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## BOOK REVIEW

### HOW A “LAWLESS” CHINA MADE MODERN AMERICA: AN EPIC TOLD IN ORIENTALISM

LEGAL ORIENTALISM: CHINA, THE UNITED STATES AND MODERN LAW. By Teemu Ruskola. Cambridge, Mass.: Harvard University Press. 2013. Pp. 338. \$39.95.

*Reviewed by Carol G.S. Tan\**

#### I. MODERN LAW’S MAP OF THE WORLD

*Legal Orientalism* begins with a map of modern law in which the United States and China are located at opposite ends. America sees itself as being built on “particularly universal” political values in which law is given a privileged position (p. 9).<sup>1</sup> From this perspective, China and Chinese law are cast as being “universally particular” (p. 9).<sup>2</sup> In its particularity, the rule of law and democracy are out of its reach. While the United States has become the world’s “chief law enforcer,” China, because of its poor human rights record, is a “law breaker in chief” (pp. 1–2). Professor Teemu Ruskola’s theoretically sophisticated book traces the historical journey traveled by American law starting with the receipt of extraterritorial rights for its citizens in 1844, a milestone in America’s career as an imperial nation; this is not least because it was at this juncture that a law of nations that was not universal but particular emerged, in part to justify America’s extraterritorial rights in China. The next development was the establishment of an American court in China whose decisions were as arbitrary as those reached by the Chinese courts, the alleged arbitrariness of those courts being why, foreigners had argued, extraterritorial rights were necessary. There was then the taking over of a Chinese court in Shanghai, with the consequence that American judges determined the very content of Chinese law. The United States passed anti-Chinese immigration laws that were justified by the assertion that the “lawlessness” of China had produced Chinese immigrants who knew only despotic rule and who were therefore unsuited to a life under the rule of law in

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\* Professor of Law, SOAS, University of London. I would like to thank the President and editors of the *Harvard Law Review* for their many helpful comments. Errors remain mine. I would also like to record my thanks to the Center of Asian Legal Exchange and the Graduate School of Law, Nagoya University for hosting me when I was in the final stages of writing this Review.

<sup>1</sup> Emphasis has been removed.

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America (pp. 8, 46, 49, and 143). The U.S. Supreme Court upheld these anti-Chinese laws on the basis of the federal government's plenary powers in passing immigration laws, powers that were unconstrained by the Constitution (p. 143).

The major part of *Legal Orientalism* is concerned with the question of how it was that Chinese law was not considered to be law and the ideational and material consequences of this exclusion. In the book's Epilogue (Chapter Six), Ruskola argues that even with the large increase in the volume of laws in China since the 1980s, legal Orientalism cannot be simply a matter of history. Ruskola notes that in China's accession to the World Trade Organization, it was necessary for China to adapt its legal system (pp. 205–06). Although China was voluntarily seeking admission, the situation was reminiscent of the early-twentieth century when China was told it had to modernize its legal system if it wanted to end extraterritorialism (p. 205). Ruskola concludes that colonialism's spread of modern law has triumphed: "Today law is universal" (p. 208). Moreover, modern law, as an extension of the state, has its own tendency to enact "colonialism without even colonizers" (p. 207). Even though this project is not yet complete and there are some areas of activity and life that Ruskola thinks are better considered "illegal" (p. 220),<sup>3</sup> the success of the modern legal project "in creating Chinese subjects who desire law and conceive of politics in juridified terms" (p. 208) is clear. Chinese citizens "are increasingly suing their employers, landlords, each other, and even the state" (p. 208). While Ruskola does not commit himself to modern law (though he states that "[t]he world in which we live is a fundamentally legal one" (p. 14)), he points to the rising rights consciousness in China and acknowledges that the importance of law as a "counterhegemonic" weapon is in fact increased in an authoritarian state such as China, where there is a greater risk of state encroachment on individual rights (p. 211). In closing *Legal Orientalism*, Ruskola observes that, despite China's economic and political rise, "the idea of 'Chinese law' continues to strike many as an oxymoron, haunted as it is by a long history of legal Orientalism" (p. 235).

A work as rich and ambitious as *Legal Orientalism* is open to multiple readings. This Review begins by placing *Legal Orientalism* in legal deconstruction before looking briefly at earlier works on the subject of Orientalism and law. It then examines the book's claims regarding the myth of China's lawlessness and explores the book's argument about why America sought extraterritorial rights from China, before looking at one empirical aspect of the work — America's prac-

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<sup>3</sup> Emphasis has been removed.

tice of extraterritoriality in China — and considering Orientalism's contribution to and future in the study of law.

## II. DECONSTRUCTION AND LEGAL ORIENTALISM

As an analytical method, deconstruction is a way of interrogating the law and its apparent discourses. Where law's technique is to define an action or condition and to provide the appurtenant legal consequences, deconstruction encourages skepticism of the oppositional dichotomies characteristic of law. Applied to legal doctrine, for instance, deconstruction encourages scrutiny of the relationship between what is established as the main rule and its exceptions or subsidiary rules. Deconstruction problematizes the premise of difference and reveals similarities so that the law's dichotomies look untenable. Applied to the theory within which legal doctrine is rooted, deconstruction suggests that, if there is a dominant narrative by which we have come to understand a legal concept's very existence, then there may be a marginalized narrative which can produce a "countervision."<sup>4</sup> If we identify a value that is assumed to be universal, we may ask if it is not in fact merely provincial.

To be sure, deconstructive technique is employed extensively in *Legal Orientalism*. In the case study of China's corporation law (Chapter Three) — a law characterized chiefly by its presumed absence until recent times — we see the binary between U.S. and Chinese law stood on its head by means of the argument that Chinese *family* law mirrored the structure and performed the functions of American corporation law (p. 67). The arguments focus on various aspects of Chinese family organizations and vehicles such as ancestral trusts. An important element of the reading of Chinese family law as a law of corporations is seeing through the state ideology of Confucianism to the individual profit-making that was being pursued. In American law, the collective entity is exceptional and, as a result, has to be made a legal person through the use of a legal fiction. In Confucianism, it is quite the opposite. The starting point is the collective, and the individual's profit-seeking activities had to be hidden behind kinship (pp. 64–65). Ruskola argues that, when looked at closely, kinship hid relationships achieved through contract.<sup>5</sup> His argument at once problema-

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<sup>4</sup> For a discussion of deconstruction, see J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)).

<sup>5</sup> Ruskola gives the example of an uxorilocal marriage where, contrary to the Confucian ideal, a son-in-law is adopted into a family with no sons and married to one of his new sisters (p. 77). Uxorilocal marriages usually involved adult men, not young boys, unlike the *t'ung-yang-hsi*, a marriage practice referred to in the same discussion, in which a girl child is transferred to a family to marry one of her new brothers upon maturity. See generally Arthur P. Wolf, *Adopt a Daughter-in-Law, Marry a Sister: A Chinese Solution to the Problem of the Incest Taboo*, 70 AM. AN-

tizes the view of China as being all about the family and not about contract. The interrogation is then reversed by the argument that many aspects of contemporary U.S. corporation law bear traces of familism. The fascinating examination consisting of a succession of points and counterpoints that draws upon sinology, kinship, anthropology, and legal history destabilizes the apparent difference between American and Chinese law premised on the individual/corporate identity binary.

Deconstruction cannot, however, supply normative direction nor can it fully explain why one value in the law was chosen over another. Thus it cannot be extended to interrogations of how we came to have a particular legal doctrine or even an entire legal system and why other concepts or models were rejected. *Legal Orientalism* cures this limitation by using intuitions gained from postcolonial studies. It thus provides an understanding of the “effect that Orientalism has had on the development” of American law, Chinese law, and international law (p. 3). Observing that these categories of law, including “law” itself, are not “pregiven object[s] of knowledge” (p. 3), Ruskola borrows Professor Boaventura de Sousa Santos’s theory of interlegality<sup>6</sup> to elaborate upon the intersubjective links between the several essentializing discourses of legal Orientalism — American biases about Chinese law, Chinese biases about American law, Chinese biases about their own law, and American biases about their own law.

### III. ORIENTALISM AND THE LAW

To appreciate how ambitious a work *Legal Orientalism* is, this Review first looks briefly at some of the existing studies of law in which traces of Professor Edward Said’s work may be found. It will be apparent that the scale of *Legal Orientalism* is unprecedented.

Ever since Said’s *Orientalism*,<sup>7</sup> if not before, we have understood that power is not sustained only through the naked use of force, but also through a discourse of difference between the colonizer and colonized peoples. Thus submission to the demands of authority cannot be accounted for by a fear of law alone, if at all. Orientalist discourses played their role in keeping the subjugated masses and their alien rulers in place. These discourses are so powerful that even after independence from colonial rule, they continue to resonate. Since we are contemplating a China that was not formally colonized, it is worth

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THROPOLOGIST 864 (1968); Arthur P. Wolf, *Childhood Association, Sexual Attraction, and the Incest Taboo: A Chinese Case*, 68 AM. ANTHROPOLOGIST 883 (1966).

<sup>6</sup> See BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE 385 (1995).

<sup>7</sup> EDWARD SAID, ORIENTALISM (1978).

noting that Said's ideas are also relevant to conditions of semi-colonialism and informal empires.

Said's *Orientalism* and other works are of most obvious relevance in prompting a reexamination of our understanding of non-Western law. How, exactly, was the legal sphere complicit in Orientalizing the Other or his or her law? It is reasonable enough to assume provisionally that legal scholars, broadly defined, participated in observing, gathering, and embedding knowledge of "local" or "Oriental" laws for the purposes of effective colonial rule. The study of local law is itself inseparable from colonialism because colonialism provided the access to the observational sites. The resulting knowledge, if we apply Said, thus emerged not from a position of neutrality but from the particular ideologies of colonialism and from the unequal relationship between the observer and the observed. Knowledge of the Other and his or her laws was thus not "pure"; this impurity tells us as much about the Western legal imagination as about the non-Western law it described. When gazed at by Western observers, laws, like other aspects of "Oriental" culture, were essentialized, homogenized, exoticized, distanced, and made to look primitive by the standards of European laws.

The very category of "local law" is today, thanks to sensitivities to Orientalism engendered by Said's work, seen as an act of colonial legislative violence. That which was previously "law," if it survived identification as "law" and was not judged "repugnant" to "civilized" rule,<sup>8</sup> was reduced to "local law." English law could be inserted into the space that was thereby cleared. As Professor John Strawson has pointed out, in British colonial practice, this method of reordering the legal space is traceable at least as far back as eighteenth-century India under Warren Hastings and William Jones.<sup>9</sup> To quote Strawson, "the occupied legal culture" is assigned a "subject place within the colonial legal order."<sup>10</sup> The process through which this was done was formalized through court judgments requiring a "recognizable body of law" (and form of government) and defining such a body of law. The presence of a system of law-like norms (which often presupposed a form of government) was often insufficient, a consequence of an entirely self-

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<sup>8</sup> One of many examples is the Weihaiwei Order in Council, 1901, Article 19. This Order was the constitutional instrument for Weihaiwei, a territory leased from China and over which Britain exercised jurisdiction without claiming sovereignty. Article 19 introduced English law into Weihaiwei whilst reserving a role for Chinese law "in civil disputes between natives" but only "so far as such law or custom [was] not repugnant to justice and morality." Art. 19, Weihaiwei Order in Council, 1901. For a discussion of the survival of Chinese law and custom in Hong Kong where such law was not repugnant to the fundamental principles of English law, see PETER WESLEY-SMITH, *THE SOURCES OF HONG KONG LAW 209-10* (1994).

<sup>9</sup> John Strawson, *Orientalism and Legal Education in the Middle East: Reading Frederic Goadby's Introduction to the Study of Law*, 21 *LEGAL STUD.* 663, 666 (2001).

<sup>10</sup> *Id.* at 668.

referential definition of “law.” “Local” laws might also have been limited in their application to land rights and to the private sphere of life (usually encompassing marriage, divorce, adoption, and succession rather than moveable property and contract).

In the particular case of the British annexation of Burma, Professor Andrew Huxley showed that local laws, and with them the local legal profession, could be swept aside by the argument that those local laws had been borrowed from elsewhere — India, in this case.<sup>11</sup> Although some British colonial officers had so admired Burmese law that they proposed a Research Institute of Burmese Buddhist Law,<sup>12</sup> their views were marginalized by the more politically powerful effort to denigrate Burmese Buddhist law. Aided by the fabricated archaeological findings of “frontier experts,” Burmese Buddhist law was said to have come from India.<sup>13</sup> Since the very annexation of Burma had been justified by the propaganda that India had once colonized Burma, this act of legal Orientalism suited the metanarrative of British imperialism in that region.<sup>14</sup>

The net result in Burma was the introduction of English law and the change to an English-speaking legal profession and judiciary. In contrast to the category of “local” law, English law was, by implication, “global.” And although other forms of law such as Hindu or Chinese law traveled from colony to colony through the British colonial bureaucracy, English law was the law that was, in practice, assumed to be applicable unless shown to be otherwise. It was capable of travelling with Englishmen, transplantable for use in faraway places to govern those whose cultures were, by all contemporary accounts, very different from that of the English. This reordering and repositioning occurred repeatedly across the British empire. One direct and ironic effect of this reordering is that those whose laws had been localized were themselves taught to view the law from the new colonial viewpoint so that they too saw their own laws as being at the peripheries of the colonial legal system.<sup>15</sup> Since colonialism is also a mental state, the process by which those studying their own law were taught to see law from the colonial viewpoint was a significant step in the process of the maintenance of colonial rule.

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<sup>11</sup> Andrew Huxley, *The Anglo-Buddhist War (1875–1905): The Circumstances Under Which Christians Developed Their Theory of Buddhism*, 7 J. COMP. L. 18, 24 (2012).

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* See generally Andrew Huxley, *Is Burmese Law Burmese? John Jardine, Em Forchhammer and Legal Orientalism*, 10 AUSTL. J. ASIAN L. 184 (2008).

<sup>15</sup> See generally, e.g., Strawson, *supra* note 9 (discussing a legal textbook for Egyptian and Palestinian students of law that explained the untidy mix of French and Islamic legal heritage in Egyptian law).

In the comparatively small body of works addressing Orientalism in and through the law, a number of these works have focused on court trials, and indeed the trial has emerged as a significant theater of Orientalism.<sup>16</sup> Court processes often provided opportunities for "cultural investigation" in which Orientalist ethnographic knowledge of culture, including law, was heard, accepted, and memorialized in the court record.<sup>17</sup> Trials, particularly adversarial ones, encouraged arguments to be made in their starkest, most exaggerated forms, which tended to result in caricature and essentialization of complex phenomena. The material consequence of these cultural investigations was usually unfortunate for "the natives" and ultimately for the law because they tended to pave the way for the suspension of civil liberties and the invocation of counterinsurgency or emergency measures.<sup>18</sup>

The court trial is also a place where Orientalist discourses belonging to the past can all too easily be invoked afresh. In examining the recent war crimes trial of former Liberian President Charles Taylor, for example, the anthropologist Professor Gerhard Anders has given a critical account of how prosecution witnesses were called to give evidence of gruesome manifestations (cannibalism, human sacrifice, secret society initiation rites, and the like) of what was impliedly African culture.<sup>19</sup> Anders observes that this evidence was not strictly necessary for the prosecution's case; rather, it was used as part of a strategy to weave a narrative of African religious and spiritual beliefs in order to cast Charles Taylor as the crazed dictator acting beyond the bounds of rationality.<sup>20</sup> It amounted to a repetition of colonial era representations of Africa as a dark, lawless continent where atrocities occur.<sup>21</sup> By repetition outside of the particular time in which that representation was made, "Africa," besides being portrayed as homogeneous, was also portrayed as unchanging.

There is also no doubt that new acts of neo-Orientalism are perpetrated today, and "in the imperial centre rather than the colonial pe-

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<sup>16</sup> See generally, e.g., Gerhard Anders, *Testifying About 'Uncivilized Events': Problematic Representations of Africa in the Trial Against Charles Taylor*, 24 LEIDEN J. INT'L L. 937 (2011); Mairii Aung-Thwin, *Recovering Peasant Politics in Colonial Burma: Orientalism, Rebellion and the Law*, 7 J. COMP. L. 39 (2012); Nandini Chatterjee, *Images of Islam: A Murder in Colonial Calcutta*, 7 J. COMP. L. 78 (2012).

<sup>17</sup> Chatterjee, *supra* note 16, at 79.

<sup>18</sup> See, for example, the effect on the lives of those labeled "thuggee" and their descendants discussed in Amrita Mukherjee, *Colonial Continuities: Criminal Tribes and the Cult of the Thug*, 7 J. COMP. L. 96, 106-10 (2012).

<sup>19</sup> See generally Anders, *supra* note 16.

<sup>20</sup> See *id.* at 958.

<sup>21</sup> See *id.* at 937, 939-40, 953-56.

riphery.”<sup>22</sup> In English court cases involving ethnic minorities’ child welfare decisions, a Christian discourse permeates in which the non-Christian or non-Western culture is presented only by reference to what it means to be a Christian. An Orientalized, racialized, and undeniably Christian understanding of other religions and cultures thus emerges.<sup>23</sup> Orientalism, we are reminded, is still at work and is still producing “material outcomes for people.”<sup>24</sup>

While several of these themes can be found in *Legal Orientalism*, the work departs from earlier efforts by other authors in its transnational expansiveness. It travels from the United States to China and back to argue that the world we inhabit today is one made by Orientalism. It is also unique in its reflexivity, in that it brings Orientalism home to bear on the very idea of (modern) law itself. As mentioned earlier, ever present in law is the binary or dichotomy. Ruskola’s theorizing shows how, in its structure, law is Orientalizing. To quote him, as “a discourse of state power,” law “makes ‘Orientals’ out of all of us” (p. 213).

#### IV. “LAWLESS” CHINA

The empirical starting point for the story that is unfolded in *Legal Orientalism* is the idea of a lawless China. What this means and when, how, and why this idea arose and became established are significant questions.

Since “lawless” conjures up a variety of situations, we should be clear about how Ruskola deploys this term in *Legal Orientalism*. Though Ruskola sometimes uses “lawlessness” to mean disorder<sup>25</sup> and sometimes to connote the absence of codified law, the term “lawlessness” where employed close to the main arguments of the book refers to the absence (or putative absence) of the rule of law and to a practice, instead, of rule by men.

As far as contemporary sources are concerned, *Legal Orientalism*’s claim that China was perceived as lawless is thinly grounded. We are told that much of Chapter One’s analysis “refers to popular and journalistic accounts” (p. 31) of China (including, we assume, Chinese law), but these are difficult to locate in the pages of the book. Ernest Alabaster and Marcel Granet are quoted from their works in 1899 and 1934, respectively (pp. 11–12), but the works of these two key authori-

<sup>22</sup> Suhraiya Jivraj & Didi Herman, “It Is Difficult for a White Judge to Understand”: *Orientalism, Racialisation, and Christianity in English Child Welfare Cases*, 21 CHILD & FAM. L.Q. 283, 307 (2009).

<sup>23</sup> *Id.* at 286.

<sup>24</sup> *Id.* at 307.

<sup>25</sup> An instance of this occurs when Ruskola describes “actual” lawlessness in China during the late imperial period when the Qing dynasty’s authority was weak (p. 50).

ties on Chinese law of their times in the West cannot be regarded as "popular and journalistic accounts." Moreover, it is doubtful whether Alabaster's lament regarding the ignorance of foreigners and some scholars regarding the existence of Chinese law should be taken at face value.

As a counterpoint to the argument regarding the overwhelmingly negative impression of Chinese law held by Europeans, some positive accounts are briefly referred to in Chapter Two. These include the positive report of a sixteenth-century Spanish Jesuit missionary to China regarding Chinese criminal justice "which these Gentiles have great care to perform[]" (p. 46),<sup>26</sup> and the views of Matteo Ricci, who is referred to for his observation that Chinese law had a few laudable characteristics (p. 251 n.73). We are later also informed, again only briefly, that early-modern-period Jesuit accounts of Chinese law were "predominantly positive" (p. 252 n.81). Given the importance of missionary accounts in sinology — for missionaries were allowed into China a long time before traders were — and Ruskola's own acknowledgement of the important role that American missionaries played in U.S. government contacts in China from the 1830s to 1860s (p. 138),<sup>27</sup> the generally scant treatment of missionaries is surprising.

The relative absence in *Legal Orientalism* of any discussion of firsthand accounts of those involved in the China trade is also rather surprising. Sir George Staunton, who worked for the British East India Company and who, in 1810, published the first translation into English of the main statutes of the Qing Dynasty's Penal Code, is mentioned only for his prefatory comment on the great challenge posed by the Chinese language to the student of Chinese law, the comment that Chinese laws were "so arbitrary" as to be "contrary to all reason and justice" (p. 47),<sup>28</sup> and his argument that submission to authority is central to Chinese government (p. 66). Staunton's Translator's Preface is thirty-five pages long and contains many other observations. For example, he speaks of China as a "highly interesting portion of the civilized world";<sup>29</sup> explains briefly that the Penal Code is but a portion of Chinese law;<sup>30</sup> and recommends that his readers follow the advice of Sir William Jones to judge a law by the extent to which it was "con-

<sup>26</sup> The author quotes 1 JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 178 (1928) (internal quotation marks omitted).

<sup>27</sup> See generally Michael C. Lazich, *American Missionaries and the Opium Trade in Nineteenth-Century China*, 17 J. WORLD HIST. 197 (2006) (arguing that missionaries were influential in shaping American policy in East Asia).

<sup>28</sup> The author quotes Staunton. Internal quotation marks have been omitted.

<sup>29</sup> George Thomas Staunton, *Preface* to TA TSING LEU LEE, *BEING THE FUNDAMENTAL LAWS, AND A SELECTION FROM THE SUPPLEMENTAL STATUTES, OF THE PENAL CODE OF CHINA*, at iii (George Thomas Staunton trans., 1810).

<sup>30</sup> *Id.* at xvi.

genial to the disposition and habits, to the religious prejudices, and approved immemorial usages, of the people, for whom they were enacted.”<sup>31</sup> Staunton even anticipates the common first impression that Chinese law frequently uses corporal punishment when he tells the reader that “a more careful inspection will lead to a discovery of so many grounds of mitigation, so many exceptions in favour of particular classes, and in consideration of particular circumstances, that the penal system is found, in fact, almost entirely to abandon that part of its outward and apparent character.”<sup>32</sup>

After the *Chinese Repository* published a review of Staunton’s translation, the periodical received a letter that objected to his positive characterizations, protesting strenuously that there was a large gap between Chinese law and its practice and complaining about the frequency of bribery and corruption.<sup>33</sup>

Chapter Two in fact promises an examination of scholarship — “Orientalist scholarship in comparative law, comparative philosophy, and comparative politics” (pp. 31–32) — justified, correctly, on the basis that “scholarship constitutes one important tradition from which our modern understandings of Chinese law emerge” (p. 32). While it is reasonable to assume that American imaginings regarding China rested on earlier European Orientalist ideas, we are led through a succession of Western thinkers — Montesquieu, Hegel, Voltaire, Marx, Weber, Foucault, Derrida — whose works span three centuries, including the twentieth (pp. 42–47). Hegel is quoted extensively with the caveat that, though he did not invent Orientalism concerning China, his writings capture neatly the key elements of the classical European Orientalist position on China (pp. 42–44). That classical European view was that China, like many primitive states, was tradition-bound and unchanging due in large part to the influences of Confucianism and neo-Confucianism. With these attributes, China’s place is at the opposite end of civilization. For Hegel, in line with ideas traceable to Montesquieu, China represented despotism, the opposite of the freedom that was the ultimate goal of civilization (p. 43). China’s despotism was a result of everything that was most obviously different about China — the importance of family relations, a state that was not separated from the family, and a conflation of morality and law. The result was that

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<sup>31</sup> *Id.* at xxvi (quoting William Jones, *Preface* to *INSTITUTES OF HINDU LAW*, at iii (1796) (internal quotation mark omitted)).

<sup>32</sup> *Id.* at xxvii.

<sup>33</sup> 1–2 G.W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* 98–99 (Howard Fertig 1969). For a discussion of the largely negative reception of Staunton’s work in the British periodicals, see S.P. Ong, *Jurisdictional Politics in Canton and the First English Translation of the Qing Penal Code (1810), Winner of the 2nd Sir George Staunton Award*, 20 J. ROYAL ASIATIC SOC’Y GR. BRIT. & IR. 141, 148–51 (2010).

individuals obeyed the law only out of fear of punishment. The views of Weber, Foucault, and Derrida are useful in showing the stubborn legacy of Orientalism, there to be revisited by great thinker after great thinker. In discussing the foundations for the discourses on the lack of Chinese law or the Chinese lack of subjectivity that *Legal Orientalism* argues led to the mid-nineteenth-century unequal treaties, could it be that the views of Staunton, China traders, and missionaries were less known to those in whose hands American extraterritoriality was pursued than were the views of Montesquieu, Hegel, and Weber? Besides, in ignoring chronology, there is the risk of unwittingly reiterating the Orientalist myth of a static China.

#### V. THE UNITED STATES AND EXTRATERRITORIALITY IN CHINA BEFORE THE OPIUM WAR

One of *Legal Orientalism's* aims is to make known the history of American extraterritorial jurisdiction. Works on Caleb Cushing, the American minister who negotiated the Treaty of Wanghia, give that history varying degrees of attention in evaluating the achievements of Cushing's mission to China.<sup>34</sup> American extraterritoriality in China is discussed in G.W. Keeton's two-volume work on extraterritoriality in China,<sup>35</sup> a work that will be referred to later, and in T.R. Jernigan's *China in Law and Commerce*.<sup>36</sup> Both of these works were first published over eight decades ago, and a fresh and dedicated examination of that history is overdue.

Why did the United States suddenly embrace extraterritorial rights for its citizens in China? Ruskola argues that the turning point was the Sino-U.S. Treaty of Wanghia,<sup>37</sup> which paved the way for a formal American empire at the end of the century when it took over Spain's colonial possessions (pp. 110, 130). Framing the discussion in this chapter is the narrative of how the new American nation, starting as it did with an insistence on equal sovereign relations between states and a rejection of European colonialism (p. 108), ended up extracting an unequal treaty from China and indeed perfecting extraterritoriality beyond similar British practice (p. 140). Ruskola's short sketch of the history of U.S. attitudes toward extraterritorial jurisdiction leads him to his starting point — that "until the outbreak of the Sino-British Opium War in 1839, . . . the United States was in fact ideologically

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<sup>34</sup> See JOHN M. BELOHLAVEK, *BROKEN GLASS: CALEB CUSHING & THE SHATTERING OF THE UNION* (2005); Ping Chia Kuo, *Caleb Cushing and the Treaty of Wanghia, 1844*, 5 J. MOD. HIST. 34 (1933).

<sup>35</sup> 1-2 KEETON, *supra* note 33.

<sup>36</sup> T.R. JERNIGAN, *CHINA IN LAW AND COMMERCE* 193-204 (1905).

<sup>37</sup> Treaty of Peace, Amity, and Commerce, U.S.-China, July 3, 1844, 8 Stat. 592.

and politically inclined to respect the sovereign equality of Oriental states such as China — unlike European imperialists such as the British” (p. 123).

One of the episodes relied on for the narrative concerning the abrupt change in U.S. policy is the express acknowledgement by the Americans of Chinese jurisdiction over foreigners in 1805 (p. 122). This acknowledgement came in the form of a protest addressed to the Governor of Canton by the American Consul and twenty-seven merchants. In it they stated that Americans resorting to China had conducted themselves “by a strict regard and respect for the laws and usages of this Empire” (p. 122).<sup>38</sup> They also referred to China’s recognition of “the ancient and well established laws and usages of all civilized nations” such that Americans could expect the “sovereign and independent Empire” of China to afford Americans protection for themselves and their property.<sup>39</sup> As G.W. Keeton points out, however, “the value of this declaration is somewhat discounted by the fact that it was made, not to admit Chinese jurisdiction over Americans . . . but to obtain Chinese assistance against the oppressive action of the British naval authorities”<sup>40</sup> who had been wont to search American vessels for deserters during the Napoleonic Wars.

Another episode that Ruskola uses to show that the Americans were unlike their British counterparts on the matter of jurisdiction is the Francis Terranova affair in 1821 (p. 134). Terranova, a sailor, had been onboard the *Emily*, an American mercantile ship, when he allegedly threw an earthenware jar at a fruit seller after she had angered him by failing to give him more for his money. The jar allegedly hit her in the head, causing her to fall overboard and drown.

In the common account of the affair, the Americans surrendered the accused to the Chinese authorities, acknowledging the jurisdiction of the Chinese courts and the application of Chinese law to Americans in China. *Legal Orientalism* does not challenge this version, where the Terranova affair is part of the sketch of the history of Sino-U.S. relations, which is intended to lay the ground for the later argument that Caleb Cushing had to find a convincing explanation for his actions because he had clearly departed from American policy.

To be sure, Terranova was the only foreigner to have been tried and executed by the Chinese in the years 1804 to 1834. This does not mean that there was *no* American opposition to Chinese jurisdiction in this affair. The evidence in fact points toward hypocrisy and racism

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<sup>38</sup> Ruskola quotes TYLER DENNETT, AMERICANS IN EASTERN ASIA 84 (1922).

<sup>39</sup> *Id.*

<sup>40</sup> 1 KEETON, *supra* note 33, at 49.

on the part of the Americans. They refused to surrender Terranova to the Chinese for trial.<sup>41</sup>

This reluctance to hand Terranova over to the Chinese authorities is remarkable given that "there were a number of people in the American community who assumed that Terranova had thrown the jar at the deceased in anger."<sup>42</sup> Furthermore, the American Consul, Wilcocks, who had viewed the woman's corpse two days after she died, concluded that the deceased had died from a head injury that was caused by the jar and that the wound could not have been inflicted post-mortem. If necessary, Wilcocks had planned to pay off the family of the deceased with a very large bribe, a common practice when foreigners had caused the death or injury of a Chinese individual;<sup>43</sup> however, the deceased's husband complained to the Chinese authorities before Wilcocks was able to do so.<sup>44</sup>

Professor Joseph Askew's careful reassessment of Terranova's trial also suggests a sharp cleavage between Wilcocks and Captain Coupland of the *Emily*. For reasons that are still unclear but that may involve the fact that the *Emily*'s cargo consisted almost entirely of opium, Coupland appears to have been determined to protect his illiterate crewman. Within two days of the woman's death, he procured more than a dozen depositions of doubtful veracity from the crews of the *Emily* and other vessels. These depositions shared some similarities in their language, content, and purpose of showing that the crew members saw that the woman's hat and the jar were "entirely whole" and undamaged shortly after the woman fell overboard.<sup>45</sup> Coupland was also quick to bring together fifteen supportive members of the American community to give his actions legitimacy,<sup>46</sup> a move that made it impossible for Wilcocks to act in accordance with his own instincts. This committee drew up demands regarding the conduct of Terranova's trial. It advised that the trial proposed by the Viceroy

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<sup>41</sup> See Joseph Benjamin Askew, *Re-visiting New Territory: The Terranova Incident Re-examined*, 28 ASIAN STUD. REV. 351, 357 (2004). In particular, Askew discusses how later accounts of the episode used the word "dropped" in place of "threw" when describing Terranova's act when in fact there was no evidence that Terranova had dropped the jar on the woman's head by accident. *Id.* at 365. According to Askew, that Terranova had dropped the jar was not part of the accused's or any other witness's testimony, nor a claim made in court, nor how the case is reported in the early historical works on the affair. *Id.*

<sup>42</sup> *Id.* at 357.

<sup>43</sup> *Id.* at 352-53.

<sup>44</sup> See GEORGE THOMAS STAUNTON, MISCELLANEOUS NOTICES RELATING TO CHINA 429-30 (1822) (quoting a May 6, 1822 article in *The Times*), reprinted in 2 KEETON, *supra* note 33, at 189, 199. The version of the events reported in *The Times* suggests extortion by the family, which was also part of the case put forward by the defense.

<sup>45</sup> Askew, *supra* note 41, at 355.

<sup>46</sup> *Id.* at 357.

proceed, even though Wilcocks's request for a qualified interpreter — Dr. Morrison — was rejected.<sup>47</sup>

The Americans demanded “a fair and impartial trial in which all evidence for his defence foreign or Chinese shall be equally and impartially received, the friends of the accused to be present during his trial and the Prisoner be permitted to remain in the custody of Capt. Coupland.”<sup>48</sup> Certainly, the Americans were allowed to be present at the trial that took place on the *Emily*. Having studied reports of the trial, Askew observes that the trial had some features of Western-style adversarial and inquisitorial trials.<sup>49</sup> This was in stark contrast with the later trial of Terranova at which no foreigner was allowed. At that later trial onshore, Terranova reportedly confessed to his crime; he was swiftly put to death by strangulation in accordance with Chinese law.<sup>50</sup> Askew argues that reports of the first trial show that the Chinese authorities had in fact been flexible in accommodating the demands of the Americans and that the Americans' complaints about the magistrate's refusal to consider the case of the defense were unreasonable. As Askew puts it, “[t]he Americans did get to put their side of the story; the judge simply did not believe it.”<sup>51</sup> Their complaints that the magistrate had prejudged the case, which likely had some truth to them, was a misunderstanding of trial procedures that — in a tradition closer to the civil tradition than to that of the common law — involve an investigating magistrate.<sup>52</sup> The various reports, taken together, suggest that the magistrate allowed arguments to be made to him and quite reasonably brought the trial to an end.

After the trial onboard the *Emily*, and with the Americans still refusing to hand over Terranova, a ban on American trading was imposed. The Chinese merchant responsible for the conduct of the *Emily* (the “security merchant”<sup>53</sup>) under the system of trading with foreigners then in place was arrested. Over two weeks later, the Americans, while still claiming that Chinese laws were deficient and declaring Terranova's innocence, made it clear that they would not resist if the Chinese authorities were to remove Terranova from the *Emily*.

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<sup>47</sup> *Id.* at 358.

<sup>48</sup> *Id.* at 357–58 (internal quotation marks omitted).

<sup>49</sup> *Id.* at 359.

<sup>50</sup> STAUNTON, *supra* note 44, at 430–32.

<sup>51</sup> Askew, *supra* note 41, at 362.

<sup>52</sup> *Id.*

<sup>53</sup> The “security merchant,” dating from its institution in 1755, was a Co-hong member who was responsible to the local authorities for a foreign ship while it remained in port. He was meant to be the sole channel of communication between the local authorities and those onboard the ship. The Co-hong itself, formed in 1720, was the guild of merchants at Canton who traded with foreigners and who regulated prices. In the Canton system, after 1782, foreigners were allowed to trade only through the Co-hong.

Terranova was removed on October 24.<sup>54</sup> Why the Americans adopted this position, why Terranova was then tried and executed so quickly, and why the Americans did not make any official complaint are matters that have yet to be fully explored. Ultimately, these questions may have neatly resolved the local Chinese and Americans' shared interests in resuming trade. Terranova's body was still warm when the Viceroy of Canton announced that "[s]ince [the Americans] have now delivered up the foreign murderer . . . it is proper to permit the trade to be again opened; and cargo to be taken up and down, in order to manifest our compassion."<sup>55</sup> He commanded the Hong merchants to reopen trade "and to communicate an order to the American chief, that he may inform the several ships that they may carry on their trade as formerly, and open their hatches, and buy and sell."<sup>56</sup>

Askew ultimately concludes that "Terranova was guilty enough for a reasonable and impartial jury to have convicted him of murder" and that there is "little evidence of any particular injustice having been done to Terranova."<sup>57</sup> It remains unclear why the Americans, the British, and other foreigners insisted that he was innocent, even when many among them thought otherwise. Askew puts forward the argument of American racism, evident from the refusal of juries to convict Europeans for the murders of "non-Whites" from the beginning of European settlement in North America, and the resistance of the British to Qing jurisdiction that had already become a feature of the relations of foreigners with Chinese authorities for some time.<sup>58</sup> Askew also suggests that there is no clear answer as to why the Chinese authorities were so determined to prosecute Terranova, especially given that the deceased was a member of the socially and economically marginalized Tanka.<sup>59</sup> A contemporary source, however, provides a clue as to why Terranova was executed:

The strong impression which prevails with the Chinese local government of the insubordinate character of foreigners renders it peculiarly disposed to seize any opportunity of inflicting upon them what it conceives to be an example of salutary terror; and to this it is further goaded on by the general feelings on the subject of the Chinese populace, to whom the foreign sailors are peculiarly obnoxious . . .<sup>60</sup>

The refusal to surrender Terranova, the demands for a fair trial, and the subsequent complaints show that the so-called American

<sup>54</sup> Askew, *supra* note 41, at 363.

<sup>55</sup> Paper Issued by the Viceroy of Canton on Sunday, October 28th, 1821, *reprinted in* STAUNTON, *supra* note 44, at 416, 417.

<sup>56</sup> *Id.*, *reprinted in* 2 KEETON, *supra* note 33, at 193.

<sup>57</sup> Askew, *supra* note 41, at 366.

<sup>58</sup> *Id.* at 366–67.

<sup>59</sup> *Id.* at 367.

<sup>60</sup> STAUNTON, *supra* note 44, at 415.

“acknowledgement” of Chinese jurisdiction and submission to Chinese law was hedged by a deep mistrust of Chinese law and legal procedure. Two decades later, after the British defeated the Chinese in the Opium War and about two weeks before the signing of the Treaty of Wanghia, there was another instance of American refusal, at least at first, to surrender an American for trial.

#### VI. CALEB CUSHING, AMERICAN TRADERS, AND MISSIONARIES

The claim that America respected China’s sovereign equality and that it opposed extraterritoriality is also rendered less certain by studies of the attitudes of American traders and missionaries in China. These attitudes also provide an alternative understanding of how American formal extraterritoriality in China began.

Ruskola’s discussion of the Treaty of Wanghia focuses on Caleb Cushing and his success in negotiating the treaty. Significant weight is attached to the fact that the treaty that he obtained, with its clauses on extraterritorial rights for American citizens, exceeded the mandate given to him by his President (p. 131). Ruskola points to assurances of American respect for Chinese law contained in President Tyler’s letter to the Emperor, a letter that Cushing had been tasked with delivering (p. 131). Ruskola also implies that it is because Cushing was aware that he acted beyond his instructions that, to legitimize his actions, he rewrote the history of international law, a version of which was then applied in American intercourse with other states (pp. 132–35).

Cushing had an interest in the Far Eastern trade, which had been informed by his father and his cousin.<sup>61</sup> He was also a friend to New England merchants who were concerned that with the signing of the Sino-British Treaty of Nanking, British traders would monopolize the China trade.<sup>62</sup> Cushing even wrote to President Tyler attempting to persuade him of the need to send a mission to China for the purpose of negotiating a trade treaty.<sup>63</sup> American traders in Canton, who had found their trade with China hampered by the Canton system, had in 1839 already petitioned for a commercial agent to negotiate a commercial treaty with China. Fearing Chinese attacks, they also asked for naval protection for their property and safety. Their petition was presented to the House of Representatives in early 1840.<sup>64</sup>

Most scholars agree that Cushing had no real difficulty in obtaining Chinese consent to his draft treaty, including its clauses on extraterri-

<sup>61</sup> See BELOHLAVEK, *supra* note 34, at 153–54.

<sup>62</sup> See Richard E. Welch, Jr., *Caleb Cushing’s Chinese Mission and the Treaty of Wanghia: A Review*, 58 OR. HIST. Q. 328, 330 (1957).

<sup>63</sup> 1 CLAUDE M. FUESS, *THE LIFE OF CALEB CUSHING* 407 (1923).

<sup>64</sup> William J. Donahue, *The Caleb Cushing Mission*, 16 MOD. ASIAN STUD. 193, 194 (1982).

torial rights for American citizens. One study suggests that, on the Chinese side, what mattered most was preventing Cushing from going to Peking.<sup>65</sup> Once Cushing had withdrawn his threat of going to Peking to meet the Emperor, the Imperial commissioner sent to negotiate with him was so relieved that the treaty was signed within thirteen days of the start of their negotiations and without protracted disputes over the substantive issues at stake.<sup>66</sup>

Other commentators deal more directly with the question of extra-territoriality but place little stress on its centrality in the negotiations over the treaty.<sup>67</sup> T.R. Jernigan, U.S. Consul General in Shanghai from 1893 to 1897 and later a lawyer in private practice in Shanghai, wrote that "it was not so difficult for [Cushing] to secure from China a large grant of treaty powers" because "China had been prepared, by her own previous acts, to grant extra-territorial rights to western nations."<sup>68</sup> This was a reference not merely to the rights granted to the British under the Treaty of Nanking. China had already entered into a similar treaty with Kokand that had allowed officials and merchants from Kokand to reside in Kashgar and other places in China and granted extraterritorial jurisdiction to the foreigners' own commercial officers.<sup>69</sup>

Moreover, while persuading China to conduct diplomatic relations of the kind European nations practiced remained a sticking point, Professor Harry Gelber argues that extraterritorial rights were not so different from China's practice of requiring foreigners to be supervised by their own headmen. In his detailed historiography of the Opium War, he explains:

As for the admission of consuls at these ports, and their duties *vis à vis* their own citizens, that also chimed well enough with the traditional Chinese view that foreign headmen should supervise their own people. The heated condemnation of the extra-territoriality provisions by Chinese nationalists and Western sympathizers many decades later differs sharply from the views and tempers of the 1830s and 1840s. Neither the Chinese negotiators at the time, nor the imperial government, were greatly worried about extra-territoriality.<sup>70</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Kuo, *supra* note 34, at 42–54; *see also* Welch, *supra* note 62, at 338–45.

<sup>67</sup> *See, e.g.*, Donahue, *supra* note 64, at 212.

<sup>68</sup> JERNIGAN, *supra* note 36, at 195.

<sup>69</sup> *See* HARRY G. GELBER, OPIUM, SOLDIERS AND EVANGELICALS 149 (2004).

<sup>70</sup> *Id.* at 150. For a modern-day view of the general disposition of the Chinese toward extra-territoriality, *see* HE WEIFANG, IN THE NAME OF JUSTICE: STRIVING FOR THE RULE OF LAW IN CHINA 22 (2012) ("In the eyes of people during the reign of the Daoguang emperor, it was only natural that foreigners should be governed by their own laws. They saw it as the most convenient and straightforward way of handling things." (quoting JIANG TINGFU, MODERN HISTORY OF CHINA 27 (1987)) (internal quotation marks omitted).

To be sure, the idea of such a headman having responsibility for the deeds of those under his supervision went against the grain of Western ideas of individual responsibility and was at the root of some of the conflicts with the Chinese authorities. Yet the system had been in place for some time. The main difference was that for most nations with a national trading company, it was a company officer rather than a consul appointed by the government who acted as the head for that nation's traders. One such company, the British East India Company, had entered into agreements with China regarding jurisdiction over its traders. Traders (and crewmen of the merchant vessels) of other European nations had the benefit of the practice of extraterritorial jurisdiction, at least to a degree, even if these rights were not recognized formally by a treaty. This fact helps explain why few foreigners had been tried for crimes in Chinese courts.

Gelber's understanding is thus that when the 1843 Treaty of the Bogue,<sup>71</sup> the supplementary treaty to the Treaty of Nanking, gave extraterritorial jurisdiction for British citizens to be tried in British courts, this formalized such jurisdiction in accord with prevailing practices.<sup>72</sup> This is also the view of Keeton, who wrote a generation earlier that formal extraterritoriality through the treaties "represent[ed] a continuation of, and not a fundamental change in, European policy towards China."<sup>73</sup> Nonetheless, to quote Professor Richard E. Welch, Cushing was responsible for "obtain[ing] the first formal recognition in China of the principle of extraterritoriality in the *form* in which it would loom so large in later Chinese diplomatic history."<sup>74</sup>

The more difficult question is why Cushing sought a treaty that expressly mentioned extraterritorial rights when this exceeded his mandate. One possible answer that has been posited is that Cushing was determined not to return to America empty-handed.<sup>75</sup> Not long after he arrived in Macao, he was informed that the Chinese authorities had made it clear that all of the ports opened to the British were also open to other foreign traders.<sup>76</sup> In the minds of some, Cushing's eight-month-long voyage to China had been unnecessary. However, as there was still merit in putting matters on the footing of a treaty (to guard against China later changing its mind), one reading of the situation is that the extension to other foreigners of the concessions granted to the British had motivated Cushing "to strive for a treaty which se-

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<sup>71</sup> Treaty of the Bogue, U.K.-China, Oct. 8, 1843.

<sup>72</sup> See GELBER, *supra* note 69, at 152.

<sup>73</sup> I KEETON, *supra* note 33, at 70.

<sup>74</sup> Welch, *supra* note 62, at 350.

<sup>75</sup> See BELOHLAVEK, *supra* note 34, at 165.

<sup>76</sup> See Welch, *supra* note 62, at 335, 337.

cured additional concessions for the United States."<sup>77</sup> A recent biography suggests that for Cushing, his China assignment, aside from satisfying his wanderlust, was a political opportunity.<sup>78</sup> In this view, returning from China with clear, express provisions on extraterritoriality to the delight of many merchants was of great personal significance to him.

Ruskola's answer is that after arriving in Macao, Cushing suffered several "indignities" (p. 132) and was prevented from carrying out his mission of delivering President Tyler's letter to the Emperor. Like the British envoy Napier several years earlier, Cushing was kept waiting for several months.<sup>79</sup> These experiences led Cushing to adopt the view reached by the British that the Chinese were arrogant and that their failure to welcome foreign traders was an insult (p. 132). With "insult" and its concomitant "honor" added to the vocabulary, submitting oneself to Chinese jurisdiction would be an act of self-humiliation in front of Europeans, among whom Americans expected to be equal in status (pp. 136–37). Extraterritorial rights were therefore utterly necessary. Ruskola's interesting and detailed critique of Cushing's memorandum to the State Department, written to justify the receipt of extraterritorial rights, shows how Cushing achieved a "considerable rhetorical feat" (p. 135) in manipulating the history of international law to deny its universality by confining its application to Christian states.

Cushing certainly threatened war against China when he was prevented from making his way to Peking. This behavior is remarkable, given the tone of the presidential letter he was charged with delivering to the Emperor.<sup>80</sup> Ruskola's argument, however, does not take into account evidence showing that Cushing may already have been of the view that extraterritorial rights were necessary. In his memorandum to the State Department, he explains that he had *entered* China with the "general conviction" that the United States should not concede jurisdiction over any U.S. citizen to a foreign state where that foreign state was not a Christian state.<sup>81</sup>

Whether or not Cushing already favored demanding extraterritorial rights, he would in Macao have been surrounded by traders and missionaries who thought it an absolute necessity to do so. Professor Stuart C. Miller, studying the private papers of about fifty American traders involved in the China trade, found that there was little evidence to support "the friendly trader concept which is so important to the gen-

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<sup>77</sup> *Id.* at 341.

<sup>78</sup> BELOHLAVEK, *supra* note 34, at 150–53.

<sup>79</sup> *Id.* at 164.

<sup>80</sup> Cushing informed the Chinese authorities that American vessels, including those of the Pacific Squadron, would arrive in Chinese waters. *See* Welch, *supra* note 62, at 339.

<sup>81</sup> *See id.* at 351.

eralizations made about early American opinions or images of the Chinese.<sup>82</sup> He instead found that most American traders who served in China supported the war. They had experienced the same frustrations from the limitations placed on trading as had their British counterparts. By this time, some of them were participating in the illegal opium trade. Miller also found that between the traders of the two nations, there was an atmosphere of fraternity that was not threatened even when Britain and America were at war. American traders regularly used the British factory facilities (libraries, chapels, and clinics).<sup>83</sup> There was very little Anglophobia.<sup>84</sup> Like their British counterparts, American traders were critical of China — its social and political systems along with its laws.<sup>85</sup> “Each trader,” Miller writes, “had his own anecdote to illustrate the oppressive injustice to be found in China.”<sup>86</sup> These conclusions from the private records of traders in Canton (and Macao, where the traders would have had to retire to between trading seasons) show that Cushing would have found a great deal of support, not only for the quest to have the same trading rights as the British, but also for extraterritorial rights.

American missionaries too, judging from the views expressed in the aforementioned *Chinese Repository*, shared the merchants’ views with respect to both the Opium War and extraterritoriality. As Ruskola points out, Peter Parker, an American medical missionary in Canton, and Reverend Elijah Coleman Bridgman, who was the first American missionary to China and who later became the first President of the North China Branch of the Royal Asiatic Society,<sup>87</sup> were Caleb Cushing’s “Chinese Secretaries” in the negotiations for the Treaty of Wanghia (p. 138). Parker and Bridgman were the founding editors of the *Chinese Repository*,<sup>88</sup> which, beginning in the 1830s, had mounted a sustained campaign to highlight the failings of the Chinese legal system and to keep up the pressure for extraterritorial rights. On extraterritoriality especially, Bridgman had made his criticisms of China and Chinese law, particularly in its practice. He had also written at length on the need for extraterritorial rights. Other missionaries also wrote of what they knew of Chinese trials and punishments and of how local magistrates and officials often did not adhere to the laws.

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<sup>82</sup> Stuart C. Miller, *The American Trader's Image of China, 1785–1840*, 36 PAC. HIST. REV. 375, 395 (1967).

<sup>83</sup> *Id.* at 381.

<sup>84</sup> *Id.* at 380–81.

<sup>85</sup> *Id.* at 383.

<sup>86</sup> *Id.* at 382.

<sup>87</sup> I KEETON, *supra* note 33, at 97.

<sup>88</sup> The *Chinese Repository* began in 1832. *Id.*

After arriving in China, Cushing found himself dealing with the Chinese authorities over the death of a Chinese man named Hsü A-mun from a gunshot wound caused by an American in Canton.<sup>89</sup> As had occurred with Terranova, Cushing refused to surrender the culprit in the face of repeated demands by the Chinese authorities in Canton.<sup>90</sup> It is when Cushing writes to Forbes to convey his decision to “refuse at once all applications for the surrender of the party who killed Sue Aman [Hsü A-mun],” that he considers the subject of extraterritoriality.<sup>91</sup> He places it in the context of a law of nations that, to use Ruskola’s terminology, is particular, rather than universal — particular, that is, to a community of “civilisation and religion.”<sup>92</sup> It is this same international law — that which does not accord equal status to all states in the question of submission to law — that Cushing develops when he later writes his report of his success in obtaining the Treaty of Wanghia. Cushing was party to the diplomatic wrangling over the case before it fizzled out; it is highly likely that if he was not at first determined to obtain extraterritorial rights, this case was critical in bringing home to him the necessity of having such rights clearly stated in a treaty.

Before leaving the subject of extraterritoriality, it is necessary to backtrack a little. The argument pursued in *Legal Orientalism* regarding America’s enthusiasm for extraterritorial rights in China rests on the centrality of this issue in the context of British imperialism in China. Prominently stated in the “thumbnail sketch” of British relations with China that led to the Treaty of Nanjing is the British demand for free trade in order to resume the opium trade, establish British superiority over the Chinese, and — “invoking an increasingly authoritative discourse of legal Orientalism” — establish extraterritorial jurisdiction because “the British insisted that they could not submit to the arbitrary and cruel practices of Chinese justice” (p. 125). The British were made up of several interest groups: the “country” (private) traders not employed by the East India Company, the political elite in London, English manufacturers, and, not least of all, Indian merchants and administrators. These groups did not necessarily espouse the same views, nor was there no oscillation or change of stance by some over time. Aside from the calls from the interested parties, other more pressing matters occupied the British government and made China a peripheral issue for what must have been, from the perspective of the British merchants in Canton, a rather long time. Continuing difficulties over Chinese imperial protocol similarly drew different responses.

<sup>89</sup> Kuo, *supra* note 34, at 43–44.

<sup>90</sup> I KEETON, *supra* note 33, at 183.

<sup>91</sup> Kuo, *supra* note 34, at 44–45.

<sup>92</sup> I KEETON, *supra* note 33, at 181–82.

Also ignored in the sketch is the dispute with the Chinese over the practical matter of control and supervision of the British merchants. As we have seen above, the Chinese authorities expected the British to control their own merchants. In the heyday of the East India Company's trade in China, this system worked reasonably well. The Company was responsible for its employees and its licensed merchants. By the early 1800s, the number of so-called "country traders" had risen. These traders were not subject to the command of the Company. From the point of view of the British government, control over such traders without proper diplomatic recognition by the Emperor of China was unusual, if not unsatisfactory. In 1833, a British Superintendent of Trade was appointed to exercise some control over the increasing number of private traders in Canton. This office was, however, not given sufficient legislative or enforcement powers until 1843.<sup>93</sup> The ineffectual control of the British government over British subjects involved in illegal trading of opium in China had become very obvious by the mid- to late 1830s. When the Chinese authorities were pursuing their anti-opium campaigns more vigorously, they expected the British Superintendent to have greater control over the illegal trade in opium. There are certainly scholarly studies that point to this jurisdictional lacuna over British merchants and that suggest that it was this lack of control as much as perceived faults with Chinese law that accounts for British demands for extraterritoriality in China.

To be sure, those who were in favor of the use of force cited the lawlessness of China and the need to convince China to participate in the order of interstate relations familiar to the Europeans and Americans. There were also murmurs of protecting British "honor" and how "British prestige" would suffer from the inability of the British to control smuggling carried out by British merchants, but these views were not necessarily widely shared until the country traders succeeded in changing public opinion in England. Consider, for example, Staunton's speech in the House of Commons in 1840 when Parliament was considering its response to the blockade of Canton and the Humen incident, in which the Chinese authorities seized and destroyed opium cargo belonging to the British.<sup>94</sup> Staunton expresses the view that the "law of nations" must apply to China, yet also implies that China has a right to determine the rules of foreigners' intercourse with itself.<sup>95</sup> He does not deny that China had laws or suggest that China's "restrictions

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<sup>93</sup> An Act for the Better Government of Her Majesty's Subjects Resorting to China, 1843, 6 & 7 Vict., c. 80 (Eng.).

<sup>94</sup> Sir George Staunton, Speech on Sir James Graham's Motion on the China Trade in the House of Commons 11-12 (Apr. 7, 1840).

<sup>95</sup> *Id.*

and regulations" could be set aside.<sup>96</sup> He goes on to speak of how, although Chinese authorities had previously failed to enforce the law against importing opium, once they had signaled strict enforcement, Britain had to accept it: "Most undoubtedly the Government of China had a full right . . . to insist on their laws being really executed. It is only necessary to inquire what those laws actually were."<sup>97</sup>

He is able to describe several principles of law applicable to foreigners:

[T]hey were to suffer death in cases of murder, and in all other cases they were to be sent away for punishment in their own country. This was a necessary consequence of the native tribunals being, according to Chinese policy, inaccessible to foreigners. . . . In all other cases, both the law and the usage, from the earliest time, down to the arrival of the Imperial Commissioner Lin, decided that all offences, or supposed offences of foreigners, should, in the first instance, be visited on the Hong Merchants, who had undertaken to become their sureties; and, secondly, on the foreigners generally, by the suspension of their trade; and the *ultima ratio* was, to expel altogether from China those to whom offence was imputed.<sup>98</sup>

Staunton finishes his description of the law with a reference to a Chinese law promulgated only a few years earlier to permit confiscation of the goods of foreigners under certain circumstances.<sup>99</sup> Staunton has been mentioned in this Review more than once, not because his views should be taken at face value, but because he was clearly a key figure in British trade relations with China. The reaction against his 1810 translation of the Qing Penal Code itself suggests that there is much more than meets the eye, including the interests of the East India Company and the political divisions of the day.<sup>100</sup> Clearly, how the British came to possess extraterritorial rights in the treaty ports is less straightforward than conveyed by the opposition of the New World to the Old World. Some of these complexities could have had the benefit of consideration in *Legal Orientalism* since the American journey toward extraterritorial rights in China is presented as one of an initial rejection of the European model of colonization and the British model of extraterritorial rights, both of which *Legal Orientalism* links discursively to the Orientalized image of Chinese law.

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<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.* at 12.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> For an essay that stresses the role of Staunton's translation in the protection of the interests of the East India Company in China, see Ong, *supra* note 33.

## VII. AMERICAN JURISDICTION IN CHINA IN PRACTICE

Following the Treaty of Wanghia, a system of American consular courts was set up in 1848. Found to be incompetent, inefficient, and corrupt, these courts were eventually replaced in 1906 by a new court — the U.S. Court for China (p. 160). Ruskola's discussion of the objectives of this court shows that the U.S. Senate and State Department intended to export to China the benefits of American rule of law, including constitutional guarantees, and that they believed this could be achieved only if the court in China was brought fully within the U.S. Constitution (pp. 157–62). While the jurisprudence of the U.S. Court reveals similarities with that which occurred under the British elsewhere, it is *Legal Orientalism's* treatment of these cases within a narrative of how U.S. law — supposedly rational — became its irrational Oriental Other that is unusual.

Ruskola's interesting analysis of the U.S. Court for China's jurisprudence — using reported cases, U.S. State Department records, and other sources — shows that though the court may have had lofty objectives, in a succession of decisions, American rule of law was revealed to be hypocritical. Time and again, the court made decisions based on expediency rather than principle and on the basis that American extraterritorial jurisdiction could proceed with a diluted version of the rule of law, or worse, a disregard for the law. As Ruskola reads it, far from being a model of rule of law to China, the court, when confronted by a “lawless” China, failed to apply its brand of “universal” law to the “particular” circumstances of its jurisdiction in China. As a result, contradictions occurred and the distinction between Law and its Orient finally reached its vanishing point. Euro-American law was not, after all, universally applicable, or at least not until China was first civilized or its people Christianized. The Euro-American model of law was also ineffective if Shanghai was to be cleansed of prostitution and other nefarious activities of drunken low-class Americans whose conduct projected a bad image of America. The U.S. Court ended up practicing despotism of the sort it was meant to replace. U.S. law in China took a “particularly particular” form. Ruskola's borrowing of Borges's mythical Chinese encyclopedic classification of Chinese animals to classify U.S. law in China is highly amusing. Borges and Ruskola, respectively, are worth quoting in full. Borges's classification of Chinese animals is as follows:

[In China,] animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable,

(k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.<sup>101</sup>

Ruskola's classification of U.S. law in China is as follows:

In China, American law is divided into: (a) compradore custom belonging to the Emperor, (b) Unequal Treaties written at gunpoint, (c) anything but the Constitution, (d) the Code of the Territory of Alaska, except when not, (e) parts of the Code of the District of Columbia (perhaps) but not its penalties (unless we like them), (f) innumerable, (g) the common law, but only if really old, yet not too old, (h) fabulous, (i) again, not the Constitution, (j) prisons in the Philippines, (k) not included in the present classification, (l) et cetera, (m) having just been repealed in Alaska, (n) that from a long way off looks like law. (p. 174)

Much of the discussion of the court and its jurisprudence concerning its jurisdiction and its sources of law will sound familiar to those who have studied the contemporaneous extension of British power through its colonies and extraterritorial courts. These courts addressed the question of what law to apply, if the territory was to continue to receive statutory law from the relevant legislature, and whether there was a cutoff point after which new statutes would not apply. If the law included the common law, would the applicable law include principles derived from cases after the court had been set up? Broadly speaking, the law that arrived in colonial places was often a more limited set of rights, a harsher system of criminal law, and a preference, not always consciously self-serving, for leaving the natives to continue with their own laws. Areas of law in which the British developed the greatest economic interest — contract and commercial law — were usually most disturbed by the introduction of English law. The kind of fundamental rearranging of the legal architecture, already mentioned above, was of course part of the wholesale change in the framework of law that recognized only some "local" law. For British colonies and overseas territories, the common law itself developed principles for determining when English law traveled with the Englishman and when it did not. In these principles, how the territory was acquired, whether there were already laws in existence in the territory at the time of acquisition, and whether such laws were contrary to the fundamental principles of English law were all determinative factors.<sup>102</sup>

Britain's own Supreme Court for China ordinarily sat in Shanghai, but its judges went on circuit to hear cases elsewhere. It had a chief judge and an assistant judge who had to have at least seven years'

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<sup>101</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS*, at xvi (Routledge 2002) (1970) (borrowing from Jorge Luis Borges).

<sup>102</sup> For a work discussing these and other principles, see generally KENNETH ROBERTS-WRAY, *COMMONWEALTH AND COLONIAL LAW* (1966).

standing at the Bar of England, Scotland, or Ireland. Below this court lay the provincial court for each consular district, presided over by the consul-general, consuls, or vice-consuls. Appeals from any provincial court lay to the Supreme Court in Shanghai and from there to the Privy Council.<sup>103</sup> In addition, the King's Minister in China could legislate for the governance of British subjects in China. The practice of the Crown appointing consuls who were recognized by the territorial sovereign to carry out ministerial acts had long been established. So too had the practice of giving consuls in non-Christian states judicial and coercive power. The exercise of jurisdiction in the treaty ports of China was a continuation of these practices.<sup>104</sup>

Familiar though the questions dealt with by the U.S. Court are, Ruskola's discussion of the court's jurisprudence extends further than any discussion of British extraterritorial jurisdiction has thus far. He connects the U.S. Court's jurisprudence to that of the Mixed Court in Shanghai, arguing that the eventual takeover of this Chinese court led to a situation whereby foreigners determined what Chinese law was (pp. 157, 185-96). Having explained the collapse of the distinction between law and its Oriental Other, Ruskola argues that one other distinction that collapsed was the distinction between territorial and extraterritorial jurisdiction. Looking at the wide extent of foreign control over the city's affairs, which included control of the courts and of foreigners and Chinese in Shanghai, Ruskola argues that Shanghai was a *de facto* colony (pp. 187-88, 195). From the perspective of the British practice of imperialism, this is not so remarkable. In United Kingdom law, though a strict distinction between extraterritorial and territorial jurisdiction in British territories was maintained in form, there was nothing in law, apart from a respect of the treaty rights of the sovereign state, to stop the exercise of extraterritorial jurisdiction from being as extensive as the exercise of jurisdiction in an area over which Britain had territorial sovereignty.

#### VIII. ORIENTALISM AND COMPARATIVE LAW

We now consider *Legal Orientalism* as a contribution to the method of studying foreign law. In the academy, it is still common enough to find institutes or journals of "foreign and comparative" or "international, foreign, and comparative" law, with the implication that each of these types of law is separate yet can be grouped together. On the distinctions between these, Ruskola is insistent that "foreign" and "comparative" are inseparable because comparison is "inescapable"; even

<sup>103</sup> The China and Japan Order in Council, 1865, *in* DIGEST OF BRITISH ORDERS IN COUNCIL RELATING TO CHINA AND JAPAN 1 (1879).

<sup>104</sup> HENRY JENKYNs, BRITISH RULE AND JURISDICTION BEYOND THE SEAS 148 (1902).

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when we do not consciously compare, our starting point is always our own system (p. 35). In Ruskola's itinerary of legal Orientalism, comparative and international law are both complicit. In the particular itinerary involving the United States and China, "[t]he primary vehicle for translating the knowledge produced by the academic discipline of comparative law into political institutions was the emerging profession of modern international law" (p. 110).

Nonetheless the book's general thrust is to blame "comparative lawyers" (p. 109) and "legal scholars" (p. 110) for the errors made about Chinese law, whether its putative absence in the rule-of-law sense, its alleged penal-only content, its lack of corporate law, and so forth. While *Legal Orientalism* is rarely critical of the more recent Chinese law scholarship of Western scholars, nevertheless, the danger of Orientalism lurks in the study of foreign law. But rather than abandon the study of foreign law, Ruskola's starting point is that "there is no pure, un-Orientalist knowledge to be had" (p. 6). From there we should proceed accompanied by an "ethics of Orientalism" (pp. 24, 54). Since Orientalism "as a structure of legal knowledge" (p. 23) creates ourselves and others, this power to compare must, he argues, be wielded "responsibly," lest we inflict material effects on the Other (p. 24). These effects, as seen earlier, are long-lasting. So too are the ideational legacies of legal Orientalism: as Ruskola's own use of Western thinkers from Hegel to Derrida demonstrates, once Orientalized, forever Orientalized.

What then, does an ethical Comparative Law look like? First, Ruskola explains the fundamental distinction between "ethics" and "morality." The latter consists of "normative systems that posit a pre-given moral subject and then elaborate guidelines for proper actions by that subject" (p. 54). "Ethics," on the other hand, is a normative system that attends to the very formation of the subject; "ethics in this sense regulates the conditions under which subjects emerge" (p. 54). To avoid morality is to avoid foreclosing certain inquiries. "Therefore," Ruskola urges, "we ought to consider the ways in which our comparisons subject others — both in the ordinary sense (limiting their agency as subjects) and in the sense of subjectification (recognizing them as subjects capable of agency)" (p. 55).

Some guidelines for an ethical Comparative Law scattered throughout the book may be stated as follows: (1) we can use a functionalist approach but without looking for exact equivalents; (2) we must not assume that all laws and legal systems follow the same developmental path; (3) we should pay more attention to the similarities between the two objects of comparison so that "law's contradictions at home" are not simply projected elsewhere (p. 55); (4) we must not be

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misled into thinking that, by admiring the Other, we have avoided Orientalism because even the positive Orientalisms can reduce the other to “the juridical equivalents of the noble savage” (p. 56);<sup>105</sup> (5) we need to be aware of how history has (through comparison) shaped the field of knowledge; (6) we must treat conventional narratives and concepts as provisional, revisiting them in the light of comparative study; (7) we must recognize that conventional narratives and concepts are in any case not pre-constituted, since as much as the Other is made by the self, so too is the self made by the process of othering; (8) instead of the usual mode of comparing *A* and *B*, we should also compare *A* to *B*; and, (9) as Ruskola demonstrates in Chapter Three of *Legal Orientalism*, we should draw from a broad range of literatures. Indeed, as already alluded to above, this chapter is a brilliant, practical example of comparative methodology.

More broadly, Ruskola suggests a more honest evaluation of law’s potential and of its shortcomings, particularly in Euro-American law, even if we risk “a certain loss of faith in law’s purity” (p. 233). The task is one of “managing” law’s contradictions (pp. 15–16) while at the same time reining in our tendency to project law’s shortcomings onto an Other. That realism may suggest a less starkly contrasting oppositional binary than the rule-of-law/rule-by-men binary, and thereby pave the way for “more effective communication across legal traditions” (p. 233).

In insisting that Orientalism is unavoidable and proposing an ethical comparative law, Ruskola has done much to defend comparative law. Indeed, he champions the necessity of studying comparative law because the modern Euro-American concept of law can only be understood through the history of legal Orientalism. Despite the lapses in chronology and the shaky premises of some of its arguments, *Legal Orientalism* is an impressively imaginative work.

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<sup>105</sup> Ruskola’s example is the Western observation that the Chinese supported “mediation and harmony,” a view usually born of an “uncritical acceptance of the Confucian ideological fiction that the Chinese naturally delight in submitting themselves to the dictates of group morality” (p. 56). This kind of Orientalism, though positive, he forcefully points out, still excludes the Chinese from both law and modernity insofar as it is presented in contrast to the West and its inherent modernity, including modern law.