

## RAPING LIKE A STATE

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*It is a remarkable fact that rhetorically the state is gendered male, while state-on-state violence is continually represented as sexual violence. This Article applies the insights of queer theory to examine this rhetoric of sexual violation. More specifically, it analyzes the injury of colonialism as a kind of homoerotic violation of non-Western states' (would-be) sovereignty. It does so by taking seriously the legal fiction of the state as an "international legal person." Historically, colonial violence is routinely described as rape. What does it mean to liken a state to a person, and its conduct to rape? How does a state rape? Whom does it rape, and under what conditions? This Article examines international legal rhetoric to illustrate the normative masculinity that is attributed to sovereign states, and it argues that non-Western states' variously deviant masculinities, together with their civilizational and racial attributes, rendered them rapable. The Article uses China as a case study. As a historically recognized yet "effete" civilization, throughout the nineteenth century China occupied an unstable intermediate position between the colonizable and the fully sovereign, savage and civilized, Africa and Europe. International law provided a vocabulary for transforming China's alleged economic and*

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*political isolation into a violation of a “right of intercourse,” which in turn justified the establishment of a nonterritorial form of imperialism that fell short of colonialism proper: the practice of extraterritorial jurisdiction. In the end, the Article argues, the queer rhetoric of international law did not simply reflect China’s inherent weakness; it helped make it internationally weak. In sum, the Article illustrates some of the general processes by which international law excludes and includes subjects. Sexual, gendered, and racial metaphors continue to structure uneven global relations even today. Queer enemies of mankind are not history.*

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## INTRODUCTION

Human nature never seems less lovable than in the relations among entire peoples.<sup>1</sup>

—Immanuel Kant

Law is peopled with fictions. In international law, by far the most important legal fiction is that of the state. Ultimately, only individuals can take actions in the name of a state, yet states are treated as “international legal

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1. IMMANUEL KANT, *Idea for a Universal History With a Cosmopolitan Intent*, in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 29, 89 (Ted Humphrey trans., Hackett Publishing Co. 1983) (1784).

persons” in their own right—as singular actors with singular motivations.<sup>2</sup> Although it is tempting to dismiss such fictions as mere rhetoric, in this Article I take seriously the anthropomorphic metaphors used to characterize legal and political interstate relations. It is a commonplace observation that aggression among states is often phrased in terms of sexual violation. Historically, colonial invasion in particular is routinely described as rape. But just what does it mean to liken a state to a person, and its conduct to rape? How does a state rape? Whom does it rape, and under what conditions?<sup>3</sup>

It is a remarkable yet surprisingly unremarked upon fact that rhetorically the state is gendered male, while state-on-state violence is continually represented as *sexual* in nature. In this Article, I apply some of the insights of queer theory to examine this rhetoric of sexual violation. More specifically, I analyze the injury of colonialism as a kind of homoerotic violation of non-Western states’ (would-be) sovereignty.<sup>4</sup> International law, like all law, seeks to normalize the subjects it regulates and in fact summons into being—historically states, in the case of international law. State sovereignty in turn is premised on a number of attributes, including a notion of normative masculinity. As this Article argues, non-Western states’ variously deviant masculinities, together with their racial and civilizational attributes, rendered them rapable. I focus on China’s changing legal status in the nineteenth century as a case study.

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2. Indeed, much of recent international law scholarship (with different normative agendas and different disciplinary investments) seeks to disaggregate the reified notion of “the state” into more specific actors that act in its name. The literature is far too large to reproduce here, but see, for example, ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER: GOVERNMENT NETWORKS AND THE DISAGGREGATED STATE* (2004); Ryan Goodman & Derek Jinks, *How to Influence States*, 54 *DUKE L.J.* 621 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1999).

3. The title of this Article is obviously indebted to James Scott’s instant classic *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1999). However, unlike Scott, I focus here primarily on the rhetorical construction of the state.

4. That is to say, except where indicated otherwise, I use the word “rape” figuratively, as a metaphor for violation and violence more generally. Hence the bulk of my analysis does not address acts of rape on the physical bodies of persons. There is a large contemporary literature on state-sponsored rape as a tactic of war—on states that rape literally, as it were—whereas my concern is with acts of states that are *likened* to rape. See, e.g., Karen Engle, *Feminism and Its Discontents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 *AM. J. INT’L L.* 780 (2005). However, while the two phenomena are obviously distinct, they are also related: Both types of acts take place within, and are enabled and constrained by, a more general discourse of rape. I address this connection in Part V below.

This is a study of the rhetoric of colonial international law,<sup>5</sup> yet it is not only a study of colonial international law nor only a study of legal rhetoric. The subject matter of this Article may at first seem peripheral to the study of international law as such;<sup>6</sup> the bulk of it examines the legal status of places outside the metropolitan West, and its primary focus is historical rather than contemporary. Yet this analysis in fact illuminates some of the general processes by which international law excludes and includes subjects. For example, as the Epilogue suggests, an analysis of the queer rhetoric of international law remains vital for understanding the contemporary conflation of Islamophobia and homophobia that seeks to expel the terrorist outside the norms of law altogether.

More broadly, and at the most general level, a queer analysis suggests that the homoerotic violation of non-Western states is a condition of possibility of fully realized (Western) sovereignty. Standing alone, the recognition that violence forms the foundation of sovereignty is not an original insight, although it is an important and oft-forgotten one.<sup>7</sup> A rhetorical analysis of international law illuminates how notions of gender, sexuality, and race are a constitutive part of the violence of sovereignty, even if they remain largely invisible, buried underneath its foundation. I focus here specifically on queer violations of sovereignty because of the relative absence of queer analyses of international legal rhetoric. I do not mean to suggest that queer theory provides a privileged approach over others. Hence, I do not seek to displace analyses that focus on the colonial formation of race, for example, but seek to supplement such approaches in critical ways.<sup>8</sup> In the end, it is simply not possible to isolate discrete discourses

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5. Unless indicated otherwise, I use the term “colonial international law” in a very broad sense, to refer to various formations of international law that have justified and coordinated imperial and colonial ventures from the discovery of the Americas through World War I and the emergence of the norm of national self-determination. In other words, the term includes what is often referred to as “classical” as well as “primitive” international law, to use David Kennedy’s terms. David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986). Although the term is used in this sense by other modern commentators as well, I should note that for nineteenth-century international lawyers, “colonial international law” would have been an oxymoron. While international law governed how colonies were established, the term “colonial law” referred to legislation whereby a state governed its colonies. Hence, colonial law was part of the state’s domestic law, and the notion of a “colonial international law” would have been a category mistake.

6. For a pathbreaking analysis of the vitality of the margins in the study of international law, see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999).

7. See, e.g., Walter Benjamin, *Critique of Violence*, in REFLECTIONS 277 (Peter Demetz ed., Edmund Jephcott trans., Schocken Books 1978) (1807); Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Jacques Derrida, *Force of Law*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Mary Quaintance trans., Drucilla Cornell et al. eds. 1992).

8. For a classic statement of intersectional analysis, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

of gender, sexuality, and race. They reinforce each other and they diverge from each other in distinct ways, but historically they are constituted in relation to one another.<sup>9</sup>

My invocation of queer theory is a commitment to a mode of analysis, not to the study of a given subject or set of subjects. There are numerous analyses of international human rights law, for example, that examine the treatment of gays and lesbians.<sup>10</sup> Such analyses can be of great legal, social, and political value, but insofar as they simply assume gay subjects that preexist legal recognition, they are not applications of queer theory. In this Article, I use the word queer to refer to a range of non-normative subject positions. These positions are at once sexual, social, and political. Thus defined, queer positions are occupied by all subjects at some point (whether they wish to acknowledge it or not) and by no subject at all times (even if they so desire). To be completely antinormative would be to be mad, and to be perfectly normative would be no less psychotic. Queer theory provides a method for analyzing how queer and normative subject positions are constituted in relation to one another and how they are secured, but also how they remain necessarily unstable and provisional. In short, it is a method for analyzing the discursive dynamics by which subjects are made and unmade, maintained and destabilized.

Hence, by analyzing China as a queer subject, I am not seeking to analogize it simply to a gay or lesbian individual. Any such attempt to determine a state's "true" sexual identity—or similarly, whether a particular state is "really" male or female—would be pointless. Just as perfect heterosexuality is impossible to achieve even for an individual (or at least epistemologically unverifiable), there are no perfectly normative polities to be found in the homosocial world of states either.<sup>11</sup> Instead, I use queer theory to analyze a range of positions China has

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9. For sustained analyses of the inextricability of race, gender, and sexuality, see DAVID L. ENG, *THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY* (2010), and DAVID L. ENG, *RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA* (2001), as well as the essays on "What's Queer About Queer Studies Now?" in 84–85 *SOC. TEXT* (2005).

10. In 2007, the American Society of International Law arranged a session on queer theory in its annual meeting, prompted by the observation that the application of queer theory to international law "remains sparse, especially if one moves beyond the treatment of lesbians, gay men, bisexuals, and trans people in human rights law." See Ralph Wilde, *Queering International Law: An Introduction*, 100 *AM. SOC'Y INT'L L. PROC.* 119 (2007).

11. A state's queerness in one context similarly does not ensure that it will not seek to regulate and normalize others in different contexts. China, for example, was both an object of Western imperialism and an empire in its own right. Indeed, it has retained its imperial boundaries up to the present, and in a representational strategy Louisa Schein calls "internal Orientalism" it today ethnicizes and genders its "minority nationalities" (*shaoshu minzu*) in many of the same ways the West has orientalized China. See generally LOUISA SCHEIN, *MINORITY RULES: THE MIAO AND THE FEMININE IN CHINA'S CULTURAL POLITICS* (2000).

occupied in legal and political rhetoric, how those positions varied over time, and how they were determined in relation to other states' positions. That these positions had gendered and sexual attributes evidently did not make China either a man or a woman, a homosexual or a heterosexual. What they *did* do was to make it a certain kind of state, a certain kind of subject of international law that was more or less vulnerable to colonial violence at various times.

At the same time, it bears noting that in a certain sense the entire enterprise of queering the history of international law is an anachronistic one. The instances of queer rhetoric that I analyze in this Article obviously did not have the same meaning in the nineteenth century as they do today—the term “queer” itself being perhaps the most notable example—which is precisely what allowed queer statements to be uttered so unselfconsciously. Yet it is noteworthy that modern notions of sexuality were codified legally as well as medically in the nineteenth century, the period on which this Article focuses.<sup>12</sup> Although I will not seek to demonstrate it here, it seems evident that the queer rhetoric of colonial international law analyzed in this Article was part of the constitution of a larger modern discourse of homosexuality and that queer theory constitutes a germane method for analyzing that rhetoric.<sup>13</sup> More fundamentally, questions of historical interpretation are hardly unique to the use of queer theory. How one imagines one's object of analysis necessarily limits what one can find.<sup>14</sup> I do not claim that queerness was the hidden but ultimate truth of colonial international law—only that a queer analysis can provide novel and useful insights for understanding it.

As a final methodological note, while I focus on the rhetoric of colonial international law, I do not mean to imply a qualitative distinction between law as such, on the one hand, and legal rhetoric, on the other. Although law is never *only* rhetoric (or else it is not law), it is always *also* rhetoric. It is precisely its discursive nature that distinguishes law from simple domination and from pure violence. Law is never only a claim of power, but also of right. This is perhaps

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12. It was in the nineteenth century, as Michel Foucault famously argues, that the “homosexual” became a new type of person with an identity of his own, replacing an earlier notion of the “sodomite” as a person who simply engaged in aberrational acts. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 43 (Robert Hurley trans., Vintage Books 1980) (1976) (“The sodomite had been a temporary aberration; the homosexual was now a species.”).

13. Indeed, Foucault's failure to consider the history of colonialism in the constitution of metropolitan sexualities is widely acknowledged as one of the main shortcomings of his analysis. See, e.g., ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* (1995).

14. See, e.g., HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Continuum Publ'g Group 3d ed. 2004) (1960).

even more true of international law than of other legal orders, given the absence of a global sovereign to enforce its precepts. To be sure, international law has taken on increasingly institutionalized forms, yet even today its rhetorical nature constitutes a major source of its power—and of its limitations as well. Indeed, because international law exists as part of a larger political imagination, my archive of international legal rhetoric includes statements not only by lawyers but also by diplomats, politicians, and other observers whose statements illustrate the legal and political status of various parts of the non-European world. At the same time, it bears repeating that while rhetoric has social and political consequences, this Article's main goal is to analyze China's place in international legal rhetoric, not the larger social or political history of international law's unfolding in China. That history is the subject matter of a larger project, of which this Article is a part.

The remainder of this Article is structured as follows. Part I reframes the study of international law temporally and spatially so as to encompass colonial legal relations. Part II sets out a brief history of the state as an international legal person. Part III turns to the analysis of colonial legal rhetoric. First, it summarizes briefly the code of honor that informed legal relations among states that were part of the European "Family of Nations." Next, it reviews some of the ways in which political communities in different parts of the world fell short of the European ideals of masculinity and homosocial honor, which in turn gave rise to distinct rhetorics of sexual violation. For example, an "uncivilized" Africa at one end of the spectrum was represented as too masculine, justifying a disciplinary violence that included rape. In contrast, "hypercivilized" Oriental civilizations at the other end were viewed as effete and not masculine enough; this generated a discourse of occasional imperial "penetrations" that occurred nominally within the norms of consensual intercourse.

Part IV focuses specifically on China as a subject of international law. China was in some ways even queerer than the paradigmatic victims of colonial violence: Although it was in fact not fully colonized, it was also not not-colonized. As a historically recognized "higher" civilization with a well-established state, it could not be occupied simply by force (like, say, the "savages" of the New World or Africa). Throughout the nineteenth century, it occupied an unstable position between the colonizable and the fully sovereign, between savage and civilized, Africa and Europe. International law provided a vocabulary for transforming China's alleged economic and political isolation into acts of interstate aggression that in turn justified the establishment of a form of nonterritorial imperialism: the practice of extraterritorial jurisdiction. Economically, China's regulation of trade with the West was construed as a

violation of a right of intercourse. Politically, arrogant diplomatic forms such as the kowtow—the ritual prostration before the emperor—came to be seen as violations of the West’s sovereign equality. The kowtow in particular became a symbol of total submission and was, I suggest, ultimately conflated with sodomy, a putatively universal vice among the Chinese. Yet by the end of the nineteenth century, China’s sovereignty came to be associated less with paradigmatically Oriental vices, and the “Chinaman” became increasingly conflated with a generic colonial native. This shift was reflected by a move from the exercise of simple extraterritorial jurisdiction toward territorial occupation, which was made possible by the development of increasingly queer legal technologies, ranging from the novel concept of a public international law lease to forms of railroad sovereignty.

Part V considers further the political and epistemological significance of the queer rhetoric of international law. It does so by analyzing nineteenth-century international law as a set of global cultural scripts, including what I call the rape script, or the narrative construction of certain entities as subjects of violation. These cultural scripts did not simply reflect the material violence of colonial relations; they played a key role in enabling it. Finally, the Epilogue considers briefly the ways in which sexual, gendered, and racial metaphors continue to structure uneven global legal relations today.

Queer enemies of mankind are not history, alas.

#### I. LOCATING INTERNATIONAL LAW IN TIME AND SPACE

Conventional histories of international law often frame the object of their inquiry restrictively in both time and space. Temporally, they have a modern bias. Spatially, they are Eurocentric.<sup>15</sup> That is, typically they trace the birth of international law to the Treaty of Westphalia in 1648, signaling the end of the post-Reformation religious civil wars, and their predominant geographic focus is on the development of secular norms of interstate relations within Europe.<sup>16</sup>

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15. See, for example, Arthur Nussbaum’s *CONCISE HISTORY OF THE LAW OF NATIONS* (1947), which remained for a long time the chief Anglophone history of international law. Until the recent proliferation of historical studies, *see infra* note 86, international lawyers were surprisingly uninterested in the historical constitution of their discipline. The recent resurgence of interest is exemplified also by the establishment of the *Journal of the History of International Law*, currently in its twelfth volume, and the appearance of edited volumes such as *TIME, HISTORY AND INTERNATIONAL LAW* (Matthew Craven et al. eds., 2007).

16. As a general matter, it is important to note that although 1648 is the single most commonly cited date for the birth of modern international law, the date is especially popular among Protestant publicists and commentators who emphasize the secular nature of the modern state. In the early twentieth century, the American James Brown Scott, among others, insisted on the central role of sixteenth-century



In historical analysis, periodization is inevitable but never innocent. Evidently there is no single date that constitutes the objective point of origin of international law.<sup>17</sup> Yet the choice of 1648 and the Treaty of Westphalia—like any other date—has vital political and ideological consequences. With a historical perspective focusing on 1648, the official story of international law becomes a history of the emergence of the liberal norm of sovereign equality among secular nation-states. This story is not necessarily untrue, but it is misleading insofar as it concerns only Europe.<sup>18</sup> If we instead follow Carl Schmitt, for example, and date our account of modern international law from 1492 and Europe’s “discovery” of the New World, the story changes significantly.<sup>19</sup> From this perspective, the narrative becomes not simply one of increasing inclusion and equality *within* Europe, but also of violent exclusion of others *outside* Europe, on the basis of religious, civilizational, and racial difference.

Not only do many standard analyses provide a radically truncated account of the colonial history of international law, but they also define their subject matter in terms that render its development at once particular *and* universal. Paradoxically, a historically specific European law of nations is presented as proto-universal at its inception. Its main qualification for such universal

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Catholic thinkers such as Francisco de Vitoria and Francisco Suarez, as indicated by their prominent inclusion in 1–22 THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1911–16).

17. For an analysis of the historiographic desire to reject the legacy of “primitive” international law, see Kennedy, *supra* note 5. Going beyond the observation that the periodization of international law is political, Kathleen Davis makes the further remarkable argument that the periodization of history itself (into ancient, medieval, and modern) is an aspect of the history of sovereignty: “[T]he history of periodization is juridical, and it advances through struggles over the definition and location of sovereignty.” KATHLEEN DAVIS, PERIODIZATION AND SOVEREIGNTY: HOW IDEAS OF FEUDALISM AND SECULARIZATION GOVERN THE POLITICS OF TIME 6 (2008).

18. Yet it is important to note that, at a minimum, it is an exaggeration even as a story about Europe. For example, many of the aspects of modern international law that are attributed to the Peace of Westphalia did not in fact emerge even in Europe until later. For an analysis of the myth of Westphalia, see STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF MODERN INTERNATIONAL LAW: SOVEREIGNTY IN BODIN AND VATTTEL AND THE MYTH OF WESTPHALIA (2004).

19. See CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* (G.L. Ulmen trans., Telos Press Publ’g 2003) (1950). Wilhelm Grewe’s THE EPOCHS OF INTERNATIONAL LAW (Michael Byers trans., 2000) (1984) follows closely Schmitt’s periodization. The most important recent challenge to the conventional periodization—decidedly without Schmitt’s undisguised nostalgia for the lost colonial order—is ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2004). Martti Koskenniemi’s nineteenth- and twentieth-century history of international law similarly expands its geographic scope to cover the global history of colonialism. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2004). Another unusually expansive history of international law is ANTONIO TRUYOL Y SERRA, HISTOIRE DU DROIT INTERNATIONAL PUBLIC (1995). On periodization, see also Antonio Truyol y Serra, *The Discovery of the New World and International Law*, 3 U. TOL. L. REV. 305 (1971).

applicability is the assumption of formal equality among sovereign states. This means that other historical structures of interstate ordering based on other assumptions do not appear as *alternative* systems of international law, as potentially competing universalisms in their own right.<sup>20</sup>

The bulk of this Article examines the rhetorical strategies by which China was excluded from membership in the so-called “Family of Nations,” or international society consisting of the “civilized” states of the North Atlantic. Hence, space here does not permit the full elaboration of an East Asian tradition of international law, namely, the classical legal tradition of what could be called “the Confucian commonwealth of East Asia”<sup>21</sup>—a kind of Confucian *ius gentium*, with a shared vocabulary and grammar of politics, as well as a common standard of civilization that set out the constitutional norms of membership in interstate community.<sup>22</sup> Although relations among states in Confucian East Asia were not

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20. There are, of course, important exceptions to this generalization. See, for example, David Bederman’s history of international law in antiquity, analyzing interstate relations in the ancient Near East, among the Greek city-states, and in the Roman world. DAVID BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001). For studies of an Islamic law of nations, see MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS* (1966); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955). International relations theory has expressed greater analytic openness to international systems outside the North Atlantic, but unfortunately most international relations theorists are notoriously indifferent to law. See, e.g., BARRY BUZAN & RICHARD LITTLE, *INTERNATIONAL SYSTEMS IN WORLD HISTORY: REMAKING THE STUDY OF INTERNATIONAL RELATIONS*. On the notion of competing universalisms, see Lydia Liu, *The Question of Meaning-Value in the Political Economy of the Sign*, in *TOKENS OF EXCHANGE* 1, 13 (Lydia Liu ed., 1999).

21. The term is Alexander Woodside’s, although he does not elaborate on this commonwealth in terms of an international law. ALEXANDER B. WOODSIDE, *VIETNAM AND THE CHINESE MODEL: A COMPARATIVE STUDY OF NGUYEN AND CH’ING CIVIL GOVERNMENT IN THE FIRST HALF OF THE NINETEENTH CENTURY* 47 (1988).

22. I provide an outline of this kind of Confucian *ius gentium* in *The East Asian Legal Tradition*, in *CAMBRIDGE COMPANION TO COMPARATIVE LAW* (Mauro Bussani & Ugo Mattei eds., forthcoming). Needless to add, the actual conduct of interstate relations within the East Asian legal order was not reducible to official pronouncements of Confucian kinship norms, just as it would be a serious mistake to confuse formal statements of liberal norms in Western international law with actual interstate practice, as observed by JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE’S CHINA AND INTERNATIONAL LAW* 4–5 (1974). As new histories of the Qing period persuasively show, a Sinocentric paradigm of Confucian political order competed with other ruling strategies. This literature is vast, but see, for example, MARK C. ELLIOTT, *THE MANCHU WAY: THE EIGHT BANNERS AND ETHNIC IDENTITY* (2001); JOHAN ELVERSKOG, *OUR GREAT QING: THE MONGOLS, BUDDHISM AND THE STATE IN LATE IMPERIAL CHINA* (2006); JAMES MILLWARD, *BEYOND THE PASS: ECONOMY, ETHNICITY, AND EMPIRE IN QING CENTRAL ASIA* (1998); PETER PERDUE, *CHINA’S MARCH TO THE WEST: THE QING CONQUEST OF CENTRAL ASIA* (2005). There is also a late nineteenth-century literature on the histories of international law in China. However, these analyses are antiquarian in orientation, and they do not purport to describe China’s relations with other states in legal terms. Rather, they characterize the fragmented status of China before its unification (by the First Emperor, in 221 B.C.E.) as a kind of “internal” political law that was structurally similar to the European law of nations. See, e.g., W.A.P. Martin, *Les vestiges d’un droit*

modeled on the abstract notion of formal sovereign equality, they did not take place in an unregulated state of nature. Rather, they were ideally governed by the norm of *zhong-wai yi-jia* (“the central and outer [states] all form one family”).<sup>23</sup> For example, the emperor of China frequently addressed the lesser sovereigns of surrounding states paternalistically as his “younger brothers” and his “younger cousins.”<sup>24</sup> In effect, Confucian family law provided the orthodox model for interstate relations.<sup>25</sup>

From this perspective, China’s historic status in international law is especially ironic. Because it conceptualized political community in terms of kinship, it was ultimately excluded from the Family of Nations. Evidently, the real ground for China’s exclusion was not that it made a primitive category mistake—confusing the logics of politics and kinship—but the simple fact that it belonged to the *wrong* political family.

In short, while much of the rest of this Article focuses on the rhetorical construction of China in terms of Western international law in the nineteenth century, it is important to keep in mind that there was also an East Asian tradition of interstate relations. What follows is a limited historical analysis that looks at China primarily from the perspective of Western international law. Inevitably, China will appear as a relatively passive object acted upon by the West. This is a limitation of the perspective chosen, not a fact about China.

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*internationale dans l'ancienne Chine*, REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE (1882).

23. See, e.g., LYDIA LIU, *THE CLASH OF EMPIRES* 85 (2004) (quoting the Yongzheng emperor). Often, the ideal was stated even more universalistically as *tian-di yi-jia* (“all under Heaven form one family”). As a terminological note, I generally use the *pinyin* system for romanizing Chinese terms. However, when the materials I cite and quote use different systems, I have not modified their usages. In addition, for some Chinese place names that have a settled spelling in the historical literature (such as the German leasehold in Shandong which is romanized as Jiaozhou in *pinyin* but transliterated as Kiaochow in most Anglophone historical sources), I have retained the older form in my own references as well. With respect to foreign-language materials, I cite to English translations whenever possible. In cases where translations do not exist (or I am not aware of them), I have provided my own.

24. See, e.g., FREDERICK FOO CHIEN, *THE OPENING OF KOREA: A STUDY OF CHINESE DIPLOMACY 1876–1885*, at 66 (1967); JOHN KING FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS 1842–1854*, at 27 (1953); MAUNG MAUNG, *BURMA IN THE FAMILY OF NATIONS* 38 (1956); Wang Gungwu, *The Rhetoric of a Lesser Empire: Early Sung Relations With Its Neighbors*, in *CHINA AMONG EQUALS* 47, 55 (Morris Rossabi ed., 1983).

25. Again, this is not to suggest that the Confucian model was the *only* one. Michael Hunt, for example, identifies at least two other historical traditions, apart from what he calls the orthodox “Sinocentric” model: namely, a “cosmopolitan” tradition and a tradition of “statecraft realism.” Michael H. Hunt, *Chinese Foreign Relations in Historical Perspective*, in *CHINA’S FOREIGN RELATIONS IN THE 1980’S* (Robert R. Harding ed., 1984).

## II. STATE AS AN INTERNATIONAL LEGAL PERSON

[T]he metaphors of the day before yesterday are the analogies of yesterday and the concepts of today.<sup>26</sup>

—Harold Berman

[I]f our discipline is to take the implications of globalization seriously, both the formal conceptions of legal personality and the sociological concept of significant legal actors and, more generally, of agency are in need of re-examination.<sup>27</sup>

—William Twining

Taking note of the fiction of the state as an international legal person should not obscure the fact that at the most fundamental level, *all* legal categories are fictions in that they never simply describe a prelegal or prepolitical reality. Law cannot look beyond itself to nature, for there are no more “natural” persons than there are unnatural ones. Although legal theorists wishfully continue to claim that “[t]he only natural persons are human beings,”<sup>28</sup> Hans Kelsen’s point remains unassailable: Law’s “natural person” is, inevitably, a legally defined category.<sup>29</sup> (The point was recognized in fact much earlier even by the natural law thinker John Locke, who similarly insisted that “person” is a “forensic term.”<sup>30</sup>)

Roscoe Pound, for one, traces the personification of the state as far back as ancient Greece: “To Plato the city-state was an individual and the characteristics of the individual human soul projected themselves enlarged in the physiognomy of the State.”<sup>31</sup> While this was indeed a personification of sorts, Plato’s view of the human soul provided a starkly hierarchical political epistemology

26. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 165 (1983).

27. WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* 10 (2000).

28. David P. Derham, *Theories of Legal Personality*, in *LEGAL PERSONALITY AND POLITICAL PLURALISM* 1, 9 (Leicester C. Webb ed., 1958).

29. HANS KELSEN, *PURE THEORY OF LAW* 172 (Max Knight trans., The Lawbook Exch. Ltd. 2d ed. 2002) (1934) (“[E]ven the so-called physical person is an artificial construction of jurisprudence . . . [and] actually only a ‘juristic’ person.”).

30. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 466–67 (Alexander Campbell Fraser ed., Oxford, Univ. Press Warehouse 1894) (1690). For a superb analysis of Locke’s “forensic” concept of the person, see ED COHEN, *A BODY WORTH DEFENDING: IMMUNITY, BIOPOLITICS, AND THE APOTHEOSIS OF THE MODERN BODY* 81–88 (2009).

31. Roscoe Pound, *Philosophical Theory and International Law*, 1 *BIBLIOTHECA VISSERIANA* 71, at 79 (1923).

that was radically different from that of a modern republic.<sup>32</sup> Moreover, at least since Thomas Hobbes, the modern state has been metaphorized predominantly as a *body politic*, rather than a political *psyche*.

To be sure, even the modern state has a spiritual history, but one that is rooted in Christianity.<sup>33</sup> To make the point schematically, in the medieval conception, God was the highest source of authority, with princes receiving their crowns from popes and bishops (or that was at least the Church's theory, even if crowned heads sought to challenge it).<sup>34</sup> However, with the eventual post-Reformation withdrawal of the Church from secular government, kings proclaimed that their authority derived directly from God, without pontifical mediation. The divine right of kings justified the emergence of the absolutist state, and it allowed monarchs effectively to take the place of God within their states.<sup>35</sup> In fact, at the time the notion of the state as an international legal person was not just an idle metaphor or a far-fetched analogy. The sovereign was literally a person (albeit one with extraordinary metaphysical features, such as possessing not one but two bodies<sup>36</sup>). In the end, with the overthrow of the absolutist state by popular revolutions, the sovereign individual came to occupy the place of the sovereign prince—and, by implication, also that of God, whom the prince had represented. The French revolution and the notion of the rights of the *citoyen* constituted effectively, in Hannah Arendt's apt phrase, "the deification of the people."<sup>37</sup>

In short, today sovereignty has been fully democratized. It has descended from God (or the Church) to prince to citizen. With the death of God and the birth of liberalism, the individual person has become the privileged paradigm of political and legal subjectivity: All rights and duties must be held by a "person." It is this juridico-political axiom that generates law's fictional persons today. In municipal law, we have the legal fiction of the corporation as a person, most notably. Analogously, we still regard sovereign states as international legal

32. See PLATO, *THE REPUBLIC* (Francis MacDonald Cornford trans., Oxford Univ. Press 1945).

33. As Carl Schmitt observes, "[a]ll significant concepts of the modern theory of the state are secularized theological concepts." CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab trans., 1985) (1922). For notable historical studies of the theological origins of the modern state, see ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957), and specifically of its legal order, see BERMAN, *supra* note 26, and recently JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008).

34. See, e.g., BERMAN, *supra* note 26, at 285 ("[T]o become a prince one must be chosen by God—which meant that one must have the approval of the ecclesiastical authority.").

35. See, e.g., PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* 49 (1974).

36. KANTOROWICZ, *supra* note 33, at 7.

37. HANNAH ARENDT, *ON REVOLUTION* 183 (Penguin Books 1990) (1963).

persons, whether or not a state today is personified by an absolute monarch in the fashion of a Sun King.<sup>38</sup>

Like all good fictions, legal fictions too have material effects on the world in which they reign. Therefore, it matters that states are figured as persons, and it matters what *kind* of persons they are.<sup>39</sup> Yet the notion of the person is curiously empty at its point of origin. Etymologically, the Latin term *persona* refers to a ritual mask worn by an actor performing a role on stage.<sup>40</sup> That is, it refers to something that *covers* one, rather than to what one *is*, one's substance. It was only subsequently that "*persona* became a metaphor and was carried from the language of the theater into legal terminology."<sup>41</sup> What distinguished a private individual and a Roman citizen was that the latter had a *persona*—a "legal personality," in contemporary parlance. In short, person was originally a theatrical term of art, then a legal metaphor for a Roman rights-bearer, and it was only later when Roman law was rediscovered, reconceptualized, and crossbred with a Christian sense of interiority that "person" acquired its modern metaphysical meaning: not only a legal actor but an individual human being as such.

Once in place, the concept of person came to provide the foundation for interstate law as well. This so-called private law analogy justified the projection of key Roman law categories onto the international plane. Sovereignty, for example, became an extension of the Roman notion of *dominium*, or ownership, with the sovereign constituting effectively a kind of Roman proprietor.<sup>42</sup> It is hardly an exaggeration to say, as one early twentieth-century observer did, that

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38. See generally JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* (2004). See also David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275, 330–49 (1996) (recounting the further analogic extension of the metaphor of personhood to international organizations); Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35 (2005) (analyzing the continuing political relevance of the concept of international legal personality).

39. Needless to say, although the person is the privileged metaphor for the state in law, there are many other political and cultural metaphors as well. For an analysis of bestial and monstrous metaphors, see JACQUES DERRIDA, *1 THE BEAST AND THE SOVEREIGN* (Geoffrey Bennington trans., 2009) (2001). On architectural and mechanistic metaphors of the state, see ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* (2009). It is noteworthy that even architectural metaphors were often gendered as well as sexualized. *Id.* at 55–85.

40. Derham, *supra* note 28, at 12.

41. ARENDT, *supra* note 37, at 106–07.

42. See, e.g., SIR HENRY SUMNER MAINE, *INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE, 1887*, at 55 (London, John Murray 1888).

“we are indebted to this analogy for almost everything that is regarded as fundamental in modern international law.”<sup>43</sup>

Yet calling a state a person provides only a point of departure for the analysis of international law, not a point of arrival. One’s view of international society obviously depends on one’s view of the nature of the persons that comprise that society. Hence, thinkers as different as Hugo Grotius and Thomas Hobbes both rely on the private law analogy, yet they derive from it very different views of the social life of states. For Hobbes, in their relations to each other states are little more than savages in a state of nature.<sup>44</sup> (This should hardly surprise us, considering that his model for the “artificial person” is the Leviathan, who is not even a person, strictly speaking, but a biblical sea monster.<sup>45</sup>) In contrast, Grotius attributes to persons as well as states a kind of natural sociability that provides international law with substantive content.<sup>46</sup>

For better or worse, the private law analogy became increasingly prevalent in the nineteenth century:<sup>47</sup> States were treated “as if they were individuals with a conscience, a sense of honor, a single interest, and a single life.”<sup>48</sup>

### III. COLONIAL LEGAL RHETORIC

[A]nalogies, it is true, decide nothing, but they can make one feel more at home.<sup>49</sup>

—Sigmund Freud

What kind of person, then, was the prototypical state, in the view of international lawyers? Below, I consider aspects of colonial international law’s persons in general terms. First, I describe European states as a civilized,

43. Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564, 564 (1917).

44. See generally THOMAS HOBBS, *THE LEVIATHAN* (A.P. Martinich ed., Broadview Press 2005) (1651).

45. For references to the Leviathan, see, for example, *Genesis* 1:20–23; *Job* 3:8, 41:1.

46. See Benedict Kingsbury & Benjamin Straumann, *State of Nature Versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 33 (Samantha Besson & John Tasioulas eds. 2010).

47. See, e.g., David Kennedy, *International Law in the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 1, 99–136 (1998) (“By century’s end, there is increasing use of a private law analogy to explain the international legal order.”).

48. Dickinson, *supra* note 43, at 590.

49. SIGMUND FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 72 (James Strachey ed. & trans., W.W. Norton 1933).

aristocratic community with its own code of honor (Part III.A). Next, I review in schematic terms the contrasting gendered, sexual, and racial characteristics by which nations outside of Europe were rendered queer and therefore rapable (Part III.B).

A. European Law of Chivalry

In the formative age of Absolutism, sovereignty was embodied literally in the person of the ruler.<sup>50</sup> Hence, the paradigmatic international legal person was the prince. The appropriation of Roman private law categories provided the foundation for a patrimonial conception of the state—the territory of a prince was treated as if it were his personal property. It could be inherited, it could be disposed of, and it could be acquired through marriage, for example.<sup>51</sup> Legally, interstate relations were inseparable from relations among dynastic families. Indeed, because of resulting complicated sexual politics, most wars in Europe were wars of dynastic succession well into the eighteenth century.<sup>52</sup>

Furthermore, princes' justifications for wars were different from those of the religious civil wars that plagued Europe until the Peace of Westphalia in 1648. Carl Schmitt, most notably, celebrates what he calls the "bracketing of war" as the greatest achievement of European public law:<sup>53</sup> Wars among sovereigns were understood as analogous to duels among gentlemen, unlike in the medieval *respublica Christiana* where wars could be labeled as either just or unjust, and unjust enemies could be disposed of accordingly.<sup>54</sup> In contrast, the aim of a duel is not to determine which side is just, but rather to preserve honor among men of aristocratic pedigree. Likewise, a war preceded with a formal declaration of war and fought to the sound of bugles in accordance with established rules was not a crime, an unjust aggression, but simply a legitimate relation among sovereigns. In sum, while Roman law gave international law the concept of *persona*, the international legal person that was born was a hybrid between a Roman landowner writ large and a feudal knight: The rules he was expected to observe were part Roman property law and part chivalric code. Thus viewed, European states constituted a civilized, aristocratic community with its own code of honor.

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50. See *supra* text accompanying note 35.

51. ANDERSON, *supra* note 35, at 39.

52. *Id.*

53. SCHMITT, *supra* note 19, at 142.

54. *Id.* at 143. The analogy of war-as-duel is pervasive in nineteenth-century international legal rhetoric. See, e.g., CARL VON CLAUSEWITZ, *ON WAR* (Michael Eliot Howard & Peter Paret trans., Princeton Univ. Press 1989) (1832); JOHN WESTLAKE, 2 *INTERNATIONAL LAW* 81 (1910).



By virtue of this fact, sovereignty was constitutionally—indeed constitutively—limited to Europe.<sup>55</sup>

As I have noted above, the primary metaphor of exclusion from the rights and duties of international law was kinship: States that did not meet the elusive standard of civilization were barred from membership in the European Family of Nations.<sup>56</sup> Even though nineteenth-century publicists sought to justify the rules of international law in terms of liberal political thought, their liberal edifice was ultimately built on the paradigmatically illiberal foundation of bloodline and kinship. Effectively, not unlike in Confucian East Asia, *family law* provided another analogy for European interstate relations as well, in addition to Roman private law.<sup>57</sup> Indeed, as I have suggested, in the era of Absolutism international law was in many regards a matter of family law not only figuratively but literally, as crowns were acquired through marriage and inheritance. Ironically, even as dynastic principles lost their currency in organizing relations within Europe, it was in the increasingly liberal nineteenth century that the rhetoric of a Family of Nations reached its peak in regulating relations with states outside Europe.

Needless to add, highly idealized norms of European public law should not be taken at face value as a complete and accurate description of interstate

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55. A common argument in fact insisted that the chivalric nature of European sovereignty depended on the practice of imperialism elsewhere. As J.A. Hobson summarizes the claim (which he rejects), “If [European] nations, it is argued, ‘are no longer called upon to struggle for food [by obtaining it from colonies], and check their growth of population while they increase their control over material supplies, they will become *effete* for purposes of physical struggle; giving way to an easy and luxurious life, they will be attacked by lower races multiplying freely and maintaining their military vigor, and will succumb in the conflict.” J.A. HOBSON, *IMPERIALISM* 182 (1902) (emphasis added). Indeed, Thomas de Quincey suggests the further corollary that part of China’s problem, for example, was its *lack of colonies*, which in turn signified a lack of virility. “We have the colonial instinct in the strongest degree; China in the lowest,” Quincey claims, as if China were not an empire in its own right, dismissing China as “a lazy, torpid body without colonies.” THOMAS DE QUINCEY, *THE OPIUM AND THE CHINA QUESTION* (1840), reprinted in *THE COLLECTED WRITINGS OF THOMAS DE QUINCEY* 180–81 (Great Books 2009).

56. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2004); GERRIT W. GONG, *THE STANDARD OF “CIVILIZATION” IN INTERNATIONAL SOCIETY* (1984).

57. Of course, even though both systems relied (in part) on kinship analogies, their notions of kinship were distinct. Remarkably, although classic international lawyers in Europe did not develop the family law analogy jurisprudentially, at the turn of the twentieth century the Chilean jurist Alejandro Alvarez (originally trained in family law) set out to do just that, outlining the principles of a regionally specific “American” international law that was based on notions of familial solidarity rather than individualism. See, e.g., ALEJANDRO ALVAREZ, *LE DROIT INTERNATIONAL AMÉRICAIN: SON FONDEMENT, SA NATURE: D’APRÈS L’HISTOIRE DIPLOMATIQUE DES ÉTATS DU NOUVEAU MONDE ET LEUR VIE POLITIQUE ET ÉCONOMIQUE* (1910); Alejandro Alvarez, *Latin America and International Law*, 3 *AM. J. INT’L L.* 269 (1909). Alvarez’s enterprise was contested from the beginning. See, e.g., SA VIANNA, *DE LA NON EXISTENCE D’UN DROIT INTERNATIONAL AMÉRICAIN* (1912).

practice.<sup>58</sup> They could be, and were, breached—albeit always at some political cost. Yet even when they were observed in the breach, they provided a discursive foundation for a “civilized” European identity. From the perspective of the Family of Nations, it was a self-evident legal and political fact that only some states were entitled to be treated with honor and dignity, as true international persons. Other communities were lesser persons, and even nonpersons.<sup>59</sup>

The colonial rhetoric of international law is often reduced to a binary civilized-versus-barbarian distinction, yet in fact such a simple dichotomy was wholly inadequate in the face of enormous diversity as European states entered into political relations with communities in other parts of the world. Unsurprisingly, there were different kinds of non-Western nonpersons or partial persons in a legal sense,<sup>60</sup> and outside Europe international law racialized and queered them in different ways, thus making possible and justifying certain kinds of violence at certain times and places.

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58. For example, as Martti Koskenniemi notes, Schmitt’s description of the law of nations between 1500 and 1900 is best viewed as a formal and abstract explication of the logical structure of absolutism in international society rather than a concrete historical analysis. Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde*, 11 *CONSTELLATIONS* 492, 495 (2004).

59. Before elaborating below on the queer peoples and nations outside Europe, it bears emphasizing that the rhetorical contrast between a normative West and a queer non-West (to use the inelegant term) is only an idealized opposition, not a factual description of either. Similar social and legal practices could code as either normal or queer, depending on where they took place and who engaged in them. Hence, I am not suggesting that European interstate society did not have its own queer tendencies, but only that they were not regarded as such. As I have already noted, the Family of Nations was a queer one by its very constitution: Insofar as European international persons were regarded as aristocratic men of honor, theirs was a single-sex family—evidently the reproduction of the Family of Nations was not sexual by nature. (It is noteworthy that other institutions to which international lawyers compared interstate society were often expressly homosocial as well, as in John Westlake’s invocation of a “cricket club” as an alternative metaphor. See JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 7 (Cambridge Univ. Press 1894).) Likewise, even in Europe the notion of a fully sovereign state was an ideal, not a fact. Dickinson, for example, bemoans international lawyers’ lack of attention to the multiplicity of different kinds of international persons of “qualified status” populating Europe: “The completely sovereign state has been taken as the normal type, and all qualifications have been admitted grudgingly. . . . Nevertheless, the books [on international law] take account in one way or another of personal unions, confederations, neutralized states, guaranteed states, civilized belligerent communities, and civilized insurgent communities.” EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 124 (1920). Indeed, Dickinson devotes much space to cataloging various kinds of vassals, semi-suzerains, and protected cities existing in *Europe* as well as elsewhere. *Id.* at 221–79.

60. For a summary discussion of various degrees of recognition accorded to “native” sovereignty, see, for example, M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION* 10–23 (1926).

## B. Extra-European Law of Queer Nations

In their feminist analysis of international law, Hilary Charlesworth and Christine Chinkin characterize the standard conception of the sovereign state as “a bounded, self-contained, closed, separate entity that is entitled to ward off any unwanted contact or interference.”<sup>61</sup> Hence, they observe, the state possesses “a heterosexual male body” which has “no ‘natural’ points of entry, and its boundedness makes forced entry the clearest possible breach of international law.”<sup>62</sup> Indeed, many nineteenth-century jurists expressed no hesitation whatsoever in determining the (proper European) state’s sex. As Bluntschli put it unequivocally, “*Der Stat ist der Mann.*”<sup>63</sup>

From their valuable insight regarding the state’s gendered body, Charlesworth and Chinkin, following many others, proceed to the logical conclusion that colonized and conquered states were in turn gendered female.<sup>64</sup> Yet the last observation need not follow. Gender is neither a fixed attribute nor a logical conclusion, but a relational identity. Therefore, it is always achieved only provisionally.<sup>65</sup> Upon a closer analysis, even the paradigmatic European state’s gender was far from determinate. It could be *more* or *less* masculine, depending on the colonial other against which it saw itself. Similarly, colonized states, too, occupied a range of positions on the male-female continuum, reflected in the queer legal rhetoric that regulated colonial violence.

Consider the case of China. Within the global architecture of colonialism, Europe’s self-proclaimed *mission civilisatrice* worked at least reasonably well so long as Europeans were dealing with peoples that they could characterize to their own satisfaction as barbarians or savages (say, the inhabitants of the New World) or peoples whose political existence could be denied altogether (say, Australian Aborigines whose land was deemed simply *terra nullius*). However, ancient Asian civilizations such as China and Japan, among others, were more difficult to dismiss. Although their civilizations were evidently very different from Europe’s,

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61. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 129 (2000). For an analysis of the uses and limits of the conceptions of the state as an embodied, unified self, as employed by feminists, see Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 293 (1993).

62. CHARLESWORTH & CHINKIN, *supra* note 61, at 129.

63. J.C. BLUNTSCHLI, *Der Stat ist der Mann*, in 1 *GESAMMELTE KLEINE SCHRIFTEN* 260 (Nördlingen, C.H. Beck’schen Buchhandlung 1879).

64. CHARLESWORTH & CHINKIN, *supra* note 61, at 130 (“Colonialism was represented in an erotic way, with the male coloniser taming, through intercourse, an unbounded, uncontrolled female people.”).

65. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (2d ed. 1990).

they undeniably had the signal markers of a “high” civilization, even as defined by Europeans themselves. In his classic analysis in 1902, J.A. Hobson stated that Asia was the “great test of Western imperialism” precisely because in his view Asian civilizations were “as complex as our own, more ancient and more firmly rooted by enduring custom,” in contrast to “the races of Africa,” who were more easily colonized as “savages or children.”<sup>66</sup> One common response to this catachresis was not to deny it, but to exaggerate it and pervert its significance. Hence, China’s problem could be said to be not that it was barbaric but that it was *hypercivilized*—its Golden Age had passed, and it was degenerating into a senile old age.<sup>67</sup> As an international person, it could therefore be dismissed as indolent and hopelessly effete—a personification not of Teutonic knighthood but of an overcivilized mandarin.

It is notable that China was in fact never fully colonized. However, as Eric Hayot puts it, it is important to analyze “the fact of *not* having been colonized” as an “event in the history of colonialism.”<sup>68</sup> How, then, was China not-colonized? Instead of suffering a full-scale territorial occupation, it was repeatedly “penetrated”—as the clichéd formulation goes—by various European states, as well the United States and Japan, which established an almost infinite variety of concessions and spheres of influence.<sup>69</sup> The graphic and endlessly recurring metaphor of penetration is instructive, as noted by Charlesworth and Chinkin, even if its meaning is not transparent. Somewhat unexpectedly, Walt Rostow’s theory of development suggests an alternative interpretation of this metaphor.<sup>70</sup> As a modernization theorist *par excellence*, Rostow subscribes to a theory of development that proceeds by stages. According to Rostow, there are a handful of non-European states that were “born free”—essentially free of “tradition”—and thus were able to take a shortcut to modernity (namely, the Anglophone settler colonies of the United States, Canada, Australia, and New Zealand).<sup>71</sup> However, the rest of the non-European world had to free itself of the shackles of tradition in order to develop further. In stimulating this process, the violence of

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66. HOBSON, *supra* note 55, at 285.

67. See, e.g., MARÍA JOSEFINA SALDAÑA-PORTILLO, THE REVOLUTIONARY IMAGINATION IN THE AMERICAS AND THE AGE OF DEVELOPMENT 42 (2003).

68. ERIC HAYOT, THE HYPOTHETICAL MANDARIN: SYMPATHY, MODERNITY, AND CHINESE PAIN 10 (2009) (emphasis added). See also Tani E. Barlow, *Colonialism’s Career in Postwar China Studies*, 1 POSITIONS 224 (1993).

69. See, e.g., Barlow, *supra* note 68, at 241 (analyzing constant historical depictions of the West’s “penetration” of China).

70. W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960).

71. *Id.* at 17.

colonialism was in fact a blessing in disguise for the colonized, Rostow argues: It ignited a sense of nationalism in communities that previously had no sense of national identity, and national identity, in Rostow's view, is a prerequisite for successful modernization.<sup>72</sup>

What is illuminating about Rostow's theory is the underlying psychosexual dynamic that animates the process of colonial development and ultimately provides the ground for extra-European sovereignty. As Maria Josefina Saldaña-Portillo elaborates the unarticulated dynamic that motivates Rostow's schema, colonized states exist effectively in a state of aggrieved masculinity, waiting for their eventual emancipation into full sovereign manhood. The unbearable humiliation of imperialism ultimately arouses a desire in the colonized to resist the aggression and to become manly, self-determining subjects of the interstate community.<sup>73</sup> In this subtler reading, colonialism is thus not simply a metaphoric rape by Western (male) states of non-Western (female) states. Rather, it constitutes a homoerotic violation of non-Western states' wounded masculinity that in turn causes the subjugated states to want to become sexual violators themselves. From this perspective, the West's casual but repeated penetrations of China constitute a kind of hazing ritual that is required for entry into the European fraternity of nations.

Consider the contrasting experiences of China and Japan. After Japan was forcibly "opened" by Commodore Matthew Perry in 1853 (to use the conventional euphemism), it recovered relatively quickly from the West's initial intrusions and soon developed sufficient military prowess to defeat China in 1895 and Russia in 1905. It was thus its martial success and successful mimicry of Western imperialism in Asia that secured Japan at least a provisional place in the Family of Nations. For example, in response to the late nineteenth-century anti-Asian-immigration movement, the United States summarily banned Chinese immigration in explicit violation of its treaties with China,<sup>74</sup> whereas Japan was instructed to restrict its emigration voluntarily. Suggestively, this pseudoconsensual U.S.-Japanese treaty arrangement was conventionally referred to as the

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72. *Id.* at 26–27.

73. SALDAÑA-PORTILLO, *supra* note 67, at 34–35.

74. See, e.g., ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998). Adding insult to injury, not only did the U.S. Supreme Court uphold the Chinese Exclusion laws, despite the fact that they expressly violated an international legal obligation the United States had voluntarily undertaken, but the Court also noted that if the Chinese government was displeased with the result, it was free to pursue diplomacy or "resort to any other measure, which, in its judgment, its dignity may demand." *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (emphasis added). Given that it was in no position to make effective demands on the United States, evidently any "dignity" that China might have claimed existed in its own imagination only.

Gentlemen's Agreement, suggesting that Japan was indeed a man of honor whose word could be trusted.<sup>75</sup> Yet at the same time, although Japanese modernizers set out self-consciously to "Leave Asia, Enter Europe" (*Datsu-A, Nyo-O*),<sup>76</sup> even Japan was ultimately unable to define itself as socially and culturally white.<sup>77</sup>

In contrast to China and Japan, Africa was rhetorically an easier case for the *mission civilisatrice*, for the simple and profound reason that African civilizations were invisible as *civilizations* in the eyes of most European observers.<sup>78</sup> For them, the Dark Continent stood for pure nature. Marlow in Joseph Conrad's *Heart of Darkness* indeed insists that going into the interior of Africa was like returning to a time when "big trees were kings."<sup>79</sup> Devoid of political civilization, African sovereignty was reducible to that of the plant kingdom, and the proverbial savages who inhabited it were little more than animals, defined by their uncontrollable appetites. In gendered terms, while China was too civilized and therefore less than fully masculine, the problem with Africa was not a deficit of masculinity, but an excess—it was *hypermasculine*. Except for the colonies of Hong Kong and Macao, the West generally respected China's territorial integrity, and the Chinese empire was not partitioned among Western states even in the orgy of the so-called Scramble for Concessions at the end of the nineteenth century. Evidently, in China casual imperial penetrations were anticipated primarily to arouse a desire to assume a more manly posture.<sup>80</sup> This prophecy was seemingly fulfilled when Chairman Mao proclaimed proudly, "No nation needs to prop us up. We can stand erect and walk on our own feet like free men."<sup>81</sup> In

75. See, e.g., ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (1999).

76. See, e.g., JOHN PETER STERN, *THE JAPANESE INTERPRETATION OF THE "LAW OF NATIONS," 1854–1874*, at 136 (Princeton Univ. Press 1979).

77. This was reflected ultimately in legal determinations about the racialized bodies of individual Japanese persons as well. In *Ozawa v. United States*, 260 U.S. 178 (1922), the U.S. Supreme Court squarely rejected Takao Ozawa's claim that he was eligible for naturalization as a white person. For a complete analysis of Ozawa's argument and its rejection by the District Court for the Territory of Hawaii and by the U.S. Supreme Court, see Devon Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009). See also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 79–109 (1996).

78. But see BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE, 1850–1910* (1992) (describing Ashanti and other African civilizations with politically organized states).

79. JOSEPH CONRAD, *THE HEART OF DARKNESS* 102 (Signet Classics 1983) (1910).

80. On "standing up as the posture of the West and modernity," in contrast to "the kowtow as the quintessential Chinese act," see, for example, ERIC REINDERS, *BORROWED GODS AND FOREIGN BODIES: CHRISTIAN MISSIONARIES IMAGINE CHINESE RELIGION* 212 (2004). For a more complete analysis of the kowtow, see *infra* Part IV.C.2.

81. JAMES REARDON-ANDERSON, *YENAN AND THE GREAT POWERS: THE ORIGINS OF CHINESE COMMUNIST FOREIGN POLICY, 1944–1946*, at 172 (1980).

contrast, rhetorically Europe's full-scale continental rape of Africa suggested a desire to *discipline*, rather than arouse, Africa's excessive, sexualized, and ungovernable hypermasculinity by means of a brutal, calculated mass violation. (In an extraordinarily graphic enactment of this metaphor, two white men in the French Congo in fact exploded a stick of dynamite in a black prisoner's rectum on Bastille Day—literally in order to celebrate French sovereignty in Africa.<sup>82</sup>)

In the European imagination, America, like Africa, had its own savages. Some of those savages may have been relatively more civilized than others but savage nonetheless—say, the Aztecs, who were hardly uncivilized yet practiced human sacrifice, for example. As in the case of Africa, the paradigmatic problem with American savages was not so much their lack of masculinity *per se*—savages, by definition, are hardly effete—but the deviant nature of their masculinity as well as their racial inferiority, as reflected in their religious and cultural practices. Indeed, from the very beginning of their discovery, there was an obsession with the putatively universal practice of sodomy among Indians.<sup>83</sup> Such charges by the Spanish *conquistadores* were strangely gratuitous, entailing reports of alleged outbreaks of sodomy without any mention of actual Indian sexual practices. Sodomy—unlike human sacrifice, for instance—was in fact not witnessed by Spaniards.<sup>84</sup> As Jonathan Goldberg characterizes the systematic persecution of sodomitical Indians, the Spanish were motivated by a “certainty that requires no proof, an argument that needs no logic to support it.”<sup>85</sup> Insofar as Indian masculinity was essentially deviant, sodomy was a moral axiom about the nature of Indians, not an empirical fact to be observed.

This is obviously a highly stylized representation of some common European views of the racial, gender, and sexual attributes of the queer international persons of Asia, Africa, and America.<sup>86</sup> It does not even begin to address

82. ADAM HOCHSCHILD, KING LEOPOLD'S GHOST 280–81 (1999).

83. See, e.g., JONATHAN GOLDBERG, SODOMETRIES: RENAISSANCE TEXTS, MODERN SEXUALITIES 179, 193–95 (1992).

84. *Id.* at 195.

85. *Id.* at 179, 195.

86. For a more complete discussion, it would be critically important to consider the place and role of the figure of the noble savage, for example. However, its primary role seems to have been to provide a rhetorical resource for critics of European politics and civilization in *Europe* (as in the case of critics of Hobbesian royal absolutism which was justified by his pessimistic view of man in the state of nature), as opposed to critics of European *overseas* colonialism. See, e.g., MICHEL DE MONTAIGNE, *Of Cannibals* (1580), in *ESSAYS AND SELECTED WRITINGS* 79, 103 (Donald M. Frame trans. & ed., St. Martin's Press 1963) (“So we may well call these people barbarians, in respect to the rules of reason, but not in respect to ourselves, who surpass them in every kind of barbarity.”).

how those attributes varied across both time and space *within* Asia, Africa, and America.<sup>87</sup> For present purposes, I want to highlight both the great variability of the non-normative positions occupied by extra-European states and peoples and the simultaneous flexibility with which Europe was able to maintain its superior position in relation to them. In the end, Europe was both manly *and* civilized. It was neither hypercivilized nor savage, and neither aggrieved in its masculinity nor hypermasculine; it was both, but not any less either for being so. As Saldaña-Portillo observes, “what could be more masterful than a subjectivity

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For more detailed legal studies of colonialism in regional contexts, see, for example, R.P. ANAND, DEVELOPMENT OF MODERN INTERNATIONAL LAW AND INDIA (2005); STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005); STUART BANNER, POSSESSING THE PACIFIC (2007); OLIVE P. DICKASON & L.C. GREEN, THE LAW OF NATIONS AND THE NEW WORLD (1989) (1920); SIBA N’ZATIOULA GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS, AND AFRICANS (1996); ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); ERIC WILSON, THE SAVAGE REPUBLIC: *DE INDIS* OF HUGO GROTIUS, REPUBLICANISM, AND DUTCH HEGEMONY WITHIN THE EARLY MODERN WORLD SYSTEM (c. 1600–1619) (2008), as well as the dated studies by Charles Henry Alexandrowicz, THE EUROPEAN-AFRICAN CONFRONTATION: A STUDY IN TREATY-MAKING (1967) and INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (1973). Despite the specificity of its title, there is an extensive analysis of the history of international law also in JULIUS GOEBEL, THE STRUGGLE FOR THE FALKLAND ISLAND: A STUDY IN LEGAL AND DIPLOMATIC HISTORY 1–220 (1927). Lindley’s early twentieth-century treatise likewise includes much historical analysis (although it has been updated rhetorically, with terms such as “savage” being replaced by “backward,” and “Family of Nations” by a slightly more contemporary “International Family”). LINDLEY, *supra* note 60.

For recent studies of China as an international legal subject (among other things), see LIU, *supra* note 23, at 31–107; IMMANUEL HSU, CHINA’S ENTRY INTO THE FAMILY OF NATIONS (1960); RUNE SVARVERUD, INTERNATIONAL LAW AS WORLD ORDER IN LATE IMPERIAL CHINA: TRANSLATION, RECEPTION AND DISCOURSE 1847–1911 (2007); Cheng Peng, *Xifang Guoji Fa Shou ci chuan ru Zhongguo Wenti de Shentao* [An Analysis of the Introduction of Western International Law in China], 1989 BEIJING DAXUE XUEBAO 105 (No. 5); Li Zhaojie, *How International Law Was Introduced to China*, in GUOJI FALÜ WENTI YANJIU (1999); Lin Baogang, *Lun wan Qing Shidafu Gongfa Guannian de Yanbian* [Changing Perceptions of Public International Law Among Late Qing Literati], 1999 ZHEJIANG XUEKAN 152 (No. 3); Wang Tieya, *Zhongguo yi Guoji Fa: Lishi yu Xiandai* [China and International Law: Historical and Contemporary Perspectives], 1991 ZHONGGUO GUOJI FA NIANKAN 5; Yang Zewei, *Jindai Guoji Fa Tounu Zhongguo Jiqi Yingxiang* [Introduction of Modern International Law to China and Its Influence], 1999 FAXUE YANJIU 122 (No. 3).

For more global contemporary analyses, in addition to the sources cited in note 19 *supra*, see LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900 (2002); JÖRG FISCH, DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT (1984); GONG, *supra* note 56; EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM, AND ORDER IN WORLD POLITICS (2002); and Onuma Yasuaki, *When Was the Law of International Society Born?*, 2 J. HIST. INT’L L. 1 (2002).

87. Indeed, a more complete analysis must first provide a historical account of the emergence of continents as the relevant units of a global racial and civilizational taxonomy. For a critical analysis of continents as “metageographical” categories, see MARTIN W. LEWIS & KÄREN E. WIGEN, THE MYTH OF CONTINENTS: A CRITIQUE OF METAGEOGRAPHY (1997). For a recommendation of “critical regionalism” as an alternative to the continental schema, see GAYATRI CHAKRAVORTY SPIVAK, OTHER ASIAs (2008).



that is able to slip effortlessly into all subject positions . . . apparently absorbing all difference into his system of total experience?”<sup>88</sup> In short, as “total” subjects, European sovereign states were perfect aristocratic gentlemen, and the laws governing their Family of Nations were a perfect *Ritterkodex* fit for (properly) civilized men.

As I have suggested, historically as well as rhetorically, international law was best adapted to the Americas and to Africa, both of which were ultimately colonized outright.<sup>89</sup> Indeed, their homoerotic violation can be viewed as the historical condition of possibility of the European sovereign state. Asia constituted a different kind of ethnographic as well as political challenge. Although the peoples of Asia were regarded as generally effete, perversely they often turned out to be *more* difficult to penetrate than the savage tribes of America or Africa.

#### IV. CHINA, FOR EXAMPLE

But China, reverend dulness! hoary idiot!, all she can say at the convocation of nations, must be—“I made the tea.”<sup>90</sup>

—Ralph Waldo Emerson

Significantly, China as a whole was not violated militarily but economically. But before even the economic violation could take place, its relatively elevated status in the European imagination had to be downgraded. Bemoaning its mythic inscrutability, international lawyers did their best to stabilize it as an object of legal knowledge (Part IV.A below). Although China could not be easily characterized as barbaric, international law provided a vocabulary for transforming its putative economic and political isolation (Part IV.B) into acts of interstate aggression, namely, a resistance to the West’s “right” to normal intercourse and a violation of its “dignity” by asking Western envoys to perform the kowtow (Part IV.C). This queer rhetoric of violation was at once racialized, gendered, and sexualized. While it reflected in many ways the grammar of colonial violence in other parts of the world, it was not simply its static

88. SALDAÑA-PORTILLO, *supra* note 67, at 80.

89. This is of course a vast historical generalization, but valid for the limited comparative purpose for which I am invoking it. There were certainly important differences in the colonization of South versus North America (outright conquest versus cession by treaty), on the one hand, and the colonization of the Americas versus Africa (settlement colonies versus protectorates), on the other hand. While African protectorates, for example, were not considered colonies in a formal sense, there is no question that in practice they amounted to colonies and were usually recognized as such.

90. 42 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON, 1822–1826, at 379 (William H. Gilman et al. eds., 1961).

reinscription, nor was it stable over time—or even at any one time. Most notably, it articulated a basis for the establishment of Western extraterritorial jurisdiction, rather than full-scale territorial conquest. Throughout the nineteenth century, China occupied an unstable intermediate position between the fully colonizable and the truly sovereign. Significantly, by the century's end the Chinese became increasingly associated with primitive colonial natives, signaling a transition from quasi-consensual intercourse to colonial rape. This was marked by a shift from the exercise of simple extraterritorial jurisdiction toward territorial occupation, which was made possible by the development of a range of new legal technologies (Part IV.D). In a remarkable symbol of the decline of China's status, in 1901 the Kaiser demanded that a Chinese prince perform the ritual kowtow before him in Berlin (Part IV.E).

In sum, the example of China illustrates the significance of the queer rhetoric of international law: It did not merely reflect China's inherent weakness, but helped *make* China weak internationally.

#### A. Impenetrable and Inscrutable

The Orient was not only impenetrable, but also inscrutable. These two attributes were deeply connected, and determining the Orient's political and legal status was a matter of considerable urgency. As soon as the *Institut de droit international* was established in Ghent in 1873, one of its very first projects was to try to locate the Orient within the architecture of international law. It created a commission to determine under what conditions and to what extent European international law was applicable in the Orient.<sup>91</sup> Even if Oriental states fell short of European standards of civilization, the *Institut* found it necessary to distinguish “the inhabitants of the Ottoman Empire, the Persians, the Chinese, and the Japanese” from “pagan and semi-savage populations.”<sup>92</sup> The commission sent a questionnaire to diplomats, consular officials, and other experts.<sup>93</sup> Not all of the questionnaires were returned, and the responses varied greatly, as one might expect, considering the indeterminate nature of “the Orient” as a category—a

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91. See 6<sup>me</sup> Commission, 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 51 (1877). The commission's original members (which included the American David Dudley Field) held their first meeting in the Hague. Martti Koskenniemi describes the commission's work in *THE GENTLE CIVILIZER OF NATIONS* 132–33 (2001), together with the history of the *Institut* more generally.

92. Sir Travers Twiss, *Rapport*, 3–4 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 301 (1879–80).

93. For reproductions of the questionnaire, see *Applicabilité du droit des gens européen aux nations orientales*, 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 141–42 (1877); *Questionnaire*, 3–4 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 298–300 (1879–80).

catch-all phrase for an entity of the European imagination that extended from Turkey to Japan.<sup>94</sup> Rather than finding fault with the formulation of the question, some saw this as evidence of the inadequacy of “Oriental law” itself—clearly, there was “nothing clear or precise” about it.<sup>95</sup> Others recognized that the question, as formulated, was simply “too vast.”<sup>96</sup>

In the end, the *Institut* resigned to its failure to fix Oriental law as a sensible object of jurisprudential knowledge. Instead, it reframed its task and requested reports on what reforms would be needed in specific Oriental countries in order to make European international law fully applicable.<sup>97</sup> In effect, since the *Institut* was unable to *describe* the Orient adequately, it decided instead to *prescribe* what the Orient should become; unable to read the Orient, it sought to overwrite it.<sup>98</sup>

Even within the Orient, China occupied a particularly queer legal position. Although it was conventionally deemed a beacon of stability—or an ugly example of stagnation, depending on one’s point of view—its image in Europe underwent a radical change over time.<sup>99</sup> When China entered the political consciousness of modern Europe, many recognized it not only as a civilizational equal but even as a political superior.<sup>100</sup> Indeed, a highly articulated bureaucratic state emerged in China much earlier than in Europe. When Louis XIV was in the process of setting up an embryonic centralized administrative system, the Kangxi emperor already ruled at the apex of the real thing.<sup>101</sup>

94. See Twiss, *supra* note 92, at 301.

95. *Extrait du procès verbal de la quatrième séance plénière*, 3–4 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 307, 307 (1879–80).

96. *Id.* at 309.

97. *Id.* at 311.

98. In 1887, the *Institut* commissioned reports on the progress of judicial reforms in various Oriental countries. For a summary of the report on China, see *Analyse sommaire du rapport de M. Ferguson, sur les réformes judiciaires en Chine et dans le royaume de Siam*, 11 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 339 (1889–92). For the full report, see Jan Helenus Ferguson, *Les réformes judiciaires en Chine et dans le royaume de Siam*, 22 RÉVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 251 (1890).

99. See generally D.E. MUNGELLO, *THE GREAT ENCOUNTER OF CHINA AND THE WEST, 1500–1800* (1999).

100. As Eric Hayot puts it, “modern Europe encounters China as the first contemporaneous *civilizational* other it knows, and not as a ‘tribe’ or nation whose comparative lack of culture, technology or economic development mitigated the ideological threat it posed to progressivist, Eurocentric models of world history.” HAYOT, *supra* note 68, at 10.

101. Jacques Gernet, *Introduction to FOUNDATIONS AND LIMITS OF STATE POWER IN CHINA*, at xv, xvi–xviii (S.R. Schram ed., 1987). See also R. BIN WONG, *CHINA TRANSFORMED* (1997) (describing earlier development of Chinese state).

Many Enlightenment figures in fact held up Chinese sovereignty as a model for Europe.<sup>102</sup>

The radical transformation of this early Sinophilia to equally intense Sinophobia and eventually into modern anti-Chinese racism is a story far beyond the scope of this Article. From the perspective of international law, what matters is that Sinophobia was not written on a blank slate; it was simply not possible to purge entirely a long history of idealizing images of China from the historical consciousness. These images were always there, however latent, and they could be activated even inadvertently.<sup>103</sup> Remarkably, the changes in the perception of China were not precipitated by the emergence of new critical *facts* about China; rather, they were primarily a new *interpretation* of China, a reevaluation of the significance of what was already known. This history made China an extraordinarily volatile legal and discursive subject. By the end of the nineteenth century, China was labeled outright “barbaric” by an increasing number of international lawyers and diplomats, yet that characterization never “stuck” as effectively as it did in Africa and in the Americas; other lawyers’ and diplomats’ evaluations of the Celestial Empire continued to range from “civilized” to “semi-civilized” to “semi-barbaric” to “barbaric” and every nuance in between.

In the end, China’s unstable status as an international sovereign was not unlike the position of the coolie—the indentured male laborer who represented the paradigmatic Chinese individual in the Euro-American consciousness. As a racialized subject of formally free migrant labor, the coolie too mediated between several binaries of the nineteenth-century liberal imagination: slavery and freedom, black and white, domestic and foreign.<sup>104</sup> Indeed, when the first coolies arrived on a Louisiana plantation in 1870 to replace slave labor, the planter’s son described them as “the queerest looking creatures he ever saw.”<sup>105</sup> China’s unstable international legal status can thus be understood as a kind of private law analogy of the queer status of the Chinese coolie: neither sovereign nor colonized, neither civilized nor savage.<sup>106</sup>

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102. See, e.g., FRANÇOIS QUESNAY, DESPOTISM IN CHINA (1767), *reprinted and translated in* 2 LEWIS A. MAVERICK, CHINA: A MODEL FOR EUROPE 139 (Lewis A. Maverick trans., 1946).

103. See Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 222 (2002).

104. MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR AND SUGAR IN THE AGE OF EMANCIPATION 222 (2006).

105. *Id.* at 153.

106. Notably, the *Institut de droit international* included a “special question” about the treatment of coolies at the end of its questionnaire regarding the international legal status of the Orient. See *Questionnaire*, *supra* note 93, at 300 (posing a question on the regulation of the international coolie trade).

## B. Problems of Intercourse

**com·merce** \ˈkɑ-(,)mərs\ n. [MF, fr. L *commercium*, fr. *com-*+ *merc-*, *merx* merchandise] (1537) 1. social intercourse: interchange of ideas, opinions, or sentiments: 2. the exchange or buying and selling of commodities on a large scale involving transportation from place to place: 3. SEXUAL INTERCOURSE. **syn** see BUSINESS<sup>107</sup>

—Merriam-Webster's Dictionary

Even those who regarded China as barbaric recognized the brute material fact that China could not be taken by sheer domination like a tribe of putative savages; its vast, highly populated territory was governed by an effective state machinery. Given China's relative impenetrability, the primary political and juridical issue from the beginning was trade, not territory as such. Accordingly, the predominant metaphor for China's relations with the West was not rape but *intercourse*. That is, while the colonial conquest of land—the paradigmatic violation of an international legal person's physical integrity—conjured the notion of sexual assault, trade by definition constituted a form of consensual intercourse.<sup>108</sup> (To be sure, territory too can be acquired both by force as well as consensually, as observed by Tocqueville, among others, when he famously compared Spaniards' "pillaging" in the New World with English settlers' "chaste affection for legal formalities."<sup>109</sup>)

China's intercourse with the West did not begin as a problem; it came to be seen as one over time. There is a long history of Western traders and missionaries traveling to China, dating back to Marco Polo and even earlier.<sup>110</sup> Clearly, Westerners had commercial access to China, if that was all they desired. By the nineteenth century, the fundamental problem was that of *Chinese* desire: While the West's appetite was insatiable when it came to Chinese tea, porcelain, and silk, the Chinese had little interest in the manufactured goods

107. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 249 (11th ed. 2007).

108. As Tani Barlow observes, John King Fairbank's analysis of China deploys the term penetration repeatedly "without ever, ever raising the darker, more usual metaphor of colonial rape." Barlow, *supra* note 68, at 241, 246.

109. As he observed of the latter, "[i]t is impossible to destroy men with more respect for the laws of humanity." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., 1969) (1835).

110. See, e.g., NIGEL CAMERON, *BARBARIANS AND MANDARINS: THIRTEEN CENTURIES OF WESTERN TRAVELERS IN CHINA* (1970).

that Western merchants offered to them. The vast Chinese economy was essentially self-sufficient.<sup>111</sup>

The economic problem of exchange was not the only obstacle, however. It was related to, and compounded by, the political problem of honor. Not only did China express little interest in buying Western goods, but it was equally uninterested in establishing regular political relations with the West, and it most certainly was not seeking diplomatic recognition from European sovereigns. In other words, China's economic self-sufficiency was matched by a political self-sufficiency. Its lack of interest in commercial intercourse with the West was generally cast in terms of China's "isolation," while its lack of interest in political intercourse was typically phrased in terms of Chinese "arrogance."<sup>112</sup> Yet in the end both constituted a kind of cultural insult to the European *amour-propre*, a violation of its dignity.

Given the persistence of hoary myths about a xenophobic Middle Kingdom living in delusional self-satisfaction, it bears emphasizing that claims about China's millennial isolation were greatly exaggerated.<sup>113</sup> European diplomatic missions had been granted imperial audiences in China since at least the arrival of papal envoys in the thirteenth century, and medieval papal legates were followed by Portuguese and Dutch missions in the sixteenth and seventeenth centuries.<sup>114</sup> The Dutch even entered into a short-lived military alliance with the imperial court.<sup>115</sup> To be sure, the price of admission for a face-to-face audience with the Son of Heaven was the observance of Chinese diplomatic and political norms, including the performance of a ritual prostration. Over time, Europeans grew increasingly unwilling to abide by such "arrogant" diplomatic forms, but they were certainly not simply excluded from political intercourse with China.

As far as economic intercourse was concerned, China was likewise anything but isolated: It stood at the epicenter of the largest regional trading system in the world, or what world system theorists today call the Sinocentric world economy.<sup>116</sup> Yet long before world systems theorists, even the eighteenth-century physiocrat François Quesnay recognized that when critics claimed that there was

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111. See, e.g., KENNETH POMERANTZ, *THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY* (2000).

112. See *infra* Part IV.C.

113. See generally VALERIE HANSEN, *THE OPEN EMPIRE: A HISTORY OF CHINA TO 1600* (2000); JOANNA WALEY-COHEN, *THE SEXTANTS OF BEIJING: GLOBAL CURRENTS IN CHINESE HISTORY* (1999).

114. See, e.g., ANTONIO SISTO ROSSO, *APOSTOLIC LEGATIONS TO CHINA* (1948); JOHN E. WILLS, JR., *EMBASSIES AND ILLUSIONS: DUTCH AND PORTUGUESE ENVOYS TO K'ANG-HSI* (1984).

115. See JOHN E. WILLS, JR., *PEPPER, GUNS, AND PARLEYS: THE DUTCH EAST INDIA COMPANY AND CHINA 1622-1681*, at 29-144 (1974).

116. ANDRE GUNDER FRANK, *REORIENT: GLOBAL ECONOMY IN THE ASIAN AGE* 126 (1998).

no foreign trade in China, they only meant that there was no *European* trade.<sup>117</sup> Moreover, even claims about European economic exclusion were unfounded. For example, the Qing, China's last ruling dynasty (1644–1911 C.E.), permitted free coastal trade in 1648, immediately after it defeated the last rebellious forces in Taiwan, and was able to provide for its coastal security.<sup>118</sup> Ironically, one of the main claims of European exclusion arose from the fact that, starting in 1757, European maritime trade was limited to the port of Canton—largely because of the growing misbehavior of European sailors and traders.<sup>119</sup> It was this newly established Canton system, as it came to be known, that became the basis of increasingly strident charges of millennial Chinese isolation.

In sum, in the nineteenth century—as before—Europeans were permitted to engage in both diplomatic and commercial intercourse with China. The real ground for European dissatisfaction was China's lack of interest in purchasing Western goods and its insistence on the observance of key aspects of the standard diplomatic protocol of the East Asian interstate order. Westerners were perfectly welcome in China, so long as they abided by China's domestic trade regulations and the legal norms of East Asian interstate practice.

### C. Turning Isolation Into Aggression

Even if China could not be colonized outright, by the mid-nineteenth century it was evident that Western gunboats could “open” it for both trade and diplomacy. Indeed, there were many who were willing to employ force outright. The British diplomat Horatio Lay stated his position unequivocally, insisting that China must, “however much against her will . . . comply with the usages of Western nations, intercourse with whom she is manifestly too weak, physically, to decline.”<sup>120</sup> On the level of *Realpolitik*, China could be—and eventually was—coerced into intercourse with the West, yet even persons such as Lay were obligated to proffer justifications for their positions. In so doing, they described China in terms of the gendered, sexualized, and racialized grammar that had

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117. QUESNAY, *supra* note 102, at 139. Kenneth Pomeranz argues that “eighteenth-century China (and perhaps Japan as well) actually came closer to resembling the neoclassical ideal of a market economy than did western Europe.” KENNETH POMERANZ, *THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY* 70 (2000).

118. See YEN-P'ING HAO, *THE COMMERCIAL REVOLUTION IN NINETEENTH CENTURY CHINA* 15 (1986).

119. R. Randle Edwards, *The Old Canton System of Foreign Trade*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 360, 363–64 (Victor H. Li ed., 1977).

120. See JAMES L. HEVIA, *ENGLISH LESSONS: THE PEDAGOGY OF IMPERIALISM IN NINETEENTH-CENTURY CHINA* 69 (2003) (quoting Horatio Lay).

developed in colonial contexts globally over centuries. However, as I have already suggested, it was not possible simply to substitute “China” for American “Indians,” for example. Although it is vital to examine what unfolded in Asia as part of a larger global narrative, it is equally important to recognize that it was not a mere reenactment of a legal script developed elsewhere. China had its own history and its own place in the European imagination, and all extra-European peoples were not queer the same way, legally or otherwise. In the operation of semi-colonialism in China, international law provided a distinctive racialized and sexualized vocabulary for transforming China’s “savage isolation” and its “arrogant” diplomatic forms into acts of aggression—namely, violations of a “right of intercourse” (Subpart 1 below) and of “sovereign equality” (Subpart 2).

1. Freedom of Trade: “Right of Intercourse”

Instead of focusing on the real problem—an enduring belief that a Chinese desire for Western goods should “simply spring up because the goods were available”<sup>121</sup>—England, most notably, cast its growing trade deficit with China as a problem of free trade. When England finally embarked on the Opium War and opened China militarily for trade outside the Canton system in 1842, it insisted that it was only defending England’s natural rights from Chinese attack. Indeed, at the heart of the Opium War, and the controversies leading up to it, was the question of the very nature of a properly constituted international legal person: As international legal persons, what kind of economic and political duties did states owe to each other?

While nineteenth-century Western diplomats and international lawyers were increasingly determined to vindicate a right to free trade in China, the project was conceptually troubled from the start. Nineteenth-century economic universalism based on the notion of free exchange suffered from the same difficulties as the Christian religious universalism that had provided the foundation for international law in a prior era. Free exchange is not a single concept: It entails the notions of both exchange and free will. Much as in Christian theology, the existence of free will entails the possibility of sin—a refusal to participate in otherwise natural market relations. (For many Britons, natural markets were an article of faith. Sir John Bowring, Governor of Hong Kong and an ardent Benthamite, insisted that any attempt to regulate trade is “as absurd and ineffective as it would be to direct the winds by Order in Council, or to manage the

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121. LU AIGUO, CHINA AND THE GLOBAL ECONOMY SINCE 1840, at 40 (2000).



tides by Act of Parliament.”<sup>122</sup>) China could be coerced into participating in “free trade,” but true economic liberalism, like Christian baptism, requires a consent that is given voluntarily. Once obtained, consent in turn justifies anything, or as Hobbes put it, “Nothing done to a man by his own consent can be injury.”<sup>123</sup>

The use of force in obtaining consent may have violated the internal logic of liberalism, yet it did not necessarily violate the doctrine of international law. Although many of the basic liberal norms of European private law were reflected in international law, even the private law analogy had its limits. Hersch Lauterpacht, one of the analogy’s great twentieth-century enthusiasts, observed ruefully that one key place where it was historically absent was title by conquest, or the acquisition of sovereignty by force.<sup>124</sup> Of course, there had always been a readily available analogy—in private law, the forceful taking of somebody else’s property constitutes robbery—but this analogy was simply declined by international law. The analogical procedure failed equally egregiously in the case of treaties. While a contract signed at gunpoint is invalid for lack of consent, there was no corresponding international legal notion of duress, as evidenced by the undoubted validity of peace treaties, for example.<sup>125</sup>

As a general matter, leading eighteenth- and nineteenth-century international lawyers such as Emerich de Vattel did regard trade as an international legal right as well as duty, as had their predecessors.<sup>126</sup> Both Grotius and Pufendorf, for example, believed in a general duty of “sociability” in international society.<sup>127</sup> According to Grotius, God had purposely ordained a diverse distribution of goods in the world precisely so that people would need to exchange them amongst each other.<sup>128</sup> Yet some publicists, such as Chancellor Kent, also agreed that although states should “cultivate a free intercourse,” a general freedom of trade was still

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122. FAIRBANK, *supra* note 24, at 73.

123. HOBBS, *supra* note 44, at 112. Significantly, one context where this political axiom does *not* hold true is the practice of homosexual sadomasochistic sex: U.S. courts consistently hold that no reasonable man would agree to submit to sexual violence by another man. Yet ironically, as Susan Schmeiser suggests, the structure of sadomasochistic sex reproduces the logic of the social contract itself, which is, effectively, a sadomasochistic bargain whereby we subject ourselves to the violence of the state. Susan Schmeiser, *Forces of Consent*, 32 *STUD. L. POL. & SOC’Y* 3 (2004).

124. H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 105 (1927).

125. See, e.g., LINDLEY, *supra* note 60, at 44, 174 (recognizing validity of “forced” treaties).

126. See EMMERICH DE VATTEL, 2 *THE LAW OF NATIONS*, Bk. II, Ch. II, Sec. 21 (Joseph Chitty trans., T & J.W. Johnson Philadelphia 1853) (1797).

127. See, e.g., Kingsbury & Straumann, *supra* note 46.

128. HUGO GROTIUS, *THE FREE SEA* 49–51 (David Armitage ed., Richard Haklyut trans., 2004) (1609).

only an “imperfect right”—something that ought to be conceded freely but the refusal of which did not authorize resort to force.<sup>129</sup>

When it came to trade specifically with China, Henry Wheaton, for one, did not mince words. He asserted that China was “anti-commercial” and “anti-social” as a matter of what he called “the fundamental principles of the Chinese law of nations.”<sup>130</sup> David Dudley Field similarly complained that China had “shut herself up in fancied superiority,”<sup>131</sup> which was “unnatural and irrational”<sup>132</sup> because man’s nature as a social being “impels him to intercourse with all the family of man.”<sup>133</sup> In the formulation of the lesser known David Gardner, too, nations were obligated to provide “free ingress and egress” for “commerce or pleasure”; therefore, China was in violation of “her international social duty.”<sup>134</sup>

In fact, the public opinion in the United States was opposed to England’s use of violence in the Opium War, even if most agreed with the ultimate goal of free trade.<sup>135</sup> Nevertheless, John Quincy Adams articulated one of the strongest positions against China. He focused squarely on the heart of the matter. He acknowledged that Westerners in China were allowed to trade, but criticized China’s lack of interest in what was being offered to her. As Adams summed up the problem, “Everyone has a right to buy, but no one is obliged to sell.” One might have thought that this was one of the risks inherent in any system of free trade, but to Adams it was evidence of “a churlish and unsocial system.” In the end, he regarded it as an “outrage upon the rights of human nature and upon

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129. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 31–32 (5th ed., New York 1844).

130. Letter From Henry Wheaton to Sec’y of State Abel P. Upshur (Aug. 30, 1843), in “Despatches—Prussia,” vol. 3, No. 234, in State Department Records (asserting also that, historically, China “held all other nations as inferiors, with whom commercial intercourse was allowed as a mere matter of arbitrary grace and favour, and on such terms and conditions as it pleases the ‘Celestial Empire’ to exact”).

131. DAVID DUDLEY FIELD, *Applicability of International Law to Oriental Nations*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 447, 450 (A.P. Sprague ed., New York, D. Appleton & Co. 1884) [hereinafter “FIELD, *Applicability of International Law*”] (“If a people shut themselves up from others, as the Chinese attempted to do, building a wall between themselves and their neighbors, there can be no international law, as there can be no international relations.”).

132. DAVID DUDLEY FIELD, *An International Code*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 131, at 384.

133. FIELD, *Applicability of International Law*, *supra* note 131, at 447, 450.

134. DANIEL GARDNER, A TREATISE ON INTERNATIONAL LAW AND A SHORT EXPLANATION OF THE JURISDICTION AND DUTY OF THE GOVERNMENT OF THE REPUBLIC OF THE UNITED STATES 195–96 (Troy, N.Y., N. Tuttle 1844). To be sure, Gardner was careful to distance himself from England’s use of force against China.

135. See Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859 (2005).

the first principles of the Rights of Nations”<sup>136</sup>—not merely a failure to respect international comity, but a violation of human rights. Ironically, in the era of mercantilism, economic self-sufficiency had been seen as a great virtue—Thomas Jefferson even held up China’s abstemious policy of “non-intercourse” as an ideal for the young United States<sup>137</sup>—but now Adams charged China with economic isolationism.

Equally remarkably, although the West’s desire for Oriental goods was only growing, this desire was continually disavowed in official communications. When the United States sent an embassy immediately in the wake of the Opium War to negotiate its first treaty with China, President Tyler insisted in his letter to the emperor that the uninvited and unwelcome U.S. embassy was merely reciprocating *China’s* feelings for the United States: “The Chinese love to trade with our people, to sell them tea and silk, for which our people pay silver, and sometimes other articles.”<sup>138</sup> (Yet evidently Tyler’s own desire for intercourse with China was considerable. When he heard of the successful signing of the first Sino-U.S. trade treaty, his bride observed wryly, “I thought the President would go off in an ecstasy a minute ago with the pleasant news.”<sup>139</sup>)

Similarly, a decade later President Pierce opened his letter to the King of Siam by referring to “the desire of your Majesty’s subjects” to receive Western goods, for which purpose Pierce offered to amend the treaty between the United States and Siam.<sup>140</sup> Yet others were quite willing to own up to their desires. The missionary *cum* international lawyer W.A.P. Martin, for example, proclaimed passionately that he wanted to “throw open [China’s] portals for unrestricted

136. JOHN QUINCY ADAMS, *J.Q. Adams on the Opium War*, in 43 PROC. OF THE MASS. HIST. SOC’Y 295–313 (1909). It is important to note that there were also principled liberals, such as John Stuart Mill, who objected to the opium trade in China specifically not as an “infringement[ ] on the liberty of the producer or seller, but on that of the buyer.” JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 106 (Oxford Univ. Press 1998) (1859). Liberal positions varied similarly with respect to imperialism more generally. Compare UDAY MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999), and JENNIFER PITTS, A TURN TO EMPIRE: THE RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE (2005), with SANKAR MUTHU, ENLIGHTENMENT AGAINST EMPIRE (2003).

137. Letter From Thomas Jefferson to G. K. van Hogendorp (Oct. 13, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 631, 633 (Julian P. Boyd ed., 1953).

138. Letter From President John Tyler to Emperor of China (undated), reprinted in Message From the President of the United States, Communicating (in Compliance With a Resolution of the Senate) Copies of the Instructions Given to the Late Commissioner to China, S. DOC. NO. 28-138, at 8 (2d Sess. 1845).

139. JOHN M. BELOHLAVEK, BROKEN GLASS: CALEB CUSHING AND THE SHATTERING OF THE UNION 182 (2005) (quoting Tyler’s bride, Julia Gardiner).

140. Letter From President Franklin Pierce to the First King of Siam (undated), reprinted in THE COMPLETE JOURNAL OF TOWNSEND HARRIS: FIRST AMERICAN CONSUL AND MINISTER TO JAPAN 565, 565 (Mario Emilio Cosenza ed., 2d ed. 1959).

intercourse” so as to “unlock the treasures of the interior.”<sup>141</sup> The U.S. State Department in turn called for an end to China’s “jealous system of seclusion.”<sup>142</sup>

By no means were sex-trade analogies limited to China and East Asia. They were applied elsewhere in the Orient as well. In 1905, an editorial on Morocco (a one-time Barbary state and another queer Oriental legal person) in the *American Journal of International Law* insisted that the United States’ interest in Morocco was only “platonic rather than business like”—an extraordinary expression that unmistakably analogized commercial intercourse and sexual relations.<sup>143</sup> Yet it was perhaps China’s effete political character that made the notion of economic intercourse especially ubiquitous and charged—as in the frequent observation that “commercial intercourse” was “forced” on China and other East Asian states.<sup>144</sup>

In the end, in a series of wars, starting with the Opium War (1839–42), China was eventually coerced to participate in so-called free trade with Western states—freedom of trade evidently not including the right *not* to buy opium. Indeed, since the real economic problem was China’s lack of desire for Western goods, that problem could ultimately be solved only by making China legalize the opium trade. Once introduced to the Chinese market, opium created its own demand, which in the end made up for China’s general indifference to European manufactures.

In short, the problem of exchange was ultimately solved only by producing desire with drugs. In a remarkable literalization of Marx’s famous metaphor, while religion was opium for the masses in Europe, in China it was opium that was opium for the masses, facilitating a foreign takeover of the empire’s economic sovereignty. Or as Marx himself described the harm to China’s economic self-sufficiency, opium obtained “sovereignty over the Chinese.”<sup>145</sup>

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141. W.A.P. Martin, The Recognition of the Nanking Government, Advocated in Two Letters for the Hon. Caleb Cushing, Late Attorney General of the United States, Letter I, in Box 216, Caleb Cushing Papers, Library of Congress.

142. Letter From Sec. of State Lewis Cass to Envoy William Reed (May 10, 1857), reprinted in Message of President Buchanan Communicating Instructions to Mr. Reed, as per Senate’s Request, April 21, 1858, at 3, S. EXEC. DOC. 35-30 (1st Sess. 1857).

143. Editorial Comment, *The Algieras Conference*, 1 AM. J. INT’L L. 138, 139 (1907).

144. See, e.g., 2 S. WELLS WILLIAMS, *THE MIDDLE KINGDOM: A SURVEY OF THE GEOGRAPHY, GOVERNMENT, LITERATURE, SOCIAL LIFE, ARTS, AND HISTORY OF THE CHINESE EMPIRE AND ITS INHABITANTS* 406 (New York, Charles Scribner’s Sons 1883) (“The commercial intercourse has, like the political, either been forced upon or begged of these governments . . .”).

145. Karl Marx, *Revolution in China and in Europe*, N.Y. DAILY TRIBUNE, Jun. 14, 1853, reprinted in MARX ON CHINA 1853–1860: ARTICLES FROM THE NEW YORK DAILY TRIBUNE 1, 2–3 (Dona Torr ed., 1951). By no means do I mean to suggest that the creation of chemical dependency to stimulate demand is limited to the actions of the British in China. Consider, for example, the North American practice of

## 2. Sovereign Equality: The Political Anatomy of Kowtow

Despite the West's success at the economic rape of China—justified legally as consensual intercourse—and despite the fact that China's sovereignty was cast increasingly insistently as effete, paradoxically China remained politically almost as impenetrable as before. The first Unequal Treaties imposed on China after the Opium War did not provide for resident ambassadors on the European model, for example.<sup>146</sup> With the West's growing indignation at this state of affairs, it became apparent that what was at stake had as much to do with a Euro-American sense of dignity as with commerce. For nineteenth-century international lawyers, non-Western sovereignty may in the final analysis have been an oxymoron, but they found it nevertheless unacceptable that China did not even *try* to reorganize its foreign relations in the terms of European public law (never mind that any effort to mimic European rituals of sovereignty was bound ultimately to fail). The U.S. envoy Edmund Roberts stated the problem forthrightly as early as 1832, complaining that the Orientals he met were “unwilling to adopt or imitate the usages and improvements of distant foreigners.”<sup>147</sup> Not only did the Chinese not desire Western goods, they did not desire Western diplomatic recognition either. They were perfectly happy to define themselves in their own terms, without reference to the West. Yet rather than an innocent desire to be left alone, this was interpreted as an antisocial act of aggression against the order of things, evidence of Chinese (and more generally Oriental) “arrogance.”<sup>148</sup>

While opium offered a relatively easy solution to the West's economic relations with China, there was no date-rape drug that could make it desire *political* intercourse with the West. At the same time, the West's diplomatic relations with China were complicated further by their perennial entanglement with the question of commercial intercourse. An audience by a foreign representative before the emperor entailed a formal presentation of tribute, including a ritual prostration called *ketou*, rendered conventionally into English as “kowtow.” The

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providing Indians with alcohol. See DAVID MURRAY, *INDIAN GIVING: ECONOMIES OF POWER IN INDIAN-WHITE EXCHANGES* 25–28 (2000).

146. See, e.g., Treaty of Nanjing, P.R.C.-U.K., Aug. 29, 1842, 93 Consol. T.S. 465; Treaty of Peace, Amity and Commerce (Treaty of Wanghia), U.S.-P.R.C., July 3, 1844, 8 Stat. 542.

147. EDMUND ROBERTS, *EMBASSY TO THE EASTERN COURTS OF COCHIN-CHINA, SIAM, AND MUSCAT; IN THE U.S. SLOOP-OF-WAR PEACOCK*, DAVID GEISINGER, COMMANDER, DURING THE YEARS 1832–34, at 92–93 (New York, Harper & Bros. 1837).

148. For a notable statement of this position, see, for example, ADAMS, *supra* note 136, at 324, who blamed the Opium War entirely on China: “The cause of the war is the Ko-tow! the arrogant and insupportable pretensions of China.”

emperor in return bestowed gifts on the tributary envoys that appeared before him. In addition to an exchange of gifts, which could be of considerable value, typically other regulated exchanges also took place in connection with an embassy.<sup>149</sup> Historically, since their first arrival in Canton, Portuguese and Dutch merchants had been happily kowtowing to the emperor in return for an opportunity to trade.<sup>150</sup> However, from the perspective of nineteenth-century international law, with its hardening public-private distinction, this protocol was increasingly unacceptable for at least two major reasons. First, it fused, and confused, the political and the economic: the public sphere of diplomacy and the private sphere of trade. Second, the norms of tributary ritual violated the principle of formal sovereign equality. Most famously, Lord Macartney, George III's ambassador to China, informed the Chinese in 1793 that he would not perform the ritual kowtow. In the name of sovereign equality, he refused to show greater deference to an Oriental monarch than his own, before whom he would only kneel.<sup>151</sup> Not only did Lord Macartney fail to obtain a trade treaty with China, as he had been charged, but the ensuing diplomatic crisis set the stage for what became, improbably, one of the major issues in Sino-Western political relations in the nineteenth century: the so-called kowtow question.<sup>152</sup>

In understanding the politics of the kowtow, it is noteworthy that almost all Western assessments of the late imperial Chinese diplomatic order can be divided roughly into two categories. One reduces the order to its diplomatic aspects. From this perspective, the exchange of gifts and the inclusion of trade as part of diplomatic presentation constituted nothing less than a "prostitution" of the dignity of the Chinese sovereign.<sup>153</sup> Another viewpoint reduces the tributary protocol to its economic aspects, interpreting its dignitary elements as nothing but a superstitious "cloak" or "fig leaf" for trade<sup>154</sup>—as if Chinese mandarins were

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149. See generally MARK MANCALL, CHINA AT THE CENTER: 300 YEARS OF FOREIGN POLICY (1984).

150. See WILLS, *supra* note 114.

151. See AN EMBASSY TO CHINA: BEING THE JOURNAL KEPT BY LORD MACARTNEY DURING HIS EMBASSY TO THE EMPEROR CH'IENTUNG 85 (J.L. Cramer-Byng ed., 1963) (1793).

152. For an excellent analysis of both the historical event and its epistemological status in Sinological knowledge, see JAMES L. HEVIA, CHERISHING MEN FROM AFAR: QING GUEST RITUAL AND THE MACARTNEY EMBASSY OF 1793 (1995).

153. See, e.g., FAIRBANK, *supra* note 24, at 38; SARASIN VIRAPHOL, TRIBUTE AND PROFIT: SINO-SIAMESE TRADE, 1652-1853, at 6 (1977).

154. FRANK, *supra* note 116, at 114 ("Central Asian merchants were known often to bring phony credentials as 'political emissaries' who paid 'tribute' as a fig leaf for humdrum commercial trade."); Wang Tiewa, *International Law in China: Historical and Contemporary Perspectives* 221 RECUEIL DES COURS 195, 222 (1990) ("The tribute may be said to be a cloak for trade and tributary relations became commercial relations.").

indeed so effete that they could not bear to witness trade in all its nakedness. Even though these analyses are in some ways diametrically opposed, they both insist on a normative separation between moral and material economies; one set of observers only chooses to locate the reality of tribute in its economic dimensions, the other in its dignitary aspects. From either perspective, however, tribute constituted an illegitimate confusion of the public and the private, the political and the economic.

Ironically, even while Western diplomats complained of China's inability to separate the properly economic and the properly political, they had no less trouble keeping the two separate themselves. For example, the main English presence in China, the East India Company, was surely a no less monstrous confusion of the logics of sovereignty and trade than Chinese diplomatic practice. As the historian John King Fairbank puts it, the East India Company had "the body of a government and the brain of a merchant."<sup>155</sup> Moreover, when China rebuffed the West's overtures for reorganizing its commercial intercourse, it was asserted that Western trade had been "prostrated"—as if trade, like ambassadors, had a personal dignity.<sup>156</sup> Equally startlingly, some asserted that commerce in China was "prostituted and degraded."<sup>157</sup> In such usage, the metaphor of prostitution had clearly lost all reference and signified *any* exchange associated with China. For if prostitution as a metaphor refers to the buying and selling of that which should not be exchanged for money (say, honor or dignity), it is difficult to understand the notion of prostitution of trade, given that trade is the socially approved practice of buying and selling. Evidently, what made British trade in Canton "prostitution" was simply the fact that it took place in China, with China.

As Western diplomats went about devising ways to break down not only China's economic but also its political isolation, they were scrupulously concerned about their own honor as representatives of international legal persons, and about China's corresponding lack of it. The British government catalogued every slight that ever occurred, or was perceived to have occurred, in a Blue Book entitled *Correspondence Respecting Insults in China*.<sup>158</sup> Predictably, the volume omitted all of the provocations that led to the insults, and this correspondence was in turn used as a justification for military aggression. No less

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155. FAIRBANK, *supra* note 24, at 58.

156. ADAMS, *supra* note 136, at 324.

157. Padre Juan Gonzalez de Mendoza, *The Chinese Empire in its Foreign Relations: The History of the Great and Mighty Kingdom of China and the Situation Thereof*, 3 BOMBAY Q. REV. 221, 244 (1856).

158. See J. Y. WONG, *DEADLY DREAMS: OPIUM, IMPERIALISM, AND THE ARROW WAR (1856–1860) IN CHINA* 196 (1998).

concerned about its dignity, the United States included in its first treaty with China the extraordinary demand that the Chinese government was to protect Americans in China from “all insult,” public or private—a hate speech clause of staggering breadth.<sup>159</sup>

For many, the lack of honor in China was primarily a corollary of its feminized nature. The U.S. diplomat Peter Parker complained of the “painful want of manliness and sincerity” of Chinese officials.<sup>160</sup> There was “absolutely no chivalry” in China, it was said; perversely, Chinese associated “true glory” with literary pursuits, while being a soldier was “derogatory to honour.”<sup>161</sup> Edmund Roberts likewise blamed both Oriental kowtowing and the lack of a manly code of honor on the absence of a martial culture: If only everyone in China carried arms, he said, “they would have to be civil and polite to each other.”<sup>162</sup> When Western troops burned down the imperial Summer Palace in Beijing during the Second Opium War, they mocked it as a “doll’s house” rather than the residence of a true sovereign.<sup>163</sup> This trope of Chinese effeminacy went at least as far back as the arrival of the first Jesuit missionaries in China in the late-sixteenth century. Matteo Ricci complained of Chinese mandarins that “in their inner hearts they are just like women” because of their dislike of violence and the infrequency with which they “wound or kill each other.”<sup>164</sup> Evidently, a mere propensity not to murder sufficed to feminize a Chinese male.<sup>165</sup>

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159. See Treaty of Peace, Amity and Commerce (Treaty of Wanghia), U.S.-P.R.C., July 3, 1844, 8 Stat. 542.

160. Letter From Comm’rs Peter Parker & Robert M. McLane to President Buchanan (Oct. 31, 1854), *reprinted* in Message of the President of the United States Communicating, In Compliance With a Resolution of the Senate, S. EXEC. DOC. 35-22, at 331 (2d Sess. 1858).

161. Letter From Commodore Shufeldt to Senator Sargent (Jan. 1, 1882), in PAUL HIBBERT CLYDE, UNITED STATES POLICY TOWARD CHINA: DIPLOMATIC AND PUBLIC DOCUMENTS 1839–1939, at 161 (1940) (indicating view of Commodore Robert W. Shufeldt who negotiated the U.S. treaty with Korea, in consultation with China).

162. ROBERTS, *supra* note 147, at 248.

163. HEVIA, *supra* note 120, at 102.

164. JONATHAN D. SPENCE, THE MEMORY PALACE OF MATTEO RICCI 43 (1985).

165. While China feminized its men, it also *masculinized* Euro-American women who lived there. As Jane Hunter shows, when white female missionaries settled in the semi-colonial conditions of China, they increasingly abandoned the “habits of femininity” they had learned to cultivate at home. JANE HUNTER, THE GOSPEL OF GENTILITY: AMERICAN WOMEN MISSIONARIES IN TURN OF THE CENTURY CHINA (1984). Furthermore, deviant Chinese gender norms were seen as exportable and highly contagious, which justified in part both Chinese Exclusion laws and quarantines of Chinatowns in the United States. For example, in San Francisco concerns about Chinese female prostitutes were linked to fears of a syphilis plague spread by Chinese prostitutes that in turn would “ultimately sink this nation into effeminacy and political death,” in the words of the editor of a medical advice journal. See NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN 109 (2001) (quoting Dr. Mary Sawtelle).



China's effeminacy made it a queer object of political desire. For example, Robert Hart, the head of China's foreign-run customs service, was accused of having "succumbed to the fatal attraction of Chinese intercourse," to the point of being "as completely Chinese in his sympathies as the Chinese themselves."<sup>166</sup> In the view of another observer, "Peking has exercised upon foreign representatives a sort of unholy glamour. They have been bewitched."<sup>167</sup> In a sarcastic reference to China's claim to being a "Celestial Empire," the British diplomat and Sinologist Thomas Wade was accused of having "ultra-celestial views and tendencies."<sup>168</sup>

Indeed, Western observers often went beyond innuendo in impugning the norms of Chinese masculinity. Asia, like the Americas, had been associated with sodomy at least since the first Jesuit observations. Ricci was convinced that sodomy was practiced widely among Chinese men.<sup>169</sup> In the nineteenth century, the U.S. diplomat Townsend Harris likewise insisted that sodomy was "the universal practice of all the people of Asia, as well as those of Arabia, Egypt, [and] Asia Minor."<sup>170</sup> Often, diplomats' charges of sodomitical practices seem to be little more than a logical corollary of the deficient nature of Chinese masculinity. In other cases, however, the concern with sodomy seems considerably more personal. A colonial official in the German leasehold of Kiaochow credited Chinese men with a wide range of sodomitic practices: "Sodomy by inserting the penis into the cloacae of large geese and ducks . . . and also pederasty, sexual abuse of children of both sexes, and rape in its most shocking forms, are all on the agenda in all of China."<sup>171</sup> Yet for all his avowed horror, the official also expressed a striking awareness of the temptations of sodomy, as he conceded wistfully, "The Chinaman certainly excites our genuine admiration with his sedulousness and . . . with the power and agility of his beautiful, athletically built body."<sup>172</sup>

This association of Chinese masculinity with sodomy can be detected also in nineteenth-century diplomats' horror at the ritual kowtow—a physical act at the core of imperial sovereignty that came to be regarded as simply beyond the

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166. MARY CLABAUGH WRIGHT, *THE LAST STAND OF CHINESE CONSERVATISM, THE T'UNG-CHIH RESTORATION, 1862–1874*, at 181 (1957).

167. *Id.* at 40.

168. *Id.*

169. MUNGELLO, *supra* note 99, at 21.

170. Townsend Harris, Journal No. 1: May 21, 1855 to April 14, 1856, in *THE COMPLETE JOURNAL OF TOWNSEND HARRIS*, *supra* note 140, at 71.

171. GEORGE STEINMETZ, *THE DEVIL'S HANDWRITING: PRECOLONIALITY AND THE GERMAN COLONIAL STATE IN QINGDAO, SAMOA, AND SOUTHWEST AFRICA* 464 (2007) (ellipsis in original).

172. *Id.*

pale of European norms of dignity. Portuguese and Dutch envoys who had performed it in the past were now accused of “sycophantic acts” that had been “carried to shocking extremities.”<sup>173</sup> The British consul Rutherford Alcock indeed called it a political “sin.”<sup>174</sup> Karl Wittfogel, the leading twentieth-century theoretician of Oriental despotism, describes the kowtow as the symbol of “total submission,” performed by a subject “on all fours like an animal.”<sup>175</sup> For a free man to perform this act of total submission was nothing less than the perversion of his freedom and his masculinity. The proper position for honorable men was to face each other standing erect, with swords on their sides, not laying prostrate on the ground waiting to be sodomized politically. Indeed, Western diplomats’ hysterical refusals even to contemplate performing the kowtow reproduce eerily the logic of a homosexual panic.<sup>176</sup>

Without elaborating on the full significance of the kowtow in Chinese political practice, suffice it to note that a ritual prostration did not signify slavish abjection. On the contrary, it was both an act of humility as well a privilege; only a person of stature was entitled to perform it.<sup>177</sup> (For example, the emperor himself performed it for his mother.<sup>178</sup>) Yet within Western diplomats’ norms of masculinity, its performance would have entailed the symbolic dissolution of the political subjectivity of the (male) sovereign in whose name it was performed.<sup>179</sup>

In sum, international law provided a vocabulary and a racialized and sexualized logic for transforming China’s desire to define its own sovereignty into a perverse, queer “arrogance” that was represented in turn as a violation of

173. DE QUINCEY, *supra* note 55, at 352.

174. FAIRBANK, *supra* note 24, at 173 (quoting Rutherford Alcock’s condemnation of the kowtow as “the one besetting sin of the past”).

175. KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* 152 (1967).

176. On the concept of homosexual panic, see EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 182–212 (1990).

177. See EVELYN S. RAWSKI, *THE LAST EMPERORS: A SOCIAL HISTORY OF QING IMPERIAL INSTITUTIONS* 205 (1998). See also HEVIA, *supra* note 152, at 232–39; James L. Hevia, “*The Ultimate Gesture of Deference and Debasement*”: *Kowtowing in China*, 2009 *PAST & PRESENT* 212.

178. RAWSKI, *supra* note 177, at 205.

179. This reflects in part the particular political logic of Western international law. Based on a medieval metaphysics of representation, an ambassador is treated legally as if his body were literally that of his sovereign. Hence, he not only enjoys the same right of extraterritorial immunity as his sovereign would, but any slight to an ambassador is also viewed as a personal slight to the sovereign whom he not only represents but whose very presence he embodies juridically. In contrast, in the East Asian interstate order, it was the sovereign’s written message carried by his envoy that was treated as the sovereign’s personification, while the envoys themselves were essentially glorified messengers. It was customary for Korean officials, for example, to kowtow not before imperial envoys from China but before the written edicts that they brought with them. In short, the bodily gestures of an envoy—whatever they signified—were not attributed directly to his sovereign, as was done in Europe.

European states' right of sovereign equality. Yet despite repeated claims by Western states that they were asking China for nothing more than intercourse on terms that were "perfectly equal,"<sup>180</sup> evidently the trouble with China was not just that it thought itself superior to the West. Rather, its true sin was the failure to recognize *Europe's* superiority: Europe and its law of chivalry were the true source of civilization and, by implication, of sovereignty as well. In the words of one disarmingly frank British diplomat, the problem with the treaties that China had signed after the Opium Wars was that they included "nothing to demonstrate to the empire that it must come to its knees"<sup>181</sup>—a demand that the Kaiser would make literally to a Chinese prince in the wake of the Boxer Rebellion.

#### D. Out of Asia, Into Africa

China and Turkey are on the way to becoming colonies.<sup>182</sup>

—V.I. Lenin

While international legal discourse provided a symbolic logic and a vocabulary for turning China into a lawbreaker, its ultimate fate was not full territorial conquest (although the colonization of Hong Kong and Macao were far from inconsequential events, and it is noteworthy that American diplomats in China pressed at one point for the U.S. colonization of Taiwan<sup>183</sup>). Evidently, the rights and duties enjoyed by China as an international legal person were part of a larger global colonial script, yet the dominant strains of international legal rhetoric did not call for full-scale occupation of China but for a kind of *nonterritorial* imperialism instead, which subsequently made China and other similarly gendered and racialized states in Asia increasingly penetrable by other means as well. Indeed, the so-called Treaties of Trade, Peace, and Amity that were forced on China were only the first step in the progressive penetration of China. As J.A. Hobson put it, "the use of imperial force to compel 'lower races' to engage in trade is commonly a first stage of Imperialism," and he insisted that in this regard China was "the classic instance of modern times."<sup>184</sup>

180. See James L. Hevia, *Making China "Perfectly Equal"*, 3 J. HIST. SOC. 380, 380–401 (1990).

181. HOSEA BALLOU MORSE & HARLEY FARNSWORTH MACNAIR, *FAR EASTERN INTERNATIONAL RELATIONS* 132–33 (1931).

182. V.I. LENIN, *IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM* 80 (E. Varga & L. Mendelsohn ed. & trans., 1948) (1916).

183. See Ruskola, *supra* note 135, at 859.

184. HOBSON, *supra* note 55, at 248.

In addition to opening new ports for Western trade, China's post–Opium War treaties provided for the privilege of extraterritoriality: Subjects of Treaty Powers were thereby exempted from Chinese laws—a remarkable privilege that the citizens of the United States, for example, enjoyed for a century. By the magic of a legal fiction, even while in China, the beneficiaries of extraterritoriality were treated as if they remained in the sovereign territory of their home states.<sup>185</sup> Various other forms of concessions and privileges that were secured by subsequent treaties were enabled, and facilitated, in important ways by extraterritoriality.

The practice of extraterritoriality was not invented in the West's encounter with China. It had a long prior history as consular jurisdiction in early modern Europe, although it was re-invented in a more draconian form and with new justifications in China. Before the consolidation of exclusive territorial jurisdiction as the modern norm, foreign consuls had performed judicial functions among their own communities. A form of consular jurisdiction facilitated also European trade in the Levant where European merchants' civil disputes were likewise typically adjudicated by European consuls. To be sure, over time Europeans demanded increasingly significant exemptions from local law, but at least in principle their rights of extraterritoriality were limited to civil matters and the same rights were extended reciprocally to Levantine traders in Europe.<sup>186</sup>

However, in nineteenth-century Asia the practice of extraterritorial jurisdiction underwent a qualitative transformation.<sup>187</sup> It became strictly unilateral, and it came to encompass criminal as well civil disputes.<sup>188</sup> Moreover, the express condition for its elimination was judicial reform on the Euro-American model. (For example, the United States' treaty with Korea in 1882 stated that the United States would not surrender its extraterritorial jurisdiction until Korea adopted laws that “conform to those of the United States, in the judgment of the United States.”<sup>189</sup>) Evidently, China's first treaties with the West did not constitute it as a member of the Family of Nations. Rather than

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185. See generally Ruskola, *supra* note 135.

186. For a brief history of the nature of consular jurisdiction in the Levant, see FRANK H. HINCKLEY, *AMERICAN CONSULAR JURISDICTION IN THE ORIENT* (1906). See also ROBERT A. VAN DYCK, *CAPITULATIONS OF THE OTTOMAN EMPIRE SINCE THE YEAR 1150* (1881); Herbert J. Liebesny, *The Development of Western Judicial Privileges*, in *LAW IN THE MIDDLE EAST* 309 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

187. Cf. FARIBORZ NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 162 (1977) (“Grounds for the establishment of extraterritoriality in the Far East were entirely contrary to those of the Ottoman Empire.”).

188. For a detailed analysis of the novel features of the extraterritoriality provisions of United States' treaties with states in East Asia, see Ruskola, *supra* note 135, at 874–77.

189. Treaty of Peace, Amity and Navigation art. 4, U.S.-Korea, May 22, 1882, 23 Stat. 720.

establishing *community*, they were premised on its very opposite—*immunity*, the West’s exemption from Chinese law.<sup>190</sup> With an intensified practice of extraterritoriality, the post–Opium War treaties with China inaugurated a century of unequal exchange and provided a legal technology that made possible what was, effectively, a colonialism without colonies—a nonterritorial form of legal imperialism.<sup>191</sup>

With extraterritoriality in place, each Western individual in China became effectively a floating island of sovereignty, an inviolable ambassador-at-large for his civilization. Yet toward the end of the nineteenth century, simple extraterritoriality no longer satisfied the Treaty Powers, as they devised new forms of legal, financial, and technological penetration. Territorial leases and railroad concessions stand out among such innovations. After 1895, during the Scramble for Concessions, there was genuine fear that China might in fact be divided up among competing territorial powers. This scramble was precipitated by a new legal form, the so-called public international law lease. This “mutant creature” was a queer legal innovation in itself.<sup>192</sup> It was founded evidently on the private law analogy, but it had no clear historical precedent and it defied publicists’ attempts at precise definition. Remarkably, the British lease for the New Territories of Hong Kong, for example, did not include an obligation to pay any rent<sup>193</sup>—a feature that was squarely inconsistent with the private law definition of a lease. Although it fell short of a formal cession of territory, the public international law lease was in fact a form of direct territorial control, on the model of outright colonialism.<sup>194</sup> Indeed, Germany referred to its lease

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190. For a fascinating study of the historical, conceptual, and biopolitical opposition between community and immunity, and of the multiple meanings of immunity as a juridico-political term and a medical concept, see COHEN, *supra* note 30.

191. See generally Ruskola, *supra* note 135, and Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217 (2008). See also EILEEN P. SCULLY, BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942 (2001).

192. See PETER WESLEY-SMITH, UNEQUAL TREATY 1898–1997: CHINA, GREAT BRITAIN AND HONG KONG’S NEW TERRITORIES 126 (1980) (characterizing public international law leases as “mutant creatures adapted to the environment created by imperialist rivalry in the Far East” whose “effect in international law had not been carefully worked out”).

193. See *id.*

194. Although there was no unanimity about the nature and effect of these leases, most commentators agreed with Oppenheim’s view that they were ultimately “cessions in disguise.” See LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 221 (1905). Lauterpacht, representing the minority position, insisted that in the case of “political leases” (as he called them) the lessor state retained its sovereignty during the lease. See LAUTERPACHT, *supra* note 124, at 184–85. The British in fact adopted both theories at the same time, viewing their lease of the New Territories of Hong Kong as a cession of sovereignty while conceding Chinese sovereignty in their leasehold in Weihaiwei. Compare WESLEY-SMITH, *supra* note 192, at 289–97, with CAROL G.S. TAN, BRITISH RULE IN CHINA: LAW AND JUSTICE IN

in Kiaochow formally as a *Schutzgebiet*, a protectorate, and it treated Kiaochow the same way as its recently established protectorates in Africa—the preeminent form of colonial control on that continent.<sup>195</sup>

The public international law leases in China typically entailed concessions for railroads, among other things. The Kiaochow lease, for example, provided for a right to construct a railroad outside the German leasehold, along with a right to establish mines within a fifteen-kilometer-wide zone on each side of the railway line (in addition to securing a fifty-five mile buffer zone outside the leasehold that was to be patrolled by German troops).<sup>196</sup> In time, the proliferating foreign railroad concessions both inside and outside of leaseholds came to constitute yet another mutant form of territorial control. The emerging “railroad sovereignty”—for lack of a better term to describe what ultimately became a form of sovereignty in its own right—was epitomized by the South Manchuria Railway Company, chartered by Japan in 1906 to operate its railroad concession in Manchuria. Officially a commercial operation, the Company became an extension of the Japanese state itself in China, as it established militarized company towns as well as agricultural settlements along its extensive railroad zone.<sup>197</sup>

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WEIHAIWEI 1898–1930, at 71–82 (2008), and PAMELA ATWELL, *BRITISH MANDARINS AND CHINESE REFORMERS: THE BRITISH ADMINISTRATION OF WEIHAIWEI (1898–1930) AND THE TERRITORY’S RETURN TO CHINESE RULE* (1985). All Western states voluntarily surrendered their privileges of extraterritorial jurisdiction in the various leased territories, WESLEY-SMITH, *supra* note 192, at 295. Remarkably, they showed thereby greater deference to a Western state holding a mere leasehold interest than to China’s sovereignty.

195. Indeed, *Harper’s* went further and referred to Germany’s first “colony” in China, noting that by “enforcing a protectorate over the whole of Shan-tung, Germany has commenced the virtual partition of China.” Poultney Bigelow, *Germany’s First Colony in China*, 1900 *HARPER’S MONTHLY* 577. See also JOHN E. SCHRECKER, *IMPERIALISM AND CHINESE NATIONALISM: GERMANY IN SHANTUNG* 60 (1971) (“Even though the new territory was technically a leasehold, the Germans never considered its status to be different from that of the other German colonies.”).

196. *Abkommen zwischen dem Deutschen Reich und der Qing-Dynastie*, MUSTERKOLONIE KIAUTSCHOU: DIE EXPANSION DES DEUTSCHEN REICHES IN CHINA 1997, at 166 (1997). For an analysis of railroad rights associated with the Kiaochow lease, among others, as “international servitudes”—again, by analogizing them to the private law concept of Roman origin—see, for example, HELEN DWIGHT REID, *INTERNATIONAL SERVITUDES IN LAW AND PRACTICE* 109–16 (1933). Yet major landgrabs could be effected even without the benefit of formal railroad concessions. For example, the territorially delimited foreign settlements in Shanghai expanded beyond their boundaries by building unauthorized “extra-settlement roads” [*yuejie zhu lu*] into the Chinese city and then claiming the right to patrol and protect not only the roads but also the properties facing them. On the struggles over “road sovereignty” [*lu quan*] in Shanghai, see FREDERICK WAKEMAN, JR., *POLICING SHANGHAI 1927–1937*, at 65–76 (1995).

197. See, e.g., YOSHIHISA TAK MATSUSAKA, *THE MAKING OF JAPANESE MANCHURIA, 1904–1932* (2001). The South Manchuria Railway Company was in many ways similar to the older East India Companies of European states, and indeed it set the stage for what was perhaps the queerest of all international legal persons in East Asia, namely the puppet-state Manchukuo, established by Japan in 1932, which was ruled nominally by Puyi, the deposed last Qing emperor. See generally PRASENJIT DUARA, *SOVEREIGNTY AND AUTHENTICITY: MANCHUKUO AND THE EAST ASIAN MODERN* (2003). Signifi-

Around the time of the Scramble for Concessions, Western colonial powers flirted seriously with the idea of taking most, if not all, of China by outright force. Even though a full-fledged colonial rape never took place, the fact that it could be seriously entertained reflected an epistemological conquest of China that was accomplished in the second half of the nineteenth century. Increasingly, *fin-de-siècle* international legal rhetoric degraded the formerly high status of Chinese civilization.<sup>198</sup> One way in which it did so was by pushing China out of Asia and into Africa. The British at first used to liken China to India, the foundation of their colonial empire in Asia. The diplomat Lord Elgin once proclaimed arrogantly, “We might annex the Chinese Empire if we were in the humor to take a second India in hand,”<sup>199</sup> yet by the turn of the century European colonial discourse tended to reduce the “Chinaman” into the generic “native” on the African model, as George Steinmetz has illustrated.<sup>200</sup>

Indeed, it was hardly an accident that the Scramble for Concessions in China was contemporaneous with the Scramble for Africa and that both events became known by the same term—“Scramble.”<sup>201</sup> Although there were differences in the predominant legal forms—protectorates in Africa, leaseholds in China—their underlying logic was increasingly similar. Moreover, China’s problems came to be attributed less and less to an excess of civilization than to a *lack* of it. Rather than hypercivilized, China was described by diplomats and international lawyers increasingly as “semi-civilized” and “barbaric,” even

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cantly, Manchukuo precipitated the first major crisis of the League of Nations and led Japan to resign from the organization. On the crisis, and on the notion of a puppet-state, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 75, 78–83 (2d ed. 2006).

198. See MUNGELLO, *supra* note 99.

199. PETER HOPKIRK, *THE GREAT GAME* 299 (1990) (quoting Lord Elgin).

200. STEINMETZ, *supra* note 171, at 462. Hannah Arendt connects the relative decline of Asia’s racial status specifically with the contemporaneous Asian labor migration into Africa:

There were . . . real and immediate boomerang effects of South Africa’s race society on the behavior of European peoples: since cheap Indian and Chinese labor had been madly imported to South Africa whenever her interior supply was temporarily halted, a change of attitude toward colored people was felt immediately in Asia where, for the first time, people were treated in almost the same way as those African savages who had frightened Europeans literally out of their wits.

HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 206 (1976) (citations omitted). The flattening of racial distinctions is reflected also in new comparisons of Africans to Chinese. A German observer in Southwest Africa, for example, insisted that the “Hottentot” face “strongly recalls the Chinese face.” STEINMETZ, *supra* note 171, at 156. A German anthropologist insisted already in 1858 that he “would rather interact with Negroes or with an honest poodle or a hound” than with the Chinese. *Id.* at 390. Remarkably, as early as 1735, Carl von Linné’s *System of Nature* included the Chinese within the same human category as the Hottentots of Africa, namely *Homo Monstrous*. *Id.*

201. Hevia, for example, emphasizes the importance of “the international and transregional context” of the Scramble for Concessions. HEVIA, *supra* note 120, at 9.

“savage.” What had once been an ancient *civilization*—however queer and past its glory—now became reduced to a *race*.<sup>202</sup> The scholar-statesman Kang Youwei complained that before its defeat by Japan in 1895, China had been regarded as at least “half-civilized,” but thereafter the Chinese were treated as if they were “on the same level as the Negro races in Africa.”<sup>203</sup>

Tellingly, Japan’s corresponding rise in legal status was accompanied by increasing rhetorical *Europeanization*, as attested by its “Leave Asia, Enter Europe” slogan,<sup>204</sup> and most importantly by its success in abolishing Western extraterritorial jurisdiction.<sup>205</sup> The tectonic shift in China’s discursive location was evident in the inflamed rhetoric surrounding the Boxer Rebellion in 1898–1901. This violent reaction against foreign imperialism climaxed in the killing of the German ambassador and the siege of several hundred Westerners and Chinese Christians in the Legation Quarter in Beijing.<sup>206</sup> The great hostage crisis was resolved by sending an unprecedented punitive expedition by the major Treaty Powers who charged China with “crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity and against civilization.”<sup>207</sup> A 1900 article indeed recommended that the West follow the course it had taken in Africa, by setting up an international administration in China on the model of the Congo!<sup>208</sup> Even the Kaiser observed that China

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202. See MUNGELLO, *supra* note 99. One rather extraordinary rhetorical strategy for acknowledging yet explaining away the fact of Chinese culture was to insist that what passed for “Chinese” civilization was in fact (corrupted) *Western* civilization in origin. See, e.g., TERRIEN DE LACOUPERIE, *WESTERN ORIGIN OF THE EARLY CHINESE CIVILIZATION* (London, Asher & Co. 1894).

203. STEINMETZ, *supra* note 171, at 463. See also SSU-YU TENG & JOHN FAIRBANK, *CHINA’S RESPONSE TO THE WEST: A DOCUMENTARY SURVEY, 1893–1923*, at 152 (Harvard Univ. Press 2d ed. 1979) (reproducing Kang Youwei’s 1895 statement, “It will not be long until we become Turks or Negroes”).

204. See *supra* note 77.

205. See generally LOUIS G. PEREZ, *JAPAN COMES OF AGE: MUTSU MUNEMITSU AND THE REVISION OF THE UNEQUAL TREATIES* (1999). See also ALEXANDER VON SIEBOLD, *JAPAN’S ACCESSION TO THE COMITY OF NATIONS* (Charles Lowe trans., 1901) (1900) (celebrating Japan’s emancipation from extraterritorial jurisdiction).

206. See, e.g., PAUL A. COHEN, *HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH* (1997); JOSEPH W. ESHERICK, *THE ORIGINS OF THE BOXER UPRISING* (1987).

207. HEVIA, *supra* note 120, at 244.

208. Paul Bourget, *La Chine et le droit des gens: Deuxième partie*, in 162 *REVUE DES DEUX MONDES* 815, 835–36 (1900). Bourget specifically cited the General Act of the Berlin Conference on Africa, in 1885, as precedent for an international takeover of the administration of China. He also noted—correctly—that the Allied powers had already set up an international administration for the city of Tientsin. On the administration of Tientsin, see RUTH ROGASKI, *HYGIENIC MODERNITY: MEANINGS OF HEALTH AND DISEASE IN TREATY-PORT CHINA* (2004). As further justification for his proposal, Bourget observed that China’s relatively high civilization only made its behavior all the more perverse, given that it was in fact acting like a “savage” people. Paul Bourget, *La Chine et le droit des gens: Première partie*, in 162 *REVUE DES DEUX MONDES* 522, 536–37 (1900). Georg Jellinek was less extreme in his assessment of



was treated “like a Negro state of secondary importance [*wie einen Negerstaat zweiter Güte*].”<sup>209</sup>

As James Hevia describes the Allied troops’ ritual defilement of the imperial grounds during the Boxer Rebellion, it was calculated in part to transform the cosmologically unique Son of Heaven into simply one sovereign among others<sup>210</sup>—a mere international legal person with the proper name “China.” Yet this new international legal person was in fact not modeled on the legal person of the European variety. Until recently, China had been disparaged as “the Sick Man of Asia,” thus likening it to the Ottoman empire, “the Sick Man of Europe”: Together, they represented two Oriental civilizations in decline. Notably, extraterritoriality had been the main form of legal imperialism in both, indexing their intermediate status on the scale of civilizations. When the point of reference for China’s racial identity began shifting to Africa, not only was there a growing preference for territorial forms of control such as leases, but the West was also increasingly willing to resort to pure violence. For example, when merchants in China responded to the Chinese Exclusion laws in the United States by organizing a boycott of American goods in 1905, President Roosevelt entertained seriously the option of a military seizure of Canton with the support of approximately 15,000 troops.<sup>211</sup>

The figurative transition from quasi-consensual commercial intercourse to colonial rape had in fact been marked symbolically at the time of the Boxer Rebellion. When the Allied Troops entered Beijing in 1900 to defeat the Boxers, they routed the troops to the capital through the imperial Qian gate. When they found the gate closed, they forced their way through the middle door of the gate—reserved for the emperor only—by blowing it up with guns.<sup>212</sup>

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China’s international legal status at the time of the Boxer Rebellion, yet he too asserted unequivocally that China was not formally entitled to the status of a civilized state; indeed he dismissed China’s objections to international intervention as hypocritical protestations of “haughty Orientals.” Georg Jellinek, *China und das Völkerrecht*, 1900 DEUTSCHE JURISTEN-ZEITUNG 401, 403 (No. 19, Oct. 1). As early as 1886, Joseph Hornung opined that since Chinese law was “inhuman,” it deprived the Chinese as a people of “the privileges of humanity.” Joseph Hornung, *Civilisés et Barbares*, 8 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 281, 289 (1886).

209. STEINMETZ, *supra* note 171, at 470.

210. Hevia, *supra* note 180, at 389.

211. DELBER L. MCKEE, CHINESE EXCLUSION VERSUS THE OPEN DOOR POLICY, 1900–1907, at 185–87 (1977). Indeed, while China as a state was being “Africanized,” Chinese persons in the United States were being “Negroized.” See Dan Caldwell, *The Negroization of the Chinese Stereotype in California*, 53 S. CAL. Q. 123 (1971).

212. HEVIA, *supra* note 120, at 197.

### E. Kowtow Redux

Given China's international legal status in 1900, from the perspective of the Treaty Powers territorial conquest would in fact have been beside the point. It would have brought little gain, and, on the contrary, it would have entailed administrative responsibilities that were easily avoided by the extensive repertoire of legal strategies of informal empire. A dense network of old and new forms of foreign sovereignty had already been superimposed on China—ranging from simple extraterritoriality to Treaty Ports to concessions to forms of railroad sovereignty to foreign telegraph lines to foreign post offices to foreign-run customs collection agencies to leaseholds to formal colonies such as Hong Kong and Macao, and every conceivable gradation of intervention and domination in between.<sup>213</sup> Even though the sovereignty of China as a whole was never formally challenged, it was rendered close to meaningless, as the West gained jurisdictional control of and access to major cities and rivers and the main lines of communication and transportation. Although the reticular structure of this colonial sovereignty fell short of actual occupation, it gave China jurisdiction and full control only over the spaces that mattered the least—the blank spaces that exist on modern maps *between* cities, railroads, and rivers. What was left was a shell of Chinese sovereignty, penetrated repeatedly from all sides so that its spatial representation looked increasingly like an elaborate latticework.

After the Boxer Rebellion and with the rhetorical Africanization of China, the apologies and indemnities that were demanded of it also reached a qualitatively new level. Perhaps most remarkably, Germany insisted that an imperial prince personally deliver the emperor's apology for the Rebellion to the Kaiser in Berlin.<sup>214</sup> In keeping with the history of Sino-European diplomatic exchanges, there was once again a dispute over protocol. Yet there was no longer even a pretense of claiming merely diplomatic equality between sovereigns but an open assertion of European superiority over China. Although China was made to give up its domestic diplomatic protocol along with the ritual kowtow, the Kaiser now

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213. For the breathtaking range of the technologies of imperial penetration, see the two-volume set by WESTEL WILLOUGHBY, *FOREIGN RIGHTS AND INTERESTS IN CHINA* (1920). For a theoretical analysis of the multiplicity of colonial and semi-colonial forms in China, see Jürgen Osterhammel, *Semi-Colonialism and Informal Empire in Twentieth-Century China: Towards a Framework of Analysis*, in *IMPERIALISM AND AFTER: CONTINUITIES AND DISCONTINUITIES* 290 (Wolf J. Mommsen ed. 1986).

214. Stefanie Hetze, *Feindbild und Exotik: Prinz Chun zur 'Sühnemission' in Berlin*, in *BERLIN UND CHINA; DREIHUNDERT JAHRE WECHSELVOLLE BEZIEHUNGEN* 79 (1987). See also the account in OTTO FRANKE, *ERINNERUNGEN AUS ZWEI WELTEN* 110–11 (Berlin 1954). It is notable that the sending of an apology mission—to be headed specifically by the emperor's brother—was structured as an international legal obligation by China: It was incorporated into Article 1 of the official Peace Protocol.

demanded just that: He requested that the Chinese prince, quite literally, kowtow before him in the German capital—thus offering himself over to German sovereignty on all fours, in total submission.<sup>215</sup>

In the end, the Chinese prince (whom the German press described as a “girlish” young man and whom German officials referred to as “the Prince of Atonement” [*Sühneprinz*]) refused even to cross from Switzerland to Germany until this demand was given up.<sup>216</sup> In Berlin, he was met with unprecedented rudeness. Upon his arrival, German guards ignored him, standing at ease and refusing even to salute him. At the audience, the Kaiser berated him loudly for crimes that were “unheard of among *civilized* peoples,” with a pointed emphasis on the word “civilized.” Remarkably, however, after enduring this unprecedented diplomatic humiliation, upon his return trip the Chinese prince was treated in accordance with his imperial status. The soldiers greeted him now,<sup>217</sup> and he turned from a diplomatic non-entity into the representative of an international legal person.

The moral of the diplomatic parable is clear: China could become an “equal” sovereign only by enduring humiliation and acknowledging the West’s superiority. That superiority in turn was marked in racial, gendered, and sexual terms, by the delivery of an apology by a queer Chinese prince.

#### V. SCRIPTS OF SOVEREIGNTY

Rape does not happen to preconstituted victims; it momentarily makes victims.<sup>218</sup>

—Sharon Marcus

Throughout this Article, I have highlighted ways in which sexual, gendered, and racial metaphors have structured uneven global, legal, and political relations historically. I have analyzed specifically China’s rhetorical status as a political and economic subject within the imaginative structure of international law in the nineteenth century. I want to conclude by considering further the political and epistemological significance of this rhetoric.

215. Hetze, *supra* note 214.

216. *Id.* Remarkably, the German press believed that the prince would have chosen death over performing a kowtow before the Kaiser, as (in the press’s hyperbolic view) doing so would have caused all of China to rise up in rebellion. *Id.* at 83.

217. *Id.*

218. Sharon Marcus, *Fighting Bodies, Fighting Words*, in *FEMINISTS THEORIZE THE POLITICAL* 391 (Judith Butler & Joan W. Scott eds., 1992).

One way to understand the rhetorical framework of nineteenth century international law is to analyze it as a set of global cultural scripts, in the sense suggested by Ryan Goodman and Derek Jinks's sociological model of sovereignty.<sup>219</sup> The model seeks to explain states' increasing institutional isomorphism as a result of the global diffusion of cultural models. These models are not adopted either because of their utility—often, they are in fact dysfunctional—or simply because of mindless habitualization, but rather because they have come to occupy an orthodox status in global culture, Goodman and Jinks argue.

The model provides a powerful explanation for much of the institutional structure of contemporary global society. A historical analysis of international legal rhetoric supplements the model in important ways. It underscores the perhaps obvious but vitally important fact that today's orthodox "world models" of state organization represent by and large the global diffusion of a historically specific North Atlantic political and legal culture. A historical examination of the constitutive limits of that culture helps us understand why even today it is easier for some actors than others to execute credibly the global scripts of sovereignty. Institutional organization of the state is one important element in making a successful claim for sovereignty, but it is not always enough; it also matters *who* is making the claim.

The point of a historical comparison is of course not to suggest that international law's boundaries remain the same today as in the nineteenth century. This is evidently not the case. By overhauling their political institutions to simulate those of the sovereign states of the West, numerous extra-European states have attained various degrees of political and legal recognition. Nevertheless, just as an individual in a colonial dominion could never perfectly mimic his colonial master, so an extra-European international legal person is still doomed to at least some degree of mimetic failure. Hard as a non-Western state may try, even at best its institutions will be "almost the same but not quite," to borrow Homi Bhabha's oft-quoted formulation.<sup>220</sup> To state a truism, the only perfect replica of a modern Western state is a modern Western state.

Consider the case of the kingdom of Hawaii. In the 1840's, Hawaii expressed a great eagerness to join the Western interstate order (to preempt being colonized by it). The kingdom followed faithfully and quite literally the global script of sovereignty by setting up a constitution, a bicameral legislature,

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219. See Goodman & Jinks, *supra* note 2; Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 101 (2003).

220. Homi K. Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, in THE LOCATION OF CULTURE 89 (1994).

and a supreme court, among other institutions.<sup>221</sup> Nevertheless, even as sympathetic an observer as Mark Twain simply scoffed at “grown folk” “playing empire,”<sup>222</sup> and Hawaiian sovereignty never seemed to pass the laughing test in the eyes of various American and European observers. China could not be dismissed as easily as Hawaii, to be sure. Yet, ironically, even though the Chinese state enacted a number of Western-style political reforms at the turn of the twentieth century, its claim to sovereignty became even *less* credible than before as it became increasingly associated with Africa.<sup>223</sup> In effect, its changing racial identity rendered it *more* rapable and *less* sovereign.

As shorthand, we might refer to the normative model of state organization as the sovereignty script and to the sexualized and racialized structure of interstate violence analyzed in this Article as a rape script. The two are dialectically related: To be sovereign is not to be rapable, and to be rapable is not to be sovereign. The notion of a rape script in turn provides a way of assessing the significance of the rhetoric of sexual violation in international law. A so-called realist observer (whether a Legal Realist or a Realist International Relations scholar) might dismiss that rhetoric as little more than a hypocritical discourse whose main function is to provide a *post hoc* justification for violence that is ultimately determined by material factors. Obviously no serious analysis will deny that colonial and semi-colonial violence ordinarily serve powerful material interests, yet it is equally important to recognize that rhetoric is a form of power and hence one important source of sovereignty, not merely its secondary reflection. All violence takes place in discourse—in language, in narratives—and discourse plays a crucial role in determining not only who gets violated and how, but even *what counts* as a violation in the first place.

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221. See SALLY ENGLE MERRY, *COLONIZING HAWAII* 63–114 (1999).

222. *Id.* at 20 (quoting Mark Twain’s *Roughing It in the Sandwich Islands*). See also AMY KAPLAN, *The Imperial Routes of Mark Twain*, in *THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE* 51, 82–83 (2002) (analyzing Twain’s views on Hawaiian government). As Twain saw it, everything in Hawaii was surrounded by scare quotes:

There is his Royal Majesty the King, with a New York detective’s income of thirty or thirty-five thousand a year from the “royal civil list” and the “royal domain.” He lives in a two-story frame “palace.”

And there is the “royal family”—the customary hive of royal brothers, sisters, cousins, and other noble drones and vagrants usual to monarchy—all with a spoon in the national pap-dish, all bearing such titles as his or her Royal Highness the Prince or Princess So-and-so. Few of them can carry their royal splendors far enough to ride in carriages, however; they sport the economical Kanaka horse of “hoof it” with the plebeians.

MERRY, *supra* note 221, at 20 (quoting Twain).

223. On late imperial reforms, see, for example, PHILIP A. KUHN, *ORIGINS OF THE MODERN CHINESE STATE* 122–32 (2002); NORBERT MEIENBERGER, *THE EMERGENCE OF CONSTITUTIONAL GOVERNMENT IN CHINA (1905–1908)* (1980).

Consider Sharon Marcus's analysis of the role played by rape scripts in "real," rather than metaphorical, rape—that is, in acts of physical violence on individual bodies. Marcus defines rape as "a scripted interaction which takes place in language and can be understood in terms of conventional masculinity and femininity as well as other gender inequalities."<sup>224</sup> She develops the term "rape script" to emphasize that "the violence of rape is enabled by narratives, complexes and institutions which derive their strength not from outright, immutable, unbeatable force but rather from their power to structure our lives as imposing cultural scripts."<sup>225</sup> Marcus is careful to insist that while rape scripts always shape social reality, they never simply predetermine it. Rather, they consist of "a series of steps and signals" which it is possible to learn to recognize and whose final outcome is contestable.<sup>226</sup> Indeed, Marcus specifically rejects a view that would see women as "inherently rapable," if not always "already raped"—an identity politics that would define women essentially by their capacity to be violated.<sup>227</sup>

Marcus's analysis in fact describes the operation of rape scripts in colonial international law as well. Like rape, colonial violence is never an inevitability simply because of the relative material positions of the violator and would-be-victim. To claim so would be to insist on a materialism so crude that it has no room for the operation of politics, ethics, or culture. In the final analysis, the rape scripts of colonial international law did not serve merely as a rhetorical justification for violence against states and peoples that were inherently colonizable, always already violated. Rather than predetermined, colonial violence—like rape—was enabled by narratives and institutions that were part of the cultural script of international law. As I have suggested, China was not violated simply because it *was* weak. The cultural script of international law was an important global institution that helped *make* it internationally weak.

Moreover, it is important to recognize the rhetoric of sexualized interstate violence not only as a discourse that has structured relations among states but as part of a larger cultural discourse of rape. While it regulates interstate relations, it also naturalizes gender relations more generally and thus forms part of the very same rape scripts that organize the sexualized and racialized operation of violence on individual persons' bodies as well. In the interplay of sexual and political

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224. Marcus, *supra* note 218, at 390. For a queer analysis of globalization that also employs Marcus's notion of a rape script, see J.K. GIBSON-GRAHAM, *Querying Globalization*, in *THE END OF CAPITALISM (AS WE KNEW IT)* 120 (1996).

225. Marcus, *supra* note 218, at 389.

226. *Id.*

227. *Id.* at 387.

metaphors, it is often difficult indeed to determine just what is the ground of comparison at any point in time. When lawyers analogize states to persons, we ordinarily consider the person as the “real” referent to which the state is metaphorically likened. Yet early publicists did not make sharp distinctions between different types of subjects of law, whether individuals, states, or other intermediate entities. Hence, as Richard Tuck argues persuasively, not only is the person a historical model for the state as a legal subject, but *states* too have served as models for conceptualizing *persons* as legal and political subjects.<sup>228</sup> We might call it the “public law analogy” of municipal law, with states providing a model for individual subjectivity. In the end, the private law analogy is not containable so as to operate in one direction only. Effectively, the rape scripts of municipal law and international law follow a similar, mutually reinforcing (although always contestable) grammar of gendered and racialized violence. Marcus observes this as well: She specifically calls attention to the widespread use of *invasion* as a metaphor for rape—mirroring the rhetoric of interstate violence and its use of *rape* as a metaphor for invasion.<sup>229</sup> It is impossible to separate neatly the rhetorics of rape and invasion, as they operate simultaneously in the organization of violence among both states and persons.

It is instructive that Marcus objects to the metaphor of invasion specifically. Rather than viewing rape as the invasion of a sacred inner space, on the model of a territorial violation, she regards rape as the forcible creation of a victim’s sexuality as a violated inner space.<sup>230</sup> This objection is equally applicable to colonial legal rhetoric, so long as we substitute sovereignty for sexuality. Given that a formal juridical sovereignty on the European model was not a Chinese notion, Western incursions into China in the nineteenth century did not constitute a violation of a preexisting sovereignty in the European sense but in fact the

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228. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 84 (2d ed. 2002). As Tuck observes, “the language in which we still describe this autonomous, rights-bearing individual is in fact a language originally used to describe states or rulers.” For example, Tuck notes, the term “autonomy” (meaning in Greek, literally, “having one’s own laws”) was originally always used to refer to a political community, yet today “autonomy” is “a living and poetic metaphor in which a *person* can momentarily be described as a city.” *Id.* at 226.

229. Marcus explicates the common understanding of rape as an “invasion”: “a subject of violence acts on an object of violence to define her as the boundary between exterior and interior, which he crosses, and as the immobilized space through which he moves.” *Id.* at 399. Indeed, describing the power of rape scripts, she too turns to a political metaphor, decrying the extent to which rape scripts have “colonized our minds and bodies.” *Id.* at 397. The use of colonial metaphors to describe sexual relations is far too common to document exhaustively, but see, for example, H el ene Cixous, “The Laugh of the Medusa,” in *NEW FRENCH FEMINISMS: AN ANTHOLOGY* 247 (1980) (describing a male view of women as “a ‘dark continent’ to penetrate and to ‘pacify’”).

230. See Marcus, *supra* note 218, at 399.

creation of a sovereignty on the Western model as something to be violated. For example, at first China did not object categorically to the exercise of extraterritorial jurisdiction: It had a long history of allowing foreign merchants to settle their own disputes (not unlike early modern consuls did in Europe). Yet by the turn of the century China came to view the very notion of extraterritoriality as such as *the* signal violation of its sovereignty. In part, the objection was to the particular way in which extraterritorial jurisdiction was being exercised, but equally importantly China increasingly came to narrate itself politically in terms of the Western script of sovereignty. Evidently, the extraterritorial jurisdiction of foreign sojourners in China did not, and could not, become a violation of China's sovereignty until *after* it sought to reconstitute its borders strictly on the Euro-American model of exclusive territorial jurisdiction.<sup>231</sup>

While an analysis of the rhetoric of sexual violation in international law as a kind of rape script is useful in understanding the nature of the violation upon which modern Chinese sovereignty is built,<sup>232</sup> it is also important to recognize the dissonances in that script. As rhetoric, it has been dynamic and unstable. Therefore, as I have suggested, it is futile to try to construct a single rhetoric of China as an international legal person. Instead, what I have tried to do is to identify some key elements in legal rhetoric and to analyze how those elements functioned at various times. It would serve no purpose to try to determine China's "real" sex as a subject of international law, for instance—whether it was "really" viewed as a male or female. As a *state*, it was evidently at least potentially

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231. The political organization of space in imperial China is a vast and contested topic. In light of new Qing history, see *supra* note 22, it is clear that the so-called Sinocentric model, based on a centered but culturally borderless Confucian universalism and elaborated famously by John King Fairbank, was never a full and accurate description of the spatial organization of the Chinese empire. See generally THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS (John K. Fairbank ed., 1968). Indeed, China had boundaries, borderlands, frontiers, and zones of various types that demarcated important territorial distinctions. For an analysis of the importance of territorial control in late imperial China, see, for example, R. Randle Edwards, *Ch'ing Legal Jurisdiction Over Foreigners*, in ESSAYS ON CHINA'S LEGAL TRADITION 222 (Jerome Alan Cohen et al. eds. 1980), and R. Randle Edwards, *Imperial China's Border Control Law*, J. CHINESE L. 33 (1987). Yet regardless of how one chooses to characterize China's territorial distinctions and its desire to control foreigners, it is nevertheless evident that political space in late imperial China was not constituted simply on a Western model of exclusive territorial jurisdiction, based on the abstract notion of empty, homogeneous space.

232. In many ways, Chinese nationalism, with its relentless emphasis on "the century of humiliation" (*bainian guochi*), exemplifies a more general modern tendency to base political identity on injury. See WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995). Indeed, Jing Tsu analyzes Chinese nationalism as an instance of "the articulation of distinct and coherent national identities based not on sovereignty but on the embrace of 'failure.'" JING TSU, FAILURE, NATIONALISM, AND LITERATURE: THE MAKING OF MODERN CHINESE IDENTITY, 1895–1937, at 20 (2005). Recognizing the cultural masochism and racial melancholia of Chinese nationalism, Tsu insists nevertheless on its resilience and productivity as a basis for national self-assertion.



male. As an *Oriental* state, it was also feminized.<sup>233</sup> Racially, in some regards and at certain times, it was viewed as civilized—albeit excessively so—while in others it was barbaric. This was precisely the queerness of colonial legal rhetoric, using Eve Kosofsky Sedgwick’s definition: “the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning” that occur “when the constituent elements of anyone’s gender, of anyone’s sexuality aren’t made (or can’t be made) to signify monolithically.”<sup>234</sup> This surely describes the instability of China’s gender, and indeed of its racial identity as well, given its historic transition from white to yellow to quasi-African. Yet, as I have suggested, Sinophobia was never able to overwrite Sinophilia completely. Even though by the turn of the twentieth century Western jurists, diplomats, missionaries, and merchants had developed a vast archive of Sinological knowledge in order to render it comprehensible and containable, China consistently and insistently exceeded their interpretations.

Finally, just as it is important to acknowledge the conflation of the discourses of sexual and political violation—with rape as a metaphor for invasion, and invasion as a metaphor for rape, for example—it bears noting that the boundary between the rhetorics of sexual and commercial intercourse is similarly fluid. Not only is there a long history of likening commercial relations to sexual ones, but the language of sex is equally indissociable from the language of commerce. Hence, when I observe that the British (most notably) discussed their economic relations with China primarily in the idiom of intercourse, I am not suggesting that in their usage the “real” meaning of intercourse was sex, and that when they employed it to refer to trade they did so self-consciously metaphorically. One of the term’s meanings was sex, and the fecundity of the sex-commerce analogy lay precisely in the undecidability of which term enjoyed ultimate priority. There is no need to insist that either sex was analogous to commerce, or commerce to sex: The analogy was, and is, reversible, and the two are analogous *with* each other.<sup>235</sup>

Indeed, as a remarkable illustration of the ambiguity of the global scripts of sovereignty and colonial violation, Chineseness itself could function as the ground for both the denial of sovereignty and a claim to it. In Ireland—the most

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233. Indeed, given that masculinity is always relative and relational, no state is “absolutely” male. Cf. Ed Morgan *The Hermaphroditic Paradigm of International Law*, 1992 CAN. COUNCIL ON INT’L L. 78.

234. EVE KOSOFSKY SEDGWICK, TENDENCIES 8 (1993).

235. The distinction between subordinating analogies (A corresponds to B) and equalizing analogies (A corresponds *with* B) is Kaja Silverman’s. As Silverman puts it, in an equalizing analogy “both terms are on an equal footing, ontologically and semiotically.” KAJA SILVERMAN, FLESH OF MY FLESH 44, 173 (2009).

important intra-European colony—Orientalism operated as an imperial as well as anti-imperial discourse. Improbably, through the nineteenth century a host of Celticist and Irish cultural nationalists claimed that Irish culture was Oriental in its origin.<sup>236</sup> Effectively, this was a way of claiming the heritage of a high (if undervalued) civilization, and thus implicitly rejecting competing characterizations of Irish as savages—whether “White Indians” or “White Negroes,” to name some of the most common epithets.

In sum, it is possible to state metaphorically that China was raped—but not because it was inherently rapable, whether because of its civilization, race, or gender. Colonial violation, like rape, does not happen to preconstituted victims; it too makes its victims momentarily. And it makes its victims in part through queer rhetoric, as I have sought to outline throughout this Article. We ignore that rhetoric at our peril.

#### EPILOGUE

In 1883, the natural lawyer James Lorimer bemoaned the fact that many non-Western states did not even wish to entertain relations with European states on European terms. As he put it wistfully, it was “a pity” that “reciprocating will cannot be ‘stored’ and exported to non-reciprocating nations.”<sup>237</sup> In 1842, with the signing of the Treaty of Nanjing at the end of the Opium War, China was essentially coerced at gunpoint to participate in so-called free trade under the aegis of (Western) international law. In China’s case, opium was indeed a chemical medium for exporting a reciprocating desire for economic intercourse that was otherwise lacking. Yet it is notable that even in China Lorimer’s “reciprocating will” no longer needs to be induced by administering opium. In the twenty-first century, China eagerly wants to be an active participant in the World Trade Organization, for example.<sup>238</sup> Without seeking to bring this story, with its rich contradictions, up to the present, it is important to

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236. JOSEPH LENNON, *IRISH ORIENTALISM: A LITERARY AND INTELLECTUAL HISTORY* 123 (2004). For another caution against reductive interpretations of Orientalism, see Ed Morgan, *Orientalism and the Foreign Sovereign: Today I Am a Man of Law*, 13 *ISR. AFF.* 730 (2007). See also Ruskola, *supra* note 103.

237. 1 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* 125 (London, William Blackwood & Sons 1883).

238. At the same time, with China’s enhanced economic clout, it is becoming evident that its desires are also increasingly complex, and its willingness to say “no” correspondingly greater, as suggested by the title of the 1996 Chinese bestseller, *China Can Say No*. See ZHONGGUO KEYI SHUO BU: LENGZHANHOUSHIDAI DE ZHENGZHI YU QINGGAN JUEZE [China Can Say No: Political and Emotional Choices in the Post Cold War Era] (1996).

consider what happens to China as well as other late-comers to sovereignty when they finally join the so-called Family of Nations.

If one takes the biological metaphor seriously, only European states were born to be equal and possess their sovereignty as a matter of birthright. All others have to earn their sovereignty, by meeting various racialized and gendered criteria of civilization. Even once those states meet the requisite norms, the logic of kinship decrees that the best they can hope for is to become stepchildren, transnational adoptees of sorts, holders of a second-hand sovereignty. At worst, they will remain bastards, tainted by their illegitimate birth from intercourse outside the civilized norms of the law of nations. Today, it is easy to reject such a genealogically exclusive Family of Nations and to see it for the illiberal foundation of a colonial international law that it was. Since World War II, sovereignty has been democratized so that it is now available to all states, regardless of civilizational criteria.<sup>239</sup>

Nevertheless, although the idea of formal equality among sovereigns still occupies an “almost ontological position” in international law, to borrow Benedict Kingsbury’s apt formulation, many of the old metaphors of gender and sexuality have hardly disappeared from the contemporary scripts of sovereignty.<sup>240</sup> On the contrary, at least since the end of the Cold War, the formal assumption of sovereign equality has undergone significant erosion, with the emergence of an entire class of what Gerry Simpson calls “outlaw states,”<sup>241</sup> noting, for example, the recent “*de facto* criminalization of Iraq, Libya and Yugoslavia.”<sup>242</sup>

239. James Whitman has analyzed the outlawing of dueling in Europe and its displacement by laws enforcing civility and respect as a generalization of aristocratic honor to all citizens, or what he calls a social “leveling up,” so that originally exclusive norms of dignity come to encompass all. See, e.g., James Q. Whitman, *Enforcing Civility and Respect*, 109 YALE L.J. 1279 (2000). In many ways, the development of international law has proceeded in a parallel fashion: The outlawing of war—analogue to the prohibition of dueling—has been accompanied by a global leveling-up, a worldwide redistribution of honor (or dignity, in more contemporary parlance), so that it is now possessed equally by all states, regardless of whether they can trace their descent from the European Family of Nations. In gendered terms, this redistribution has entailed a global leveling-up to a certain standard of masculinity as well. It is useful to recall that John Austin famously, and suggestively, regarded international law as a branch of “positive morality” (rather than positive law) and classified it together with “*the laws of honour*” as well as “*the law set by fashion*.” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 140–41 (Prometheus Books 2000) (1832) (emphasis in original). On the continuing role and relevance of notions of honor in international law, see, for example, Allen Z. Hertz, *Honour’s Role in the International State System*, 31 DENV. J. INT’L L. & POL’Y 113 (2003).

240. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599, 600 (1998).

241. GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004). Significantly, Simpson extends his analysis historically as well, challenging the notion of sovereign equality as a legal norm even in the nineteenth century. While all jurists concede that the so-called Great Powers enjoyed political hegemony in post-Napoleonic Europe, Simpson analyzes the idea of the Great Powers as a *legal* concept—a notion that is “a juridical idea . . . that

Such outlaw states are in fact often identifiable by gendered, sexual, and racial criteria as well. Even today, the fact remains that some states are manlier than others, and hence born to lead—the United States, most notably. Likewise, there are still states that are too corrupt and effete to govern themselves—many of them are today described as “failed states”—and there are still states with excessive, ungovernable masculinity that need to be disciplined. We no longer describe such states as savage but call them rogue states instead. Yet frequently they are as queer in the political imagination as their predecessors. In 1991, during the first Gulf War, a T-shirt depicting Saddam Hussein’s face on a camel’s rear end proclaimed, “We Will Not Be Saddam-ized,” thereby equating Saddam Hussein’s invasion of Kuwait to an act of forcible sodomy.<sup>243</sup> Similarly, a poster of Saddam had a missile targeted at his buttocks with the message, “Hey Saddam This Scuds [sic] For You!!”,<sup>244</sup> thus suggesting a homophobic American desire to sodomize Saddam.

And there remain the true outcasts of the international legal order: political entities that are not recognized as states at all. Often, they are described as terrorists—the modern-day equivalents of pirates. Indeed, their sexual practices are as suspect as those of pirates, and the promiscuity of their political targeting seems in turn to reflect their sexual perversity. In a striking echo of the Saddam poster a decade earlier, within days after September 11, 2001, Osama bin Laden was being depicted sodomized by the Empire State building.<sup>245</sup>

It is no wonder that these queer enemies of mankind fall outside the norms of law altogether.

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has been presented as a material fact.” *Id.* at 69. Simpson argues that the notion of “criminal” and “outlaw” states has a similarly long pedigree although “until recently, these categories had relatively little jurisprudential purchase”—until after the Cold War, most notably. *Id.* at 312.

242. *Id.* (quoting James Crawford).

243. GOLDBERG, *supra* note 83, at 4.

244. *Id.* at 5.

245. Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOC. TEXT 101 (2002). On the fusion of Islamophobia and homophobia after 9/11, see also JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).