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A RESPONSE TO PROFESSOR TAN'S  
REVIEW OF *LEGAL ORIENTALISM*

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I want to thank Professor Carol Tan for her generous, extensive, and insightful review of *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, 2013).<sup>1</sup> With a sure hand and an easy command of multiple, related literatures, she offers a detailed analytic map of the book's main contentions, synthesizing its key points and suggesting new directions for further inquiry. Indeed, Professor Tan provides much more than a review of the book's arguments, as she enhances them by supplying a great deal of supplemental historical information. As the review is detailed and evidently stands on its own, rather than commenting on its specifics, I will use this Response as an opportunity to expand upon and clarify a few of the arguments with which Professor Tan's review is most engaged (Parts IV, V, and VI of the review). Insofar as she introduces historical background not referenced in my analysis, considering such additional material also allows me to focus on some matters that I could not address within the scope of the book.

First, I acknowledge Professor Tan's observation (Part IV) that *Legal Orientalism's* review of the history of claims of the relative or absolute absence of law in China is necessarily "schematic,"<sup>2</sup> as I note myself in Chapter 3.<sup>3</sup> While a more detailed history of such claims remains desirable, one of the chief burdens of the book is to explore some of the epistemological and material *consequences* of that history. To that end, the book is concerned with the circulation of cultural stereotypes in mainstream legal and political discourses — whether or not those stereotypes had any empirical justification. I recognize that such an analysis runs "the risk of unwittingly reiterating the Orientalist myth of a static China,"<sup>4</sup> as Professor Tan cautions. That risk, however, is inherent in the very nature of the discourse that the book describes and examines critically. Indeed, the lack of reference to "re-

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<sup>1</sup> Carol G.S. Tan, *How a "Lawless" China Made Modern America: An Epic Told in Orientalism*, 128 HARV. L. REV. 1677 (2015) (reviewing TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013)).

<sup>2</sup> See *id.* at 1684–87.

<sup>3</sup> TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 62 (2013).

<sup>4</sup> Tan, *supra* note 1, at 1687.

al” Chinese law is the single most important characteristic of legal Orientalism as a discourse.

Second, to supplement the analysis in *Legal Orientalism* Professor Tan provides an instructive discussion (Parts V and VI) of U.S. traders’ reservations about Chinese law even before the Opium War,<sup>5</sup> offering it as a potential qualification to the argument that until 1839 it “appeared that the United States was in fact ideologically and politically inclined to respect the sovereign equality of Oriental states such as China.”<sup>6</sup> It is important to emphasize that by no means do I wish to suggest that there was a single monolithic view about Chinese sovereignty shared by all Americans prior to the Opium War. Without question many American traders in China were highly mistrustful of Chinese officials and judicial administration (as I acknowledge in Chapter 4).<sup>7</sup> However, they were ultimately a small subset among a larger expatriate community of European merchants, and their views often aligned more closely with those of their European associates in Canton than with their countrymen on the U.S. mainland. Indeed, many American traders, unlike the majority of Americans, had been in favor of the Opium War, yet their negative assessments were not yet representative of mainstream views in the United States.<sup>8</sup> As Professor Tan observes, on the eve of the Opium War a group of disgruntled American merchants in Canton went so far as to ask Congress to send a commercial representative to negotiate a trade treaty and to provide

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<sup>5</sup> See *id.* at 1687–99.

<sup>6</sup> RUSKOLA, *supra* note 3, at 123. It is important to note the qualified nature of this argument: prior to the Treaty of Wanghia, it *appeared* that the United States was politically and ideologically *inclined* to respect Chinese sovereignty. The claim is, as I state it elsewhere, that the dominant discourse made it “possible *at least in principle* to view China as a sovereign state that enjoyed a political status equal to that of the United States.” *Id.* at 130 (emphasis added). Given the absence of an actual political relationship between the two states prior to the Treaty of Wanghia, their relative politico-judicial status was necessarily a matter of hypothesis, determined in the field of cross-cultural perception rather than diplomatic intercourse.

<sup>7</sup> *Id.* at 122.

<sup>8</sup> In fact, it is not clear just how widely such negative assessments were shared even among Americans in China. In her analysis of U.S. traders’ skeptical views about Chinese law Professor Tan draws primarily on Stuart C. Miller, *The American Trader’s Image of China, 1785–1840*, 36 PAC. HIST. REV. 375 (1967). See Tan, *supra* note 1, at 1695–96. Jonathan Goldstein’s subsequent study characterizes Miller’s analysis as falling outside of the “historical consensus.” JONATHAN GOLDSTEIN, PHILADELPHIA AND THE CHINA TRADE 1682–1846, at 5 (1978). Referring to contemporary trade journals, Earl Swisher has argued that American traders were “not only ‘respectful and obedient’ but regarded any insistence on extraterritoriality and other special rights in China as high-handed and unjustified.” Earl Swisher, *Extraterritoriality and the Wabash Case*, 45 AM. J. INT’L L. 564, 571 (1951). While it goes beyond the immediate subject matter of *Legal Orientalism*, the question of American traders’ views about Chinese law remains, at a minimum, a contested one.

for legal protections.<sup>9</sup> Crucially, however, at that time those pleas did not find a receptive audience in Washington, D.C.<sup>10</sup>

Third, I want to emphasize that I concur wholly with Professor Tan's observation (Part VI) that the Qing government readily agreed to Caleb Cushing's demand to include an extraterritoriality clause in the Treaty of Wanghia.<sup>11</sup> As Professor Tan observes, the more difficult question is not why the Chinese agreed to extraterritorial jurisdiction, but why Cushing insisted on asking for it when doing so exceeded the express instructions he had received from President Tyler. Cushing himself attributes it to his discovery, upon his arrival in China, that the British and Portuguese had done so, which would have made it "ignominious" for the United States to settle for anything less.<sup>12</sup> Professor Tan suggests that Cushing may also have been influenced by hostile views about Chinese judicial process held by U.S. merchants and missionaries with whom he associated during his stay in China. Professor Tan's analysis of their views is, again, insightful, and it complements nicely the more abbreviated account I provide in *Legal Orientalism*. Given the intimate relations between the American and British merchants in China — Professor Tan refers to "an atmosphere of fraternity" that obtained among them — it seems inevitable that U.S. traders' and missionaries' views of Chinese law were influenced to some considerable degree by those of the British community in Canton.<sup>13</sup> In the end, however, my goal is not to establish Cushing's ultimate personal and psychological motivations for secur-

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<sup>9</sup> See RUSSELL STURGIALL ET AL., *MERCHANTS OF THE UNITED STATES AT CANTON, CHINA*, H.R. DOC. NO. 26-40 (1840).

<sup>10</sup> Equally significantly, the following year a group of China merchants in Boston and Salem submitted a petition to the House of Representatives in which they urged the United States *not* to intervene in the trade in Canton, on the ground that "the character, laws, and customs, of the Chinese nation, are so little understood." THOMAS H. PERKINS ET AL., *CHINA TRADE. — MERCHANTS OF BOSTON AND SALEM, MASSACHUSETTS*, H.R. DOC. NO. 26-170, at 2 (1840).

<sup>11</sup> See Tan, *supra* note 1, at 1692–99. Indeed, I have argued elsewhere that extraterritorial jurisdiction for foreign sojourners was largely consistent with Qing imperial practice. Only later in the course of the nineteenth century did the existence of Western extraterritorial privileges come to be seen as a derogation from Chinese sovereignty. See Teemu Ruskola, *Raping Like a State*, 57 *UCLA L. REV.* 1477 (2010). As Randle Edwards elaborates in his classic analysis, the Chinese insisted on jurisdiction only in cases in which foreigners in China were accused of homicide. See R. Randle Edwards, *Ch'ing Legal Jurisdiction Over Foreigners*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 222 (Jerome Alan Cohen et al. eds., 1980).

<sup>12</sup> RUSKOLA, *supra* note 3, at 137.

<sup>13</sup> Tan, *supra* note 1, at 1696. Professor Tan also suggests that the episode in which a Chinese man died from a gunshot fired by an American during Cushing's stay played a critical role in his decision to insist on extraterritoriality. *Id.* at 1697. While the matter is open to interpretation, the incident strikes me more as the immediate occasion that posed the question, rather than as a causal factor that made extraterritoriality a *sine qua non* in Sino-U.S. relations. In fact, the various "indignities" to which Cushing thought he had been subjected by Qing officials (analyzed in RUSKOLA, *supra* note 3, at 132) had already taken place when this homicide occurred, suggesting that he had well-formed views even prior to the incident.

ing a formal grant of extraterritorial jurisdiction for Americans in China. What matters historically as well as analytically is that he was able to draw on an existing discourse of legal Orientalism — not yet dominant in the United States — in order to justify his decision to do so.

Finally, I thank Professor Tan for offering an illuminating discussion of the diversity of British views on Chinese law more generally prior to the signing of the Treaty of Nanjing. Her analysis of Sir George Staunton's views is especially useful. As she observes, even though Staunton was a pillar of the British merchant community in China, he never denied "that China had laws or suggest[ed] that [they] could be set aside."<sup>14</sup> While a detailed genealogy of British views goes beyond *Legal Orientalism's* primary focus on the Sino-U.S. legal encounter, it goes without saying that not everyone in Britain had a negative view of Chinese law prior to the Opium War, just as it was not the case that all Americans had a positive one. With respect to Staunton, as the translator of the Qing code and a Sinologist in his own right (in addition to his career with the East India Company), he was by far the most knowledgeable person in England on the subject of Chinese law. This experience made his views extraordinarily well informed, but also by definition unrepresentative of the general opinion, as Tan too observes.<sup>15</sup> It is clear that he did not deny that China had laws — a position that only the truly uninformed could (and did) take — yet his views of Chinese law were profoundly ambivalent. In his 1810 translation of the Qing Code he characterized Chinese laws as "altogether indefensible" on "many points," even while stating that in other regards they were "perhaps not unworthy of imitation, even among the fortunate and enlightened nations of the West."<sup>16</sup> In the 1840 parliamentary debate over the Opium War — a war that he regarded as "absolutely just"<sup>17</sup> — he called attention to China enforcing its "sanguinary laws" against British traders in China.<sup>18</sup> While he did not believe that the British in China were free to ignore local law, this characterization echoed his earlier condemnations of Chinese laws on

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<sup>14</sup> Tan, *supra* note 1, at 1698–99.

<sup>15</sup> *Id.* at 1685–86 (describing Staunton's positive statements about Chinese law as exceptional and typically not well received by other merchants).

<sup>16</sup> George Thomas Staunton, *Translator's Preface* to TA TSING LEU LEE; BEING THE FUNDAMENTAL LAWS, AND A SELECTION FROM THE SUPPLEMENTARY STATUTES, OF THE PENAL CODE OF CHINA xxiv (T. Cadell & W. Davies eds., George Thomas Staunton trans., 1810). Staunton also noted that even while much of China's legislation may have been admirable on paper, in its enforcement it was also "very frequently violated by those who are [its] administrators and constitutional guardians." *Id.* at xxviii.

<sup>17</sup> 53 PARL. DEB., H.C. (3d ser.) (1840) 739 (U.K.).

<sup>18</sup> *Id.* at 779.

homicide, most notably, as “absolutely intolerable.”<sup>19</sup> I share Professor Tan’s view that British attitudes to Chinese law did become increasingly negative over time — much like American ones, only earlier — yet it seems undeniable that from the beginning a critical reason for British merchants’ resistance to Chinese jurisdiction was their concern with the quality of justice provided by the Chinese legal system.<sup>20</sup>

By way of conclusion, I reiterate my gratitude to Professor Tan for her insightful and inspired review of *Legal Orientalism*. It not only analyzes the book’s historical argument with care but also situates it in the context of an emerging literature on legal Orientalism more generally. There is little doubt that much work remains to be done. I especially concur with Professor Tan’s observation that the story of “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.”<sup>21</sup> I provide a preliminary and necessarily schematic account of this comparative history insofar as it is relevant to the Sino-U.S. legal story that is the book’s primary focus. At the same time, I hope it may serve as a point of departure for further study. Indeed, in a sign of vibrancy of this field of inquiry, younger scholars are already in the process of conducting more detailed inquiries into specifically British idioms of legal Orientalism.<sup>22</sup>

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<sup>19</sup> GEORGE THOMAS STAUNTON, REMARKS ON THE BRITISH RELATIONS WITH CHINA 14 (London, Edmund Lloyd 1836) (emphasis omitted). As early as 1833, Staunton sponsored the China Trade Act, authorizing the establishment of British courts in China, specifically because of what he viewed as unjust and unacceptable Chinese laws regarding homicide. *See* China Trade Act, 1833, 3 & 4 Will. 4, c. 93, § 6 (U.K.).

<sup>20</sup> This is evident in the historical review provided in one of the main sources cited by Professor Tan, 1 G.W. KEETON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA (1969), which records a long history of British complaints about the Chinese legal system, dating back to at least 1692 when the East India Company characterized Chinese laws as overly severe. *See id.* at 29. As Keeton states: “The agents of the English East India Company in China resisted Chinese jurisdiction as a matter of course, since they had already adopted a precisely similar policy in India and Japan, following the accepted view that a British subject always remained under British protection wherever he went in the Far East.” *Id.* at 78.

<sup>21</sup> Tan, *supra* note 1, at 1699.

<sup>22</sup> *See, e.g.*, LI CHEN, CHINESE LAW IN THE IMPERIAL EYES (forthcoming 2015) (on file with author).