisprudence because it lacked a "determinate sovereign source." That is, because no global sovereign existed to which states were subject, international law could not properly be classified as positive law. That international law could be conceived of moreover as an external restraint on sovereign authority was, according to Austin, "a flat contradiction in terms."[53] "The duties which it imposes," Austin maintained, "are enforced by moral sanctions: by fear on the part of sovereigns of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected."[54] On those grounds, then, Austin's defined international law as public opinion or "positive morality."

With this restrictive definition of positive law, Austin issued a basic theoretical question for and intellectual directive in the formation of post-Austin positivist international jurisprudence: is international law really law (in the proper sense of the term)?[55] Hence one of the main epistemic challenges assumed by English "positivist" international jurists involved broadening the scope and meaning of Austin's concept of positive law in order to include international law as a legitimate subject of inquiry for scientific jurisprudence.

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[52] Austin, *PJD*, 13.

[53] Ibid., 31.

[54] Austin, *PJD*, 201. He did, however, concede a place for the jurisprudence of international law: "Positive morality, as considered without regard to its goodness or badness might be the subject of a science closely analogous to jurisprudence." Ibid., 126.

[55] As T.J. Lawrence remarked: "If we follow Austin and hold that all laws are commands of superiors, international law is improperly so called." See Lawrence, *The Principles of International Law*, 25.

One of the basic ways they did so was by invoking the domestic law analogy – the argument that the principles which international lawyers judge to be valid in inter-individual relations can also be applied to inter-State relations.[56] More specifically, positivist international lawyers drew on the liberal private law analogy (a species of domestic law analogy), which likened contracts and treaties and private property and sovereign territory: a contract between individuals resembles a treaty between states inasmuch as both could be defined as a formal agreement between co-equals[57]; and the private law right of property resembles the relation of a state to its territory. These private law analogues constituted the "positive" sources of nineteenth-century "civilized" international law. The centrality of the private law analogy, moreover, was reflected in the general methodological emphasis, in positivist international jurisprudence, on the consent of states (i.e. the reciprocity of will) as recognized in treaties (identifiable consent) and custom (tacit consent).[58] From Austin's perspective, then, positivist international jurists were essentially "analogy mongers," who confounded positive law and "analogous law" (i.e. international law).[59] Whereas for post-Austin positivist international jurists,

[56] As one prominent international legal scholar remarked: "We are indebted to this analogy for almost everything that is regarded as fundamental in international law." Edwin DeWitt Dickinson, "The Analogy Between Natural Persons and International Persons in the Law of Nations," *Yale Law Journal* 26 (1916-1917): 564. For other definitions of the domestic law analogy and its fundamental significance in modern international legal thought, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002), 44; Schmitt, *Nomos*, 143-147.

[57] Hence, to sign a treaty was commonly referred to as "contracting a treaty."

[58] William Grewe, *The Epochs of International Law*, rev. and trans. Michael Byers (New York: Walter de Gruyter, 2000), 503-04.

[59] Relatedly, positivist international jurists often analogized their scientific study of law with other new positive sciences. See, for instance, T.E. Holland's analogy between the "science of jurisprudence" and the "science of grammar." "The assertion that Jurisprudence is a formal science may perhaps be made clearer by an example. If any individual should accumulate acknowledge of every European system of law, holding each apart from the rest in the chambers of his mind, his achievement would be best described as an accurate acquaintance with the legal systems of Europe. If each of these systems were entirely unlike the rest, except when laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavor to hold fast, and to avoid confusing, the heterogeneous information of which he had become possessed. Suppose however, as is

international law shared enough properties with other forms of accepted positive economic law to be properly called law.

IV.2.2. Abstract Sovereignty

Prior to the nineteenth century, there existed no singular historical sovereign form or unified doctrinal definition of sovereignty. Instead, a plurality of different shapes and sizes of sovereigns, with various powers and rights, frequently overlapped within the same geography. In this way, the application of sovereign state law was personally, as opposed to territorially, based. Sovereignty, at the time, did not yet have a determinate territorial referent.

An abstract, homogenized conception of legal sovereignty came to be doctrinally defined in Euro-American jurisprudence over the course of the nineteenth century, when it became a generally recognized principle of international law that sovereign states possessed exclusive territorial jurisdiction over persons and things within their territorial boundaries. In this way, modern sovereignty became territorially defined as a jurisdictional space in which the state exercised absolute competence, irrespective of the nationality, race, or religion of the person who came before the state's courts. Modern sovereignty came to be defined, in sum, in highly

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the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar object, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods, and ideas common to every system of law. Such a scheme would be a formal science of law; presenting many analogies to Grammar, the science of those ideas of relation which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind." He then clarified the analogy in this way: "Just as similarities and differences in the growth of different languages are collected and arranged by Comparative Philology, and the facts thus collected are the foundation of abstract Grammar; so Comparative Law collects and tabulates the legal institutions of various countries, and from the results thus prepared, the abstract science of Jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realized in actual systems." Holland, *The Elements of Jurisprudence*, 7.

abstract and impersonal terms of a unified body of law administered by the state's courts, which covered all persons and things within that state's territorial boundaries.[60]

This, then, is "absolute sovereignty," which refers to the domestic autonomy exercised by a supreme authority – i.e. the formal control over a bounded territory and the right to prescriptive jurisdiction. It is also referred to as the "internal" dimension of "Westphalian sovereignty." The "external" corollary of Westphalian "internal" sovereignty relates to international autonomy and inter-sovereign equality. Within this Westphalian jurisprudential framework, international law was characterized by self-contained European sovereign states that mutually recognized each other as juridical persons with equal legitimacy and equal rights.[61]

Leaving aside, for a moment, the abstract character of the nineteenth-century doctrine of sovereignty, the jurisprudence of Westphalian sovereignty corresponds to Carl Schmitt's description of the *traditional* inter-state order of *jus publicum Europaeum*. For Schmitt, the inception of this traditional international legal order came only when European states recognized the *justis hostis* (just enemy) doctrine, which thereafter initiated wars "in form" – a formal structure of war as a relation among states.[62] The emergence of this inter-state doctrine marked a fundamental historical shift away from the *justa causa* doctrine; international law no longer derived its legitimacy from the authority of the Church. Instead, the *justis hostis* doctrine firmly

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[60] *The Schooner Exchange v. M'Faddon*, 7 (Cranch) 116 1812. See Wheaton, *Elements of International Law*, 200; Sir Robert Phillimore, *Commentaries upon International Law*, vol. 1, 376; Hall, *A Treatise on International Law*, 50 fn., 166 fn; Lassa Oppenheim, *International Law*, vol. 1, sec. 317 note; Lawrence, *The Principles of International Law*, 212.

[61] On the history of Westphalian sovereignty see, Daniel Philpott, "Sovereignty: An Introduction and Brief History"; Derek Croxton "The Peace of Westphalia of 1648 and the Origins of Sovereignty"; Stephen Krasner, *Sovereignty: Organized Hypocrisy*. There is also an extensive critical literature on the "myth" of Westphalia. See, e.g., Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?"; Benno Teschke, *The Myth of 1648*.

[62] Schmitt, *Nomos,* 166.

ensconced the state as the center of gravity of the European interstate order, which was fundamentally based on the principle of sovereign equality: sovereigns possessed equal rights and equal legitimacy. As such, there could be no supra-sovereign authority that decided on the legitimacy of war. Any appeal to such a supra-sovereign authority, Schmitt argued, would have fundamentally contradicted one of the core principles of the European interstate order: "*Par in parem non habet jurisdictonem*" ("Equals have no jurisdiction over each other").[63] The sovereignty of every individual state in relation to all the others only was apparent. In realty the *aequalitas* [principle of equality] bound them together."[64] As an inter-sovereign principle, the *aequalitas* allowed for the recognition of neutrality, and thus prevented the possibility of a contained war from becoming a total European war. While this territorial "system of equilibrium" was interrupted periodically by war and territorial re-structuring, balance and order were ultimately restored at The Great European Peace Conferences of 1648, 1713, 1814-15, 1856, 1878, and 1885.

It was precisely this traditional European inter-state order that was dissolving in the second half of the nineteenth-century just as positivist international jurisprudence was coming into its own.[65] And it is in light of this epochal transformation in modern international law that we can fully appreciate Koskenniemi's argument that Austinian sovereignty was *not* the dogma of nineteenth-century international lawyers, but it was rather a "critique of [absolute] sovereignty." That critique was part and parcel of their liberal reformist "sensibility," which Koskenniemi frames in terms of a "moderate nationalism" combined (sometimes uneasily) with

[63] Ibid., 157.

[64] Ibid., 167.

[65] On the dissolution of the *jus publicum Europaeum,* see Schmitt, *Nomos,* 227-239.

"liberal internationalism."[66] What is most crucial, for present purposes, is that this critique of absolute sovereignty – and the tension between nationalism and internationalism, particularism and universalism that characterized it – was borne out in British international lawyers' formulations of "civilized" international society.

IV.2.3. International Society

For positivist international jurists international law and "international society" were coterminous. Westlake's formulation of the latter was paradigmatic in this respect. For Westlake, "Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognize that there is a society of states, we recognize that there is international law." He understood the profession of international law in those same terms: "The international lawyer is in search of the rules existing in the international society and more or less enforced by it."[67] Crucially, Westlake simultaneously clarified the character of international society and justified international law as law properly so called (thus making it worthy of scientific jurisprudential inquiry) through a domestic law analogy: "Now when international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the state society of men, and a law of the society of states sufficiently like state law, to justify the claim…on the solid ground of likeness to the type."[68]

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[66] See Koskenniemi, *Gentle Civilizer of Nations*, 4.

[67] Westlake, *The collected papers* of *John Westlake on public international* law, 3, xxiii.

[68] Westlake, *International law*, Part I, 6. Westlake did, however, recognize the limitations of this analogy: "If on the other hand we compare the international society with the national one which exists by virtue of the state tie, the differences which strikes us most are the collective character and overwhelming strength of the power which enforces the rules of the latter, and the great variety of topics to which those rules relate. In other words, there is in a

The analogical idea "international society," which Westlake authored, did a considerable amount of jurisprudential work in nineteenth-century international law. English positivist international jurists invoked it to challenge Austin's command-based theory of law and his "denigrating" characterization of international law as "positive morality." On that score, Westlake argued that Austin's "terminology obscure[s] the fact that the rules in question do not exhaust the ethical duties of states, that in the forum of conscience rules which it is proper for his fellow man to enforce can no more measure the whole duty of man when he is aggregated into nations than when he acts as a private person in his own country." His claim, then, was that just as domestic society was based on the "conscience" of men – and thus not exclusively on commands issued by a sovereign – so too was "international society" bound by the "conscience" of states. Westlake then clarified the domestic law analogy of the "conscience" of states in this way: "[S]ince the individual men associated in the state are moral beings, and the action of the state which they form by their association is their action, the state must also be a moral being, having a responsibility and a conscience which are the summation of the responsibilities and consciences of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a state is capable of being a subject of law and having rights."[69] Invoked in this moral context, then, the domestic analogy supported the personification of the state by imputing it with a conscience – these moral "obligations which are incumbent on men" were also incumbent on states. In this way also, a normative element was introduced into

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state a sovereign authority and the citizens are in general subjection to it, while in the society of states there is no sovereign authority and the life of each is touched by international law only at a few points. A third difference, that which exists in the amount of obedience paid to international and national law respectively, does not seem to deserve the prominence sometimes given to it. The truth is that much the larger part of the mutual relations of states is carried on with great regularity in accordance with the international law relating to several matters concerned, and that cases which have a contrary appearance are mostly those in which a rule is uncertain or in which the change of a rule is strongly advocated." See Westlake, *The collected papers* of *John Westlake on public international* law, 7-8.

[69] Westlake, *International Law,* Part I*,* 3.

positivist international jurisprudence: the juridical conscience of states formed the moral underpinning of international law-cum-society.

In their appeals to the moral conscience of states to challenge Austin's command-based definition of law, positivist international jurists also confronted *the* fundamental paradox of modern international law: how was it possible to create legal order between free and equal sovereign states in the absence of a supra-sovereign authority to enforce those international laws? It was this paradoxical quality of international law that led Austin to classify it (along with natural law and constitutional law) as "analogous law," rather than positive law, properly so called. With respect to Austin's classification, Westlake acknowledged, on the one hand, that the moral conscience "[a]s rules for human conduct, perpetually violated, can have no connection but that of metaphor with the laws of nature." On the other hand, however, he argued, "they have so much analogy with jural laws that the question arises whether they do not form with these last a real class of the highest or most comprehensive kind, to the whole of which the term 'law' is applied with an identical meaning. In order to answer that question in the affirmative the notion of human enforcement, which accompanies all jural laws and makes by its presence the very distinction between them and rules of only moral obligation, would have to be excluded from the meaning of law in the largest extension which it can receive without going into metaphor."[70] Westlake's claim, then, was that just as there was a "moral conscience" which obligated men to the rules of conduct in domestic society, there was also a "moral conscience" which obligated states to the rules of conduct in "international society." And it was on those moral grounds, then, that Westlake sought to defend international law as law properly so called, and to include it as a legitimate subject of jurisprudential inquiry. In a similar critical vein, Hall

[70] Westlake, *Chapters on the Principles of International Law*, 15.

claimed that "International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."[71] As for Westlake, Hall understood the conscience of a subject in the domestic legal sphere, which bound said subject to "the laws of his country," to have an analogue in the international legal sphere. So conceived, the modern "civilized" state was imputed with the moral conscience of a "civilized" person.

It is against this positivist jurisprudential background that Koskenniemi has rightly argued that the "founding conception" of late nineteenth-century international law "was not sovereignty but a collective (European) conscience – understood always as ambivalently either consciousness or conscience, that is, in alternatively rationalistic or ethical ways … Even in the absence of a common sovereign, Europe was a political society and international law an inextricable part of its organization."[72] This notion of moral conscience provided the normative standpoint for critique to judge individual and state behavior, in peace and wartime, both in and outside of Europe.[73] To take but one example, consider the famous de Martens clause of the 1899 Hague Convention, where the signatories agreed that,

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[71] Hall, *International Law*, 1. In a similar vein, Robert Phillimore (1810-1885), the eminent naturalist jurist, countered Austin's objections to international law this way: "[O]ut of a recognized society of nations, as out of a society of individuals, Law must necessarily spring. The common rules of right approved by nations as regulating their intercourse are of themselves…such a law." See Robert Phillimore, *Commentaries upon International Law* (Philadelphia: T & J.W. Johnson, 1854), vol. 1, 91.

[72] Koskenniemi, *Gentle Civilizer of Nations*, 51. This "moral" element of nineteenth-century British international law is apparent in Hall's thinking that the rules of international law were a "reflection of the moral development and the external life of the nations which are governed by them." Hall, *A Treatise on International Law*, 1.

[73] As it pertains to European relations with "un-civilized" non-European societies, Westlake maintained, "of uncivilised natives international law takes no account." Their treatment was left instead "to the conscience of the state to which the sovereignty is awarded." Westlake, *The collected papers*, 136, 143.

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.[74]

This authoritative statement not only provides evidence of the centrality of the analogical conception of conscience to the moral critique of absolute sovereignty codified in the modern Laws of War. It was also indicative of the general theory and vocabulary of jurists and diplomats around the turn of the twentieth century. Reading with Schmitt, such appeals to supra-sovereign principles of "civilization" and "humanity" had no basis in traditional inter-state international law in that they fundamentally lacked a spatial determination; they were without any concrete territorial basis, and, as such, they signaled "a headlong leap into the nothingness of a universality lacking any grounding in space or on land."[75] By Schmitt's account then, modern "universal" international law, as borne out of the international legal conventions at the turn of the twentieth century, no longer recognized any territorial boundaries or spatial demarcations of the earth. As such, the concrete spatial moorings of the "traditional" *jus publicum Europaeum* dissolved into an abstract "spaceless universalis[m]" – a *jus publicum universal* – which came to permeate all international legal and jurisprudential thought.[76]

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[74] As quoted in Howard S Levie, "Humanitarian Law and the Law of War on Land," 183. For a useful introduction to the historical context of the 1899 Hague Conference, see Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After," *International Affairs* 75 (1999).

[75] Schmitt, *Nomos*, 237.

[76] Ibid., 290.

IV.2.4. The Standard of Civilization

Underlying jurisitic formulations of "international society" was a normative claim about inter-state order, i.e. the "rules of conduct which modern civilised states regard as being binding on them in their relations with one another."[77] Of crucial significance is that the notion of international society implied membership, and post-Austin positivist international jurists formulated general socio-political criteria for entry. In the secondary literature these general socio-political criteria are commonly referred to as the "standard of civilization" – it constituted the central organizing principle and universal metric of post-Austin positivist international jurisprudence. The standard underpinned a system of analytical classification which aimed to categorize the juridical status of all non-sovereign entities encountered through European imperial expansion on the basis of general socio-political criteria (as discussed below).[78] Hence the boundaries of nineteenth-century international law can be assessed with reference to the limited scope of "civilized" international society.[79]

Positivist international jurists defined a "civilized state," first and foremost, in terms of state sovereignty, i.e. control over a bounded territory. Territorial sovereignty was *the* basic

[77] Hall, *A Treatise on International Law*, 1. He insisted: "It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilization." See Ibid., 40.

[78] This standard of civilization was highly flexible and thus open to contestation. So, while Thomas A. Walker (1862-1935) defined international law as law among "civilised nations," he nonetheless felt it necessary to note that "civilisation is a complex fact, the combination of advance with order, the condition, in brief, of a progressive society. The term is purely relative." See Walker, *A Manual of Public International Law* (Cambridge: Cambridge University Press, 1895), 7. Similarly for Lawrence, some degree of "civilization" counted as the first element of qualification for membership in international society, yet "it is difficult to define the exact amount….In matters of this kind, no general rule can be laid down." Lawrence, *The Principles of International Law,* 58–59. Thus, "each case must be judged on its own merits by the powers who have to deal with it." Lawrence, *A Handbook of Public International Law*, 25.

[79] All of the international lawyers under review in the present chapter – Wheaton, Westlake, Hall, Holland, Oppenheim, Lawrence, Lorimer, Phillimore shared a general conception of an exclusive international society, though the geographic boundaries they drew for that society, and their civilizational criteria, varied.

precondition for membership into international society. Lawrence was unequivocal on this point: "International law regards states as political units possessed of proprietary rights over definite portions of the earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions."[80] In this way also, Holland remarked that European relations with "tribes do not resemble those which may arise out of Treaty with civilized and well-organized States, even when their civilization is of a non-European type."[81] That any non-European society with territorially defined boundaries could qualify as a sovereign actor, however, generated a potentially limitless number of legal personalities under nineteenth-century international law. For instance, the African kingdoms of Ethiopia and Mali, universally deemed by Victorian jurists to be "uncivilized," would have to be conferred sovereign status according to strict positivist principles. That positivist jurists avoided the term "sovereign" when referring to these and other non-European states suggests, at a minimum, that there existed a conceptual gap within positivist jurisprudence between a formal (geographic) notion of sovereignty and the posited or presupposed substance of "civilization" which informed jurists' determinations of international legal status.[82]

From here we can usefully draw on Gerrit Gong's classic study, *The Standard of Civilization in International Society*, to succinctly summarize the primary institutional

[80] Note Lawrence's use of "propriety rights" and private law analogy in his definition of international law. See Lawrence, *The Principles of International Law*, 136.

[81] Holland, *Lectures on International Law*, 117.

[82] "There are states in existence…although their number decreases gradually, which are not, or not fully, members of th[e] family [of nations] because their civilization, if any, does not enable them and their subjects to act in conformity with the principles of international law." Oppenheim, *International Law*, 109.

requirements for the constitutive recognition of a "civilized state" and its admission into international society. By his account, there were five:

> 1) a 'civilized' state guarantees basic rights, i.e. life, dignity, and property; freedom of travel, commerce, and religion, especially that of foreign nationals;
> 2) a 'civilized' state exists as an organized political bureaucracy with some efficiency in running the state machinery, and with some capacity to organize for self-defense;
> 3) a 'civilized' state adheres to generally accepted international law, including the laws of war; it also maintains a domestic system of courts, codes, and published laws which guarantee legal justice for all within its jurisdiction, foreigners and native citizens alike;
> 4) a 'civilized' state fulfills the obligations of the international system by maintaining adequate and permanent avenues for diplomatic interchange and communication;
> 5) a 'civilized' state by and large conforms to the accepted norms and practices of the 'civilized' international society, e.g. suttee, polygamy, and slavery were considered 'uncivilized,' and therefore unacceptable. [83]

The standard of civilization was formulated and advanced, then, as a general measure of internal stability and inter-state exchange, as well as a demand for juridical reform – that the non-European state in question "put its house in order" and comply with the codified standards of positive international law to ensure the protection of foreign persons and property.

The formulation of the standard of civilization marked a terminological shift in international law discourse. What had been called in the seventeenth and eighteenth centuries the "law of Christian nations" and/or "the public law of Europe" (*droit public de l'Europe*) was rearticulated during the late eighteenth and nineteenth centuries as the Law of Nations and/or international law.[84] Alluding to the secularization of international law, Holland claimed that it was no longer bound by religious doctrine: there was "nothing in the character of its principles which need restrict its application to the Nations professing the Christian faith." International

[83] Gong, *The Standard of Civilization*, 14-15.

[84] The term "international law" was first coined by Bentham in 1789. See Bentham, *An Introduction to the Principles of Morals and Legislation*, 327. See also, M.W. Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" *American Journal of International Law* 78 (1984).

law, he claimed, was a "question rather of Civilization than Creed."[85] In light of this secular shift in modern international law, my contention is that nineteenth-century international lawyers did not simply imagine the geographic boundaries of "civilized" international society to conform to a traditional spatial distinction between "civilized" Christian Europe and "uncivilized" non-Christian Europe. Rather, the formulation of "civilized"/"semi-civilized"/"uncivilized" distinctions in nineteenth-century international law points to the historical supersession of a traditional Euro-centric spatial order by a new supra-European global nomos – one not historically bound to any one particular imperial state, but rather to a global, supranational logic of capitalism that sought to commodify all things and all persons. That global juridical order was taking institutional shape at the turn of the twentieth century: the inclusion of non-European states (e.g. China, Japan) at international conventions signaled that the geographic boundaries of international law had pushed beyond the scope of European Christendom. In light of this global historical broadening of international law, Westlake noted: "The civilization has grown up by degrees, and populations have become included in it among whom it did not originate."[86]

This jurisprudential schema of "civilized" international law and its characteristic constitutive doctrine of recognition was underwritten by a universal theory of historical progress.[87] "Civilization" was not, then, an ontological category in nineteenth century international law: every non-Christian, non-European state could, in principle, and to a certain

[85] Holland, *Lectures on International Law*, 38.

[86] Westlake, *Chapters on the Principles of International Law*, 104.

[87] Whereas the declarative doctrine of recognition held that "the formation of a new State is...a matter of fact, and not of law." See Oppenheim, *International Law*, vol. 1, 264. From this theoretical perspective, then, statehood exists independent of recognition. See Sir Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 91. On the emergence of this positivist constitutive doctrine of recognition, see James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2007).

extent in practice, become a full and equal sovereign member of international society. In this "progressive" light, Lawrence remarked that "[t]he area in which the [international law] operates is supposed to coincide with the area of civilisation. To be received within it is to obtain a kind of international testimonial of good conduct and respectability."[88] So conceived, this universalist secular standard "outlined a path for non-Western states to become recognized as sovereign equals and thus obtain the protections of (Western) international law."[89] It was only through such constitutive recognition that a heretofore non-sovereign entity could be rendered into sovereign-cum-"civilized" legal subject.[90]

This developmentalist logic of the nineteenth-century standard of civilization in international law did not, then, permanently fix "civilized," "semi-civilized," and "un-civilized" states in international society. Rather, these civilizational divisions were understood along a universal historical continuum. In my view, moreover, this developmentalist logic distinguishes nineteenth-century positivist international jurisprudence from Vitoria's natural law jurisprudence: his justification of the colonial subjugation of Amer-Indians, it shall be recalled, had no recourse to a notion of historical development and/or progress. Likewise, Vitoria's rudimentary opposition between civilization and barbarism was not articulated to a notion of developmental progress. Rather, Vitoria's jurisprudence, as Anghie demonstrates, *fixed* the Amer-Indians as abject Other in a Euro-centric international law.

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[88] Lawrence, *The Principles of International Law*, 59.

[89] Jack Donnelly, "Human Rights: A New Standard of Civilization?" *Royal Institute of International Affairs* 74 (1998): 8.

[90] Oppenheim states, "For every State that is not already, but want to be, a member [of the Family of Nations], recognition is therefore necessary. A state is, and becomes an International Person through recognition only and exclusively." See also Oppenheim, *International Law*, vol. 1, 109; Hall, *A Treatise on International Law*, 83-93.

If we can agree, on these grounds, that Vitoria's natural law jurisprudence was *not* identical in character to nineteenth-century positivist international law, then we can also agree that Anghie's argument for the deep "colonial" structure underlying and connecting these two jurisprudential systems requires rethinking. The question now is twofold: What accounts for that historical change between these two jurisprudential systems? And relatedly, what motivated this developmentalism in nineteenth-century international law? What I would like to suggest – in a tentative way here – is that that historical change was intimately related to the increasingly dynamic character of *capitalism*, i.e. capitalist production as it assumed the form of manufacturing and, then, modern industrial production. The kind of dynamism I am referring to here is a socio-historic dynamism: it constitutes the historical matrix within which ideas and theories of progress, such as those articulated by nineteenth-century international lawyers, are generated and acquire plausibility.

We can take stock of this historical form of developmentalism not only in modern nineteenth-century international law, but also in modern political economy, and particularly in Adam Smith's magnum opus, *The Wealth of Nations*. Making sense of Smith's developmentalism requires an understanding of his novel category of wealth, which, for Smith, was bound to the nature of modern society, as well as to the well-being of a "civilized" nation.[91] Wealth, for Smith, refers to "the necessaries and conveniences of life which it [the nation] annually consumes." So defined, wealth is not simply a function of the extension of a nation's natural resources, i.e. "the soil, climate, or extent of territory of any particular nation." Rather, wealth has a distinctly temporal dimension in Smith's theory – it is the amount annually

[91] This reading of Smith is indebted to Moishe Postone, who treats Smith not as an economist, or moral philosopher, but as "a social theorist who sought to grasp the structure and historical directionality of society." See Moishe Postone, unpublished "Lecture on Adam Smith."

produced and consumed in the nation. Wealth, he argued, was a function of the amount produced per unit time. As such, wealth is a social category in Smith's theory, not a natural category: it is a function of "the skill, dexterity, and judgment" with which labor is applied, and by the proportion between those productively employed in "useful labour" and "those who are not so employed."[92] Social wealth, in other words, is a function of the productive powers of labor.

On those social theoretical grounds, Smith held that the most important factor driving the improvement of a nation's productivity is the social division of labor. Hence, labor is central to Smith's theory. Or, to put that differently, his theory is of the centrality of labor in modern society. Smith's argument that labor is the fundamental source of wealth marked a clear historical revaluation of labor – previously disdained and viewed as being without virtue, labor is now resituated at the center of modern social life. That historical and theoretical centering of social labor marked a "fundamental break with all forms of society in which aristocratic values [were] hegemonic."[93] In this way, then, Smith's theory can be understood as an attempt to grasp the emergence of a historically new social order – one organized not in a top-down manner by the state, but rather socially constituted through a division of labor.

It is against this social theoretical background, then, that we can understand Smith's *historical* distinction between "civilized" and "savage" nations. A "savage" nation, according to Smith, is one in which "every individual who is able to work, is more or less employed in useful labor, and endeavors to provide…the necessaries and conveniences of life, for himself," as well as for those who are unable to work: the very young, the elderly, and the infirm. Because such

[92] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1.

[93] Postone, "Lecture on Adam Smith."

nations are "so miserably poor," however, they frequently cannot support these unemployed dependents. Whereas a "civilized" nation is a "thriving nation," which, because "the produce of the whole labour of the society is so great," can support "a great number of people who do not labour at all," yet consume "ten times", even a "hundred times" the average (i.e. the aristocracy). In such a "civilized" society, even a worker "of the lowest and poorest order" can – so long as he is "frugal and industrious" – enjoy "a greater share of the necessities and conveniences of life than it is possible for any savage to acquire." This leads Smith to argue that the poor in a wealthy, "civilized" society are in a far more enviable position than the wealthiest individuals in a "savage" society. Hence, "the accommodation of an European prince does not always so much exceed that of an industrious and frugal peasant, as the accommodation of the latter exceeds that of many an African king, the absolute master of the lives and liberties of ten thousand naked savages."[94]

The difference between "savage" and "civilized," in Smith's theory, is only a function of the *historical* level of productivity. It does not denote, for Smith, an ontological difference; nor does Smith assume that "savagery" inheres in particular persons or groups as a result of their customs, habits or belief systems. In contrast, then, to the racial theories of the nineteenth century that ontologized distinctions between savage and civilized groups, Smith's theory worked, in effect, to deontologize the category of civilization, and to "render it instead as a

[94] Smith, *Wealth of Nations*, 2, 16. This polemical argument that what is good for society is also good for the individual is later undercut when Smith elaborates upon the structural conflicts of interest between the three ranks of "civilized society" – "stock" owners (capitalists), land owners, and workers. In a similar fashion, Smith complicates his initial determination of "savage" and "civilized' man, as discussed above, when he returns to contrast the two in the section on education (Book V, esp. 282-337) – there the "savage" appears as a much more well-rounded and physically capable individual than the enfeebled "civilized" worker, who, through his assimilation into a specialized division of labor, has become "as stupid and ignorant as it is possible for a human creature to become." Ibid., 303.

function of a position on a linear historical continuum – a continuum that, in theory, can be traversed by all peoples."[95]

Insofar as the difference between "savage" and "civilized" societies is simply a function of the level of productivity, in Smith's theory, then those differences are essentially quantitative in nature. As such, Smith conceived of all societies as existing on a linear historical continuum: all were subject to a single universal and "civilized" metric – the level of productivity of labor.[96] There is, then, an implicit theory of historical progress or development in Smith's idea of civilization. That progressive idea underwrote a developmentalist schema in which all societies could be positioned according to their level of productivity. Hence, their position within this civilizational schema was not fixed, but was changeable. From Smith's developmentalist theoretical perspective, moreover, the inferiority of savage societies was not an immutable nature. Rather, it was a socially and historically conditional, and thus remediable, characteristic. The developmentalist logic, in Smith's theory, was essentially identical to the developmentalist logic of nineteenth-century "civilized" international law. The juridical production and treatment of "semi-civilized" China bears out this point.

IV.3. The Formation of China as a "Semi-Civilized" International Legal Person

John Fairbank, the prominent China historian, has referred to the period from 1842 to 1943 in China – which marks the formal beginning and end of extraterritoriality and the

[95] Postone, "Lecture on Adam Smith."

[96] Ibid.

"unequal treaties"[97] – as the "treaty century."[98] This epochal characterization, it could also be argued, is equally applicable to Southeast Asia and the non-European world more generally during the nineteenth century: in addition to China, unequal European-non-European commercial treaties were signed during this period by Japan,[99] Korea,[100] Siam,[101] and the Ottoman Empire.[102] Those treaties liberalized international trade relations and were characterized in the main by the opening of treaty ports, the introduction of fixed tariffs, and the standard use of extraterritoriality which served as the primary legal-diplomatic instrument for the protection of European foreign nationals and their trading rights and interests.[103] The proliferation of these commercial and

[97] On unequal treaties generally, see F. Nozari, *Unequal Treaties In International Law* (Stockholm: Stockholm University Press, 1971); Ingrid Detter, "The Problem of Unequal Treaties," *International and Comparative Law Quarterly* 15 (1966); Anthony Lester, "Bizerta and the Unequal Treaty Theory," *International and Comparative Law Quarterly* 11 (1962); Lucius Caflisch, "Unequal Treaties," *German Yearbook of International Law* 35 (1992). Compare with earlier juristic assessments of unequal treaties: Hugo Grotius, *On the Law of War and Peace*, ed. Stephen C. Neff (Cambridge: Cambridge University Press, 1912), 234-35; Samuel Pufendorf, "On the Law of Nature and of Nations," in *The Political Writings of Samuel Pufendorf*, ed. Craig. L. Carr, trans. Michael J. Seidler (New York: Oxford University Press, 1994), 200; Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty (New Jersey: Lawbook Exchange, 2005 [1758]), 298.

[98] Fairbank, *China*, 205.

[99] The following is an abbreviated list of countries that obtained extraterritorial rights in Japan by treaty: Russia (1855); the United States (1857); Great Britain (1858); France (1858); Portugal (1860); Prussia (1861); Italy (1866).

[100] The following is an abbreviated list of countries that obtained extraterritorial rights in Korea by treaty: Japan (1876); China (1899); the United States (1882); Great Britain (1883); Germany (1886); Russia (1884); Italy (1884).

[101] The following is an abbreviated list of countries that obtained extraterritorial rights in Siam by treaty: the United States (1856); France (1856); Denmark (1859); the Netherlands (1860); Prussia (1862).

[102] The first modern capitulations were conceded by the Turks to France in 1535, after which a series of capitulation treaties were signed between the Ottoman Empire and European powers. Other similar capitulation/extraterritoriality arrangements came to be exercised by European states during the nineteenth century in Algiers, Morocco, Tripoli, Tunisia, Zanzibar, Egypt, and Ethiopia. See C. Alexandrowicz, "Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries," *Recueil des Cours* 100 (1961): 203; H. Kassan, "Extraterritorial Jurisdiction in the Ancient World," *American Journal of International Law* 29 (1935): 237.

[103] The predominantly commercial nature of British imperial expansion in China was reflected in the 1842 Sino-British Treaty of Nanjing, and its two annexes – the 1843 General Trading Regulations for Trade and Tariff and the 1843 Supplementary Treaty, also known as the Treaty of Bogue. These treaties elevated property rights as the basic organizing principle of modern Sino-British relations. Gong suggests that the 'modern' idea of unequal treaties was an "integral part of 'imperialism' and 'colonialism.'" Gong, *The Standard of Civilization*, 66–67. Fairbank has

extraterritorial treaties was part of a patterned historical development towards international legal formalization, which, by the turn of the twentieth century, came to encompass the whole earth.

For European international lawyers, the global-cum-imperial expansion of European treaty law during the nineteenth century raised the question of how to account for and justify a new global juridical order, and its new non-European subjects. The historical fact of these treaties presupposed that international law was applicable between European and non-European societies. Their global existence, moreover, implied a universal international law. It was this global historical context, then, that motivated a new professional class of European international lawyers to confer validity to these European-non-European agreements so as to enable the contracting parties to place their confidence in these treaties as well as to invoke their provisions in practice. My contention is that the (partial) juridical incorporation of heretofore non-sovereign entities, like China, within the province of an emergent global international law motivated a reconceptualization of core Austinian positivist principles (i.e. absolute sovereignty) and the formulation of a new doctrine of state recognition based on a highly flexible and universalist "standard of civilization."[104] This transnational "civilized" legal discourse expressed, at one and the same time, conceptions of both a universal international law and a particular, Euro-centric international law; it justified both a formal equality in European-non-European

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similarly argued that the treaty regimes in China represented "a semipermanent form of Western intervention in Chinese life . . . an East Asian wing of Europe's worldwide hegemony, specially an arm of British informal empire." See Fairbank, *China Perceived: Images and Politics in Chinese-American Relations* (London: Deutsch, 1976): 86. Another historian framed the unequal treaties as an extension of "informal empire": these legal instruments enabled colonial powers to maintain a "business system" in "semi-colonial" China. See J. Osterhammel, "Semi-Colonialism and Informal Empire in Twentieth-Century China: Towards a Framework of Analysis," in *Imperialism and After: Continuities and Discontinuities*, ed. Wolfgang J. Mommsen et al (London: Allen and Unwin, 1986), 290. According to Richard Horowitz, "Unequal treaties formed the international legal mechanism for defining semi-colonial relationships." Richard S. Horowitz, "International Law and State. Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century," *Journal of World History* 15 (2004): 455.

[104] See Anghie, *Imperialism*, 92-96; Koskenniemi, *The Gentle Civilizer of Nations*, 138-142.

treaty relations, as well as the real substantive inequality of these international exchanges of rights and obligations.

In the case of "modern" Sino-Western relations that tension between formal equality and substantive inequality accompanied the introduction of "civilized" international law in China through the 1842 Sino-British Treaty of Peace, Friendship, Commerce, Indemnity – the first "modern" Sino-Western treaty. It brought the first opium war (1839-1842) to a formal conclusion and established the legal terms and procedures of Sino-British exchange. Under the terms of the treaty, China was forced to pay a $21 million indemnity, five treaty ports (Canton, Amoy, Foochow, Ningpo, and Shanghai) were opened to foreign trade and residence, the tariff was fixed at 5%, the island of Hong Kong was ceded in perpetuity to Britain, and a new judicial system was established consisting of consular courts with extraterritorial jurisdiction over British subjects.[105]

For British authorities, this treaty signified a mutual recognition of legal and diplomatic equality between Britain and China.[106] This was reflected in Article XI of the treaty, "Correspondence between British and Chinese authorities," which stipulated that "subordinates of both countries" were to be placed "on a footing of *perfect equality*."[107] The stipulation of "perfect equality" was embodied in the overall composition of the treaty form: both languages,

[105] While the Treaty of Nanjing did provide for British consular representation in China, the first formal reference to "extraterritoriality" came later in the General Regulations of Trade, which were then incorporated in a supplementary treaty in 1843 (the Treaty of Bogue). For the rights of foreign powers in the port areas see W.W. Willoughby, *Foreign Rights and Interests in China* (Baltimore: Johns Hopkins, 1920), vol. 1, 500–3; Quincy Wright, *Legal Problems in the Far Eastern Conflict* (New York: Institute of Pacific Relations, 1941), 69–73.

[106] How Chinese authorities interpreted the treaties is a different question. For recent works that address questions and issues concerning the translation and interpretation of the unequal treaties, see Dong Wang, *China's Unequal Treaties: Narrating National History* (Oxford: Lexington Books, 2005) and Lydia H. Liu, *The Clash of Empires*.

[107] *Treaties, Conventions, etc., between China and Foreign States*, Article XI, 355.

English and Chinese, were printed side by side to reflect a new inter-state parity. Importantly, Article XI also defined the legal and diplomatic nomenclature used in formal relations thereafter: "communication," "statement," "declaration," "and representation." Authorities and representatives of the two sovereign states were to correspond, then, as co-equals in a standardized language.[108] While historically new to Sino-Western commercial relations, the language and structure of the treaty conformed to more long-standing British modes of structuring international agreements which date back to the early eighteenth century when the British began to formalize a system of "Peace and Friendship" treaties between Great Britain and other "high contacting parties." At this time a treaty boilerplate came into general international operation, which was used by Britain and America to, among other things, regularize treaty relations with "First Nations" (indigenous peoples of the Americas located in what is now Canada).[109]

The provision of "perfect equality" in the Treaty of Nanjing marked a historical break and secular shift in Sino-Western/foreign relations. That shift can be understood with reference to previous treaties entered into China on the basis of ritual or ceremonial equality. The crucial precedent in this regard is the 1689 Treaty of Nerchinsk signed by Fedor Golovin on behalf of Russian co-tsars Peter I and Ivan V and Songgotu on behalf of Kangxi Emporer. In addition to facilitating trading relations, the treaty established borders between the two countries, which

[108] This standardized language in Sino-Western treaty relations was later accompanied by the assertion that Western-language texts of the treaties were to be authoritative. In the British case, this was formally declared in Article 50 of the 1858 Sino-British Treaty of Tianjin. Ibid., 418.

[109] Starting in 1701, the British made a series of maritime "Peace and Friendship" with the Mi'kmaq, Maliseet and Passamaquoddy peoples in order to end hostilities and encourage cooperation.

ultimately amounted to Russia surrendering the area north of the Amur River.[110] The authoritative version of the treaty was in Latin, with translations in both Russian and Manchu (the "official" language of the Qing Imperial court was Manchu at this time and continued to be into the eighteenth century).[111] Significantly, both parties agreed to the reciprocation of the kowtow (kneeling and holding one's head to the ground). That *both* parties performed this customary ritual amounted to a reversal of traditional Chinese diplomacy, which required only the non-Chinese party to accept (from the standpoint of Europeans) Chinese "suzerainty," i.e. "tributary status." In light of this ritual reciprocity, the Treaty of Nerchinsk has been referred to as the first modern treaty entered into by China.[112] It was followed by the 1728 Treaty of Kiakhta, which opened up the caravan trade (Chinese tea for Russian furs), confirmed and clarified the borders established in the Treaty of Nerchinsk, and dealt with the exchange of fugitives (i.e. extradition, as opposed to extraterritoriality). Both treaties regulated trading and diplomatic relations between the Qing Empire and Imperial Russia until the 1858 Treaty of Aigun and 1858 Treaty of Beijing, when the borders between the countries were revised.

We can begin to historically differentiate these earlier treaties (the Treaty of Nerchinsk and the Treaty of Kiakhta) from the modern Treaty of Nanjing on two major fronts. First, the latter was specifically conducted in terms of modern international law.[113] British authorities'

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[110] For a brief history of eighteenth-century Chinese-Russian relations, see Benjamin A Elman "Ming-Qing border defense, the inward turn of Chinese Cartography, and Qing expansion in Central Asia in the Eighteenth Century," in *The Chinese State at the Borders*, ed. Diana Lary (Vancouver, B.C.: UBC Press, 2008).

[111] The three translations of the Treaty of Nerchinsk differed considerably. On these differences, see V. S. Frank, "The Territorial Terms of the Sino-Russian Treaty of Nerchinsk, 1689," *The Pacific Historical Review* 16 (1947).

[112] Gong, *The Standard of Civilization*, 134.

[113] This distinction between ritual/symbolic and formal equality corresponds to the historical shift in late-eighteenth and nineteenth-century interstate relations from ceremonial to instrumental relations. See Hevia, *Cherishing Men from Afar*, 74-90.

insistence on the inclusion of the language of "perfect equality" was intended as a direct challenge to the tributary ritual of the kowtow; it signified China's recognition of Britain as an independent and sovereign nation. In his instructions to the British Plenipotentiary leading up to the Treaty of Nanjing, Lord Palmerston made respect for the equal dignity of British envoys a *sine qua non* of any formal agreement with China. This remained a point of crucial significance for Britain following the Treaty of Nanjing. Thus, in Article III of the 1858 Sino-British Treaty of Tianjin, Britain insisted that her Ambassador shall "not be called upon to perform any ceremonial derogatory to him as representing the Sovereign of an independent nation on a footing of equality with that of China."[114]

This secular shift to "perfectly equal" Sino-Western relations, moreover, was also formally expressed in the Treaty of Nanjing's redefinition of customary trading *privileges* in a set of transferrable commercial *rights*. Those customary trading privileges traditionally resided with the merchant guilds – The Company, on the one side, and the Co-Hong, on the other. Each was responsible for its own members and agents, and settlements were typically made by informal negotiation, as opposed to a written contract. The abolition of The Company's trading privileges was accomplished through the Charter Act of 1833. The abolition of the Co-Hong's trading privileges came in the form of Article VI of the Treaty of Nanjing, "Abolition of privileges of Hong merchants at Ports of residence of British merchants." It read: "The Government of China having compelled the British merchants trading at Canton to deal exclusively with certain Chinese merchants, called Hong merchants (or Co-Hong), who had been licensed by the Chinese government for that purpose, the Emperor of China agrees to abolish that

[114] *Treaties, Conventions, etc., between China and Foreign States*, Article III, 405.

practice in future at all ports where British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please…"[115]

The formal abolition of the customary privileges of monopoly merchants in the Canton trade established a new international commercial rights regime in China. The method of that establishment speaks to the second "modern" feature of the Treaty of Nanjing – namely that it was a coerced or "commanding treaty."[116] The British imposed the treaty's iniquitous terms under the threat of naval bombardment of Nanjing.[117] The legal and diplomatic centerpiece was extraterritoriality, which exempted British foreign nationals from the civil and criminal jurisdiction of Chinese law.[118] The content and scope of British foreign jurisdiction in China was defined in the 1843 "General Regulations, under which the British Trade was to be conducted at the Treaty Ports." It set forth the general procedures of commercial exchange between English and Chinese merchants, including issues of import and export dues, tonnage dues, weights and measures, tariff rates, examination of goods, and payment of duties. It also established the institutional (consular) structure of British governance in the treaty ports. British extraterritoriality was then generalized into an international legal order in China through a proliferation of imperial unequal treaties with extraterritorial provisions between foreign trading

[115] Ibid., Article V, 353.

[116] The use of force did not invalidate a treaty. "It is believed that the United Kingdom has at no time expressed any dissent from the current doctrine that a treaty is not rendered *ipso facto* void, and cannot be repudiated by one of the parties, by reason of the fact that such a party was coerced by the other party into concluding it, whether that coercion is applied at the time of signature or of ratification or at both times." A. McNair, *The Law of Treaties: British Practice and Opinions* (Oxford: Clarendon Press, 1938), 129.

[117] For that reason the 1842 Treaty of Nanjing and subsequent Sino-foreign foreign treaties were considered "unequal" – "because they were not negotiated by nations treating each other as equals but were imposed on China after a war, and because they encroached upon China's sovereign rights – which reduced her to semicolonial status." See Immanuel C. Y Hsü, *The Rise of Modern China* (Oxford: Oxford University Press, 1970), 239.

[118] Legal and jurisdictional controls exercised over British subjects in China were further defined and expanded in the Foreign Jurisdiction Acts – 6 & 7 Vict. c. 94 – passed in 1843.

nations (including Japan in the 1895 Treaty of Shimonoseki) and China. This international treaty port order, with extraterritoriality as its core legal-diplomatic instrument, and the 1842 Treaty of Nanjing as its charter of rights, characterized modern imperial Sino-British/Western relations for 101 years.

The formal establishment of modern British extraterritoriality provided the legal grounds for the recognition and transfer of treaty rights (to trade, travel, and proselytize) from the British state to its subjects (citizens) in China.[119] Britain then locked in any subsequent treaty rights acquired by foreign powers in China through the inclusion of the Most Favored Nation (MFN) clause in the 1843 Sino-British Treaty of the Bogue. Article VIII of the treaty provided the formal legal grounds for the recognition and transfer of concessions (rights and privileges) granted through any Sino-foreign agreement to Britain.[120] It stated: "[S]hould the Emperor [of China] hereafter, from any cause whatever, be pleased to grant additional privileges or immunities to any of the subjects or citizens of such foreign countries, the same privileges and immunities will be extended to and enjoyed by British subjects; but it is to be understood that

[119] The Treaty of Nanjing thus brought formal recognition of British domestic law in China. On that international legal basis, Orders in Council and Acts of Parliament further established modes of formal reciprocity, including the transferability of rights, between Treaty powers in China. For example, In Vict. c. II. "An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions" states: "By the application of this Act the Consular Courts may, in any action in which it is necessary, remit a case for the opinion of a Court in any foreign State with which Her Majesty may have made a convention for the purpose, in order to ascertain the law of that State as to the facts in question….And, vice versa, a Consular Court may be requested by a Court in any foreign Country with which such a convention exists, to give an opinion on a case submitted to it as to the law administered by such Consular Court on the facts set out in the question." As defined by the Act of 1878, moreover, British subjects and foreigners, on both British and foreign ships, were declared temporary subjects of the Queen's Courts. 41 & 42 Vict. c. 73.

[120] The MFN clause has its origins in seventeenth-century European diplomacy, and became a standard provision in commercial treaties beginning in the late-eighteenth and nineteenth centuries. Its progressive standardization signaled a move from protective tariffs to the liberalization of international trade relations: Most Favored Nations were entitled to receive equal trade advantages (e.g. low tariffs, freedom of investment) from the country granting such treatment.

demands or requests are not, on this plea, to be unnecessarily brought forward."[121] Formally defined in these terms, the MFN clause guaranteed that Britain would automatically become recipient of any corresponding rights and privileges granted thereafter to other contracting parties with China. It had the effect, then, of extending the bilateral Treaty of Bogue, in future, to a multilateral treaty.[122] While the MFN clause was (and is[123]) used to insure reciprocal trading rights in commercial treaties, this was not the case for the MFN clause in imperial treaty relations in China, which was unconditional and unilateral. It involved a loss of reciprocal rights: China was obliged to extend the same concessions to other Treaty powers, without obtaining reciprocal concessions from those treaty powers.

In sum, the Treaty of Nanjing expressed the mutual recognition of "perfect equality" between Britain and China, while also laying the institutional basis for an unequal exchange of rights and obligations. This inter-state principle of equivalence, and its nineteenth-century imperial legal form (i.e. the "unequal treaty"), was brought into existence through force and violence, which was an endemic feature of the universalization of "civilized" international law in the non-European world.[124]

The formation, i.e. constitutive recognition of China as a "semi-civilized" legal personality further illuminates this tension between formal equality and substantive inequality at

[121] See *Treaties, Conventions, etc., between China and Foreign States*, Article VIII, 393.

[122] Eighteen states held treaty rights prior to World War I. See Philip R. Abbey, "Treaty Ports &Extraterritoriality in 1920s China," Internet article (2005). See online at: http://www.geocities.com/treatyportOl/TREATY01.html.

[123] The first article of the General Agreement on Tariffs and Trade (GATT 1947) requires that contracting states grant one another most favored nation status. See online at: **http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm**. This principle remains in place under current World Trade Organization agreements.

[124] On the endemic feature of violence and unequal force in the history of modern international law, see Mieville, *Between Equal Rights*, 126-128.

the heart of "civilized" international law discourse. That civilizational discourse informed a taxonomy of state behavior based in the main on three social stages: civilized, barbarous, and savage. The archetypal jurisprudential schema was authored not by a "positivist" jurist, but by a naturalist, James Lorimer. His approach to international law was rooted in natural law jurisprudence. The "Law of nations," he claimed, "is the law of nature, realised in the relations of separate political communities." He divided humanity into "three concentric zones or spheres" – that of "civilized" humanity, "barbarous" humanity, and "savage" humanity.[125] He elaborated this tripartite division of humanity in terms of three distinct forms of recognition:

> 1. "The sphere of plenary political recognition extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States or North and South America which have vindicated their independence of the European States of which they were colonies."
> 2. "The sphere of partial political recognition extends to Turkey in Europe and Asia, and to the old historical States of Asia which have not become European dependencies–viz., to Persia and the other separate States of Central Asia, to China, Siam, and Japan." These "semi-barbarous," states "whose municipal law and the judgments of whose courts are not recognised by civilised nations" were, in his judgment, excluded from full participation in international law.
> 3. "The sphere of natural, or mere human recognition, extends to the residue of mankind, though here we ought, perhaps, to distinguish between the progressive and non-progressive races."[126]

For Lorimer, then, there existed no universal Law of Nations, and consequently, he held "the same rights and duties do not belong to savages and civilised man." This did not mean, however, that international layers should only deal "with the first of these [civilizational] spheres." Rather, he "must take cognisance of the relations in which civilised communities are placed to the partially civilised communities which surround them."[127]

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[125] See Lorimer, *The Institutes of the Law of Nations,* vol. 1, 101.

[126] Ibid., 101-102.

[127] Ibid., 13, 102.

Lorimer's natural law jurisprudential schema of humanity, when read alongside positivist international jurisprudence, throws into relief two crucial features of "civilized" international law discourse:

1. There existed a discursive convergence between nineteenth-century naturalist and positivist jurisprudence with respect to the standard of civilization. This universalist standard functioned, in both forms of international jurisprudence, as a normative metric to determine membership in international society. It also provided a geographic boundedness to the scope of international law, delimiting its core, "civilized," actors from peripheral, "semi-civilized"[128] and "un-civilized" (e.g. African societies) subjects. Positivist international lawyers, like Westlake, Hall, and Lawrence, readily drew on Lorimer's tripartite naturalist jurisprudential schema to categorize and justify these different classes of states. Moreover, they followed Lorimer's general council that one of the principal functions of the international lawyer was not "to apply the positive law of nation to savages, or even to barbarians, as such; but [rather]… to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition."[129] Within this common jurisprudential schema of "civilized" international law, then, partial membership in international society was possible. Westlake was quite clear on this point: "Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it. Thus a large part of the relations between the European and American states on the one hand, and China and Japan on

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[128] On the "semi-civilized"/semi-sovereign status in nineteenth-century international law, see Schmitt, *Nomos*, 227-229; Gong, *The Standard of Civilization*, 54-93.

[129] Lorimer, *The Institutes of the Law of Nation*s, 102.

the other hand, is conducted on the footing of ordinary international law."[130] Such partial recognition of "semi-civilized" legal personality, in the case of East Asian commercial societies, denoted, at a minimum, their formal capacity to engage in treaty relations.[131] This novel form of legal personality, moreover, can be historically distinguished from the abnegation of legal personality that accompanied the European territorial acquisition in Africa, which was classified either as an act of conquest or an act of annexation – in both cases, territorial sovereignty was surrendered *de facto* by an African polity to the occupying European state.[132]

In addition to the previously noted philosophical differences between naturalist and positivist jurisprudence, which separated Lorimer's approach from his positivist counterparts, the former, unlike the latter, emphasized the immutable biological characteristics of race in his hierarchical divisions of international society.[133] Lorimer justified those legal divisions by appealing to the new "science" of race, and to the work of Arthur de Gobineau in particular. "No modern contribution to science," Lorimer believed, "seems destined to influence international politics and jurisprudence to so great an extent as that which is known as ethnology, or the

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[130] Westlake, *Chapters on the Principles of International Law*, 82. He remarked further: "The common civilisation then… contains the principle that the institutions, whether of government or of justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. Those foreigners are subject to the local courts and authorities, and not to separate jurisdictions, and their own governments will not, normally, interfere for their protection so long as they enjoy equal treatment with natives." See Ibid., 103.

[131] A non-European state's treaty-making capacity was not, however, sufficient grounds for full membership in international society: "It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies." Hall, *A Treatise on International Law*, 41.

[132] Holland opined that European relations with "tribes do not resemble those which may arise out of a Treaty with civilizes and well-organized States, even when their civilization is of a non-European type." Holland, *Lectures on International Law*, 117.

[133] In this way I would argue that Lorimer's jurisprudential schema of a divided humanity should be understood as reifying and biologizing what positivist international jurists, in their developmentalist schemas of international society, understood as a historical outcome.

science of races."[134] It was from this emergent scientific racist perspective, then, that he claim that civilizational progress amongst certain peoples – singling out Aboriginal Australians and Africans – was virtually impossible. More polemically, Lorimer argued that despite the 1856 Treaty of Paris, which had (nominally) admitted Turkey in the Law of Nations, "the Turks…have proved to be incapable of performing its duties, and who possibly do not even belong to the progressive races of mankind."[135] His jurisprudential classification of Turks as "barbarians" was based not on any empirical assessment, but rather on his view that "the Turks are probably incapable, as a race, of working at any political development enabling them to set up a constitutional form of government." Even if such political development were to take place in Turkey, Lorimer believed that the Koran and the Muslim belief system would always and necessarily stand in the way of any equal and meaningful relations between Turkey and the rest of the "civilized" world.[136]

By contrast, positivist international jurists countenanced a developmentalist-reformist schema for "civilized" international society within which the distinctions between "civilized,"

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[134] The categorization of Chinas "semi-civilized" acquired significant purchase in nineteenth-century "scientific" literature. For example, Jan Jakob Maria de Groot, the Dutch Sinologist and historian of religion, categorized China as a "semi-civilized people.'' See de Groot, *The Religious System of China: Its Ancient Forms, Evolution, History, and Present Aspect, Manners, Custom, and Social Institution Connected Therewith* (Taipei: Literature House, 1964 [1892]), vol. 1, 11, 24, 292, 370. In his lecture at the Ethnographical Society on 27 March 1866, Frederick Farrar, a cleric of the Church of England, classified China as belonging to the "semi-civilized races." See Farrar, F.W. "Aptitudes of Race," *Transactions of the Ethnological Society of London* 5 (1867). It can be found online at: https://archive.org/details/jstor-3014218.

[135] Turkey has frequently served as the archetypal illustration of the "semi-civilized" state insofar as it had an "anomalous" position in nineteenth-century international law on account of the regime of capitulations that operated there. See Westlake, *International Law*, vol. 1, 40-49; Oppenheim, *International Law,* 147–149; Hugh McKinnon Wood, "The Treaty of Paris and Turkey's Status in International Law," *American Journal of International Law* 37 (1943); Cf. Fikret Adanır, "Turkey's Entry into the Concert of Europe," *European Review* 13 (2005); Aimee M. Genell, "Autonomous Provinces and the Problem of 'Semi-Sovereignty' in European International Law," *Journal of Balkan and Near Eastern Studies* 18 (2016). For a comparative analysis of unequal treaty regimes in Turkey and China, see Resat Kasaba, "Open-Door Treaties: China and the Ottoman Empire Compared," *New Perspectives on Turkey* 7 (1992).

[136] See, Lorimer, "La Doctrine de la reconnaissance: Fondement du droit international," 343 (my translation).

"semi-civilized," and "un-civilized" were *not* geographically fixed, but rather understood along a universal historical continuum.[137] This developmentalist logic ultimately laid the groundwork for the juridical transformation of "semi-civilized" states like China into fully sovereign, "civilized" states – once they had reformed their domestic and international legal behavior to conform to the "civilized" norms of "international society."[138] From this developmentalist perspective, then, Chinese inferiority was not immutable, but conditional, and thus remediable. Hall opined in that vein: "states outside European civilization must formally enter into the circle of law-governed countries. They must do something with acquiescence of the latter or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction." This went beyond any single act of acquiescence or conformity, such as conducting treaty relations or sending and receiving diplomatic envoys (which China did). China's full admission into the "Family of Civilized Nations" depended, in sum, upon its recognition of the "universality" of "civilized" international law, the precondition for which was not only the reform of its international behavior, but also domestic legal and juridical reform.[139] The latter entailed, most fundamentally, the codification of civil and criminal codes, the formulation of an abstract science of law, and an independent judiciary to ensure the autonomy of law. The absence of these European hallmarks of legal modernity were the principal concerns cited by Euro-American lawyers, prior to and following the 1842 Treaty of Nanjing, for the

[137] There were exceptions to this positivist rule. Most notably, Westlake arguably subscribed to a "softer" version of Lorimer's racialized jurisprudential schema of international society. He viewed international society as European society. It was "composed of all the States of European blood, that is of all the European and American States except Turkey, and of Japan." See Westlake, *International* Law, vol. 1, 40.

[138] So conceived, "civilization" was "conditional as to enable the respective State and its subjects to understand and to act in conformity with the principles of the Law of Nations." Oppenheim, *International Law,* 31.

[139] See Hall, *A Treatise on International Law*, 41-42.

necessity of retaining jurisdictional control over British foreign nationals in China.[140] Following the formal introduction of British/European extraterritoriality in China, the demand for domestic legal and judicial reform then became a prerequisite for the renunciation of British/European rights of extraterritoriality.[141] This civilizational demand was codified in treatises on international law, as well as in several treaties concluded with China at the turn of the twentieth century. Most notably, Article XII of the 1902 Sino-British Treaty of Shanghai submitted a willingness to abrogate extraterritoriality if China would "reform her judicial system and bring it in accord with that of Western nations."[142]

2. Lorimer's natural law jurisprudential schema illuminated one strand of the dual signification of the standard of civilization in nineteenth-century international law. On the one hand, it was mobilized to justify European imperial domination, and, more specifically, the imposition of unequal commercial and extraterritorial treaties between Europeans and non-Europeans. Lorimer submitted an unequivocal and sweeping endorsement of the forcible domination of non-European states: "Colonisation, and the reclamation of barbarians and savages, if possible in point of fact, are duties morally and jurally inevitable; and where circumstances demand the application of physical force, they fall within necessary objects of

[140] See e.g., Piggott, *Extraterritoriality;* Hinckley, *American Consular Jurisdiction in the Orient*; G.W. Keeton, *The Development of Extraterritoriality in China*; Skinner Turner, "Extraterritoriality in China," *British Yearbook of International Law* 10 (1929); H.G.W. Woodhead, *Extraterritoriality in China: the Case Against Abolition* (New York: Garland Publishers, 1980 [1929]); Wesley Fishel, *The End of Extraterritoriality in China* (Berkeley: University of California Press, 1952); W.W. Willoughby, *China at the Conference: A Report* (Baltimore: Johns Hopkins, 1922); Charles Denby, "Extraterritoriality in China," *American Journal of International Law* 18 (1924).

[141] See, e.g., Charles Cheney Hyde, *International law chiefly as interpreted and applied by the United* States, 2 vols. (Boston: Little, Brown & Co., 1922), 462-464.

[142] As quoted in Keeton, *The Development of Extraterritoriality in China*, vol. 2, 2. A similar promise was made in Article XV of the U.S.-Chinese Treaty on October 8, 1903. Article XII of the Sino-British Commercial Treaty of 1902. See *Treaties, Conventions, etc., between China and Foreign States*, 557; Article XV of the Sino-American Commercial Treaty of 1903, Ibid., 756; Article XI of the Sino-Japanese Commercial Treaty of 1903, Ibid., 662.

war." On this normative ground, he sought to defend "wars against China and Japan…to compel these countries to open their ports."[143] Lorimer's civilizational defense of these "free trade" wars and the commanding treaties that followed articulated closely with British positivist international lawyers' justifications of the Sino-British unequal treaties and the "anomalous" maintenance of British extraterritoriality: they viewed this imperial privilege-cum-right as a necessary but temporary deviation from the "universal" principle of sovereign equality to safeguard the "civilized" rights of British foreign nationals to trade, travel, and proselytize in China.[144] As the British government maintained, it was the "wide gulf" in conceptions of international law that existed between Europe and America on the one hand, and China on the other, that justified the imposition of unequal treaties. Specifically, it noted that: "the conception of international relations as being intercourse between equal and independent States – a conception which was woven into the very texture of the political ideas of the nations of the West – was entirely alien to Chinese modes of thought."[145]

On the other hand, the standard of civilization was also mobilized to broaden the doctrinal scope of the traditional *jus publicum Europaeum*, which had been historically limited to Christian European states, to include non-European societies in a *jus publicum universal*. Lorimer's racialized jurisprudential schema of "civilized" international law – whose application was necessarily limited to Euro-American "civilized" humanity – hewed to the geographic

[143] Lorimer, *The Institutes of the Law of Nations*, vol. 2, 28.

[144] Westlake, *International Law*, 41; *Chapters on the Principles of International Law*, 82, 101-109. Hall viewed extraterritorial privileges in "states not within the pale of international law" to have "no place in works of international law, because they exist only by special agreement with countries which are incompetent to set precedents in international law." Hall, *A Treatise on International Law*, 321 note.

[145] British Reply to Chinese Note to the Six Powers Concerning the Abolition of Extraterritoriality, Aug. 10th 1929, in H.G.W. Woodhead, *Extraterritoriality in China*, 60–61.

boundaries of the traditional Christian European inter-state order. Whereas positivist international lawyers redefined those traditional boundaries by invoking this universalist secular standard to constitutively recognize non-Christian East Asian commercial states like China – first as "semi-civilized" state, and then, once it had demonstrated its full conformity with the "civilized" rules and norms of international law, as a fully "civilized" and sovereign state.[146] Juristic determinations of China's "semi-civilized" status were directly correlated with its perceived level of socio-political organizational development as well as its international behavior: the gradual inclusion of China as a quasi-legal personality, with imperfect status in international law, followed soon after the Treaty of Nanjing.

This is exemplified in the successive editions of Henry Wheaton's *Elements of International Law*. First published in 1836, the book went through 15 American and English editions in total. In the first edition of *Elements*, Wheaton explicitly rejected the universality of international law: "Is there a uniform law of nations?" He answered, "The public law [of nations], with slight exceptions, has always been, and still is, limited to the civilized and Christian people in Europe or to those of European origin." In justifying his position, Wheaton, found recourse to traditional sources in the history of international law – citing, among others, Grotius, Bynkershoek, and Montesquieu – and observed that these early jurists did not believe there to be an immutable, universal law of nations "which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and pagan, have recognized in theory or in

[146] China formally acquired full international legal status only with the abrogation of European extraterritoriality during the 1940s. British extraterritoriality was formally abrogated in the Treaty for the Relinquishment of Extra-Territorial Rights in China, which was a bi-lateral treaty between the British and Chinese governments signed on January 11, 1943. China concluded a similar treaty with the United States the same day.

practice."[147] In that vein, Wheaton argued: "The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations. Hence the international law of the civilized Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing."[148]

Revised editions of *Elements*, however, drew back on this rigidly circumscribed view of the "particularity" of the European Christian Law of Nations. In the 1846 third edition, and in all subsequent editions, Wheaton's previous definition of international law "among civilised, Christian nations" was revised to read "among civilised nations."[149] Furthermore, in the 1846 edition, four years after the Treaty of Nanjing, Wheaton included a discussion of China as a participant in the public law of nations since it had "been compelled to abandon its inveterate anti-commercial and anti-social principles, and [has] acknowledge[d] the independence and *equality* of other nations in the mutual intercourse of war and peace." In this edition, moreover, he now noted the imperfect legal status of China: "While of the ability of China to form binding international engagements there can be no doubt," the question remains as to "how far she has even now entered into the pale of public law."[150]

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[147] Wheaton straddled the fence, in my view, between naturalist and positivist jurisprudence. His definition of international law was characteristic of this "eclectic" approach. He defined it as "consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." Wheaton, *Elements of International Law,* 14, 15.

[148] Wheaton, *Elements of International Law*, 44-45.

[149] This is Gong's insight. See Gong, *The Standard of Civilization*, 54.

[150] Wheaton, *Elements of International Law*, 19, 20. My emphasis.

No definitive answer to that question was forthcoming. Westlake acknowledged that non-European countries like China were formally treated on the level of ordinary international law in their relations with European states insofar as they maintained treaty and diplomatic relations with European states. He also claimed that China and Japan "with an old and stable order of its own, with organized force at the back of it, and complex enough for the leading minds of that country to be able to appreciate the necessities of an order different from theirs…must be recognized as being civilized." And yet, he insisted that China and Japan (as well as Siam, Turkey and Persia) "have civilisations differing from the European," which explained and justified why Europeans in such countries required extraterritorial protection.[151] Oppenheim echoed this ambivalent sentiment. In contrast to "full-Sovereign States," he thought, "doubtful was the position of all non-Christian States such as China, Korea, Siam, Persia, and further Abyssinia, even if Christian." Like Westlake, Oppenheim viewed those non-European civilizations as "essentially so different from that of the Christian States that international intercourse with them of the same kind has been hitherto impossible. And neither their Governments nor their population are *at present* able to understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law." The salient issue was not that such non-European civilizations were somehow inherently incapable of following the "civilized" rules and norms of European international law. Any such notion was disproven by the fact that these countries "send and receive diplomatic envoys and conclude international treaties." Consequently, "the opinion is justified that such States are International Persons only in some respects – namely, those in which they have expressly or tacitly been received into the

[151] Westlake, *Collected Papers*, 103.

Family of Nations."[152] What limited these countries from being recognized as "full-Sovereign States," according to Oppenheim, was that the "civilization" of these societies "*has not yet reached* that condition which is necessary to enable their Government and their populations in every respect to understand and to carry out the command of the rule of International Law."[153]

Determining the relative levels of "civilization" of these non-European states was not at all a straightforward process. "So anomalous are those not-full sovereign states," Oppenheim admitted, "that no hard and fast general rule can be laid down with regard to their position within the Family of Nations, since everything depends upon the special case."[154] As it pertains to China, one such case presented itself in the context of France's blockade of the Formosa port in 1884. France's actions led China to communicate to Britain its expectation that the British government would prevent French ships from coaling in British treaty ports. That request, according to Hall, made apparent "a tendency…on the part of…states ["outside the sphere of international law"] to expect that European countries shall behave in conformity with the standard which they have themselves set up." Neither China's treaty-making capacity nor the fact that it sent and received permanent embassies were sufficient grounds for China to expect "reciprocal obedience" from Britain or any other "civilized" Treaty Power. While China may, in future, "be brought within the realm of law," in its present situation, "European states [were *only*] obliged by their sense of honour,…by their interests, to be guided by their own artificial rules in dealing with semi-civilised states" like China.[155]

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[152] Oppenheim, *International Law*, 148.

[153] Ibid., 33.

[154] Ibid., 102. My emphasis.

[155] Hall, A Treatise on International Law, 42.

China's ambiguous status in international law at the turn of the twentieth century stood in contrast to Japan's newly acquired recognition as a "civilized" state. Like China, Japan had signed a series of unequal treaties with Western nations in the mid-nineteenth-century, which included, among other provisions, fixed tariffs and extraterritorial provisions. Unlike China, however, Japan proceeded to "modernize" its legal system soon thereafter in order to obtain judicial autonomy and become a full member of "civilized" international society.[156]

In the midst of its efforts to codify its laws during the 1880s, the Japanese government raised the issue of treaty revision, and specifically that of tariff autonomy and the repudiation of extraterritoriality.[157] Against the background of these "modern" Western reforms of Japanese domestic law, Hall, writing in 1924, commented: "The right of Japan to rank with the civilised communities for purposes of international law, so questionable when the first edition of this book was published [in 1884], has long since been clearly established." The grounds for this argument were, first, that Japan had "had acceded (in 1886) to the Geneva Conventions, and to various 'universal conventions' as to weights and measures, ports, telegraphs, and the like." Secondly, "during the coarse of hostilities against China…[Japan] "adhered to the recognized laws of war." Through a series of bi-lateral treaties concluded in the late 1880s and 1890s – which, in the case of the 1890 British-Japanese treaty required Japan to demonstrate that its newly codified laws would be in satisfactory operation for a year – Japan sought to abrogate extraterritoriality and obtain tariff autonomy. Those efforts culminated in 1899 when extraterritorial jurisdiction was

[156] See Turan Kayaoğlu, "The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality," International Studies Quarterly 51 (2007).

[157] For an excellent recent study of modern extraterritorial privileges in Japan, established by the treaty regime in the 1860s, particularly the "right to hunt" asserted by British authorities, see Douglas Howland, "An Englishman's Right to Hunt: Territorial Sovereignty and Extraterritorial Privilege in Japan," *Monde(s): histoire, espaces, relations* 1 (2012).

abolished in the Japanese Empire. While these treaties brought Japan into international society as a fully "civilized" state, it was, according to Hall, the 1902 Anglo-Japanese Treaty (which firmly established equal relations between the two nations through a strategic alliance in opposition to Russian expansion) that "set the final seal on the recognition of [Japan], which after the war of 1904-05, took an undisputed place among the Great Powers."[158] Holland concurred: "Japan's respect for International Law was abundantly proved during her war with China, and, on a larger scale, during her war with Russia (1904, to September 1905)." While he lamented Japan's "outburst of savagery at Port Arthur,[159] [Japan] has conformed to the laws of war, both in her treatment of the enemy and in her relation to neutrals, in a manner worthy of the most civilized nations of Western Europe."[160] Likewise, Wheaton, citing first Sino-Japanese war (1894-1895) in which Japan had "striven scrupulously to comply with the highest civilized standards", claimed it was "impossible to dispute [Japan's] right to rank among the powers who are, without reservation, subject to international law."[161]

China, by contrast, had not yet sufficiently demonstrated a respect for the "civilized" laws of war, though it had begun, in Holland's estimation, to adopt the "rudimentary and inevitable conceptions of International Law…[and] have shown themselves to be well versed in

[158] Hall, *A Treatise on International Law*, 43.

[159] As one journalist wrote of the Port Arthur Massacre in The New York World: "The defenceless and unarmed inhabitants were butchered in their houses and their bodies unspeakably mutilated. There was an unrestrained reign of murder which continued for three days. The whole town was plundered with appalling atrocities. It was the first stain upon Japanese civilization. The Japanese in this instance relapsed into barbarism. All pretences that circumstances justified the atrocities are false. The civilized world will be horrified by the details." *The New York World*, December 12, 1894, 1.

[160] Holland, *Lectures on International Law*, 88, 128-129.

[161] Wheaton, *Elements of International Law*, 21.

the ceremonial of embassy and the conduct of diplomacy."[162] Both were on full display through China's participation at the 1899 and 1907 Hague Conferences, which threw into relief its partial membership in international society. "The mere fact that the Chinese government was invited to send representatives to such an assemblage," Hall argued, "may be taken as an acknowledgement of its international status." Chinese representatives refrained from signing the Convention relative to the laws and customs of land warfare at the 1899 Conference,[163] but, at the second Peace Conference, the Emperor of China did sign the amending Convention on this subject, as well as the Convention for the adaptation of the principles of the Geneva Convention to maritime warfare. China's initial refusal to abide by the "elementary European rules of war" was troubling for Western international lawyers, as was its "gross breach of law involved in the assault on the Pekin[g] Legations in the summer of 1900…but her inclusion among the Powers invited to the Hague in 1907 set the matter [of China's International personhood] at rest."[164] Holland concurred: China's attendance had brought it (along with Persia and Siam) to the "outer courts of the charmed circle," perhaps even qualifying it as a "fully civilized state."[165]

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[162] Holland, *Studies in International Law*, 129.

[163] The Qing dynasty did, however, acknowledge eight of the fourteen conventions at the first Peace Conference (Conventions 1, 2, 3, 5, 9, 10, 13, and 14).

[164] Hall, *A Treatise on International Law*, 42. Lawrence offered this dissenting opinion: "The attacks upon them [diplomats] in China in the summer of 1900 were an outrage of the grossest kind." See Lawrence, *Handbook of Public International Law*, 81. Likewise Wheaton argued "the gross contempt for the comity of nations shown by the assault of the Pekin Legations in the following year, and the murder of the German minister and the Chancellor or the Japanese Legation, have gone far towards depriving her [China] of what credit and status she had acquired." Wheaton, *Elements*, 20.

[165] Holland, *Lectures on International Law*, 39-40. Other European international lawyers, however, were more skeptical of Holland's tolerance vis-à-vis China. For example, The German jurist, Georg Jellinek, claimed it was "an entirely unprovable assertion" that China had accepted international law, despite its inclusion at international conventions. For Jellinek, China participated in the first Hague Conference "only in an inferior way" and "it naturally has not ratified these conclusions" pertaining to the law of war. This was indicative of the fact that China "has never given up its haughty political pretensions and fictions: it still imagines itself the primary empire, and its still regards foreign nations, according to its official theory, as vassals and satellites." See Jellinek, "China and das Völkerrecht," *Deutsche Juristen-Zeitung* 19 (1901), 61, 59.

This brief history of the fraught juridical production of China as a "semi-civilized" legal personality attests to the ambivalent character of "civilized" international law. On the one hand, this normative discourse was mobilized to justify the global-cum-imperial expansion of unequal treaty relations and extraterritoriality by excluding non-European societies from the pale of international law. On the other hand, this discourse was also mobilized to recognize new "semi-civilized" non-European states, like China, as partial members of international society, and, through this constitutive process, to broaden the doctrinal scope of the traditional *jus publicum Europaeum* into a *jus publicum universal*. This historical broadening and transformation of international law was not only the work of European international lawyers. It was also, and arguably more importantly, the work of a new class of non-European international lawyers.[166] Understanding the historical nature of that legal and jurisprudential "work," and the European and non-European agents that carried it out, requires coming to terms with the ambivalent character of "civilized" international law discourse – which made possible both China's inclusion and exclusion from international society. Below, I theorize this discursive ambivalence by historically grounding it in a particular abstract form of commercial society that attained global significance during the second half of the nineteenth century.

IV.4. Liberal Abstraction and International Legal Reasoning

Thus far, our investigation of the formation of China as a "semi-civilized" legal subject has illuminated a jurisprudential schema of "civilized" international law underwritten by a universal theory of historical progress. In my view, the schema's logic indicates that

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[166] See Becker Lorca, *Mestizo International Law*.

international jurists had adopted the notion of a universalizing process with "civilized" international law as its *telos*.[167] With a critical eye towards such teleology, contemporary legal scholars have characterized nineteenth-century international law as "Euro-centric": its universalism both reflected and concealed the particularistic norms of European jurists and their preconceived notions of European "civilization."[168] Viewed in this imperial light, the imposed legal universalism was inauthentic and false.

This is the essence of Anghie's central thesis regarding the "colonial" structure of modern universal international law – a "deep structure" which linked Vitoria's natural law jurisprudence with the positivist jurisprudence of British international lawyers. The historical unfolding of that colonial structure through the development and universalization of "civilized" international law – which posited the egoistic, rights-bearing "civilized" legal subject as its formal and normative premise – bears out what Anghie describes as "a movement towards abstraction."[169] His critical reading of that nineteenth-century movement, or logic, focuses in the main on its colonial imposition on non-European societies; that is, how international lawyers mobilized abstract positivist legal concepts (sovereignty, international society, civilization) to discursively Other non-European societies. In this respect, then, Anghie offers a decidedly

[167] While nineteenth century liberal international lawyers recognized variation in national laws, the essence of law, was generally regarded to be universal: "national laws were but aspects or stages of the universal development of human society." Koskenniemi, *Gentle Civilizer of Nations*, 46.

[168] Gong states, "In general, the standard of 'civilization' reflected the norms of liberal European civilization which arose to replace, thought it remained firmly rooted in, the mores of Christendom." Gong, *The Standard of Civilization*, 15. The traditional historiographical consensus is that positivist international law, and its universalist categories, were formulated within a European context and applied *ex post facto* in order to legitimate "imperial" exploits. See, in general, Bull and Watson, eds., *The Expansion of International Society*. Recent historical studies have challenged that orthodoxy, arguing instead for the constitutive effect of European expansion on the "universality" of nineteenth-century international law. See, in particular, Koskenniemi, *Gentle Civilizer of Nations* and Anghie, *Imperialism*.

[169] Anghie, *Imperialism*, 51. See also, Morton J. Horowitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992 [1977]), 12.

instrumentalist analysis of modern abstract international law. And while he is certainly successful in demonstrating the ideological mobilization of abstract juridical concepts to exclude and subjugate non-European societies, he nonetheless fails to explain what the historical impulse was for this "movement towards abstraction" in "civilized" international law.

Rather than simply dismissing the abstract universalism of nineteenth-century "civilized" international legal discourse as false and inauthentic, I wish to focus our attention instead on the aforesaid historical transformation from *jus publicum Europaeum* to *jus publicum universal*. Schmitt viewed this epochal shift of interstate international law in terms of the breakdown of two distinct spatial orders: a global economic order and a Euro-centric inter-state order. His argument was that it was the "sphere of economy" – driven by the logic of the "free movement of capital and labor" – that finally dissolved the structure of the traditional European inter-state order. Its dissolution took the form of an abstract international legal universalism, which he saw reflected in the language of "civilization" and "humanity." While Schmitt was highly critical of this abstract legal universalism, he did not claim it was merely "false" spatial consciousness.

> The prevailing concept of a global universalism lacking any spatial sense certainly expressed a reality in the economy distinct from the state – an economy of free world trade and a free world market, with the free movement of money, capital, and labor…. In short: over, under, and beside the state-political borders of what appeared to be a purely political international law between states spread a free, i.e. non-state sphere of economy permeating everything: a global economy.[170]

For Schmitt, then, the abstract legal universalism of nineteenth-century international law did not simply conceal the particularistic norms and values of European jurists. It also reflected the abstract universalizing process of global capitalism, which he understood as distinct from and superseding the territorial logic of the traditional *jus publicum Europaeum*. Reconsidered from

[170] Schmitt, *Nomos*, 197, 235.

this Schmittian perspective, nineteenth-century international jurists did not, pace Anghie, simply imagine the normative geographic boundaries of "civilized" international law to conform to a traditional spatial distinction between "civilized" Christian Europe and "uncivilized" non-Christian Europe. Rather, the "civilized"/"semi-civilized"/"uncivilized" distinctions in nineteenth-century international law point to the emergence of a historically new supra-European juridical order.[171] However, while Schmitt's analysis of the capitalist emergence of this new global nomos advances our present discussion beyond Anghie's colonial framing of the abstract universalism of nineteenth-century international law, Schmitt regrettably lacked any real theory of capitalism.

My contention is that a non-orthodox Marxian theory of capitalist legal forms refines our understanding of the transnational movement towards *liberal abstraction* in Euro-American international law and legal jurisprudence, alluded to by Schmitt.[172] By liberal abstraction is meant a socially specific form of conceptual abstraction bound, historically and normatively, to

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[171] Schmitt, however, framed the historical transformation from *jus publicum Europaeum* to *jus publicum universal* in terms of the breakdown of those core global spatial distinctions/dualisms – land and sea, state and economy, public and private law – that had previously grounded the traditional European inter-state order. Quite tellingly for Schmitt, the prescient event in the crisis of European international law came when the US government recognized the flag of the Congo Society on April 22, 1884.

> It set a precedent with respect to recognition of a new state on African soil that had significant consequences, although at the time it was perceived to be a peripheral matter. Nevertheless, it was a symptom that traditional, specifically European international law was dissolving gradually, but nobody seemed to notice. The decline of the *jus publicum Europaeum* into a universal world law lacking distinctions no longer could be stopped. The dissolution into general universality simultaneously spelled the destruction of the traditional global order of the earth. Ibid, 227

Hence, the recognition of a new of a new state on African soil effectively dissolved the traditional juridical distinction between sovereign states and colonial space free for discovery and occupation. This jolt to the territorial status quo then began to loosen the structure of *jus publicum Europaeum*, which entirely lost its "spatial sense" in the Universal Conventions at the turn of the twentieth century.

[172] What Koskenniemi makes clear, however, is that nineteenth-century European international lawyers applied this reformist logic not only to the imperial peripheries, but also to the domestic legal sphere. See Koskenniemi, *Gentle Civilizer of Nations*, 18.

commodity-mediated exchange relations.[173] This historically limited form of conceptual abstraction – which made possible the juristic articulation of an abstract, rights-bearing legal subject – is a product and core feature of modern capitalist society, which Marx analyzed, in *Capital*, with reference to a peculiar form of social practice he called, "abstract labor." It refers to the basic historical condition in modern capitalist society that people do not produce goods for their own means of subsistence, but rather as a means to buy goods and services from others through exchange. In this way, Marx reasoned, labor in capitalism assumes a general social function: it mediates how individuals relate to each other and to nature, and, as such, it constitutes a unique, historically specific form of impersonal social interdependence.

Marx's category of the "commodity" purported to grasp the socially specific features of this labor-mediated form of practical interdependence. The real, practical abstraction of human labor that creates commodities lies at the core of a historical logic of equivalent exchange – a constitutive exchange principle, which Marx calls "value," that establishes a commonality among people abstracted from the qualitative specificities of particular persons. It does so by reducing qualitatively distinct forms of concrete laboring activity (e.g. handloom and powerloom weaving) into an abstract, homogenous quantum of socially average labor time. Marx understood the twofold character of the commodity form accordingly. Considered as a product of concrete, qualitatively specific laboring activity, the commodity was an object whose qualitatively particular properties rendered it serviceable to human needs. Considered as a value, however, the commodity was merely a product of socially average labor time.

Marx's category of the commodity purported not only to grasp a historically specific form of social interdependence, but also the *phenomenal appearances* that this abstract social

[173] See Andrew Sartori, *Liberalism in Empire*, 21-27.

form assumed to its practitioners. Presently we are concerned with Marx's critique of *legal* phenomenal appearances – and specifically, the abstract rights-bearing legal subject – which he analyzed, in *Capital*, with reference to the socially necessary conditions of possibility for commodity exchange. Because ["c]ommodities themselves cannot go to the market and perform exchange in their own right," Marx reasoned, what is required for a transaction of values to take place is "recourse to their guardians, who are the possessors of commodities." On that basis, Marx proceeded to set the modern "economic stage" with its characteristic legal "guardians" as follows:

> In order that these objects may enter into relations with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. Here the persons exist for one another merely as representatives and hence owners, of commodities.[174]

For Marx then, the realization of value in the act of exchange presupposes a conscious act of will on the part of the commodity owner. And it is this judicially constituted will, generated in the sphere of exchange relations, which makes commodity owners "free" and "equal" to other owners of commodities. In this transactional context, legal personality – man's "will" (which resides in the commodity) and formal capacity to be a subject of rights – is simply an abstraction of the value relation. Hence, these guardians of commodities "appear on the economic stage [as] merely personifications of economic relations."[175] By that same reasoning Marx argued that commodity exchange requires a socially specific form of legal regulation – the contract – which

[174] Marx, *Capital*, 178.

[175] Ibid, 179.

regulates conflicts between two formally equal and autonomous wills who mutually recognize and defend their rights and interests in this legal form. Hence, "the juridical relation mirrors the economic relation": just as value abstracts from the concrete, particular qualities of disparate laboring activities to render them commensurable by virtue of their common social substance (abstract labor), the legal form, as a relation between two bearers of rights, abstracts from the qualitative differences and inequalities of particular individuals to render them formally equal under the law.

This very dense critique of bourgeois law, and its phenomenal appearances, provided the theoretical groundwork for Pashukanis's commodity exchange theory of law, as presented in *The General Theory of Law and Marxism* (henceforth: *GTLM*). Following from Marx's discussion of the "guardians" of commodities, Pashukanis identified three legal phenomenal appearances which come to light in exchange: 1) Each actor must recognize the "free" *will* of the other, which "resides in the object" being exchanged; 2) Each actor must recognize the other as the rightful *owner* of the commodity; and 3) Each actor must recognize the other as an *equal*, irrespective of any inherent differences between them. Pashukanis's argument is that the constant exchange of commodities in the sphere of circulation gives rise to these three phenomenal forms of appearance – equality, free will and private ownership interest – which, in their historical totality, give expression to "a single social relation." The formation of the bourgeois egoistic legal subject – the abstract, undifferentiated bearer of these rights and interests – represents the crystallization of these three phenomenal forms in one "mystified," that is to say, "fetishized" legal form. So construed, the bourgeois legal subject comes to logically approximate the commodity form in that "all concrete peculiarities which distinguish one representative of the genus homo species from another dissolve into the abstraction of man in general, man as a legal

subject."[176] Man's capacity to act as a "bearer" of private rights and interests thereby becomes entirely "separated from the living concrete personality," and, as a result, the legal subject "ceas[es] to be a function of its effective conscious will and becom[es] a purely social function."[177]

For Pashukanis, this process of abstraction intrinsic to commodity exchange (i.e. value) relations was historically reflected, in the domain of bourgeois jurisprudence, in modern jurists' general theories of domestic and international law, and the fundamental definitions of law articulated therein. With respect to nineteenth-century international law, those fundamental definitions or constituent elements were: absolute sovereignty, international society, and the standard of civilization. The historical articulation of these general concepts, which "comprise a theoretical reflection of the [international] legal system as a perfected whole," only became possible once capitalism had become the predominant international social form of organization. Hence, this intellectual process of abstraction underlying the juristic formulation of these general concepts of international law mirrors the social process of abstraction inherent in modern commodity exchange relations; international jurists are only able to make use of abstract categories, such as the rights-bearing, "civilized" legal subject, because of this socially specific form of practical abstraction bound to commodity exchange. Prior to the rise and generalization of commodity exchange relations, this "free and equal" abstract legal subject was *a priori* inconceivable. In the feudal world, man was viewed *not* as a bearer of abstract rights, but rather in terms of various privileges associated with concrete distinctions established by birth, social rank, education, and occupation. Within this context of organic patriarchal relations, "every

[176] Pashukanis, *GTLM*, 153.

[177] Marx, *Capital*, 179.

right was a privilege": "all rights were considered as appertaining exclusively to a given concrete subject or limited group of subjects." As such, equality was assumed only "in a narrow legal sphere", on the periphery of ancient and feudal society; legal personality possessed no "constant element," no homogenous meaning, in an epoch in which labor did not function as a social means, and, as a result, lacked any notion of "universal" formal equality between men.[178]

Nineteenth-century "civilized" international legal discourse posited the abstract rights-bearing "civilized" legal subject as its formal and normative premise primarily through the assumption of the domestic law analogy. This liberal form of legal analogical reasoning has a long and continuous history in modern international legal thought.[179] It found one of its early and paradigmatic articulations in Hugo Grotius's natural law jurisprudence – a system of legal thought premised on a State-as-Person or State-as-Individual argument that analogized relations between sovereign states to relations between the owners of private property. [180] As Pashukanis noted, Grotius was the "first theorist of international law," whose "whole system depends on the fact the he considers relations between states to be relations between the owners of private property."[181] In his acceptance of the liberal private law analogy, Grotius acknowledged,

> [T]hat the necessary conditions for the execution of…equivalent exchange between private owners, are the conditions for legal interaction between [sovereign] states. Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may freely dispose of its

[178] Pashukanis, *GTLM*, 119.

[179] This is to say nothing of the import of the domestic law analogy in liberal political theory. See Koskenniemi, *FATU*, 76-100; Michael Walser, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 58-63.

[180] See Hugo Grotius, *The Freedom of the Seas*, 29. This quote comes from Pashukanis's entry "International Law" from the three-volume *Encyclopedia of State and Law* published between 1925 and 1927 by the Communist Academy. It is reproduced in the Appendix of Mieville's *Between Equal Rights*, 321-336: at 328. See also, Emeric de Vattel, *The law of* nations, 195.

[181] Pashukanis, *GTLM*, 329.

> own property, but it can gain access to another state's property only by means of a contract on the basis of compensation; do ut des.[182]

In this way, then, Grotius's State-as-Individual argument gave primacy to the State and its absolute rights and its will to the law; it was based on the liberal-naturalist assumption about the primacy of the individual in society. For Pashukanis, this bourgeois jurisprudential schema was indicative of a deeper historical truth about the interconnection between modern domestic law and modern international law: both are "moments" of the same commodity-mediated legal form. This is, in my view, what rendered the domestic law analogy normatively compelling to a range of bourgeois jurists, both historically and philosophically (naturalist, positivist, "eclectic").

Our principal concern here, however, is not the natural law origins, but the generalization of the domestic (private) law analogy in the context of the professionalization of nineteenth century international law, "the golden age of international legal positivism."[183] This was, concurrently, a historical context characterized by the quantitative increase in treaties (both equal and "unequal")[184] – a legal situation reflected in the new qualitative significance accorded to treaty law by international jurists, diplomats, and other legal specialists. While treaties of course existed prior to this period, it was only during the nineteenth century that treaty law came to be generally recognized by international jurists as a fundamental source of international law.[185] Treaty law's heightened significance in nineteenth-century international law is further evidenced

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[182] In Mieville, *Between Equal Rights,* Appendix, 328

[183] Koskennimei, *FATU*, 131. But see his complication of any straightforward definition of such positivism, Ibid.

[184] On the global proliferation of multilateral treaties starting in the nineteenth century, see, Robert A. Denemark and Matthew J. Hoffmann, "Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making," *Cooperation and Conflict* 43 (2008).

[185] This is not an unprecedented claim. See Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965), 36.

by new state practices in record keeping on commercial treaty relations.[186] Of particular importance in the English context was the Hertslet commercial treaty series, compiled by English civil servant and author, Lewis Herslet (1787–1870) and his son, Sir Edward Hertslet (1827–1885).[187] It consisted of a collection of treaties and conventions, between Great Britain and foreign powers, "and of the laws, decrees, orders in council, &c., concerning the same, so far as they relate to commerce and navigation, slavery, extradition, nationality, copyright, postal matters, &c., and to the privileges and interests of the subjects of the *high contracting parties*."[188] The term, "high contracting parties" (which also appears in the de Martens clause, see above), designated the parties or representatives of states who have signed or ratified a treaty or international agreement (e.g. convention). It is indicative in the main of how modern international jurists, diplomats, and other legal specialists viewed treaties. They did so as contracts.

This liberal form of analogical reasoning found its paradigmatic expression in Holland's dictum, "The Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to the relations of individuals."[189] The private legal ideas Holland had specifically in mind were those of contract and property: a contract between individuals resembles a treaty between states inasmuch as both could be

[186] The relevant nineteenth-century U.S. Treaty Series is contained in *Papers Relating to the Foreign Relations of the United States*, which has since been renamed *Foreign Relations of the United States*.

[187] Other relevant British publications of treaties included the *Treaty Series* compiled as Parliamentary Papers, which appeared starting in 1892. Other major collections of treaties in relation to China are: William Frederick Mayers, ed., *Treaties between the Empire of China and Foreign Powers, Together with the Regulations for the Conduct of Foreign Trade, Conventions, Agreements, Regulations, etc*., 5th ed. (Shanghai: North China Herald Office, 1906); John V.A. MacMurray, ed., *Treaties and Agreements with and Concerning China*; *Customs, Treaties, Conventions, etc., between China and Foreign States* (New York: Oxford University Press, 1921).

[188] My emphasis.

[189] Holland, *Studies in International Law and Diplomacy*, 152.

defined as a formal agreement between co-equals; and that the private law right of property resembles the territorial rights of a state. On those analogical grounds, Holland claimed that these private law ideas could be legitimately applied to the Law of Nations; these private legal ideas formed the "sources" of the Law of Nations. In this respect, then, the schema underlying Holland's dictum points to a general process of transference in nineteenth-century positivist international jurisprudence in which ideas from the domestic, private legal context were analogically applied or extended to the public international legal context. [190] And it is in light of this liberal analogical reasoning that we can appreciate David Kennedy's sweeping argument that "[i]nternational legal positivism is simply the working out of the private law metaphor of contract applie[d] to a public legal order."[191]

This legal-jurisprudential process of transference is relatively well-covered territory in the existing histories of modern international law. Most notably, Hersch Lauterpacht's (1897-1960)[192] seminal work, *Private Law Sources and Analogies of International Law*, documents the

[190] Positivist international jurists' recourse to the private law analogy assumed a prior recognition of the distinction between public law and private law. Following Morton Horowitz' line of juristic reasoning in his critical short essay, "The History of the Public/Private Distinction," I would argue that this public/private positivist distinction in positivist jurisprudence corresponded to the public/private distinction in nineteenth-century laissez-faire liberalism, in which "public" signified the state, and "private" signified the economy. On the justification of this public/private distinction in nineteenth century Anglo-American jurisprudence Horowtiz remarked: "The emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century. Although…there were earlier anticipations of a distinction between public law and private law, only the nineteenth century produced a fundamental conceptual and architectural division in the way we understand the law. On the of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law – public law – and the law of private transactions – torts, contracts, property, and commercial law." Morton J. Horowitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1992):1422.

[191] Kennedy argued the case as follows: "[P]ositivism rooted the binding force of international law in the consent of sovereigns themselves, on a loose analogy to the private law of contract, and found the law in expressions of sovereign consent, either through a laborious search of state practice or a catalog of explicit agreements." Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Nordic Journal of International Law* 65 (1996): 398.

[192] Lauterpacht was a member of the United Nations' International Law Commission from 1952 to 1954 and a Judge of the International Court of Justice from 1955 to 1960. His writings and opinions continue to be cited in briefs,

recurrence of the private law analogy in nineteenth and early twentieth century international law and legal jurisprudence. His study demonstrates that private law analogies have been freely resorted to, by judges and jurists, in determining questions of, inter alia, territorial sovereignty, acquisition and loss of territory, servitudes, bankruptcy, interest, mandates, leases, measure of damages, burden of proof, and tort responsibility.[193] This analogical reasoning was brought to bear not only on intra-European relations, but also European-non-European relations. In terms of the latter, Lauterpacht highlighted the imperial import of the private law conceptual framework, which was mobilized by European international lawyers to justify the colonial acquisition of non-European territory through the concepts of discovery, occupation, conquest, and cession.[194] Lastly, to this thumbnail sketch of the historical significance of the private law analogy in modern international law it must be added that this form of analogical reasoning was absolutely central in the legal and jurisprudential construction of corporate personhood during the nineteenth century. It was during this period when corporations were analogized to, and recognized as, juridical persons with rights and interests.[195]

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judgments, and advisory opinions of the World Court. See Martti Koskenniemi, "Lauterpacht: the Victorian tradition in international law," *European Journal of International Law* 8 (1997).

[193] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with special reference to international arbitration)*. See also, Arnold D. McNair, "So-Called State Servitudes," *British Yearbook of International Law* 6 (1925): 122. ("Most treaties or conventions between states are jurisprudentially contracts, and the private law of contract has proved an important source of rules for their formation, interpretation and dissolution.")

[194] See Carty's analysis of the relationship between the domestic law analogy and liberal capitalism in *The Decay of International Law*: *A Reappraisal of the Limits of Legal Imagination in International Affairs*. (London: Palgrave Macmillan, 1986) 8-11, 43-60, et seq. In a similar vein, D.P. O'Donnell argues that this propertied conception of territory dominates Anglo-American legal thinking, see *State Succession in Municipal and International Law*, 2 vols. (Cambridge: Cambridge University Press, 1967), vol. 1, 72.

[195] See Joseph Story's definition of a corporate personhood in Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 667, 4 L. Ed. 629 (1819).

Drawing on Pashukanis's theory of legal fetishism, I understand the private law analogy as a fetishistic form of legal reasoning that justified the personification of the ("civilized") state by likening it and its territory to a natural individual with innate private property rights.[196] Viewed in this critical theoretical frame, the private law analogy worked to naturalize and universalize a socially specific idea of legal personhood and its moral "conscience" in modern international law. The reason why this modern legal form of personhood could appear as natural and universal to international law practitioners, moreover, is the same reason that the salient forms and features of modern capitalism (exchange value, money, capital) could appear as natural and transhistorical to its social actors: both were bound to a peculiar form of abstract laboring activity that generated phenomenal forms of appearance. Those "fetishized" forms of appearance both expressed and concealed the social essence of modern capitalist relations – that is, the historically specific function of labor as a social medium in capitalism.[197] In my view, these theoretical insights into legal fetishism constitute one of the crucial missing pieces of Schmitt's critical analysis of the historical emergence of the abstract legal universalism of nineteenth-century "civilized" international law. That is to say, Pashukanis's theory sheds significant light on the historical grounds for the "movement towards abstraction" underlying the *jus publicum universal*, which Schmitt only loosely relates to the abstract and universalizing logic of capital.

The historical continuity of the domestic and private law analogy in modern international legal argument – which holds irrespective of the historically operative jurisprudential paradigm

[196] Whereas H.L.A Hart claims that this domestic analogy "is one of content not form." See H.L.A Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 231.

[197] On the relationship between abstract labor and commodity fetishism, see Postone, *Time, Labor, and Social Domination*, 166-171.

(naturalism, positivism, pragmatism) – speaks directly to Koskenniemi's claim: "while often expressly accepted [or applied], [the domestic law analogy] is *necessarily* entailed in the modern system of international law." Hence, adopting the domestic law analogy is not so much "a conscious political choice" on the part of the "professional" international lawyer as it is a logical entailment of their "socialization," which necessitates the "internalization" of "international legal liberalism" and its principal themes: "(s)elf-determination, independence, consent, and…the Rule of Law."[198]

And these core liberal principles of modern international law are, in turn, associated with a distinctly liberal paradox: how to justify normative order on the basis of "free and equal" subjects. The self-contradictory search for an objective normative order, which begins with the subjective, egoistic premise of "free and equal" State-as-Person, bears out a dyadic logic. And *this*, according to Koskenniemi, is what makes *liberal* international legal discourse – and the discursive oppositions articulated within it (naturalism-positivism, communitarianism-individualism, rules-processes, law-morality, law-politics, etc.) – conceptually coherent and normatively meaningful to international law practitioners. Koskenniemi frames this dyadic logic in terms of "ascending" and "descending" "patterns of justification," which denote "two ways of arguing about order and obligation in international affairs."[199] The descending argument employs deductive reasoning and traces order and obligation "down to justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior or superior, to State behavior, will or interest. They are taken as a given normative

[198] Koskenniemi, *FATU*, 5.

[199] David Kennedy frames these "patterns of justification" in terms of the one 'hard', 'subjective', and consent-dependent, and the other 'soft', 'objective', and 'justice'-oriented, see Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987).

code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be." Whereas the ascending argument, by contrast, employs inductive reasoning and "bases order and obligation on State behaviour, will or interest. It takes as given the existence of States and attempts to construct a normative order on the basis of 'factual' State."[200]

This dyadic logic provides the conditions of possibility for modern international legal argument, according to Koskenniemi, in the following way: In the absence of a single locus of sovereignty, the only plausible way in which international lawyers can resolve conflicts in an "objective" manner is by invoking a supra-sovereign normative principle, whether it be "the general principles of international law," "the constitutional framework of the world order," or "the base values of human dignity." The problem with these "descending arguments," however, is that they leave themselves open to the charge of utopianism: if law is viewed as entirely independent from States behavior will or interest, it becomes merely "natural morality." In order "to avoid utopianism, [international lawyers] must establish the law's content so that it corresponds to concrete State practice, will and interest." But the problem with this "ascending argument" is that it leaves itself open to the charge that law is simply an apology for power politics. Hence the circularity of liberal international legal argument, whose existence is constantly called into question because it lacks a super-ordinate authority that can determine an overriding norm and guarantee its observance.[201] This liberal paradox, explains Koskenniemi,

[200] See Koskenniemi, *FATU*, 59.

[201] Both Koskenniemi and Pashukanis define the core contradiction of international law in similar paradoxical terms of the modern jurist's search for an objective normative order based on the liberal subjective premise of "free and equal" States-as-Individuals. Here is Pashukanis's critical iteration of the circularity of liberal ("bourgeois") international law: "[I]n international law the subjects of legal relationships are the states themselves as the bearers of sovereign authority. A series of logical contradictions follows from this. For the existence of international law it is necessary that states be sovereign (for sovereignty in any given case is equated with legal capacity). If there are

leads necessarily to the constant oscillation of international lawyers, who, in a continuous effort to reconcile sovereign will and public order, shift from concreteness to normativity, from apology to utopia; "neither…can be consistently preferred" since… [its] contradictory premises…make possible *both* equally valid doctrinal solutions and equally valid critiques of those doctrinal solutions (as either utopian or apologist)."[202]

This recurrent circularity, as discussed above, was borne out in the nineteenth-century international lawyers' attempts to justify their new positive legal science and discipline of international law vis-à-vis Austin's command theory of law. They approached this epistemic challenge – which articulated to the aforesaid paradox of how to create order between "free and equal" sovereign states in the absence of a global sovereign – by invoking the domestic law analogy in general, and the private law analogy in particular. This liberal mode of analogical reasoning, I have also argued, informed nineteenth-century legal conceptions of international society, as well as the universalist standard of civilization *via* the private law conception of territorial sovereignty.

Hence, we can also observe this structural circularity in nineteenth-century international lawyers' formulations of a "universal" juridical order, which was nonetheless divided into a set of hierarchical, "civilizational" divisions. This universalistic-cum-particularistic legal reasoning informed the constitutive doctrinal recognition of China as a "semi-civilized" legal subject and

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no sovereign states then there are no subjects of the international law relationship, and there is no international law. But, on the other hand, if there are sovereign states, then does this mean that the norms of international law are not legal norms? For in the opposite case, they must possess an external power which constrains the state, i.e. limits its sovereignty. Conclusion: for international law to exist it is necessary that states not be sovereign. Bourgeois jurisprudence has devoted a great amount of fruitless effort in solving this contradiction." Pashukanis, *GTLM*, 331.

[202] Koskenniemi, *FATU*, 65, 590-91. This leads Koskenniemi to conclude that "international law is inescapably indeterminate and its objectivity a mirage." Koskenniemi's argument regarding the indeterminacy of liberal legal argument forms one major strand of the Critical Legal Studies' critique of law. For an overview of said critique, see Nigel Purvis, "Critical Legal Studies in Public International Law," *Harvard International Law Journal* 32 (1991).

its partial juridical incorporation into international society. To put that more clearly in Koskenniemi's language: the nineteenth-century constitutive doctrine of recognition underpinned, on the one hand, *descending* legal arguments that gave normative primacy to the universal character of the international order to broaden the scope of "civilized" international society and formally include "semi-civilized" non-European societies, and, on the other hand, *ascending* arguments that prioritized sovereign will and sought to extend European extraterritorial jurisdiction by excluding those same non-European societies from the domain of "civilized" international law. This dyadic logic also accounts for the dual signification of the standard of civilization in nineteenth-century international law: it was mobilized to justify both public international order and sovereign will; to justify formal universal equality and substantive inequality; to justify the simultaneous inclusion of and exclusion of non-European "semi-civilized" states into international society. This descending-ascending, universalistic-cum-particularistic legal reasoning was made possible by the dualistic liberal structure of nineteenth-century international law, which posited the abstract, rights-bearing "civilized" legal subject as its formal and normative premise.

Reading with Pashukanis, the primary significance of the domestic law analogy in nineteenth-century "civilized" international law and legal jurisprudence attests to the historical primacy of subjective private law and its abstract legal subject. This, then, is a counterargument to Austin's "positivist" approach to law and his command theory, which "attempt[ed] to make the idea of external regulation the fundamental logical element in law [which] le[d] to law being equated with a social order established in an authoritarian manner."[203] Pashukanis's theory gives

[203] From this equation, Pashukanis argued, it is "inferred that he essence of law is exhausted in the norms of conduct, or in the commandment emanating from a higher authority." This grounds Pashukanis's criticism of Hans Kelsen and the "normative school," whose exclusive focus on "the formal relevance of norms" was predicated on the claim

pride of place instead to the legal relation between "free and equal" individuals, which "law does not [originally] create, but finds in existence." For Pashukanis, the rules and norms imposed by the state are secondary. They are derived, both logically and historically, from a socially specific legal relationship between two private property owners – two autonomous entities with abstract wills, who can relate to each other as "free and equal" individuals *only* through a contract, which formally embodies the mutual recognition of two equal subjects. And it is this structured relationship between commodity owners, rather than an external norm-setting authority, which lends these normative ideals of freedom and equality their specific social meaning and significance.[204]

Why is modern international law plagued by such recurrent circularity? What, in other words, accounts for its structural indeterminacy? For Koskenniemi, the key to understanding this underlying tension in modern international legal argument lies in its contradictory liberal structure, premises and problematics. "The fundamental problem of the liberal vision is how to cope with what seems like mutually opposing demands for individual freedom and social order." The liberal doctrine of politics, broadly construed by Koskenniemi, gives formal expression to

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that the legal relation between subjects is generated by an objective norm; in this purely formalist jurisprudential inquiry the idea of external regulation constitutes the "logical element of law." It is from precisely this formalistic standpoint that one of Pashukanis's contemporaries could argue: "It is not because creditors generally demand repayment of a debt that the right to make such a demand exists, but, on the contrary, the creditors make this claim because the norm exists; the law is not defined by abstraction from observed cases, but derives from a rule posited by someone." Pashukanis makes the exact opposite case: "If no debtor repaid his debts, the relevant regulation would have to be considered as non-existent in real terms. Should we wish to assert the existence of these regulations despite this, we would be forced to fetishise the norm in some way or other." Pashukanis, *GTLM*, 86-90.

[204] Pashukanis did *not* deny that legal norms could be imposed by an external authoritative command. In the specific case of contract law, he acknowledged "[p]olitical power can, with the aid of laws, regulate, alter, condition and concretise the form and content of the legal transaction in the most diverse manner. The law can determine in great detail what may be bought and sold, how, under what conditions, and by whom." But this does not change the fact that "the economic relation of exchange must be present for the legal relation of contracts of purchase and sale to arise." By this same reasoning Pashukanis argued, "The state authority introduces clarity and stability into the structure of law, but does create the premises for it." These premises are rooted instead "in the material relations of production", which, in its modern capitalist form, means production *for the sake of exchange*. Ibid., 93-96.

this paradox and is simultaneously a strategy for reconciling these opposing demands.[205] Its controlling premises are twofold. The first is that "legal standards emerge from the legal subjects themselves. There is no natural normative order. Such order is artificial and justifiable only if it can be linked to the concrete wills and interests of [*free and equal*] individuals. Second, it assumes that once created, social order will become binding on these same individuals. They cannot invoke their subjective opinion to escape its constraining force." In this way, liberal doctrine advances both "an ascending, individualist argument: social order is ultimately legitimate only insofar as it provides for individual freedom. And there is the descending, communitarian argument: individual freedom can be preserved only if there is a normatively compelling social order." For Koskenniemi, "the liberal cannot satisfy himself with a purely ascending or a purely descending argument." The former ensures the "concreteness of the law" and justifies social order by reference to individual ends. But because "individual ends differ, indeed conflict," the ascending position, which lacks any binding principle, is not sufficient on its own; "in the absence of [such]overriding principles civil war seems a constant threat." Hence, a descending argument is required to ensure the binding force of law, its normativity; it justifies the over-ruling of particular individual ends. Neither argument can be "consistently preferred" over the other since "[t]he only legitimate [liberal] social arrangement is one which provides for both: it must be ascending in that it is legitimized by reference to individual ends. It must be

[205] Koskenniemi, *FATU*, 66, 71. The formation of classic liberal doctrine, which took shape between the sixteenth and eighteenth centuries, involved a critique of this faith-based descending medieval argument as both "political" and "subjective." It received its paradigmatic articulation in the political theory of Thomas Hobbes (1588-1679), whose argument about social order and obligation signaled "the decisive break from medieval argument." See Ibid., 79.

descending in that it contains a theory whereby some people's subjective ends can be overruled."[206]

It is from this critical theoretical standpoint – the self-contradictory nature of modern liberal doctrine – that Koskenniemi unfolds the history of modern liberal argument as "a continuous flow of transformations, or movements, from a descending position to an ascending one and vice-versa." Above all, this structural circularity is reflected in liberal thinkers' Sisyphean efforts to mediate the opposing demands of subjective freedom and normative order – "to imagine a law which would be simultaneously concrete and normative." Hence, modern liberal thought "exhausts itself in…the endless struggle with its own premises." Hence also the structural indeterminacy of modern international legal discourse, which creates the conditions of possibility for opposing yet equally valid doctrinal outcomes. *This* is what accounts for "the entire reversibility" of international legal doctrine.[207]

At a purely descriptive level, Koskenniemi's critical exposition of the antinomies and structural indeterminacy of modern liberal legal thought articulates closely with Pashukanis's critical exposition of modern bourgeois legal thought in *GTLM*. But whereas for Koskenniemi, the contradictory premises of modern liberal thought derive from "fundamentally contradictory…structures of thought,"[208] for Pashukanis, these contradictory premises are rooted in "the actual interrelations of people who cannot regard their private endeavors as social

[206] Ibid, 21, 71, 83, 84.

[207] This mode of legal professionalism becomes especially problematic in moments of doctrinal controversy and uncertainty ("hard cases") when "competent" international lawyers can advance equally "valid" doctrinal solutions – so then, the *pacta sunt servanda* principle can thus plausibly be countered with *rebus sic stantibus*, the "effective control" test with a "legitimacy of government" test, the "non-retroactivity of intertemporal law" rule with a "living law" doctrine, and so forth *ad infinitum*. This is to argue, in short, that juristic interpretation boils down to hidden political choices between central conceptual schemes leading to opposing yet equally valid outcomes. Ibid., 41-70.

[208] Koskenniemi, *FATU*, 62-3.

aspirations except in the absurb [sic] and mystified form of the value of commodities."[209] In modern capitalist society, Pashukanis reasoned, where "individual private labour becomes social labour…through the mediation of a universal equivalent [i.e. money], the conditions for a legal form with its antithesis between the subjective and the objective, between the private and the public, are already given." These historically "given" antitheses constitute the contradictory premises of bourgeois legal thought, which confront the modern jurist as "a strange dichotomy in the concept [of law] whose twin facets, whilst they are to be found on different planes, undoubtedly compliment one another. Law is simultaneously the form of external authoritarian regulation and the form of subjective private autonomy. In the one case, the fundamental, substantive characteristic is that of unconditional obligation, of absolute coercion, while, in the other, it is the characteristic of freedom, guaranteed and recognized within certain limits."[210] This "strange dichotomy" was, Pashukanis and Koskenniemi agree: 1) a logical result of the normative priority of the free and equal legal subject in bourgeois thought; and 2) reflected in the

[209] Pashukanis, *GTLM*, 165. My contention is that Koskenniemi's "synchronic" analysis of liberal discourse cannot adequately address this logically prior question of historical plausibility: by foregoing an analysis of "the diachronic," Koskenniemi theoretically rules out any kind of critical inquiry into the socio-historic context of articulation for liberal argument. I place this question of socio-historic context at the front and center of my analysis of the universalization of liberal "civilized" international law. Whereas for Koskenniemi, social context – which he basically equates with "professionalism" – is always mediated by discourse. His analysis of the liberal discourse of professional international lawyers begins and ends with language – "the deep grammar of international law," which enables and constrains their argumentative practices. This kind of discourse analysis rests on the epistemological claim that we have no access to an external social context beyond discourse; in this structuralist schema, discourse produces a certain account of reality by generating a specific kind of knowledge about particular concepts and objects, as well as by shaping the rules of what can be said about those concepts and objects. My argument is, to the contrary, that there is something about the modern social context of capitalism that renders these liberal legal discursive principles and practices conceptually coherent and normatively meaningful to the social actors that engage in them.

[210] Pashukanis, *GTLM*, 42, 97. Modern law, he maintained, "*exists only in antithesis*: objective law – subjective law; public law-private law, and so on [domestic-international, law-morality, law-politics]." By contrast, "in medieval Europe only embryonic legal forms existed. All the antitheses mentioned above fuse into an undifferentiated whole. There is no clear dividing line between law as an objective norm and law as legal power. They make no distinction between the general norm and its concrete application." And likewise: "The feudal or patriarchal mode of authority does not distinguish between the private and the public. The feudal lord's public rights with regard to his serfs were simultaneously his rights as a private owner." Ibid., 58-59.

circular logic of bourgeois jurist's self-contradictory search for an objective source of normative order and obligation on the basis of this subjective, egoistic premise. For both jurists, moreover, it is this normative priority of the abstract free and equal legal subject that distinguishes modern legal argument, and all its relevant antitheses, from medieval argument wherein there was "no clear dividing line between law as an objective norm and law as legal power… [and] no distinction between the general norm and its concrete application."[211]

But whereas Koskenniemi merely posits this historical shift between liberal and medieval argument,[212] Pashukanis attempted to ground it historically in determinate social practices bound to modern commodity exchange relations: It was the emergence of a commodity-mediated economy in Europe during the seventeenth and eighteenth centuries, which took place alongside the historical division of the "public" state and "private" civil society, that rendered the core antinomies of bourgeois legal thought (public-private, subjective-objective, law-politics, law-morality, etc.) conceptually coherent and normatively meaningful to practitioners of law.[213] For

[211] Ibid.

[212] Koskenniemi's interest in elucidating the formal logic of liberal argument is "more structural than historical." His analysis is synchronic and it proceeds by taking "vertical cuts" into liberal discourses "to expose their rules of formation, the conceptual structure which explains the outcomes and specific doctrines adopted." As such, there is no attempt by Koskenniemi to explain the historical emergence of this abstract and dualistic form of liberal thought; likewise, there is no attempt to explain the historical impulse behind abstraction. Koskenniemi, *FATU*, 72.

[213] The textual basis for this historical argument was mostly drawn from Marx's early writings, which Pashukanis reads in light of Marx's more mature critical theory of social forms in *Capital*. Pashukanis focused in particular on Marx's "On the Jewish question," where Marx articulated the historical "problem of subjective and objective law" in terms of the general philosophical formulation of the problem of the individual as member of civil [bourgeois] society and as citizen of a state. This modern civil-society-state differentiation (which Marx critically appropriated from Hegel) was borne out of the dissolution of medieval society, which Marx characterized as an "undifferentiated unity" in which man's productive social life and his political life were indistinguishable. (In the *Grundrisse*, Marx distinguished between three general types of society: the tribal, the oriental, and the ancient; no separation of the political state from civil society because these societies were all characterized by the common ownership of means of production by the political whole.) "Th[is] old civil society," Marx argues, "had a *directly political* character; that is, the elements of civil life such as property, the family, and types of occupation had been raised, in the form of lordship, caste and guilds, to elements of political life. They determined, in this form, the relation of the individual to the *state as a whole*." See Marx, "On the Jewish Question," in *The Marx-Engels Reader*, 2nd ed., Robert C. Tucker ed. (New York: W.W. Norton & Co, 1978), 44 (original emphasis). The dissolution of undifferentiated

Pashukanis, these antinomies are not simply a logical condition of possibility for liberal thought. They are embedded in and reflective of a particular form of society that imparts a "universal" significance to the modern legal subject and its paradigmatic legal form, the contract – a historically limited form of regulation, which regulates disputes between two formally equal individuals, who mutually recognize and defend their rights and interest in this legal form.[214] This, then, is socially specific legal relationship between two autonomous entities with abstract wills, who can relate to each other as "free and equal" private individuals (i.e. private property owners) *only* through a contract.[215] Hence the modern contract form "mirrors" the value form insofar as both function as a general principle of equivalence, abstracting from the concrete differences of individual persons in order to bind them together, *qua* "free and equal" subjects, in a socio-legal system of mutual interdependence.

And it is in this legal form, which historically arises to regulate relations between two autonomous abstract wills, that Pashukanis, following Marx, located a fundamental antinomy between subjects with equal rights. Crucially for Pashukanis, this antinomic relationship was not an exclusive feature of capital-labor relations, and its mediating labor contract form. Rather, it was a general and constitutive feature of modern capitalist society, which gives rise to recurrent

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medieval society coincided with the rise of commodity exchange relations and the resultant opposition between two forms of property: the form of common property which originally corresponded to the tribal *Gemeinwesen* and the form of private property corresponding to the exchange of commodities. It is this historical opposition, Marx argued, that made historically possible the differentiation of the political state from civil society – two distinct spheres, one corresponding to public life and the activities of the *citoyen*, the other corresponding to private life and the affairs of the egoistic individual.

[214] Pashukanis contrasted this contractual form of legal regulation with technical regulation; the former involves a dispute between two autonomous parties, each defending their rights; whereas the latter is characterized in the main by a certain "unity of purpose." So then, "train timetables regulate rail traffic in quite a different sense than…the law concerning the liability of the railways regulates its relations with consigners of freight." Pashukanis, *GTLM*, 81.

[215] Law emerges historically, according to Pashukanis, to regulate these conflicts of private interest: "Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interests begins." So then, "it is dispute, conflict of interest" between which creates the legal form." Ibid, 93, 81.

legal situations, at the domestic, international, and global levels, wherein no objectively valid legal or doctrinal solution is possible between subjects with equal rights. Implied in this recurrent capitalist legal situation is the potentiality of dispute and/or recourse to force and self-help. And this potentiality has particular historical and theoretical significance for modern liberal international law between formally equal sovereign states, which, unlike modern domestic legal systems (comprised of formally equal citizens), lacks a super-ordinate legal authority. It is this *practical* antinomy between formally equal legal subjects with equal rights inherent to modern capitalist law, Pashukanis maintained, that lies at the root of the structural circularity and indeterminacy of bourgeois legal theory, which posits this subjective, egoistic bourgeois legal subject as its historical premise. Hence, equally valid but diametrically opposed liberal international legal arguments regarding the nature of order and obligation are only made possible in and by a particular kind of tendentially global society that produces universally transposable abstract rights-bearing legal subjects.

In this way also, Pashukanis's theory enables us to move beyond Koskenniemi's synchronic analysis of the "controlling assumption" of the "free and equal" legal subject in liberal legal discourse. In treating this abstract legal subject as a historically limited category, Pashukanis poses the logically prior question to Koskenniemi's structuralist inquiry – namely, what endows the liberal legal subject with its abstract character in the first place? Pashukanis's answer is that this abstract historical category reflects socially-specific abstract relations mediated by commodity exchange. (It does not, pace Anghie, merely serve as an ideological cover for exploitative colonial relations). Which is also to argue that the "controlling assumption" of the "free and equal" legal subject in modern liberal legal discourse only becomes socially

valid and normatively compelling through the regular repetition of the exchange of values in the marketplace. Pashukanis explained:

> Historically…it was precisely the exchange transactions which generated the idea of the subject as the bearer of every imaginable legal claim. Only in commodity production does the abstract legal form see the light; in other words, only there does the general capacity to possess a right become distinguished from concrete legal claims. Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights. In the market, the person imposing liabilities simultaneously become himself liable. He changes roles simultaneously from claimant to debtor. Thus it is possible to abstract from concrete differences between legal subjects and to accommodate them within one generic concept.[216]

This intellectual process of abstraction underlying modern (liberal) jurists' formulations of the fundamental definitions of law mirrors, according to Pashukanis, the social process of abstraction inherent in modern commodity exchange relations. So jurists are only able to make use of abstract categories, like the civilized "legal subject," because of the social fact of abstraction.

IV.5. Conclusion

Before there was Anghie's critical history of the colonial origins of modern "universal" international law, there was Schmitt's *Nomos of the Earth*. He defined the concept of nomos – and with it the central argument of the book – from his "threefold root of law." "The earth," he argued, "is bound to law in three ways. She contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order."[217] From this initial determination of the law's material relationship to the earth, Schmitt argued that the original act of law – the territorial appropriation of the earth – established

[216] Pashukanis, *GTLM*, 118. Further conditions of possibility for the development of the modern discipline of law – that is in the attempt to find general definitions for the law. There is an exact analogy with political economy, Pashukanis argues: "The relations of capitalist commodity production alone form the subject-matter of political economy as an independent theoretical discipline employing its own specific concepts." Ibid., 57.

[217] Schmitt, *Nomos*, 42.

the material matrix for all subsequent legal relations. In this way also, all "legal and jurisprudential thinking" was historically determined, for Schmitt, by land appropriation and the concrete territorial boundaries that were derived from this foundational act.[218]

In its most basic sense, then, Schmitt's concept of "*nomos*" denoted a concrete spatial order. Thus, the "world historical event" in the foundation of a truly global *nomos* was the circumnavigation of the earth in the fifteenth and sixteenth centuries. Schmitt categorized all law prior to this time as "pre-global": the Egyptian, the Asiatic, the Hellenistic, and the Roman Empires lacked "a global consciousness and thus [had] no political goal oriented to a common hope."[219] The Age of Discovery inaugurated a global orientation in law based on scientific calculation; the territorial demarcation of this global spatial order then characterized, according to Schmitt, the epoch of "traditional" inter-state international law, i.e. *jus publicum Europaeum*. So defined in this materialist fashion, the origins of "modern" international law were derived from the partitioning of the earth by European sovereign states. The traditional European concept of "statehood," Schmitt explained, had a determinate spatial relationship to its historical epoch – it described a "concrete historical fact."

This historical unity between concept and material object in international law was undone, in Schmitt's view, at the turn of the twentieth century, at which time European international law lost its "grounding" in any concrete historical order. As discussed earlier, Schmitt saw this historical de-grounding of *jus publicum Europaeum* in the system of "Universal" international legal conventions. These conventions signaled, for Schmitt, an epochal crisis in the European

[218] Schmitt stated this more explicitly in an earlier work: "There is no more a free-floating jurisprudence than there is a free-floating intelligentsia. Legal and jurisprudential thinking occurs only in connection with a total and concrete historical order." See Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), 40. As quoted in G.L. Ulmen's "Introduction" to Schmitt, *The Nomos of the Earth*, 20.

[219] Ibid., 50-66.

interstate legal order, which entailed the dissolution of traditional spatial distinctions between sovereign and non-sovereign, public law and private law, and land and sea, into a "spaceless universalism." A concrete j*us publicum Europaeum* dissolved into an untethered, abstract *jus publicum universal*, which found its most characteristic expression in the concepts of "civilization" and "humanity."

Drawing on a non-orthodox Marxian social theory of *law in capitalism*, I have sought to grasp this historical transformation Schmitt analyzed and lamented (and on which Anghie is notably silent) with reference to the liberal abstraction of legal personhood – which constituted the essential form of an emergent global imperial order of capitalism and the controlling and contradictory premise of that order's "civilized" international legal discourse. This global nomos, and its quintessential civilizational discourse, took juridical shape through the universalization of nineteenth-century international law. The juridical production of China as a "semi-civilized" legal subject constituted *one* moment in that universalizing legal process. Viewed in this Marxian theoretical light, then, the abstract universalism at the core of modern "civilized" international law was grounded *not* in territorial appropriation (i.e. colonialism), but in the abstract and universalizing logic of a global capitalist economy.

Chapter V
Domination, Resistance, and the Universalization of "Civilized" International Law in China: The Formation of China as a "Civilized" Legal Subject

The previous chapter constructed a critical theoretical exchange between Koskenniemi and Pashukanis pertaining to the professionalization-cum-liberalization of modern international law beginning in the second half of the nineteenth century. We defined this historical process, with Koskenniemi, in terms of European international lawyers (implicit) acceptance of liberalism, and its core premises and problematics, which entailed a particular structuring of international legal argument based on a descending-ascending/universalistic-particularistic logic. This dyadic liberal logic informed the constitutive recognition of China as a "semi-civilized" legal subject and its partial juridical incorporation into international society. As discussed, nineteenth-century European international lawyers made, on the one hand, *descending* legal arguments that gave normative primacy to the universal character of the international order to broaden the scope of "civilized" international society and formally include "semi-civilized" non-European societies, and, on the other hand, *ascending* arguments that prioritized sovereign will and sought to extend European extraterritoriality by excluding those same non-European societies from the domain of "civilized" international law. This descending-ascending, universalistic-particularistic legal reasoning, I argued, was made possible by the dualistic liberal structure of nineteenth-century international law, which posited the abstract, rights-bearing "civilized" legal subject as its formal and normative premise. Reading with Pashukanis, I then attempted to ground this dual liberal legal structure, and the abstract legal subject upon which it was premised, in determinate social practices bound to modern commodity exchange relations.

Building on this discussion, the present chapter shall elucidate the global historical implications of this critical theoretical exchange between Koskenniemi and Pashukanis. To do so I shift the analytical focus from European to non-European international lawyers in order to further illuminate the dual structures of "civilized" international law and the historical transformation from *jus publicum Europaeum* to *jus publicum universal* made possible by those dual legal structures. My specific focus is on Chinese legal resistance to Western legal imperialism (i.e. the unequal treaties and extraterritoriality), which took institutional shape during the early decades of the twentieth century in the form of an anti-imperial legal-diplomatic movement whose central political goal was attain international recognition of China as a fully "civilized" and sovereign subject of international law. Comprised of a new professional class of Chinese international lawyers – Sao-Ke Alfred Sze (1877-1958), Chengting T. Wang (1882-1961), and W.W. Yen (1877-1950), and V. K. Wellington Koo (1888-1985) – this anti-imperial movement emerged in full force during the 1920s and 1930s in the context of the early Republican government's efforts to "modernize" Chinese state and economic law.[1] Its basic discursive strategy involved the re-appropriation and re-signification of doctrines and concepts of nineteenth-century "civilized" international law. This entailed, most fundamentally, the re-appropriation of the positivist doctrine of absolute sovereignty – and its twinned normative ideals of territorial integrity and sovereign equality in international relations – as the formal and normative grounds upon which to make appeals to abrogate the Sino-Western unequal treaties and extraterritoriality. I examine those appeals and critiques of foreign legal imperialism as they were made in professional journals, treatises, and at major international conferences following

[1] Legal modernization entailed bringing Chinese law and jurisprudence into structural conformity with Western legal systems and ideas of positive law. See Turan Kayaoglu, "The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality" *International Studies Quarterly* 51, no. 3 (Sept. 2007).

the First World War, leading up to the abrogation of Western extraterritoriality in China during the 1940s.

My investigation of Chinese international lawyers' anti-imperial legal discourse illuminates its ascending-descending/particularistic-universalistic argumentative structure. I shall make the case that their overarching anti-imperial legal discursive strategy involved, on the one hand, making an *ascending* argument that prioritized sovereignty and sought to augment China's jurisdictional competence and defend its particular national interests and rights as a "civilized" state, and, on another, making a *descending* argument that prioritized order and systematicity and exhibited China's allegiance to the "universal" international standard of civilization. This normative standard occupied a dual signification in this polyvalent liberal legal strategy: it was mobilized to justify both sovereign will and public order. What we shall come to see, then, is a dialectical movement in Chinese international lawyers' anti-imperial legal reasoning from the concrete to the abstract, from the particular to the universal…from apology to utopia.

This dialectical movement underpinning Chinese international lawyers' anti-imperial legal discursive strategies can also be seen in their oscillations between appeals to positive international law (treaties, conventions, etc.), on the one hand, and, in their appeals to regain China's "lost rights," on the other.[2] The latter critical legal discourse was, in essence, a liberal naturalist, descending argument about China's fundamental right to self-determination. It assumed this right existed anterior to any consensualist ascending legal principles; legal order and obligation were thus derived, in this descending schema, from a pre-existing "universal"

[2] This transnational legal history has been elucidated by Karen Knop, whose work on the modern history of the right of self-determination speaks directly to the historical, political, and normative significance of this liberal form of analogical reasoning in modern international law. Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2004), 69.

normative code which overrode an individual sovereign's will and interests, and to which all "civilized" states were necessarily bound. I argue that this descending naturalist argument was built on a private law analogy between property and sovereignty – just as a property owner could appeal for the restoration of wrongfully taken property, Chinese international lawyers' made appeals to China's right of self determination in order to remedy a past wrong (i.e. Sino-Western/foreign unequal treaties) and restore its territory to its rightful owner.[3] So whereas nineteenth-century European international lawyers mobilized the private law analogy to justify colonial expansion and legal domination, Chinese international lawyers employed this liberal analogical reasoning as a counter-discourse to reclaim China's fundamental rights of sovereignty, which had been "lost" at the hands of imperialist foreign Treaty Powers.[4]

My argument is that this dyadic liberal form of argumentative practice was historically embedded in the dual liberal structures of "civilized" international legal discourse, which both enabled and constrained Chinese international lawyers' anti-imperial discursive strategies of legal appropriation. Through my investigation of their struggle for recognition of China as a fully sovereign state and international legal subject, I aim to throw light on the constitutive social power of "civilized" international legal discourse to generate and lend normative credibility to liberal ideas of national "interests," rights, and international order. In so doing I also intend to illuminate the legal-historical dynamics of a global international politics of "civilized" sovereignty within which competing ideas of national "interest," sovereign rights, and international order came to be articulated by a new class of non-Western international lawyers in

[3] This discourse has been absorbed in contemporary scholarship more than it has been the subject of critical inquiry. For a recent history of the rise and proliferation of the "unequal treaties" discourse in China, see Wang, *China's Unequal Treaties.*

[4] These fundamental sovereign rights were "extinguished" in the nineteenth century, according to Anghie, *Imperialism* 82; R.P. Anand, *New States and International Law* (Delhi: Vikas Publishing House, 1972), 21.

the late nineteenth and early twentieth century. It was their critical engagement with the principles and practices of nineteenth century international law that laid the groundwork for a transnational anti-imperial international legal discourse, which, in turn, transformed modern international law into a global subject and site of political contestation.

Building on our previous critical theoretical exchange between Koskenniemi and Pashukanis, this chapter shall relate the dualistic liberal argumentative structure of Chinese international lawyers' anti-imperial discourse to the universalization of nineteenth-century "civilized" international law in China – a dynamic global historical process underpinning the production and circulation of both a legitimating ideological discourse of extraterritorial empire and a counter-discourse and anti-imperial critique of the legitimacy of extraterritoriality.[5] By placing this imperial discourse and anti-imperial counter-discourse within a singular historical frame, I seek to relate the liberal normative commitments of both legal discourses to the determinate capitalist context that rendered the principals and practices of nineteenth-century "civilized" international law conceptually coherent and normatively compelling, to European and non-European international law practitioners. In this way also, I am proposing a historical and theoretical redefinition of the universalization of modern international law that takes into account the paradoxical historical trajectories borne out through it vis-à-vis China. Hence, the same nineteenth-century liberal legal structures (absolute sovereignty, the standard of civilization, international society) that justified the imposition of unequal Western treaty law in China and its exclusion from the Family of Nations also enabled Chinese international lawyers to appeal for recognition of China as a fully sovereign and equal "civilized" subject of international law.

[5] This articulates closely with Richard Ashcroft's argument that "liberalism as a theoretical expression of social life supplied the values, assumptions, and arguments for both a defense and a radical critique of the existing social order." See Richard Ashcraft, "Liberal Political Theory and Working-Class Radicalism in Nineteenth-Century England," *Political Theory* 21, no. 2 (1993).

The salient question, then, is how are we to understand the dual structure of nineteenth-century civilized international law and the paradoxical historical trajectories borne out through its universalization in China? My contention is that this requires a critical social theory of law that can grasp the abstract and antinomic liberal forms of law and legal personhood that were being "universalized" though non-Western international lawyers' reception and re-appropriation of "civilized" international legal discourse. This chapter, building on the previous, endeavors to elucidate such a theory.

V.1. Re-thinking the Universalization of "Civilized" International Law and its "Semi-Peripheral" Appropriation

Recent debates over when and how international law became a universal legal order have thrown light on the contradictory global historical trajectories associated with this process of legal universalization. By most accounts this process began during the nineteenth century in the context of European global imperial expansion and colonial rule. It took institutional shape in two interconnected international legal developments – the global spread of the Westphalian model of sovereignty, and the hegemonic rise of positivist international jurisprudence and its standard of civilization, which justified European imperial domination by denying non-European societies international rights and excluding them from the Family of Nations.[6] Europe, in this global imperialist narrative, constitutes the historical subject of the universalization of international law; the non-European world, the object of it. An alternative global historical account, which has more recently gained purchase in international legal scholarship, holds that the "true" moment of modern universal international law came only during the twentieth century,

[6] Schwarzenberger, "The Standard of Civilisation in International Law"; Anghie, *Imperialism*, 84–87; Gong, *The Standard of "Civilization" in International Society*.

with the inclusion of previously excluded non-European states into the international community as formally equal sovereign subjects. From this critical global perspective the historical transformation from *jus publicum Europaeum* to *jus publicum universal* took place as a result of anti-imperialist/anti-colonialist legal movements in the non-European world, which redeployed modern international law's concepts and ideals (i.e. freedom, equality, self-determination) to resist Western legal imperialism and gain entry into the Family of Nations.[7]

The former account, as we have discussed, is essentially Anghie's argument in *Imperialism, Sovereignty, and the Making of International Law*. The latter account is exemplified in the recent work of Arnulf Becker Lorca. Juxtaposing their accounts is instructive insofar as it illuminates the global historical significance of "civilized" international law both as a legitimating ideological discourse of empire and as an anti-imperial discourse and critique of empire. My contention is that neither Anghie's nor Becker Lorca's critical analysis of this universalizing process is theoretically equipped to explain the historical boundedness of these oppositional discourse formations; neither affords us a theoretical framework that can fully grasp both the imperial and anti-imperial potentialities of modern international law. What is required, in my view, is a dialectical social theory of international law that can situate the *co-production* of these counter-discourses in the history of imperial-cum global capitalism.

As will be recalled, Anghie's overarching thesis in *Imperialism, Sovereignty, and the Making of International Law* is that the colonial encounter, and the "dynamic of difference" generated by it, shaped the deep structure of modern international law. This was reflected, above all, in the sovereignty doctrine, which was formulated "for the explicit purpose of excluding the colonial world…. [and] this exclusion, and the imperialism which it furthers, constitute in part

[7] Becker Lorca, "Universal International Law," 497–98.

the primordial and essential identity of international law." From this perspective then, modern international law has served as a necessary othering discourse and universalist ideology of legitimation for the colonization of the non-Western world. Since its first articulation in Vattel's natural law jurisprudence to justify Spanish colonization of the Amer-Indians, this dynamic of difference has since been "reenacted whenever the discipline [of international law] attempts to renew itself."[8] Hence, just as Vitoria's universal jurisprudence provided legal cover for Spanish colonization of Amer-Indians, nineteenth-century Euro-American positivist international lawyers' invocations of legal universality worked, in similar fashion, to manufacture sites of cultural difference, exclusion and exception in order to justify the West's civilizing mission. Such universalistic legal appeals were essentially Eurocentric – historical articulations of parochial values and norms in the guise of legal universals – and thus inauthentic and false.[9] These invocations of legal universality created sites of cultural difference, exclusion and exception in order to justify imperial expansion, colonial rule, and the West's civilizing mission. This colonial dynamic, Anghie therefore concludes, is encoded in the very genetic makeup of modern international law; it constitutes the "*the primordial and essential identity of international law*." Hence its various claims to universality – whether naturalist, positivist, or pragmatist – always end up being a cover for imperial domination of one kind or another.[10]

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[8] Anghie, *Imperialism*, 313.

[9] Hence, Third World jurists adoption of this European ideal was "inauthentic," according to Anghie. He points specifically to the contemporary jurisprudence of the International Court of Justice," in order to show that "[i]nternational law remains emphatically European." Anghie, *Imperialism*, 111.

[10] See Anghie, *Imperialism*, 314. He also claims that "[t]he association between international law and universality is so ingrained that pointing to this connection appears tautological." On the universality of modern international law, see R.Y. Jennings, "Universal International Law in a Multicultural World," in *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, eds., M. Bos and I. Brownlie (Oxford: Oxford University Press, 1987), 39, 40–41; Bruno Simma "Universality of International Law from the Perspective of a Practitioner," *The European Journal of International Law* 20, no. 2 (2009)*;* Georges Abi-Saab, "International Law and the International Community: The Long Road To

Given Anghie's sweeping characterization of the Eurocentric nature of nineteenth-century "civilized" international law, how, it must be asked, did this legal orientalist-positivist discursive system of international law become a normatively compelling legal-jurisprudential frame of reference for a new global class of non-Western international lawyers (including the Chinese international lawyers under review here) in their formal and normative critiques of unequal treaties and extraterritorial empire? What, in other words, rendered this "Eurocentric" nineteenth-century international legal discursive framework plausible as an anti-imperial counter-discourse across geographic and linguistic boundaries?

These questions are essential to understand the paradoxical historical trajectories borne out through the universalization of nineteenth-century "civilized" international law in China – a dynamic process underpinning the historical production of both a legitimating ideological discourse of extraterritorial empire and a counter-discourse and anti-imperial critique of the legitimacy of extraterritoriality. In my view, Anghie offers no theoretical framework to begin to even pose such questions about this contradictory process of legal universalization. To be clear, the issue is not that Anghie spends insufficient time addressing the history of anti-imperial legal resistance in the "peripheries." Rather, it is that his critical theory doesn't allow for the possibility of meaningful forms of oppositional legal consciousness and legal resistance. This one-sided view of the process of legal universalization stems from his over-determined conception of the structure of modern international law, that is, "the dynamic of difference" generated through the colonial legal encounter and reproduced in cycles of European imperial domination.[11] This language of dynamism notwithstanding, I would argue that "structure," in

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Universality," in *Essays in Honor of Wang Tieya*, ed. Ronald St John MacDonald (Dordrecht: Martinus Nijhoff, 1994).

[11] Anghie, *Imperialism*, 313.

Anghie's reading of the history of modern international law, leads ineluctably to stasis – the automatic reproduction of the same colonial structures of domination, albeit concealed under different universalist legal jurisprudential guises.

Anghie defines the history of the universalization of nineteenth-century "civilized" international law in terms of the imposition of alien European norms and values, in the guise of legal universals, on non-European societies. Whereas I do so in terms of a contradictory legal-historical process inextricably bound to commodity exchange practices. That contradictory process provided the formal and normative grounds for the historical articulation of liberal imperial legal discourses and anti-imperial legal counter-discourses, which collectively constituted a new global international legal politics of civilized sovereignty. And, whereas Anghie fixes Europe as the dominant subject of this global historical process of legal universalization, and the non-European world as the object of it, I argue, to the contrary, that this contradictory historical process *decentered* Europe as the dominant subject of modern international law (precisely at the same time that European international lawyers were formulating their Eurocentric civilizational hierarchies) and motivated a historical shift from *jus publicum Europaeum* to *jus publicum universal*. Anghie's colonial history papers overs over this transformation entirely. That omission is a result of his over-determined conception of the deep colonial structure of modern international law, which theoretically limits him from explaining the possibility of political agency and historical change from the operation of those "colonial" legal structures themselves.[12] Hence the successive hegemonic jurisprudential paradigms of

[12] It is also the result of Anghie's under-theorization of the historical significance of capitalism and private law to the formation of a modern universal international law. I seek to move beyond these theoretical limitations by drawing on a Marxian social theory of *law in capitalism* to elucidate the mutual constitution of nineteenth-century capitalist imperial international legal structures and the forms of political agency and legal subjectivity produced within and against those dual capitalist legal structures.

international law Anghie examines – sixteenth-century naturalism, nineteenth-century positivism, and twentieth century pragmatism – are read as historical instantiations of this underlying colonial dynamic of exclusion and subordination, a dynamic he views as "self-sustaining and…endless."[13]

Becker Lorca's counterargument to Anghie is that international law became universal not as a result of European global imperial expansion and domination, but rather through its critical appropriation as a counter-hegemonic discourse by non-Western, "semi-peripheral" international lawyers.[14] In making this counterargument he seeks to redefine the meaning of "universality." As opposed to the more conventional historical reference to its nominal geographic reach (as Anghie defines it), Becker Lorca instead defines this legal universalism with reference to the historically transformed "doctrinal outlook" of modern international law towards non-Western states. He argues,

> Nineteenth-century international law achieved global geographical scope by including two separate regimes: one governing relations between Western sovereigns under formal equality, and the other governing relations between Western and non-Western polities under inequality, granting special privileges to the former. International law changed radically when the doctrines erecting the boundaries between these two regimes, the doctrine of recognition and the standard of civilization, were reinterpreted so that a number of non-Western sovereigns were admitted into the international community and thus became governed by the regime recognizing formal equality.

The historical merging of these two separate regimes constituted a shift from *jus publicum Europaeum* to *jus publicum universal*. At the core of this global transformation, according to Becker Lorca, was the transnational anti-imperial strategy of "semi-peripheral appropriation,"

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[13] Ibid., 4. For another type of imperially hard-wired argument about international law, see Mieville, *Between Equal Rights*.

[14] Becker Lorca, "Universal International Law" and "Sovereignty Beyond the West: The End of Classical International Law," *Journal of the History of International Law* 13, no.1 (2011).

which universalized nineteenth-century international law insofar as it broadened the doctrinal scope of the "civilized Family of Nations" to include non-Western states. This then, in contrast to Anghie's colonial critique, is a progressive account of the history of modern international law, driven not by Western imperial structures of domination, but rather by the rise of new non-Western anti-imperial political agents. And the historical emergence of this new mode of non-Western political agency, he suggests, signified the *true* moment of the universalization of modern international law.[15]

That process of legal universalization was driven, in Becker Lorca's view, by the globalization of the professional discipline of international law, which gave rise to a generation of non-Western "semi-peripheral"[16] international lawyers who trained in Europe. He focuses in particular on the works of Carlos Calvo (Argentinean, 1822–1906), Etienne Carath´eodory (Turkish national, ethnic Greek, 1836–1907), Fedor Fedorovich Martens (Russian national, ethnic Estonian/Baltic German, 1845–1909), Nicolas Saripolos (Greek, 1817–1880), and Tsurutaro Senga (Japanese, 1857–1929). While he acknowledges the diversity of international legal argumentation of these non-Western jurists, one of his overarching theses is that underlying

[15] Becker Lorca, *Mestizo International Law*, 66.

[16] The roots of the term "semi-periphery" lie in world-system theory. See Immanuel Wallerstein, *Semi-Peripheral Countries and the Contemporary World Crisis*, *Theory and Socie*ty 3 (1976). Becker Lorca uses the term to refer to semi-peripheral polities, which include Japan, China, the Ottoman Empire, Latin American states. What unifies these semi-peripheral states as a comparative object of legal-historical inquiry, in his analysis, is twofold: first, though none of these societies were formally colonized for various geopolitical and economic reasons, they were all subjected to various levels of legal imposition, intervention, and inequality by Western imperial powers (i.e. unequal commercial and extraterritorial treaties) that were not, as a general rule, tolerated *within* the "civilized Family of Nations"; and secondly, those imperial legal relations then came to be defined and critiqued *as unequal and contradictory* – from the normative standpoint of modern international law's twofold ideal of sovereign autonomy and equality – by a new global professional class of semi-peripheral jurists who sought to bolster the sovereignty of their respective states. On comparative historical analyses of the semi-periphery, see, e.g. Richard S. Horowitz, "International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century," *Journal of World History* 15 (2004); C. A. Bayly, "Distorted Development: The Ottoman Empire and British India, Circa 1780-1916," *Comparative Study of South Asia, Africa, and Middle East* 27 (2007); Reşat Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," *Journal of World History* 4, no. 2 (Fall 1993).

such diversity was a common discursive strategy of anti-imperialist legal resistance. That transnational legal discursive strategy involved "internalizing" the positivist doctrines and concepts of nineteenth-century international law (i.e. absolute sovereignty and the standard of civilization) and then re-appropriating them in order to "to advocate for a change in extant rules of international law and to justify the extension of the privileges of formal equality to their own states in their interactions with Western powers."[17] His examination of semi-peripheral international lawyers uncovers a "common pattern" of appropriation, which, he argues, was "pragmatic" and "strategic" in nature insofar as "it served the *interest* of semi-peripheral states by allowing their jurists greater room for agency."[18] Considered from this instrumentalist perspective, semi-peripheral jurists' struggle for their respective countries' international legal personality and the "universal" rights afforded by it (juridical autonomy and equality) was ultimately motivated by national interests and particular policy objectives; the historical articulation of those interests by semi-peripheral jurists signified the emergence of a new mode of non-Western political agency.

Notwithstanding his many differences with Anghie, Becker Lorca nonetheless shares with Anghie a similar critique of the "Eurocentric" character of nineteenth-century "civilized" international law. This critique is wedded to his decidedly instrumentalist conception of international law, which leads him to state: "Western international lawyers and diplomats,

[17] Becker Lorca, "Universal International Law," 482-483. He then carries this argument forward as it relates to the second generation of semi-peripheral jurists who "developed a less universalistic approach to international law." Ibid., 550.

[18] Ibid., 496. My emphasis. This is, in my view, a fairly standard instrumentalist narrative of China's inclusion into the Family of Nations, which is shared, for example, by Jacques deLisle, who argues, "China's expansive conceptions of sovereignty and crabbed notions of the sources of international law were self-interested positions for a regime that was a newcomer to the international legal order, dissatisfied by its content but too weak to change its rules." Jacques de Lisle, "China's Approach to International Law: A Historical Perspective," *Proceedings of the Annual Meeting* (American Society of International Law) 94 (April 2000): 272.

representing their merchants' interests or their states' expansionist policies, deployed the idea of an exclusively European international law in order to justify the exclusion of non-European entities from the privileges of an international legal order based on sovereign equality." From this instrumentalist perspective, then, Becker Lorca holds nineteenth-century Western international lawyers' claims of legal universality as false Eurocentric universalism. That Eurocentric universalism was then challenged and, in Becker Lorca's view, largely overcome by semi-peripheral international lawyers, who, representing their own states' interests, redeployed nineteenth-century international law as a counter-hegemonic tool of resistance and restraint against European expansion and domination. In the process, he argues, they transformed international law into a truly universal legal order – one which reflected not only Western imperial states' interests, but also the interests of non-Western states.[19]

Becker Lorca's critical account of the universalization of nineteenth-century civilized international law – that is, its reception and strategic re-appropriation by non-Western international lawyers – raises the question, again: how did this "Eurocentric" legal-jurisprudential system become a normatively compelling critical frame of reference for a new global class of non-Western international lawyers? What rendered "civilized" international law plausible as an anti-imperial counter-discourse across geographic and linguistic boundaries? [20] Becker Lorca's only available theoretical recourse, in addressing a question he does not, or rather, is theoretically unable to pose, is to his general conception of international law as a neutral legal instrument and/or strategic discourse that can be mobilized by different interested parties, for

[19] Becker Lorca, "Universal International Law," 479, 540.

[20] Anghie frames this question this way: "If…the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law, then grave questions must arise as to whether and how it is possible for the post-colonial world to construct a new international law that is liberated from these colonial origins?" Anghie, *Imperialism*, 8. I return to Anghie's problematic answer at the conclusion of the dissertation.

different political ends[21]: it could be appropriated just as easily by Western international lawyers seeking to legitimate imperial expansion and domination as it could by non-Western international lawyers trying to resist it. While this type of instrumental analysis may begin to account for how non-Western international lawyers deployed international law, it does not address the logically prior question of the conditions of possibility for the historical reception and plausibility of nineteenth-century international legal norms and modes of reasoning by non-Western international lawyers. Nor does it explain why these anti-imperial interests and strategic modes of resistance employed by non-Western international lawyers should have been served by the specific *form* of international law that they were critically appropriating as a counter-discourse. Becker Lorca's instrumentalist analysis of semi-peripheral appropriation and the resultant universalization of international law is, in sum, exclusively one of the historical *content* of international law; it "leaves the social and historical character of its form unexamined."[22]

Previously, we examined the liberal form of "civilized" nineteenth-century international law with reference to the historical specific movement towards liberal abstraction underpinning its legal orientalist-positivist discourse. Drawing on Pashukanis's commodity exchange theory I argued that the abstract, free and equal legal subject constitutes the cell form of modern capitalist society and the controlling premise of bourgeois legal theory. This was my theoretical point of departure in arguing, first, that this liberal abstraction of legal personhood constituted the cell

[21] Non-Western jurists "mimicked their Western colleagues," but to pursue different ends. Becker Lorca, "Universal International Law," 484. This conception of international law "as an empty vessel which could be filled with any content" was held by much of the first generation of TWAIL (Third World Approaches to International Law) scholars, and has been critiqued by second and third generation TWAIL scholars for, among other things, "overestimate[ing] the liberating potential of international law." They "failed to appreciate that international law, as it had evolved, did not offer space for a transformational project." B.S. Chimini, *International Law and World Order* (New York and London: Sage Publications, 1993), 17. Also see, B.S. Chimini, "Third World Approaches to International Law: A Manifesto', in *The Third World and International Order: Law Politics and Globalization, Developments in International Law*, eds., B.S. Chimni, Karin Mickelson and Obiora Okafo (Leiden: Brill, 2003).

[22] Bob Fine, *Capitalism and the Rule of Law* (London: Hutchinson, 1979), 34–35.

form of an emergent global imperial order of capitalism, which took juridical shape through the universalization of "civilized" international law during the nineteenth and early twentieth centuries; and secondly, this liberal idea of legal personhood constituted the controlling and contradictory formal and normative premise (primarily through international lawyers' assumption of the domestic law analogy) of that global imperial order's civilized international legal discourse. "Civilized" international law – so defined as a distinctly liberal form of legal discourse – can then be understood as historically capable of generating both ideological legal discourses legitimating extraterritorial empire (i.e. legal-orientalism-positivism) and critical legal discourses of and resistance to extraterritorial empire (e.g. Chinese international lawyers' anti-imperialism, which internalized and re-appropriated legal orientalism-positivism).

From this theoretical vantage point, I argue that this liberal form of legal personhood, and the modes of legal reasoning bound to it, defined the legal discursive terrain of an emergent international politics of civilized sovereignty within which competing ideas of national "interest" and "universal" international rights and order came to be articulated by non-Western international lawyers. The transformation of China from a "semi-sovereign" *object* to a sovereign *subject* of international law offers a window into the global emergence of this new international politics of sovereignty, which was characterized in the main by a struggle over legal personhood and membership. Through my investigation of the struggle for legal recognition waged by Chinese international lawyers I seek to throw light on the constitutive social power of modern liberal international legal discourse – its formal and normative dual structures – to shape and reshape Chinese national interests, identities, and strategies of anti-imperial resistance.

My argument, then, is that modern liberal international law has a dual character: its formal and normative structures shape and constrain international lawyer's discursive practices,

but those practices also constitute and can, to a certain extent, reconfigure those structures. In arguing that liberal international legal forms have a dual structure, I intend to avoid the trappings of over-determined analyses of the "colonial" structure of international law, such as Anghie's, which have no real theoretical recourse in explaining the historical possibility of agency and change from the operations of those "colonial" legal structures themselves (that is, without appealing to exogamous factors).[23] Whereas the understanding of dual legal structures proposed in this study implies a very different idea of historical agency – one that is not opposed to structure, but rather is itself a constituent of structure. Such a conception seeks to grasp how practitioners of law (broadly construed) are both enabled and constrained by law's formal and normative structures. It is my contention that a dialectical theoretical framework which regards the structure of international law as dual in this way can allow for a critical mediation between Anghie's history of domination and Becker Lorca's history of resistance, enabling a more robust understanding of the mutual constitution of nineteenth-century imperial legal structures and the forms of political agency produced within and against those imperial legal structures.[24] My analysis of the formation of China as a "civilized" international legal personality illuminates this dialectical process.

V.2. The Formation of Chinese Anti-Imperial International Law and the Decline of Extraterritoriality

When it is not being framed in terms of the global imperial imposition of Western (read: "Eurocentric") international legal norms and rules, the universalization of international law has

[23] For a discussion of the problems of traditional structuralisms, see Sewell, *Logics of History*, esp. 124-151.

[24] On contradictory social structures as the precondition for "the existence of social critique," see Postone, *Time, Labor, and Social Domination*, 88.

otherwise been understood in terms of its "pragmatic" and "strategic" reception and re-appropriation, as a counter-hegemonic discourse, by non-Western international lawyers. More specifically, the critical legal re-appropriation of the principles and practices of nineteenth-century international law (legal positivism, absolute sovereignty, the standard of civilization), so it has been argued by Becker Lorca (among others), served the national "interests" and policy objectives of non-Western states. In the case of "semi-peripheral" states like China, those objectives most characteristically included the abolition of the unequal treaties and extraterritoriality. From this instrumentalist, interest-based perspective, then, Chinese international lawyers and diplomats learned the rules of the game in order to resist Western legal domination – and to earn for China its recognition as a fully sovereign and "civilized" state worthy of admission into the international community.

It has been my argument that this instrumentalist rendering of the universalization of international law may well explain the "strategic" mobilization of the principles and practices of "civilized" international law by non-Western international lawyers. But it fails to account for the contradictory liberal form of this transnational anti-imperial legal discursive strategy. That is to say, it fails to explain the historical grounds or conditions of possibility for semi-peripheral international lawyers' anti-imperial critiques of unequal treaties and extraterritoriality. Reading with Koskenniemi and Pashukanis, I have suggested that the dialectical reversibility of nineteenth-century "civilized" international law must be understood with reference to its underlying liberal ascending-descending/particularistic-universalistic logic. And that that logic was bound to the global-cum-imperial expansion of commodity exchange relations during the second half of the nineteenth century. Within this critical theoretical frame, we shall examine,

below, the liberal grounds upon which Chinese international lawyers challenged the unequal treaties, focusing in particular on their critiques of extraterritoriality.

V.2.1. The "Positivization" of Chinese law

China's termination of the "unequal treaties" and extraterritoriality – and its inclusion into the international community as a fully "civilized," sovereign state – was intimately related to the implementation of large-scale institutional reforms.[25] The formal pledges of foreign Treaty Powers to end extraterritoriality at the turn of the twentieth century[26] compelled Qing authorities to begin to implement these structural changes in order to "modernize" their domestic legal system and bring it into structural conformity with Western "civilized" legal standards.[27] The gradual "positivization" of the Chinese legal order is Turan Kayaoğlu's term for legal institutionalization – that is, "the codification of laws, the spread of a court system and the establishment of a legal hierarchy." This developed hand in hand with the rise and fall of

[25] The connection between the abolition of extraterritoriality in Japan and the Chinese legal reformsh, see Douglas Robertson Reynolds, *China, 1898–1912: The Xinzheng Revolution and Japan* (Cambridge, MA: Council on East Asian Studies, Harvard University, 1993).

[26] I refer here of the Sino-foreign treaties concluded between 1902-03, as discussed in the previous chapter. The template for this pledge was made in Article XII of the 1902 Sino-British Mackay Treaty, which stated: "China having expressed a strong desire to reform her judicial system, and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extra-territorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other conditions warrant her in so doing." *Treaties, Conventions, etc., between China and Foreign States* 2nd ed., vol.1. (Shanghai: Statistical Department of the Inspectorate General of Customs, 1917), 557

[27] 'The Western Power's promise to relinquish extraterritorial rights and to assist in law reform along Western lines propelled a concentrated effort to adopt and adapt Western law at the turn of the twentieth century." Following the ratification of Treaty, "for the first time, the Qing court agreed that sweeping reforms were necessary for treaty revision." See also, Cassel Pär Kristoffer, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012), 175.

See Jianfu Chen, "Modernisation, Westernisation, and Globalisation: Legal Transplant in China," in *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*, eds., Jorge Oliveira and Paulo Cardinal (Berlin and Heidelberg: Springer, 2009), 93.

modern extraterritoriality in China (and other "semi-peripheral" states).[28] Along these general historical lines, this gradual and uneven process of judicial modernization, i.e. positivization, in China has been cited as one of the central reasons for the subsequent abolition of extraterritoriality during the mid-twentieth century.[29] On that score it has been argued that "[t]he greatest legacy of extraterritorial consular jurisdiction in China was, therefore, the structural conformity of its legal system to Western ideas of positivist legality."[30]

There is undoubtedly a great deal of historical evidence to bear out this argument, especially as it pertains to the waves of institutional reform which were instituted (in fits and starts) by the Qing[31], followed by the Republican government, followed by the Communist government. I make no attempt here to recount all of those waves of reform.[32] For our present purposes, I wish to note only two things. The first concerns the second wave of "legal institutionalism," which accompanied the founding of the Republic of China in 1911.[33] Political

[28] See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), 122.

[29] The introduction of modern international law in China was part and parcel of that process. More specifically, it was China's experience with unequal treaties that shaped Chinese international lawyers' critical appropriation of international law. The problems resulting from the application of the unequal treaties and the struggle for their abrogation motivated intense scholarly writing in China during the early twentieth century. See generally, Wang, *China's Unequal Treaties*.

[30] See Mariya Tait Slys, "Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China," online ed. (Genève: Graduate Institute Publications, 2014).

[31] Initial attempts to 'positivize' the Chinese legal order, by both the Qing government and the early Republican governments, yielded only partial results. This was largely due to the legal and cultural pluralism of the Chinese Empire, as well as its political fragmentation. The failure to institutionalize state law explains why, for Kayaoğlu, the Chinese were unsuccessful in abolishing extraterritoriality until the Second World War. See Kayaoğlu, *Legal Orientalism,* 165.

[32] See instead, Richard S. Horowitz, "International Law and State Transformation in China, Siam and the Ottoman Empire during the Nineteenth Century," *Journal of World Hist*ory 15, no. 4 (2004). On the abolishment of cruel punishments in China, see Jerome Bourgon, "Abolishing 'Cruel Punishments': A Reappraisal of the Chinese Roots and Long Term Efficiency of the Xinzheng Legal Reforms," *Modern Asian Studies* 27, no. 4 (2003).

[33] On the 1911 Republican revolution, see Joseph Esherick, *Reform and Revolution in China: The 1911 Revolution in Hunan and Hubei* (Berkeley: University of California Press, 1976).

cohesion and the formation of a unitary modern nation state were at the heart of the revolutionary movement, and, for that reason, the modernization of Chinese law in order to achieve territorial and economic integrity were perceived as crucial objectives. Following the Nationalists' coup d'état, the project of legal modernization in China was put into action. This included, but was not limited to, the promulgation of a civil code, which was based on the Japanese civil code (derived from the German civil code). At the same time, there was a concerted effort made to replace the traditional Imperial Laws with modern criminal and commercial codes.[34] It was in this "modernizing" context, then, that a new class of Chinese legal specialists (judges, lawyers, jurists, diplomats, etc.),[35] many of whom were trained in Europe and the US, came to voice an oppositional legal politics of recognition on the world scene that called into question the legitimacy of extraterritoriality and the "unequal treaties" – a term, which only came into use in China in the early part of the twentieth century.

Secondly, while I certainly do not deny the significance of the positivization-cum-institutionalization of Chinese law, I also do not think that this historical framework can fully account for the argumentative structure of Chinese anti-imperial international legal strategies. These, I shall argue, cannot simply be subsumed under the category of positivism, as Becker Lorca, Kayaoğlu, and others have done. Rather, as we have indicated through our previous

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[34] Philip C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001), 29

[35] The transmission and appropriation of modern international law in China began during the second half of the nineteenth century with the publication of Western treatises translated into Chinese. In 1864 William A.P. Martin, an American missionary and sinologist translated Henry Wheaton's *Elements of International Law*. Martin also translated into Chinese, T.D. Woolsey's *Introduction to the Study of International Law*, W.E. Hall's *Treatise on International Law*, as well as several diplomatic guidebooks. See Liu, *The Clash of Empire*, 113-120. In addition to, and in light of, this translation work, there was a proliferation of early twentieth-century original Chinese research on international law, with a strong emphasis on the study of the "unequal treaties" and extraterritoriality. This included, under the aegis of the Foreign Ministry of the Beijing government (1912-28), the development of "Treaty Studies" which examined treaty-related problems. See Wang, *China's Unequal Treaties*, 42-45.

discussions of Koskenniemi and the professionalization-cum-liberalization of modern international law, the so-called "positivization" of international law only captures one dimension of a contradictory liberal logic. In this way, I shall argue that accounts of said "positivization" of Chinese international law, and its anti-imperial international legal discourse in particular, paper over a deeper contradictory liberal logic that gave rise and lent normative credibility to both positivist *and* naturalist appeals for recognition of China's sovereign rights.

V.2.2. The 1919 Paris Peace Conference

Through its declaration of war against Germany and Austria-Hungary, China automatically terminated the extraterritorial rights of those nations in China. Having gained legal equality against its erstwhile enemies, China then sought to gain sovereign equality with its Allies following the termination of the First World War, at the 1919 Paris Peace Conference.[36] With its government internally divided, China sent a delegation, which represented both the Peking and the Canton governments (though only the former was recognized as the legitimate government of China). The delegation was comprised of Lu Cheng-Hsiang, Minister for Foreign Affairs in the Peking administration and veteran diplomat, Dr. V.K. Wellington Koo, Minister to Washington, Dr. Sao-ke Alfred Sze, Minister to London, Ch'en-tzu Wei, Minister to Brussels, and two Canton leaders., Dr. Cheng-t'ing T. Wang and Dr. C.C. Wu.

While China's participation was limited at the Peace Conference, the Chinese delegation nonetheless pressed its case for treaty revision, which included: (1) the restoration to China of

[36] On June 13, 1918, China signed a Treaty of Amity with Switzerland, which provided for, inter alia, Swiss consuls. This would be the last extraterritorial treaty signed by China. In point of fact, a presidential mandate, issued on April 28, 1919, declared that all non-treaty nations who wished to enter into treaty relation would China would have to do so "on the basis of equality." Mingchien Joshua Bau, *The Foreign Relations of China: A History and a Survey*, (New York and Chicago: Fleming H Revell, 1919), Part 3, 497.

foreign urban concessions and leased territories; (2) the abolition of restrictions imposed upon China by the Boxer Protocol of 1901; (3) the abolition of consular jurisdiction; and (4) the granting of complete tariff autonomy. These demands were formally submitted in a memorandum entitled, "Questions for Readjustment."[37] This measured document, while acknowledging the legitimate treaty basis for foreign extraterritorial rights, underscored the impermanence of extraterritoriality. It did so by, first, by referencing the formal promises made by the extraterritorial powers to relinquish those rights in several Sino-foreign treaties signed in 1902-03 (the previously discussed Mackay Treaty being the prime example of such formal pledges). The document also noted the temporary nature of extraterritoriality, which exhibited "a marked tendency to disappear everywhere sooner or later."[38] The immediate point of reference here was Japan where foreign consular jurisdiction was abolished in 1899.

In light of these historical considerations, the memorandum proceeded to the core of China's case for treaty revision and recognition of its sovereign equality.

> [T]he primary question to be answered is, therefore, whether the state of Chinese laws and the arrangements for their administration have attained a point to satisfy these…Treaty Powers and warrant them in relinquishing their extraterritorial rights. While we do not claim that the Chinese laws and their administration have now reached such a state as has been attained by most advanced nations, we do feel confident to assert that China has made very considerable progress in the administration of justice an in all matters pertaining thereto since the signing of the [original] Commercial Treaties.[39]

The document proceeded to enumerate the concrete steps China had taken, since the 1902-03 treaties, to bring its judicial system in conformity with the "advanced nations." They may summarized as follows: (1) the adoption of a National Constitution prescribing the separation of

[37] For the full text of "Questions For Readjustment. Submitted by China to the Peace Conference. Paris, 1919," see *Chinese Social and Political Science Review* 5, no. 2 (June 1920).
[38] Ibid, 139.

[39] Ibid.

governmental powers, assuring both Chinese and foreigners the fundamental rights of life and property and guaranteeing the independence of judicial office; (2) the preparation of five legal codes, namely, the criminal, civil and commercial codes, and the criminal and civil codes of procedure; (3) the drafting other important pieces of legislation, such as the Law for the Organisation of the Judiciary, the Provisional Regulations of the High Courts and their Subordinate Courts, the Ordinance for Commercial Associations and the Regulations for the Court of Arbitration in Commercial Matters; (4) the explicit adaptation of the laws of 'the most advanced nations' to the Chinese context; (5) the establishment of a three-tiered hierarchical court system had been established, namely the District Courts, the High Courts or Courts of Appeal, and the Taliyuan or the Supreme Court in Beijing; (6) the complete separation between civil and criminal cases and the publication of all trials and judgments rendered; (7) in criminal matters, the abolishment of corporal punishment in coercing confessions; (8) the establishment of institutions providing modern legal education, as well as examinations regulating access the legal profession; (9) the requirement all the judicial officers of the courts, high and low, received regular legal training, with a large number having studied abroad, and, finally, (10) the successful improvement of the prison and police systems.[40]

With regard to its request to abolish consular jurisdiction, the memorandum offered a very clear statement of Chinese dissatisfaction with the institution. The reasons for this dissatisfaction stemmed in the main from the multiplicity of foreign legal systems and overlapping jurisdictions in China:

> The prevailing rule by which the consular jurisdiction is determined is that of defendant's nationality: claims against Englishmen must be made in English Courts, against Frenchmen in French Courts, against Americans in American Courts, and so forth. What

[40] Ibid, 138.

> constitutes an offence or cause of action in one consular court may not be treated as such in another. It is for this reason that different decisions are given, while the facts are exactly the same, and this inequality of treatment hurts the sentiment of equity and justice.[41]

Other sources of Chinese dissatisfaction with extraterritoriality included the lack of effective control over witnesses and plaintiffs of foreign nationality. When said witnesses were invited to appear before Chinese courts, such appearances were based entirely on the foreign national's voluntary action, and, per treaty stipulations, "he could not be fined or committed for contempt of court, nor could he be punished by that court if he should commit perjury." Similarly, local courts found it difficult to obtain evidence in cases where a foreigner committed a crime, particularly if the offence occurred inland. According to the treaty law, aliens could not be arrested or tried directly, but were to be handed over to the nearest consulate for judgment. The document also highlighted the necessary conflict of interest between foreign consuls' twofold responsibility between their consular functions, on the one hand, and their judicial responsibilities, on the other. If it was the primary duty of a foreign Consul to guard the interests of his nationals, it is "scarcely consistent to add to that duty the task of administering justice."[42] The delegation of these two functions to a single individual, it was argued, quite clearly conflicted with the principles of neutrality and impartiality of justice that were in fact used to reproach the administration of Chinese law. Let us take note here of this discursive parallel between the Chinese critique of the defects of foreign extraterritoriality, on the one hand, and, on the other, the British/European critique of the "deficiencies" of Chinese law, which was deployed to justify the original imposition and persistence of European extraterritoriality in China. I return to this parallel subsequently.

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[41] See *Questions For Readjustment*. *Submitted by China to the Peace Conference* (Paris: Paris Peace Conference, 1919), 16.
[42] Ibid.

The Memorandum concluded by requesting the definitive termination of consular jurisdiction, upon the fulfillment, on the Chinese side, of future legal reforms anticipated to be accomplished by 1924. Those reforms included: (1) The promulgation of a Criminal, a Civil and a Commercial Code, a code of civil procedure and a Code of Criminal Procedure; and (2) The establishment of new courts in all the districts where foreigners reside. Notwithstanding the informal acknowledgments of the legitimacy of China's demands by Wilson, Clemenceau, and other conference members, none was formally prepared to recognize China's appeal for sovereign equality, and none was prepared to relinquish its extraterritorial rights in China. Instead, they urged China to submit its complaints to the nascent League of Nations for redress. For the meantime, it would remained status quo as it concerned the concrete foreign application of the unequal treaties.

V.2.3. The Washington Naval Conference, 1921-22

China's appeals to modify and eventually abolish the unequal treaties and extraterritoriality, on the basis of modern principles of international sovereign equality, were also on full display at The Washington Naval Conference held from November 12, 1921 to February 6, 1922. Nine Powers participated: the U.S., Belgium, Britain, China, France, Italy, Japan, The Netherlands, and Portugal. The conference was called by President Warren Harding as a diplomatic means to restrain Japanese naval expansion in the west Pacific waters by pushing (among other policies) a continuation of the Open Door in China. Discussions related to the imperiled state of that international cooperative policy offered the Chinese contingent at the Conference an opportunity to appeal for an end to the "unequal treaties" and extraterritoriality."

The guiding rationale for this legal appeal was outlined in a statement of ten principles read by Dr. Sao-ke Alfred Sze, Minister to the Court of St James and chief of the Chinese delegation, at the first meeting of the Committee on Pacific and Far Eastern Questions on November 16, 1921. Seven of the ten principles directly address the issue of sovereign equality:

> 1. a) The Powers engage to respect and observe the territorial integrity and political and administrative independence of the Chinese Republic.
> b) China upon her part is prepared to give an undertaking not to alienate or lease any portion of her territory or littoral to any Power.
> 2. China, in full accord with the principle of the so-called open door or equal opportunity for the commerce and industry of all nations have treaty relations with China, is prepared to accept and apply it in all parts of the Chinese Republic without exception.
> 3. With a view to strengthening mutual confidence and maintaining peace in the Pacific and Far East, the Powers agree not to conclude between themselves any treaty or agreement directly affecting China or the general peace in these regions without previously notifying China and giving to her an opportunity to participate.
> 4. All special rights, privileges, immunities or commitments, whatever their character or contractual basis, claimed by any of the Powers in or relating to China are to be declared, and all such or future claims not so made known are to be deemed null and void. The rights, privileges, immunities and commitments, now known or to be declared, are to be examined with a new to determining their scope and validity and, if valid, to harmonizing them with one another and with the principles declared by this Conference.
> 5. Immediately or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed….
> 7. In the interpretation of instruments granting special rights or privileges, the well established principle of construction that such grants shall be strictly construed in favor of the grantors, is to be observed.
> 8. China's rights as a neutral are to be fully respected in future wars to which she is not a party.[43]

These eight principles defined a proposed framework for a new cooperative international policy in China based on the recognition of China's sovereign equality with other Treaty powers.[44] The entailments of this proposed doctrine of recognition were then specified in terms of China's right to "territorial integrity" (i.e. its "political, jurisdictional, and administrative freedom") and its

[43] Ibid.

[44] The Canton government suggested that apart from these "platitudes," emphasis, in these guiding principles, should be placed on recovering China's territorial, economic, and administrative integrity. See *Weekly Review of the Far East*, December, 24, 1921.

right to neutrality in wartime. They were also specified in terms of the elimination of all restrictions placed on China's sovereign rights – namely, extraterritoriality and all other non-reciprocal rights and privileges held by Treaty powers ("whatever their character or contractual basis"), to which China had not consented.

Following from our discussion in the previous chapter, I would suggest that underlying the Chinese delegation's appeal to China's sovereign equality to end the "unequal treaties" and extraterritoriality was a historical logic of reciprocity based on equivalent exchange relations. This historical logic is made evident in the second principle, which, when read with the other principles cited above, effectively equates China' sovereign equality with other Treaty powers with a new commercial equality based on reciprocal rights. It does so specifically in its recognition and affirmation of the Open Door principle of "equal" commercial and industrial opportunity for all Treaty powers in China (minus the non-reciprocal rights associated with unconditional MFN treatment[45]). From this overall perspective, then, this statement of principles can be read as a demand for a more reciprocal basis – greater "perfect equality," as it were – in China's international exchange relations.

At the sixth meeting of the Committee on Pacific and Far East Questions, on November 25, 1921, Dr. Wang Ch'ung-hui presented the Chinese case against extraterritoriality. Following a brief historical presentation of the development of extraterritoriality in China, he then delineated several "serious objections" to the institution.

> 1. In the first place, it is a derogation of China's sovereign rights, and is regarded by the Chinese people as a national humiliation.

[45] For a Chinese critique of the MFN clause as "a disparagement of Chinese sovereignty or political rights," see Kuo Yun-Kuan, "The Legitimate Bounds of Most-Favored Nation Treatment in China, *The Chinese Social and Political Science Review* 40 (1916).

> 2. There is a multiplicity of courts in one and the same locality, and the inter-relations of such courts has given rise to legal situations perplexing both the trained lawyer and to the layman.
> 3. Disadvantages arise from the uncertainty of law. The general rule is, that the law to be applied in a given case is the law of the defendant's nationality, and so in a commercial transaction between, say, X and Y of different nationalities, the rights and liabilities of the parties vary according to whether X sued Y first or Y sued S first.
> 4. When causes of action, civil or criminal, arise in which foreigners are defendants, it is necessary for adjudication that they should be carried to the nearest consular courts which might be miles away; and so it often happens that it is practically impossible to obtain the attendance of the necessary witnesses, or to produce other necessary evidence.
> 5. Finally, it is a further disadvantage to the Chinese that foreigners in China, under cover of extraterritoriality, claim immunity from local taxes and excises which the Chinese themselves are required to pay. Sir Robert Hart, who worked and lived in China for many years, has said in his book *These from the Land of Sinim*, 'the extraterritoriality stipulation may have relieved the native officials of some troublesome duties, but it has always been felt to be offensive and humiliating, and has ever a disintegrating effect, leading the people on the one hand to despise their own government and officials an, on the other, to envy and dislike the foreigner withdrawn from native control.[46]

In addition to the "national humiliation" of extraterritoriality (to which I return momentarily), this foreign institution, according to Wang, led to legal uncertainty, as well as to legal inequality. It created an "anomalous" situation in China arising from the fact that each foreign country administered its own laws. A multiplicity of courts and a diversity of foreign laws allowed foreigners to escape the law and to profit from its lacunae at the expense of Chinese subjects.[47] It is at this point that we can profitably return to the aforementioned discursive parallel between the Chinese critique of extraterritoriality, on the one hand, and the European critique of Chinese law that justified the "necessity" of extraterritoriality in China, on the other hand. Both mobilized a common positivist-utilitarian language to critique the other – as "uncertain,"

[46] *Conference on the Limitation of Armament* (Washington, 1922), 932-936.
[47] These and other objections to extraterritoriality are also cited by the Commission on Extraterritoriality, as will be discussed shortly. See *Report of the Commission on Extraterritoriality in China, September 16, 1926* (Washington, 1926).

"arbitrary," and "anomalous" – in order to then propose certain prescriptive remedies.[48] In this way, then, we detect an underlying positivist-utilitarian standpoint for critique that linked these two critical legal discourses. Which, in turn, speaks to the twofold nature and significance of the universalization of international law in China, which made possible both imperial legal discourses and anti-imperial legal counter-discourses.

While the nine powers jointly recognized the "sovereignty, independence, and territorial and administrative integrity of China," this formal recognition was mostly meaningless insofar as China was in a state of civil war and lacked any authoritative central government. Nor did this formal recognition change China's partial status as a "semi-civilized" state in international law. And while no abrogation of extraterritoriality was forthcoming, the Nine Powers promoted the creation of a special Commission on Extraterritoriality in China whose intention was,

> "to inquire into the present practice of extraterritorial jurisdiction in China, and into [its] laws, the judicial system and the methods of judicial administration of China with a view to reporting their findings of fact in regard to these matters, together with their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislative and judicial reforms as would warrant the several powers in relinquishing, either progressively or otherwise, their respective rights or extraterritoriality."[49]

In so doing, the nine Powers also granted their respective governments the powers to appoint one member of the Commission, while excluding China from doing so. Naturally, China objected. While it pledged to cooperate with the work of the Commission, "and to afford to it every possible facility for the successful accomplishment of its tasks," it proposed that it too be allowed to appoint a representative, and, more forcefully, "that China shall be free to accept or to

[48] R.Y. Lo, "Extraterritoriality in China," *The Chinese Social and Political Science Review* 9 (1925).
[49] Resolution V and Additional Resolutions Adopted by the Washington Conference on the Limitation of Armament. December 10, 1921. Cited in Robert Thomas Pollard, *China's Foreign Relations: 1917-1931*. (New York: Macmillan, 1933).

reject any or all of the recommendations of the Commission."[50] The Chinese proposal was rejected and the resolution to create the Commission was adopted without amendment, though China was later conceded a role in the Commission.

V.2.4. The Commission on Extraterritoriality

Before the Commission met in Beijing in January 1926, Dr. Wang Ch'ung-hei (Chinese minister of justice and Chinese commissioner), who was named honorary president of the body, drafted a memorandum concerning the "present practice of extraterritorial jurisdiction in China." It advanced the notion that the scope of the Commission's inquiry should encompass not only consular jurisdiction per se, but also the associated practices of extraterritoriality. Those included:

1. Trial of mixed cases between Chinese and foreigners having extraterritorial rights;
2. Trial of cases between foreigners having extraterritorial rights; and
   (a) Foreigners having no extraterritorial rights
   (b) Foreigners of countries having no treaty relations with China
3. Mixed courts;
4. Quasi right of asylum in premises occupied by foreigners and on foreign ships;
5. Issue of foreign nationality certificates to Chinese citizens;
6. Claim of foreigners to exemption from taxation;
7. Special areas:
   (a) Foreign settlements.
   (b) Leased territories.
   (c) Legation quarter at Peking
   (d) Railway zones.[51]

Once the commission convened in January it gave a relatively sympathetic hearing to Wang's memorandum, agreeing, in principle, to the first six items. It objected to the seventh, however,

[50] Ibid., 218-219.
[51] "Memorandum on the Chinese Commissioner on the Present Practice of Extra-territorial Jurisdiction in China," *British Parliamentary Papers*, China, no. 1 (1927).

on the grounds that these "special areas" were of a political or diplomatic character, rather than a juridical one, and thus did not fall within the Commission's purview.

Wang then submitted a second memorandum, which called into question any "hard-and-fast distinction" between the political and diplomatic, on the one hand, and the juridical, on the other. "Any undue insistence upon either of these aspects to the exclusion of the other," he opined, "would leave many of the problems connected with extraterritoriality unsolved." Wang concluded the memorandum by denouncing consular jurisdiction and its associated rights and privileges as an *imperium in imperio*, and, as such, it constituted a derogation of China's sovereign rights. Even more polemically, he invoked the doctrine of *rebus sic stantibus* (fundamental change of circumstances).[52]

> While it is true that the right of the Powers to establish consular or extraterritorial courts having jurisdiction over their nationals has been granted by the treaties between China and the Powers, it is none the less true, as pointed out by Dr. Hoiki in his speech at the inaugural meeting of this commission, 'that the regime was introduced into this country simply as a modus vivendi to aid in establishing harmonious relations between China and foreign countries.' It is obvious that the system was not meant to be a permanent institution, and that changed conditions render its abolition necessary for the maintenance of those harmonious relations for which it was primarily intended….what appeared to be feasible seventy or eighty years ago can no longer be regarded as tenable….A fundamental readjustment of China's relations with the Powers is therefore necessary for ensuring mutual confidence and understanding in the interests of all concerned."[53]

Crucially, Wang's invocation of *rebus sic stantibus* starts, theoretically, from a different point of departure than the more frequently cited concept of unequal treaties. Whereas the prohibition of unequal treaties normally covers a situation existing at the time of the conclusion of the treaty

[52] Though polemical, Wang's invocation of *rebus sic stantibus* was not unprecedented. Chinese scholars have argued that unequal treaties could be unilaterally terminated or renegotiated on the basis of the *clausula rebus sic stantibus.* See T. Wang "International Law in China: Historical and Contemporary Perspectives" *Recueil des Cours* 221 (1990); H. Chiu "Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties" in *China's Practice of International Law: Some Case Studies*, ed. J.A. Cohen (Cambridge: Harvard University Press Cambridge, 1972), 239, 267.

[53] "Memorandum on the Chinese Commissioner on the Present Practice of Extra-territorial Jurisdiction in China," March 23, 1926, *China Year Book*, 1928, 14-15.

(duress, inequality, non-reciprocity), *rebus sic stantibus*, by contrast, applies only to treaties which somehow become "unequal" as a result of changed circumstances. It was, for Wang, the political and diplomatic circumstances of extraterritoriality that had so radically changed since China initially agreed to these mid-nineteenth-century treaties. This anti-imperial legal argument, implicit in Wang's broadening of the scope of the Commission's purview of inquiry, fell on deaf ears.

It took nine months and 21 sessions for the traveling, fact-finding commission to finally draft and publish an official Report on Extraterritoriality in China. The Report was divided into four parts: Part I on the "Present Practice of Extraterritoriality in China" provided a brief historical overview of the development of the institution, enumerated the major objections to it, and cited contemporaneous accounts of its status in 1926. It framed consular jurisdiction as a temporary *modus vivendi*, which was to be abolished once the development of China's legal system made it unnecessary. Part II, entitled "Laws and Judicial System of China," expressed the Commission's "verdict" on the status of China's laws and judicial system. It was here that the Commission found a serious discrepancy between the codified laws on the books and their personal and arbitrary application in practice. Part III on the "Administration of Justice in China", focused in particular on the state of Chinese prisons and tribunals. Part IV, provided a series of "Recommendations" to both the Chinese and Western governments.[54]

Overall, the Commission's Report described the Chinese legal system as wholly unsatisfactory, incomplete and inefficient. Its unequivocal conclusion was that consular jurisdiction could not be abolished until China's laws and their administration were more clearly and sufficiently bought into accord with Western legal standards. Above all else, this meant

[54] *Report of the Commission on Extraterritoriality in China, September 16, 1926* (Washington, 1926).

ensuring the autonomy of the Chinese judiciary from political and especially military intrusions. The Commission found that very few of China's law "were ever enacted or confirmed by Parliament in the method generally prescribed by the modern constitutions." Rather, they "have as their basis mandates of the President or orders of the Ministry of Justice, neither of which has, strictly speaking, any legal or constitutional authority to make laws." Against this background, the Commission stated, "at the present time there is no effective security against arbitrary action by the military authorities with respect to life, liberty or property insofar as such security can be afforded by the effective functioning of the Chinese civil and judicial authorities." Furthermore, it highlighted an array of "lacunae" in Chinese law, including the absence of a civil code, a commercial code, a bankruptcy code and patent law. It also criticized the inadequate number of Chinese courts, as well as the largely unsatisfactory nature of Chinese prisons. If foreign extraterritorial rights were to be abolished, all of these "deficient" features of Chinese law and its administration would have to be substantially reformed. The important stipulation was that "upon the relinquishment of extraterritoriality, the nationals of the powers concerned will enjoy freedom of residence and trade and civil rights in all part of China in accordance with the general practice in intercourse among nations and upon a fair and equitable basis."[55]

It is in light of the Commission's Report and final verdict concerning the necessity of the retention of consular jurisdiction that we can appreciate the continued hold of the standard of civilization in early twentieth century international law and diplomacy (even though the language of civilization is not immediately present in the Report).[56] On that score, Gerrit Gong has argued

[55] Ibid., Part II and Part III.

[56] It is in this vein that the historian George W. Keeton argued: "The sociology of law is particularly important in considerations of the extraterritorial systems. Two civilization, fundamentally different – even directly opposed – in every important characteristic, have found it necessary to regulate their intercourse by a system of extraterritoriality

that the Commission was essentially established to measure the Chinese degree of "civilization." The Commission's opinion for the retention of Western extraterritoriality confirms, for him, that China had not yet attained the Western standard of civilization.[57] Gong's criticism has been more recently clarified by Turan Kayaoğlu, who argues "the Report on Extraterritoriality in China is the clearest expression of the Western judgment about the Chinese judiciary and of the description of the Western requirement for legal reforms in accordance with the *legal positivist* worldview as a necessity of extraterritoriality.[58] That is to say, Chinese law was judged as being deficient and incomplete from the standpoint of an ideal-typical standard of positivist legality.

V.2.5. The Internalization of the Standard of Civilization

The international standard of civilization, as previously discussed, was underpinned by a developmentalist logic, which was most characteristically expressed in a stadial conception of the history of civilization. This progressive idea of history informed nineteenth-century British "positivist" jurists' schemas of "civilized" international society, which did not permanently fix "civilized," "semi-civilized," and "un-civilized" states within it. Rather, these civilizational divisions were understood along a universal historical continuum. This developmentalist logic, I argued moreover, is what paved the conceptual road for China to become a full and equal sovereign member of international society. And it is what distinguishes nineteenth-century

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and its abolition has only become possible since the two civilizations have found common ground – China's acceptance of Western standards in some of the more important of her relations with the West – upon which to meet." See Keeton, *The Development of Extraterritoriality in China*, vol. 2, 217.

[57] See Gong, *The Standard of Civilization*, 157. Pär Kristoffer refines Gong's verdict on the Commission insofar as he notes a shift in emphasis on the justification of Western extraterritoriality in China. "Instead of the barbarity of traditional Chinese practices," he argues, "it was now the weakness of the central government that served as justification for extraterritoriality." Cassel Pär Kristoffer, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012), 177.

[58] Kayaoğlu, *Legal Imperialism,* 173. My emphasis.

"positivist" international jurisprudence from Vitoria's natural law jurisprudence, which fixed Amer-Indians as abject Other in sixteenth-century Spanish international law.

This developmentalist logic also informed Chinese international lawyers' stadial conceptions of the "advancement" of China and Chinese law. It was essentially absorbed by Chinese international lawyers and diplomats who, as we have seen, argued against the continued persistence of consular jurisdiction "in view of the fact that China had recently made much progress in the reform of her judicial system and in the codification of her laws."[59] While the language of civilization was often muted, the developmentalist logic behind it remained firmly in place. That logic also found concrete doctrinal expression in Chinese international lawyers' proposals for the gradual abolition of extraterritoriality. Consider, for, Dr. M.T. Tyau, a prominent Chinese jurist, who proposes the abolition of extraterritoriality in three stages: "the first state to be spent in the reorganization or institution of 'mixed' tribunals with the cooperation and assistance of treaty states; the second stage to involve the abolition of the consular courts; and the final state to restore to China complete jurisdiction over foreign residents in China."[60] Leaving aside its many practical difficulties, such proposals for treaty revision shared a gradualist schema, which normally involved foreign co-operation and the application of mixed courts as an intermediate point between foreign law and Chinese law.

The suffusion of legal orientalist discourse in Chinese anti-imperial legal discourse also played out in their discourse of "humiliation." Even prior to the popularization of this discourse in the PRC, the sentiment was acknowledged by Robert Hart, who remarked that

[59] Cited in Pollard, *China's Foreign Relations*, 217.

[60] This quote is the summary of Tyau's proposal. See N. Wing Mah, "Foreign Jurisdiction in China," *The American Journal of International Law* 18, no. 4 (Oct. 1924): 691.

extraterritoriality "has always been felt to be offensive and humiliating." It was these words, it shall be recalled, that found there way into Dr. Wang Ch'ung-hui's denunciation of extraterritoriality, at the Washington Conference, as "a derogation of China's sovereign rights…[which] is regarded by the Chinese people as a national humiliation."[61] There is a peculiar self-orientalizing aspect of this discourse of humiliation. As William Callahan has persuasively argued, "With humiliation it is often the self that is "othered." This critical discourse, which historically emerged with China's transition from an Empire to a nation-state, describes a "modular form of nationalism, a specific historical narrative that produces nation-states out of empire and civil war. What is curious about this specific narrative is that it involves complex self/other relations. National humiliation joins all Chinese in a performance that is both critical and self-critical. China needs to not only "other" Japan and the West, but "other" itself by way of a thorough self-criticism: National humiliation is necessary for national salvation." It is in this respect, then, that we can appreciate how "the discourse of National humiliation [characteristic of Chinese international law discourse] is one of the few discourses that transcended the Communist/nationalist ideological divide to describe modern Chinese subjectivity more generally."[62]

V.2.6. Self-determination and the Recovery of "Lost Rights"

Following the inauguration of the first wave of institutional reforms in China during the late nineteenth century, "[t]he watchword of the new China," as Mary Clabaugh Wright has

[61] *Conference on the Limitation of Armament* (Washington, 1922), 933.

[62] William A. Callahan, "National Insecurities: Humiliation, Salvation, and Chinese Nationalism," *Alternatives* 29 (2004): 203, 207, 209.

convincingly argued, "was 'recovery of sovereign rights.'" This discourse permeated Chinese international law and diplomatic discourse leading up to the final abrogation of the unequal treaties and extraterritoriality in the 1940s. (Indeed, it survived long after insofar as the unequal treaties and extraterritoriality became a principle target of Western capitalist imperialism in the PRC and an academic topos for the periodization of histories on Sino-Western relations.)

The import of this Chinese discourse of the "recovery" of China's sovereign rights was recognized, for example, by the French Plenipotentiary, who, just prior to the conclusion of the First World War, acknowledged China's desire to "recove[r] national jurisdiction" as well as "recover their sovereign rights" from Germany following the conclusion of the war.[63] In point of fact, V.K. Wellington Koo, who was a member of the Chinese delegation at the 1919 Versailles Conference, placed it at the center of China's objectives at the Peace Conference, and beyond. He believed China should voice "her grievances internationally…in order to win back some of her *lost rights*."[64] This discourse of rights recovery was also recognized by American diplomats in their assessment of the Chinese "Commission for Preparation of Extraterritorial Abolition," which was created by a presidential mandate in 1920 (Dr. Wang Ch'ung-hiu, Chief Justice of the Chinese Supreme Court, was appointed chairman; Chain I-p'eng, Vice-Minister of Justice, was appointed vice-chairman.) The principle function of this Chinese commission, as reported by the American Minister at the time, was "to consider legal aspects of judicial reform, and in general to proceed along lines looking to the recovery of by China or jurisdiction over foreign nationals within its borders."[65]

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[63] As quoted in Fischel, *The End of Extraterritoriality*, 32.

[64] Craft, *V.K. Wellington Koo and the Emergence of Modern China,* 45. My emphasis.

[65] Ibid., 52.

What this Chinese legal discourse of rights recovery assumed, then, was that these sovereign rights had been lost and/or taken away at some earlier point. In my view, this argument about recovering China's lost right was, in essence, a liberal naturalist argument about the fundamental right to self-determination. In Chinese international lawyers' assumption of this fundamental right, it can then be argued that this emergent discourse was only made possible through the universalization-cum-liberalization of modern international law in China. For that reason, "[t]he Chinese 'discovered' sovereignty' just as they effectively 'lost' it."[66] Moreover, this anti-imperial legal formulation for treaty revision and abrogation presupposed that Chinese lawyers and diplomats had sufficiently internalized the ideas of State sovereignty and of a nation's right to *self-determination*, which, prior to the early twentieth century, had little or no part in the Chinese legal tradition.

While this anti-imperial counter-discourse of the ("lost") rights of self-determination was tailored by Chinese lawyers and diplomats to address the particular wrongs they associated with modern Sino-Western/foreign legal relations, it acquired transnational significance in the context of the globalization of professional international law during the twentieth century. This transnational legal history has been elucidated by Karen Kope, whose work on the modern history of right of self-determination speaks directly to the historical, political and normative significance of this liberal form of analogical reasoning in modern global/universal international law. She argues, "The right to self-determination can be seen as restoring power or territory to the rightful sovereign, just as private law reunites the restoration of wrongfully taken property to its owner. In contrast to the story of a freely chosen future, this story of self-determination is of

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[66] Jeremy Paltiel, *The Empire's New Clothes: Cultural Particularism and Universal Value* (New York: Palgrave, 2007), 61.

a past wrong; the bonds of identity, it underwrite, those of historical deprivation."[67] In the specific case of China, the past wrong was its "unequal" treaties with foreign Imperial Powers; Chinese international lawyers narrated this history of injustice and inequality in terms of "The Century of Humiliation." What Kope is specifically referencing here is the import of the private law analogy in non-Western discourses of international law. Building on that insight, what I wish to argue is that the (implicit) appropriation of this mode of analogical reasoning – which structured this critical facet of Chinese international lawyers' anti-imperial legal discourse of rights – was indicative of their historical acceptance of liberalism (as defined earlier by Koskenniemi). So whereas nineteenth-century European international lawyers applied the private law analogy to justify colonialism, Chinese international lawyers (implicitly) applied it as a counter-discourse to reclaim China's fundamental rights of sovereignty, which had been "lost" at the hands of imperialist foreign Treaty Powers.[68]

This dyadic ascending-descending logic, which is characteristic of liberal international law, was manifested in Chinese international lawyers' oscillations between positivist and naturalist appeals for recognition of China's sovereignty. On the one hand, Chinese international lawyers appealed to positive international law – and we saw in regards to the frequently cited 1902 Sino-British MacKay treaty as a formal promise to end extraterritoriality – as grounds for China's acceptance into the international community. This ascending, positivistic legal argument was coupled, on the other hand, with a descending, naturalist one about China's "lost rights," which assumed this basic right existed anterior to any consensualist ascending legal principles (sovereign equality, freedom and independence). Legal order and obligation are

[67] Kope, *Diversity and Self-Determination in International Law*, 69.

[68] It is these sovereign rights that Antony Anghie claims were "extinguished" in the nineteenth century by European imperial Powers. See Anghie, *Imperialism*, 82.

derived, in this descending naturalist schema, from a pre-existing "universal" normative code, which, in principle, overrode an individual sovereign's will and interests, and to which all "civilized" states were necessarily bound.

More generally, this dyadic liberal logic is apparent in the critical anti-imperial strategy of Chinese international lawyers and diplomats, who, on the one hand, made an *ascending* argument that prioritized sovereignty and sought to augment China's jurisdictional competence and defend its particular national interests and rights as an "advanced" and fully "civilized state," and, on the other, made a *descending* argument that prioritized international public order and systematicity and exhibited China's allegiance to the "universal" standard of civilization (agreeing to its terms by making the necessary institutional reforms). It is in this way, then, that this normative standard of civilization occupied a dual signification in Chinese international lawyers' polyvalent anti-imperial legal strategies: it was mobilized to justify both sovereign will and public order.

V.2.7. The Final Abrogation of Extraterritoriality

After the abolition of the capitulations in Turkey by the 1923 Treaty of Lausanne, China remained the only major, "semi-sovereign" commercial state still bound by extraterritoriality. And while there is no shortage of recruitable evidence of Euro-American lawyers, diplomats, state officials, etc. continuing to appeal to a universalist standard of civilization in order to justify the unequal treaties and extraterritoriality in China, there was also a sense, by the early twentieth century, that extraterritoriality's "time was up."[69] This was reflected, in part, in the fact that the language of civilization had largely fallen out of favor. Consider, for example, Sir John Fischer

[69] See Fishel, *The End of Extraterritoriality*, 95.

Williams, who, in 1929, admitted that "the concept of 'civilized society' as a community of nations or States distinct from the rest of the world no longer corresponds with the main facts of contemporary life." According to a French jurist, writing in 1930: "The family of nations is the totality of states [civilized and uncivilized] and other subjects of international public law." Similarly, H.A. Smith of London University called attention to the consequences of the breakdown in the distinction between civilized and uncivilized states: "In practice, we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say that they are no concern of ours…This means in effect that we have now abandoned the old distinction between civilized and uncivilized States."[70]

Notwithstanding these academic recognitions of the waning influence of the standard of civilization, China's partial status in international law remained just that until the formal abrogation of Western extraterritoriality in China during the 1940s.[71] In the end, it was *realpolitik* in the context of total war that compelled the Western termination of China's "semi-civilized" status: the British and Americans abrogated extraterritoriality in China, on January 11, 1943, in order to strengthen relations with their Chinese ally as a defensive measure against Japan. The event was marked with great celebration in China, and the next day the Nationalist Guomindang government published A Letter to All Servicemen and Masses, triumphantly

[70] As quoted in G. Schwarzenberger, "The rule of law and the disintegration of international society," *Transactions of the Grotius Society* 22 (1937) 66.

[71] Extraterritoriality was formally abrogated in the Treaty for the Relinquishment of Extra-Territorial Rights in China, which was a bi-lateral treaty between the British and Chinese governments signed on January 11, 1943. China concluded a similar treaty with the United States on the same day. The signing of these treaties took place context of total war**;** the British and Americans abrogated extraterritoriality in China in order to symbolically strengthen relations with their Chinese ally. See K. C. Chan, "The Abrogation of British Extraterritoriality in China 1942-43: A Study of Anglo-American-Chinese Relations," *Modern Asian Studies* 11, no. 2 (1977).

announcing that "we, the Chinese nation, after fifty years' of sanguinary revolutions and five and a half years' of sacrifice in the War of Resistance, have finally transformed the history of a hundred years of the Unequal Treaties of sorrow into a glorious record of the termination of the Unequal Treaties."[72]

V.3. Semi-Peripheral Agency and the Dual Structures of "Civilized" International Law

The historical inclusion of non-Western states (both semi-peripheral and "Third World"[73]) into the modern international legal order has been read as a progressive narrative of the globalization of international law marked by an overarching movement towards greater levels of justice and inclusion.[74] Becker Lorca's recent iteration of this progressive narrative cites this transnational discursive phenomenon of semi-peripheral appropriation of nineteenth-century international law as evidence of a new mode of non-European political agency in the history of modern international law.[75] That political agency came to be globally embodied in a new professional class of semi-peripheral jurists, whose collective body of work, by Becker Lorca's

[72] Dong Wang, "The Discourse of Unequal Treaties in Modern China," *Pacific Affairs* 76, no. 3 (2003): 399.

[73] Anghie defines the Third World as "those non-European societies and territories which were colonized from the sixteenth century onwards by the European Empires, and which acquired political independence since the 1940s." See Anghie, *Imperialism*, p. 3

[74] See Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: T.M.C. Asser Press, 2009). For a selection of endorsements of modern legal universalization, consider this first: "When international law commenced its modern career in the sixteenth and seventeenth centuries, it was cast largely in the Graeco-Judeo-Christian mould. Since then it has moved towards greater universalization. Many more universal perspectives drawn from all the world's cultural traditions can and must be fed into it as it develops to suit the needs of the 21st century." And later: "a multitude of new states, long deprived of their sovereignty, [which] were released from the bondage of colonialism to become full-fledged members of the community of nations." Christopher Weeramantry, *Universalising International Law* (Leiden and Boston: Martinus Nijhoff, 2004), 2-3, 109. For similar endorsement of the universalization of international law, see Sompong Sucharitkul, "Asian Perspectives of the Evolution of International Law: Thailand's Experience at the Threshold of the Third Millennium," *Chinese Journal of International Law* 1, no. 2 (2002); Heinhard Steiger, "From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law," *Journal of the History of International Law* 3 (2001): 180-93, 190-91.

[75] Becker Lorca, "Universal International Law," 497–98.

account, helped transformed international law from a legal instrument of imperial domination into one of restraint against such domination. From this "critical" semi-peripheral perspective then, the real significance of modern legal universalization lies not in the West's imposition of its legal norms and values on non-Western cultures. Rather, its significance lies in the counter-hegemonic revaluation of Western international law and sovereignty and the political agentification of non-European peoples, societies, and states, implied by it.

On the one hand, Becker's comparative analysis of semi-peripheral appropriation throws new light on the global anti-imperial significance of the universalization of nineteenth-century international law. In particular, he demonstrates how non-Western international lawyers, by internalizing nineteenth-century international law (legal positivism, the doctrine of absolute sovereignty, the standard of civilization, and international society) and then appropriating it, could defend and bolster their respective state's jurisdictional competence. In so doing, they also laid the legal-jurisprudential groundwork for a transnational anti-imperialist legal discourse, which broadened the doctrinal scope of the Eurocentric "Family of Civilized Nations" to include non-Western states. In these respects, Becker Lorca offers a valuable corrective to the now sizeable scholarship (of which Anghie's work is exemplary) focusing predominantly, if not exclusively, on the global imperial significance of the universalization of international law. On the other hand, Becker Lorca, like the one-sided Eurocentric narratives of modern legal universalization he seeks to critique, fails to explain the contradictory nature and significance of this global historical process, which, I have suggested, involved the mutual constitution of international legal structures of domination and the forms of political agency and resistance produced within and against them. So while semi-peripheral appropriation did in fact signify a historically new mode of non-Western political agency, as Becker Lorca rightly claims, I would

argue that that agency was constrained in ways that his instrumentalist analysis is incapable of adequately theorizing.

The significance of those historical constraints on Chinese international lawyers' political agency goes beyond the most apparent one – namely, China's relative geopolitical weakness vis-à-vis Treaty powers (which meant that the Chinese international lawyers and diplomats under investigation "never negotiated from a position of strength"[76]). A realpolitik assessment of power differentials in Sino-foreign relations may well be able to explain the historically contingent geopolitical constraints on, for example, Chinese diplomats inability to recover Germany's leased territory and rights in Shandong province (which were transferred to Japan, essentially on the basis of its right of conquest) at the 1919 Paris Peace Conference. But what I have in mind is a qualitatively different, structural form of constraint, whose existence is related but not reducible to asymmetric power relations. Its historical and normative significance, I argue, lies in the legal discursive universe within which Chinese international lawyers' claims for sovereign equality and universal rights were plausibly formulated, advanced and contested.

For political reasons discussed below, Becker Lorca assumes a very broad scope of freedom for semi-peripheral international lawyers to choose among particular legal doctrines and concepts in their anti-imperial legal strategies. That said, it should be noted that he does in fact acknowledge certain basic limitations on semi-peripheral appropriation, though he discusses those limitations in terms of non-Western international lawyers' "conceptual commitments." He views those commitments as characteristic of an emergent semi-peripheral "disciplinary consciousness [which] was shaped by the tactical assimilation of extant international law through the selection of some of its features: positivism (over naturalism as international law's normative

[76] Craft, *V.K. Wellington Koo and the Emergence of Modern China*, 21.

source), doctrines that substantiated an absolute notion of sovereign autonomy and equality (over doctrines that made sovereignty permeable), and the internalization of the standard of civilization as the attribute granting international legal subjectivity (over, for example, the use of the maxim *ubi societas ibi ius*)."[77] I view these "conceptual commitments" not as tactical choices, but as structural constraints, which limited the legal resources available for appropriation by Chinese international lawyers, among other semi-peripheral jurists. Those structural constraints reflected the legal discursive grounds upon which modern international lawyers – speaking on behalf of the "civilized Family of Nations" – judged what did and did not constitute legitimate anti-imperial legal resistance.

In order to more sufficiently theorize those structural constraints, we turn, first, to the critical insights of Umut Özsu, before returning to our previous exchange between Koskennimei and Pashukanis. In his response piece to Becker Lorca's article, Özsu also calls into question Becker Lorca's account of semi-peripheral appropriation, and the "agency" at work in this counter-hegemonic practice, both politically and methodologically.[78] In Özsu's view, Becker Lorca oscillates between two understandings of agency, one strategic or instrumentalist, the other constitutive. The former would indicate a "relatively wide ambit of freedom" for semi-peripheral lawyers to choose among particular international legal doctrines and concepts. As Özsu correctly notes, Becker Lorca tends to emphasize this instrumentalist notion of agency for political reasons centering around his desire for contemporary non-Western jurists from marginalized and/or oppressed societies to actively "recover" this critical and universalistic semi-peripheral orientation so as to bring it to bear on contemporary political and disciplinary

[77] Becker Lorca, "Universal International Law," 486.

[78] See Özsu, "Agency, Universality, and the Politics of International Legal History."

developments in international law.[79] Özsu then proceeds to problematize this political project of "recovery" from the standpoint of a constitutive understanding of agency, the basis for which Özsu relates back to Becker Lorca's claim that semi-peripheral lawyers "internalized" nineteenth-century international law (positivism, absolute sovereignty, the standard of civilization). This claim suggests a "much more ambitious theory of socialization," which, in Özsu's opinion, Becker's Lorca's analysis is methodologically incapable of elucidating.[80]

Offering his own theoretical perspective on this process of socialization, Özsu contends, "semi-peripheral engagement with international law would [from this perspective] appear to be less a matter of strategic or tactical 'utilization' and more a matter of being *constituted* as a bearer of a mode of legal expertise or as a guardian of a form of legal order. Such a conception would naturally imply a narrower ambit of freedom: the jurist is depicted not as a conscious actor maneuvering on the basis of *raison d'état* so much as a conduit for the more diffuse process of socialization through which he and his state are integrated into a larger international system." Framed along these theoretical lines, moreover, semi-peripheral appropriation, as a transnational legal discursive strategy of resistance, can thus also be understood with reference to a transnational socializing process "that occur[ed] behind [jurists'] backs, as it were, not something which gr[ew] out of a purely intentional project of their own making."[81]

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[79] In and apart from what he considers to be the politically irresponsibility of emphasizing this agency in the face of "brutal" structures of domination. See Ibid.

[80] Özsu doesn't pull any punches: "Becker Lorca's article offers no resources with which to answer such questions, or even to pose them as such." Ibid., 64.

[81] Ibid., 63-64.

What Özsu is getting at here (and elaborates upon more fully elsewhere[82]) is the existence of a constitutive social logic at work in modern international legal discourse in general, and in this transnational anti-imperial discursive strategy of appropriation in particular. Semi-peripheral jurists can be viewed accordingly as embodiments of this social logic and all its constitutive tensions and paradoxes. By internalizing the doctrines and concepts of nineteenth-century international law and then appropriating them, these jurists could, on the one hand, "turn international legal structures to their advantage in order to safeguard or strengthen [their respective states'] politico-economic independence."[83] Take, for example, the standard of civilization, which, in spite of its nineteenth-century imperial legal origins, was reinterpreted and redeployed in counter-hegemonic struggles, as in the aforementioned case of Chinese international lawyers' appeals to abrogate Western extraterritoriality on the grounds that China had, through its domestic reforms and "civilized" international behavior, conformed to this international standard. On the other hand, however, this transnational socializing process (internalization and appropriation) could also eventuate in the reproduction of nineteenth-century legal discursive structures of domination, as in the case of Friedrich Martens, the Baltic-Russian jurist who employed the standard of civilization in order to distinguish the "civilized" international status of Russia from a host of regional neighbors, including Turkey, Persia, China and Japan.[84]

In unfolding this paradoxical history of the standard of civilization (both in this review piece and elsewhere), Özsu underscores the dual capacity of modern international law – its

[82] See Özsu, "De-territorializing and Re-territorializing Lotus: Sovereignty and Systematicity as Dialectical Nation-Building in Early Republican Turkey," *Leiden Journal of International Law* 22 (2009).

[83] Özsu, "Agency, Universality, and the Politics of International Legal History." 73.

[84] Becker Lorca, *Mestizo International Law*, 124-128.

"constitutive force," to produce and reproduce discursive structures of domination, while simultaneously providing the discursive tools to challenge and, at times, even reconfigure those historical structures. He analyzes this dual capacity with reference to the contradictory "formal structures"[85] of international law which "are both constraining and enabling, both limiting and empowering….The dynamism conferred on international law by its internal contradictions – a dynamism that is institutional no less than discursive, material no less than symbolic – is an intense and far-reaching one." Framed in these terms, non-Western international lawyers' discursive strategies of appropriation were both enabled and constrained by the formal and normative structures of nineteenth-century international legal discourse.[86]

Leaving aside how Özsu explains this constitutive dynamism (which he does through a Bourdieusian approach predicated on the notion of law as a social "field"[87]), let me underscore here his contention that this constitutive social logic was historically bound to the "form of legal order" into which semiperipheral jurists and their respective states were being incorporated. And while he doesn't specify the historical features of that legal order, he does relate it directly to the development of a world economy during the nineteenth century. It was in this global imperial context, he argues, that Western international lawyers constructed the normative architecture and legal and doctrinal framework that justified, inter alia, unequal treaties and extraterritoriality. As

[85] By formal structures Özsu means: "patterns of reasoning that inform international law's formal infrastructure, constituting the background normative framework within which claims may plausibly be advanced and countered." Özsu, "Agency, Universality, and the Politics of International Legal History," 68-69

[86] Özsu, "De-territorializing and Re-territorializing Lotus," 31.

[87] Appropriating Bourdieu, Özsu proposes a theoretical framework which conceives of "international law as a social 'field' whose constitutive 'logic is determined' largely by 'the specific power relations which give it its structure' but is not so thoroughly determined by these relations as simply to do away with 'the internal logic of juridical functioning.' This field limits the opportunities available to those operating within it by favouring prevailing configurations of power, but it also arms them with means of resisting, and even revamping, these same configurations." Hence, the "field" both structures and is structured by agents. Ibid., 28.

I read it, the crux of Özsu's critique here is that Becker Lorca's inability to account for the constitutive social logic, and its enabling and constraining capacities vis-à-vis semiperipheral appropriation, stems from his "troubling" decision not to pursue any kind of sustained inquiry into the historical significance of capitalism to the global legal, disciplinary and discursive processes that he analyzes.[88]

I take Özsu's two critical theoretical insights highlighted above – that there was a constitutive social logic underpinning semiperipheral appropriation and that this logic was historically bound to the world economy – as points of re-entry into the question of capitalism and the contradictory liberal logic of "civilized" international law discourse. We have previously discussed this contradictory capitalist legal logic through a critical exchange between Koskenniemi and Pashukanis: the former delineated the grounds for professional (read: liberal) international legal argument; the latter related those liberal legal grounds to historically determinate commodity exchange practices. Those capitalist grounds, we then concluded, underwrote the professionalization-cum-liberalization of nineteenth-century "civilized" international law, which entailed a particular structuring of international legal argument based on a dyadic ascending-descending/particularistic-universalistic logic.

This dyadic liberal reasoning found various and often contradictory instantiations in the context of the universalization of "civilized" international law. We have observed its import in the dual signification of the standard of civilization in nineteenth-century international law. European international lawyers mobilized it to justify both public international order and sovereign will; to justify formal universal equality and substantive inequality; to justify the simultaneous inclusion of and exclusion of non-European "semi-civilized" states into

[88] This, despite the fact that Becker Lorca does mention in passing the significance of the development of a world economy.

international society. On the other hand, Chinese international lawyers, through their internalization and re-appropriation of the standard of civilization, made descending arguments that prioritized order and systematicity and exhibited China's allegiance to the "universal" international standard of civilization, while, on the other hand, making ascending arguments that prioritized sovereign will and sought to augment China's jurisdictional competence and defend its particular national interests and rights as a "civilized" state. In sum, this nineteenth-century international legal standard could underwrite both European imperial discourses legitimating unequal treaties and extraterritoriality and anti-imperial counter-discourses that sought to abrogate these legal forms of domination.

We have also observed the dyadic liberal reasoning underpinning Chinese international lawyers' anti-imperial legal discursive strategies in their oscillations between appeals for sovereign recognition on the basis of positive international law (treaties, conventions, etc.), on the one hand, and, in their appeals to regain China's "lost rights," on the other. The latter critical legal discourse, as I have suggested, was underwritten by a liberal naturalist, descending argument about China's fundamental right to self-determination, which assumed this right existed anterior to any consensualist ascending legal principles. What this particular anti-imperial legal naturalist argument reveals, moreover, is the liberal import of the private law analogy between property and sovereignty – just as a property owner could appeal for the restoration of wrongfully taken property, Chinese international lawyers' made appeals to China's right of self determination in order to remedy a past wrong (i.e. Sino-Western/foreign unequal treaties) and restore its territory to its rightful owner.

This liberalization of semi-peripheral argumentation is implicitly recognized by Becker Lorca in his discussion of *"particularistic universalism."* (Though notably, Becker Lorca never

references Koskenniemi's work, nor for that matter does the word "liberalism" appear in his study.) This is his characterization of the paradoxical form of "semi-peripheral legal consciousness," which, he maintains, grew out of semi-peripheral jurists common strategic appropriation of nineteenth-century international law (positivism, absolute sovereignty, and the standard of civilization). He frames "semi-peripheral legal consciousness" in terms of a fundamental contradiction between, on the one hand, semi-peripheral jurists' commitments to the "universalistic" norms of the global professional order of which they had become (nominal) members, and, on the other hand, their "particularistic" commitments "to their respective national standpoints and interests."[89] He elaborates on that tension in the following way:

> Semi-peripheral jurists faithfully believed in the universality of international law as neutral and scientific knowledge and as a legal order where instituting sovereign autonomy and equality should attain validity on a global scale. However, semi-peripheral jurists' specific articulation of the universal rendered international law particular. Given their eagerness to be faithful to their own representations of international law's universality, in addition to the fact that international legal doctrine was a channel to support modernization or nation-building projects defined by the specific political predicaments faced in different parts of the globe, semi-peripheral lawyers' international legal thinking acquired a local or regional distinctiveness."

While the "universalistic" dimension of semi-peripheral legal consciousness is more or less clear from this passage (if too narrowly defined[90]), Becker Lorca offers only a vague description of its "particularistic" dimension. As far as I can tell, "the particular" is basically being used to denote the "situatedness" of semi-peripheral jurists in space and time; that it could also be used to

[89] For a description of the disputes between universalist and particularist international lawyers in the Latin American context, see Arnulf Becker Lorca, "International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination," *Harvard International Law Journal* 47 (2006).

[90] He bases this description on a particular retort by Calvo: "These words entail a reproach that is not comprehensible for an Argentinean jurisconsult who follows the world's scientific movement…As an Argentinean I comply with the law of my country, but as an author of a book of universal jurisprudence, I have had to situate myself under a scientific point of view, seeking, if not a mode to uniform the principles, at least to reconcile the interests of all peoples." As quoted in Becker Lorca, *Mestizo International Law*, 99.

denote, in a much more concrete fashion, "the ruthlessly 'particularistic' realpolitik" characteristic of many of the non-Western international lawyers under the temporal purview of his analysis is mostly lost on Becker Lorca. In any case, his description of the particularistic-universalistic legal reasoning of semi-peripheral jurists nonetheless begins to articulate with the ascending-descending/particularistic-universalistic logic of professional *liberal* international legal argument delineated by Koskenniemi.[91]

These considerations speak to the global historical implications of Koskenniemi's critical theory as it pertains to the socialization-cum-professionalization of international lawyers, both Western and non-Western. Their common acceptance of liberalism, and its core premises and problematics, provided the discursive conditions of possibility for their liberal ascending-descending/ particularistic-universalistic legal reasoning, and the dualistic anti-imperial legal strategies built on that dyadic reasoning. Reading now with Pashukanis, I depart from Koskenniemi's theory by relating the contradictory normative structure of professionalized international legal argument to a historically specific set of constitutive social practices tied to commodity exchange, which – and this is crucial – were not spatially bound to any particular geography.[92] This non-territorial quality of modern commodity exchange is, in my view, what accounts for the universal transposability of nineteenth-century "civilized" international law,

[91] Becker Lorca implicitly recognizes only the ascending pattern of justification in semi-peripheral legal reasoning inasmuch as he argues that semi-peripheral jurists, like the majority of their nineteenth-century European counterparts, subscribed overwhelmingly to positivism over naturalism, thereby prioritizing the State(-as-Individual) as the fundamental source of international legal order and obligation. The general international legal principles of sovereign freedom, equality, and independence are then "scientifically" derived, in this legal positivist schema, from this secular source of authority. What Becker Lorca fails to consider in his analysis of critical semi-peripheral appropriations of nineteenth-century international legal positivism, however, is thrown into sharp relief by Koskenniemi's theoretical insights into the dualistic character of professional liberal doctrine, which holds whether "positivist, naturalist, or eclectic."

[92] Whereas Koskenniemi situates the rise of the modern discipline of international law in the context of an underspecified "liberal modernity." Koskenniemi, *The Gentle Civilizer of Nations*, 57-66.

which posited the abstract rights-bearing legal subject as its formal and normative premise (primarily through the domestic law analogy). On these critical theoretical grounds, moreover, I have argued that these universally transposable capitalist practices possessed the constitutive social power to generate and lend normative credibility to both liberal imperial discourses of "civilized" international law and liberal anti-imperial counter-discourses of "civilized" international law. By historically grounding these liberal legal discursive practices in the rise and global spread of commodity exchange practices, Pashukanis's theory can also illuminate how these liberal argumentative practices were bound to modern legal forms – the contract, the treaty, the abstract legal subject – characterized by moments of equality and inequality, freedom and unfreedom, consent and coercion, law and self-help.[93] And it is this theoretical insight into the dialectical nature of modern capitalist legal forms, I would suggest, that can throw light on the necessary role of force and violence in modern international law.

This dialectic between "law and self-help," consent and coercion, equality and inequality, finds its paradigmatic expression in the "free" wage labor contract, which mediates the sale and purchase of labor power as a commodity. Marx elucidated the implications of this contradictory bourgeois legal form with reference to the struggle between collective capital and collective labor over the limits of the working day. Conflict, he argues, inheres in these relations between workers and capitalists precisely because they are structured by commodity exchange:

> The nature of commodity exchange itself imposes no limit to the working day…The capitalist maintains his rights as a purchaser when he tries to make the working day as long as possible, and, where possible, to make two working days out of one. On the other hand, the peculiar nature of the commodity sold [labour power] implies a limit to its consumption by the purchaser, and the worker maintains his rights as a seller when he wishes to reduce the working day to a particular normal length. *There is here therefore*

[93] Pashukanis argued: "Law and self-help those seemingly contradictory concepts are, in reality, extremely closely interlinked." Pashukanis, *GTLM*, 99.

> *an antinomy, of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides*. Hence, in the history of capitalist production, the establishment of a norm for the working day presents itself as a struggle over the limits of that day, a struggle between collective capitalist, i.e. the class of capitalists, and collective labourers, i.e. the working class.[94]

There is, for Marx, an inherent indeterminacy in the structure of the law of exchange of equivalents, which, in the case of relations between workers and capitalists, stems from the fact that the value of labour power and the length of the workday are not fixed quotients. This indeterminacy – which Marx refers to in terms of "the moral and historical element" in the valuation of labor power – manifests itself in the legal situation where there is no impartial and fair way to adjudicate between the equal rights of the capitalist and the worker. And it is in this context that force can come into play as a regulator and final arbiter of exchange relations involving labour power.[95] Such force, Marx maintains, can assume different forms in this legally indeterminate context – both direct and personal, as well as indirect and impersonal[96] – though the emphasis in this chapter on the working day is on the formation of political alliances in the legal limitation of the working day, i.e. state-mediated "impersonal" force. The particulars of that English political context aside, the salient point of this chapter is that conflict and force are inherent in, as opposed to extrinsic or pathological to, a system of commodity exchange relations comprised of abstract legal subjects, *both individual and collective*.

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[94] Marx, *Capital*, 344. My emphasis.

[95] Note: Marx's focus in the chapter on the working day is on the formation of political alliances.

[96] Marx clarified the distinction between personal and impersonal domination by drawing a historical distinction between modern and feudal forms of authority: "The authority assumed by the capitalist as the personification of capital in the direct process of production, the social function performed by him in his capacity as manager and ruler of production, is essentially different from the authority exercised on the basis of production by means of slaves, serfs, etc…on the basis of capitalist production, the mass of direct producers is confronted by the social character of their production in the form of strictly regulating authority and a social mechanism of the labour-process organised as a complete hierarchy – the authority reaching its bearers, however, only as personification of the conditions of labour in contrast to labour, not as political or theocratic rulers as under earlier modes of production…" Marx, *Capital*, vol. 3 (Moscow: Foreign Languages Publishing House, 1962), 859.

For Marx, class is a relational category. It denotes a historically specific social relation mediated by a set of abstract laboring practices bound to the commodity form. In the passage above, Marx begins to ground class conflict in this contradictory social form, which, he reasons, determines both the legal terms and subject positions of the struggle between the laboring and expropriating classes. This social form of mediation constitutes the condition of possibility for the modern legal situation of "right against right." Marx's formulation of this antinomy, as Postone explains, "is a determination of social subjectivity as well as of social objectivity. As the form of an objective social antinomy, it is also a determination of the self-conceptions of the parties involved. They conceive of themselves as possessing rights, a self-conception which is constitutive of the struggle involved."[97] In other words, workers, in their struggle to limit the length of the working day, come to constitute themselves as a class by acting as a collective rights-bearing commodity owner. This is, at the same time, the social constitution of an oppositional form of consciousness – a new critical subjectivity conditioned by a contradictory social-legal form of mediation. So the thrust of Marx's argument here is that capitalism, as a contradictory society, "generates the possibility of a critical stance towards itself."[98] On these dialectical grounds, what Marx so persuasively demonstrated was how this capitalist socio-legal form structured the bourgeois rights discourse at the heart of the struggle of the nineteenth-century English labor movement – a modern discourse grounded in an antinomic social logic that renders equal and opposite legal, rights-based arguments possible, and, as a result of this structural indeterminacy, leaves open the possibility of extra-legal force.

[97] Postone, *Time, Labor, and Social Domination*, 317.

[98] Ibid., 88.

What Pashsukanis argues, in *GTLM*, is that this dialectic of "law and self-help," consent and coercion, equality and inequality, is not confined to the exchange of labour power between workers and capitalists. That is to say this antinomic relationship is not an exclusive feature of capital-labor relations, and its mediating labor contract form. Rather, it is characteristic of capitalist legal forms in general insofar modern capitalist society gives rise to recurrent legal situations (outside of the exchange relation between workers and capitalist, which implies its own unique indeterminacies) – at the domestic, international, and global levels – where it is impossible, from the standpoint of the law of exchange of equivalents, to objectively determine or impartially adjudicate between subjects (commodity owners) with equal rights. Implied in this recurrent capitalist legal situation is the potentiality of dispute and/or recourse to force and self-help. And it is this potentiality that has particular historical and theoretical significance for modern international law between formally equal sovereign states, which, unlike modern domestic legal systems (comprised of formally equal citizens), lacks a super-ordinate legal authority. Self-help, in the international legal sphere, can take the form of various retaliatory measures, reprisals, and war. It is this *practical* antinomy between formally equal legal subjects with equal rights inherent to modern capitalist legal forms, Pashukanis maintained, that lies at the root of the structural circularity and indeterminacy of bourgeois legal theory, which posits this subjective, egoistic bourgeois legal subject as its formal and normative premise. Hence, equally valid but diametrically opposed liberal international legal arguments regarding the nature of order and obligation are only made possible in and by a particular kind of tendentially global society that produces universally transposable abstract rights-bearing legal subjects. Hence also, the descending-ascending, universalist-particularistic imperial and anti-imperial international

legal discursive practices, discussed above, were bound to historically determinate commodity exchange practices.[99]

These Marxian theoretical insights offer a critical optic into the universalization of "civilized international" law, which gave rise to new forms of legal domination and resistance, legal inequality and equality, legal subjects, quasi-legal subjects, and non-legal subjects. Understanding the dialectical nature of modern capitalist legal forms brings to account both the historical nature and significance of modern international treaty law, as well as the legal-historical dynamics of the politics of "civilized" sovereignty between formally equal states with substantial differences in material power. My investigation of the formation of China as a "civilized" international legal subject has attempted to throw light on the nature and limits of formal capitalist equality and the "antinomy of right equals right" (between which "force decides") that inheres in modern international legal forms. Those capitalist antinomic legal forms were globalized through the imperial expansion of European-non-European "unequal" treaty relations during the nineteenth and early twentieth centuries. This capitalist antinomy, I have argued, was *formally* manifested in the 1842 Sino-British Treaty of Nanjing, which provided for "perfect equality" between Britain and China, but nonetheless included iniquitous terms, like extraterritoriality, "consented to" by the Chinese government while British gunboats threatened to bombard Nanjing. It was this contradiction between formal equality and substantive inequality, moreover, that became the critical focal point of Chinese international lawyers' resistance to the Sino-foreign "unequal" treaty order in general, and more specifically,

[99] "Law in its general definitions, law as a form, does not exist in the heads and the theories of learned jurists. It has a parallel real history which unfolds not as a set of ideas, but also as a specific set of social relations which me enter into not by conscious choice, but because the relations of production compel them to do so. Man becomes a legal subject by virtue of the same necessity which transforms the product of nature into a commodity complete with the enigmatic property of value." Pashukanis, *GTLM*, 68.

to Britain's extraterritorial empire in China. That anti-imperial legal resistance – which took rhetorical shape and played out in the context of an emergent global international politics of "civilized" sovereignty – was embedded in a contradictory liberal "civilized" rights discourse, which posited the subjective, egoistic bourgeois legal subject as its formal and normative premise.

V.4 Conclusion

By drawing on a Marxian social theory to re-center the question of capitalism to the contradictory process of international legal universalization, I have sought to illuminate the dual significance of liberal legal forms (contract, property, personhood) in structuring the principals and practices of both nineteenth-century "civilized" international law and the transnational anti-imperial legal movement that internalized and critically re-appropriated those "civilized" legal principals and practices. That dual significance, I have argued, is papered over in Anghie's "traditional" state-centric analysis of the imperial history of modern international law. It has also been overlooked in Becker Lorca's instrumentalist account of the "pragmatic" and "strategic" reception and re-appropriation of international law as a counter-hegemonic discourse. My contention, in sum, is that both theoretical frameworks have limited explanatory power when it comes to understanding the global legal dynamics involved in the rise and fall of non-territorial commercial empires, such as Britain's extraterritorial empire in China. Rather, those global legal dynamics – and the oppositional discursive formations they gave rise to and rendered equally valid under modern liberal international law – must be understood with historical reference to the global-cum-imperial expansion of liberal forms of law and legal personhood bound to commodity exchange practices. It was these liberal legal forms of abstraction that constituted

the formal and normative grounds of an emergent global nomos of empire – one not historically bound to any one particular imperial state, but rather to an abstract, supranational logic of capitalism.[100] "Civilized" international law served as an ambivalent universalizing vehicle for this contradictory historical logic: it generated and lent normative credibility to both ideological legal discourses legitimating extraterritorial empire and legal counter-discourses that sought to de-legitimate extraterritorial empire.

[100] It was precisely this global juridical order, which lacked any concrete spatial (i.e. territorial) moorings, that Schmitt saw taking shape at the turn of the twentieth century. See Schmitt, *Nomos*, esp. 214-258.

Conclusion

In this dissertation, I have analyzed the universalization of nineteenth-century "civilized" international law through an investigation of the rise and fall of modern British extraterritoriality in China. My analysis of the pre-1842 constitution of legal orientalism focused on two concurrent and overlapping juridical discourses: 1) the Sinophobic legal orientalist critique of "un-civilized" China; and 2) the English legal positivist critique of the common law tradition. These discourses, I have argued, mobilized the same core tropes about the "particularistic" nature of Chinese law, on the one hand, and the English common law tradition, on the other: both were cast as "personal," "irregular," "arbitrary," and "despotic" in order to deny each the status of "civilized" law; and both, on those same normative grounds, were made subject to certain "universal" liberal laws and legal-jurisprudential reformist projects.

I have argued that these convergent appeals to a legal universalism, on the one hand, and a Eurocentric idea of civilization, on the other, were historically and normatively bound to the liberal rights-bearing legal subject. This private law conception of legal personhood provided the normative grounds for the juridical critique of the legal "particularities" found in/assigned to both Chinese law and the English common law. In throwing light on the private law affinity between these concurrent discourses, my comparative analysis of legal orientalism has sought to complicate and qualify the predominant historical and theoretical framing of this polyvalent legal-jurisprudential discourse as an exclusively imperial and/or colonial discourse that justified Western domination of non-Western societies.

Having established the private law normative grounds of legal orientalism, I then investigated the legal-historical contexts in which this polyvalent discourse was instantiated in modern "public" international law. I focused in the main on its Euro-centric civilizational

discourse, which, I argued, provided a universalizing vehicle for the essentializing and reformist logics of legal orientalism. That discourse accompanied the nineteenth-century expansion of Euro-American treaty law and extraterritoriality – a global historical process that constituted the formal grounds for the uneven and often violent juridical incorporation of China into the global domain of modern international law. I analyzed this paradoxical juridical incorporation, as it unfolded over course of the "Century of Humiliation" (1842-1943), through an investigation of the practical and theoretical works of a new professional class of international lawyers, both British/Western and Chinese, as well as the foundational Sino-British/Western commercial and extraterritorial treaties and conventions. On the one hand, "civilized" international law discourse underwrote British/Euro-American international lawyers' legal legitimations of the post-1842 unequal treaty order in China, the legal centerpiece of which was modern extraterritoriality. Those legal orientalist legitimations were codified in nineteenth-century international positivist jurisprudence, which produced China as a "semi-civilized" international legal subject. On the other hand, "civilized" international law discourse also underwrote a self-orientalizing, anti-imperial critique of the legal legitimacy of Sino-foreign unequal treaties and extraterritoriality, as articulated by Chinese international lawyers in the early decades of the twentieth century. That anti-imperial critique worked to juridically transform China from a "semi-civilized" subject into a fully "civilized" sovereign subject of international law.

My investigation of the paradoxical historical trajectories borne out through the universalization of modern "civilized" international law in China has cast new light on the private law structures that articulated European imperial jurisprudence to Chinese anti-imperial jurisprudence. At the core of this jurisprudential articulation, I have argued, was the liberal rights-bearing legal subject – the controlling and contradictory normative premise of modern

universal-cum-"civilized" international law. It was this private law normative premise that rendered these imperial/anti-imperial counter-discourses conceptually coherent and juridically valid to both sides.

In support of this thesis I have elaborated a Marxian theory of legal forms influenced by the work of Pashukanis. This non-orthodox Marxian theory purports to historically and normatively contextualize private law forms in general, and this liberal idea of legal personhood in particular, in modern commodity exchange practices. In so doing it seeks to move beyond orthodox Marxian understandings of law as a superstructural reflex of an economic base and/or an ideological reflection of particular set of class interests in order to investigate the liberal legal and jurisprudential forms – treaties, legal personhood, legal orientalism, legal positivism – through which "civilized" international law was universalized in China. My overarching goal has been to illuminate the dual nature and significance of liberal private law forms, i.e. the rights-bearing legal subject, in structuring the imperial and anti-imperial principles and practices of nineteenth-century "civilized" international law. It has been my argument that this non-orthodox Marxian theory of legal forms, which frames the structure of modern international law as dual in this historically specific way, can allow for a more robust conception of the mutual constitution of nineteenth-century capitalist imperial legal structures and the forms of political agency produced within and against those legal structures.

My dissertation's theoretical contribution in refining our understanding of the dual structuring by private law of modern international law has far-reaching historical and historiographical implications. This dual significance of private law forms has been overlooked in traditional public law analyses of the universalization of modern international law. Such analyses tend to locate empire in the realm of politics and the state, that is, in public law. My

contention has been that this predominant state-centric framework has limited explanatory power when it comes to understanding the global legal dynamics involved in the rise and fall of non-territorial commercial empires, as typified in Britain's extraterritorial empire in China. Rather, those dynamics can best be understood with reference to the global imperial expansion, reception, and appropriation of liberal forms of private law and legal personhood bound to commodity exchange practices. The historical production and circulation of these liberal legal forms, I have argued, operated in and through the global juridical order of capitalism's empire. My thesis is that this global imperial realm was not simply the product of any one particular imperial state or concrete institution lending it ideological support. Rather it was constituted during the nineteenth century by the liberal principles and practices of commodity-mediated exchange relations, which acquired "universal" social significance and legal legitimacy in "civilized" international law discourse.

This was the framework within which the development of modern European extraterritoriality and the universalization of international law must be situated if we are to fully come to terms with the paradoxical historical trajectories of the latter and the rise and fall of the former. By illuminating the dialectical interrelation between the essential private law forms of imperial and anti-imperial liberal international law and jurisprudence in the context of their universalization in China, my dissertation has provided a critical framework within which to historically ground and interrogate the underlying liberal normative assumptions and resultant conceptual antinomies that have heretofore structured the history and historiography of modern universal international law.

The critical theoretical framework developed in this dissertation also throws into relief the decidedly romantic character of the histories of European and non-European international

law reviewed in this dissertation. Consider first, Schmitt, who laments the supersession of the traditional *jus publicum Europaeum* by a *jus publicum universal*. What was lost in that historical transformation, for Schmitt, is a concrete spatial sense of the global juridical order, which was replaced by an abstract "spaceless universalism." Or consider Becker Lorca, whose political project is to actively "recover" the critical strategic stance of the non-Western jurists he analyzes – a stance he feels is largely absent from the disciplinary thinking of contemporary non-Western international lawyers. Even Koskenniemi may be characterized as a legal romantic in *The Gentle Civilizer of Nations*. What was lost in the fall of the modern discipline of international law, with its turn to pragmatism in the second half of the twentieth century, was a liberal orientation and *l'esprit d'internationalite* – which Koskenniemi clearly admires and regrets its historical passing.

Anghie's "alternative history" would seem to be the outlier. There is no positive point of return in his colonial history of international law insofar as that history is plagued by jurisprudential cycles of domination. And yet, a certain kind of legal romanticism creeps in through the backdoor, as it were, when Anghie turns to consider whether there might exist any real emancipatory potential in international law. "If…the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law, then grave questions must arise as to whether and how it is possible for the post-colonial world to construct a new international law that is liberated from these colonial origins?" The possibility of such an "anti-imperial international law" would ostensibly seem quite remote in that "[e]ven for non-Western countries that have gained formal recognition of their 'civilized' sovereign status, this achievement…was a profoundly ambiguous development, as it involved alienation rather than empowerment, the submission to alien standards rather than the affirmation of *authentic identity*."

And it is here – in this unmotivated appeal to an "authentic identity" – that we can detect a romantic moment in Anghie's critical thinking. His appeal to an underspecified cultural particularism is the one possibility, he offers, to ground a new "anti-imperial international law." What that "authentic identity" looks like, and how one gains access to it, remain unexplored. We are left only with Anghie's abiding hope that that through "the writing of alternative histories of the discipline: histories of resistance to colonial power, history from the vantage point of the peoples who were…the victims of international law", that it may be possible to rethink the colonial structure of international law so that it "might in some way make good on its promise to further international justice."[1]

Insofar as Anghie begins and ends his work on a relatively optimistic note about the possibilities of creating an "anti-imperial international law," I find it regrettable that his critical "alternative history" of the modern discipline of international law offers no real historical or theoretical insight into the bases for such an "anti-imperial international law" and the realization of "international justice." Presumably though, this would entail some kind of reclaiming of the "authentic" values of particular non-Western cultures, as opposed to the "false" Eurocentric universalism of colonial international law. And insofar as that is the case being made here, it raises a number of difficult questions – which Anghie leaves unattended – about the particularistic stance upon which Anghie's appeal to cultural authenticity is made.

Becker Lorca's "alternative history" is the mirror opposite. His stated desire is for contemporary non-Western jurists from oppressed and marginalized societies to actively "recover" a critical and universalistic semi-peripheral juristic perspective on political and disciplinary developments in international law. For Becker Lorca, it was semi-peripheral

[1] Anghie, *Imperialism*, 8, 108, 12.

appropriation that transformed *jus publicum Europaeum* into *jus publicum universal*, and that historical transformation entailed an effective recovery of the legal universalism that been "lost" during the nineteenth century when positivism superseded naturalism as the hegemonic Western international jurisprudential paradigm. As he puts it: "international law's space of validity, which had been theoretically reduced to intra-Western relations after the shift from naturalism to positivism, regained universality." What is of greatest significance to me here is that Becker Lorca's reading of semi-peripheral jurists' recovery of legal universalism parallels his own political project to recover a universalistic semi-peripheral orientation towards contemporary international law.[2] (This project of recovery, I have suggested, can also be seen in Chinese international lawyers' discourse of recovering China's "lost sovereign rights.") I find Becker Lorca's political project highly questionable from the standpoint of *what* was actually being recovered by non-Western international lawyers. That *what* speaks, in my view, to the socially specific form of legal universalism that the non-Western jurists, under Becker Lorca's purview, had internalized and re-appropriated in their counter-hegemonic discourses.

My contention is that the *what* here was a naturalized idea of legal universality. The historical articulation of this idea did not signify a return or a rehabilitation of natural law jurisprudence. Rather, it was a fetishized idea of universal sovereign rights, which took hold of the professional disciplinary thinking of non-Western international lawyers. These universal sovereign rights were "lost" only when non-Western international lawyers had internalized a liberal conception of bourgeois legal subjectivity. It was this fetishized abstract right-bearing legal subject, I have argued, that constituted the controlling and contradictory premise of nineteenth-century "civilized" international law: it generated and lent normative credibility to the

[2] Becker Lorca, *Mestizo International Law*, 139.

imperial legal discourses, that Anghie criticizes, and the anti-imperial legal counter-discourses that Becker Lorca seeks to recover.

While it is well beyond the scope of this conclusion to theorize an adequate critical basis for a new anti-imperial international law, I would suggest nonetheless that the Marxian social theory of law proposed in this dissertation may offer some words of caution for attempts to ground any such law in a cultural particularism and appeal to "authentic identity," as Anghie does, or in a fetishized form of legal universality which needs "recovering," as Becker Lorca does. We might instead understand both of these normative standpoints of critique as historically bounded to a socially-specific form of liberal jurisprudence – one which acquired a universal character through the global-cum-imperial expansion of capitalism. If that is in fact the case, we might also acknowledge that any critical rethinking of the grounds for a new anti-imperial international law would need to take into account the dual-sided logic of capitalism, and the paradoxical trajectories of the universalization of international law it made possible.

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