

Clashing Kingdoms, Hidden Agendas: The Battle to Extradite Kwok-A-Sing and British Legal Imperialism in Nineteenth-Century China

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This essay blends history, law, and politics in considering the role of legal imperialism nineteenth-century English extradition law in colonial Hong Kong. Building upon the pioneering work of Jerome Cohen, this essay enhances and clarifies our understanding of Chinese legal history and its continued (and future) influence on Sino-Western relations. By focusing upon the series of In re Kwok-a-Sing decisions as they traversed courts from colonial Hong Kong to imperial London, this study analyzes how, through skilful legal reasoning, the British courts managed to circumvent laws and assert their political domination in Southeast Asia by repeatedly refusing to extradite Kwok-a-Sing to China. In the process, the paper considers how Britain and other Western powers (including the United States) invariably used law to subordinate China, facilitating a cultural alienation and humiliation whose effects continue to dog Sino-Western relations. It accordingly makes legal history relevant to understanding contemporary international politics.

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I. INTRODUCTION

At half past four in the afternoon on October 4, 1870 in the South China Sea, a party of some twenty Chinese coolies commandeered the French steamer *La Nouvelle Pénélope*.¹ The men, who had boarded the vessel four days earlier in Macao alongside three hundred other coolies, typically remained below deck, safely siphoned off from the crew. That particular afternoon, however, the seamen, assured of their safety by the massive barriers erected across the deck to separate European sailor from Asian laborer, had allowed the coolies above stairs. Even if the blockades failed to halt a Chinese surge, the cannons stationed at each door in the barrier would.² Despite such protections, however, the gang of twenty coolies “collected near a seaman, who was keeping guard at a barrier that was placed across the deck, attacked him and threw him overboard.”³ This initial killing complete, the coolies deftly moved to a fore deck where the ship’s captain strolled unarmed, wholly unaware of the assault. His ignorance proved fatal, as several coolies attacked and killed him, stripping the Frenchman of his watch and a substantial sum of currency, before throwing his body overboard into the depths of the Pacific.⁴ Within minutes, the cabal murdered the majority of the remaining crewmen and forced the few survivors to re-chart the ship’s course from Peru back towards China. Once *La Nouvelle Pénélope* had reached Mainland China the coolies ran the ship aground, where the native

¹ *Attorney-General of Hong Kong v. Kwok-A-Sing*, (1873–74) 5 L.R.P.C. 181 [hereinafter *Kwok-a-Sing*]. See also *Attorney-General of Hong Kong v. Kwok-a-Sing* (19 June 1873), reprinted in 12 REPORTS OF CASES IN CRIMINAL LAW ARGUED AND DETERMINED IN ENGLAND AND IRELAND, at 565–73 (Edward Cox ed., 1875) [hereinafter Cox].

² *Kwok-a-Sing*, *supra* note 1, at 181.

³ *Id.* at 196. See also Cox, *supra* note 1, at 568–69 (providing an additional account of how the massacre aboard *La Nouvelle Pénélope* began, which the official Law Reports removed).

⁴ Cox, *supra* note 1, at 568–69.

population plundered the vessel.⁵ Many of the coolies subsequently fled into Mainland China, where local authorities arrested and tried the men for their crimes.⁶

One man, however, departed to British-controlled Hong Kong. Known as Kwok-a-Sing, the 24-year-old had led the band of coolies in the raid of *La Nouvelle Pénélope*. One witness later testified that Kwok-a-Sing also murdered the captain.⁷ In the subsequent legal battle that traversed courts from the magistracy in Hong Kong to the Privy Council in London, the British government repeatedly refused to extradite Kwok-a-Sing to China on charges of murder and piracy.⁸ Britain's refusal to extradite directly contradicted Hong Kong Ordinance No. 2 of 1850, which mandated "the Rendition for Trial to Officers of their own Country of such Subjects of China as have committed Crimes or Offences against their own Government, and afterwards taken Refuge in Hongkong."⁹ An appraisal of the ordinance, as well as the acts and treaties governing nineteenth-century Anglo-Sino relations, reveals the central role of British legal imperialism in solidifying both political and legal control over China in the late nineteenth century. This phenomenon becomes more apparent after analyzing the series of *In re Kwok-a-Sing* judgments rendered by the magistracy courts of Hong Kong, the Supreme Court of Hong Kong, and finally, the British Privy Council.

While skeptics may raise their eyebrows as to the relevance of an 1870 case in understanding China and the modern international legal order, Jerome Cohen has repeatedly articulated the intrinsic importance of Chinese legal history in making sense of contemporary Sino-Western relations.¹⁰ Writing in 1980, he astutely noted, "It is a tendency of lawyers to be contemporary-minded activists, relevance mongers whose interest in legal history is limited to its impact upon the present."¹¹ As C.

⁵ *Id.* at 569.

⁶ *Kwok-a-Sing*, *supra* note 1, at 181.

⁷ Cox, *supra* note 1, at 568.

⁸ *Id.*

⁹ Hong Kong Ordinance No. 2 of 1850, 1850 (Hong Kong), available at <http://oelawhk.lib.hku.hk/archive/files/85e96901d33124000dbecaacf916237e.pdf>.

¹⁰ Jerome A. Cohen, *Introduction* to *ESSAYS ON CHINA'S LEGAL TRADITION* 3 (Jerome Alan Cohen, R. Randle Edwards & Fu-mei Chang Chen eds., 1980) [hereinafter COHEN, *ESSAYS ON CHINA'S LEGAL TRADITION*].

¹¹ *Id.* See also Cohen's monumental first work, JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963*, at 5-7 (1968) [hereinafter COHEN, *THE CRIMINAL PROCESS*], demonstrating the value of Chinese legal history as a means of understanding fundamental truths about Chinese society that have never wholly vanished. Cohen deftly proved how ancient Chinese law reinforced Confucian social norms and disentangled the evolution of the Ch'ing Code between 1644 and 1912; he simultaneously unearthed a centuries-long seam running between past and present. See also JEROME A. COHEN & HUNGDAH CHIU, *2 PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (Princeton University ed. 1974) [hereinafter *2 PEOPLE'S CHINA*] (underscoring this connection between past and present and particularly emphasizing, through documentary

Stephen Hsu remarked, Cohen has taken this understanding of Chinese legal history beyond the modern international legal order and utilized the past to “anticipate the pace and direction of its future development.”¹² Cohen’s conviction that many of China’s contemporary, conflicted approaches towards international law developed as a result of the forcible introduction of Western diplomatic privileges and immunities during the nineteenth century (and the equally forcible refusal of China to implement these privileges) finds support in the series of *Kwok-a-Sing* decisions.¹³ Equally, just as Cohen maintains that the Peking elite gradually assimilated to the Western international legal tradition following the Treaty of Tientsin in 1858, the subtleties of *Kwok-a-Sing*, while giving credence to his position, also demonstrate the continued, underlying reticence of the Chinese to fully engage with the Western legal tradition.¹⁴ China’s conflicted attitude towards the West and the international legal order thus originated during the nineteenth century, persisted in the twentieth century, and, if history is any indicator, as both Cohen and Hsu have argued, will continue to dog China’s engagement with the global political order in the twenty-first century.

In re Kwok-a-Sing thus presents an opportunity to both enhance and clarify our understanding of Chinese legal history and its continued (and future) influence on Sino-Western relations. An analysis of the relevant treaties, acts, and ordinances by the British imperial courts in the *Kwok-a-Sing* cases served three important functions. Foremost, it illustrated how, by skillful legal chicanery, Britain legitimized its colonization of Hong Kong and domination of the Chinese. By manipulating the application of the law and relying upon Western legal and cultural mores in the *Kwok-a-Sing* decisions, Britain solidified its political power in the region to the detriment of China. Secondly, the alternately patronizing and jingoistic language of the various *Kwok-a-Sing* decisions, as well as contemporary government correspondence and news accounts of the cases, further augmented British power in the region by constructing the Chinese government, laws, and culture as inferior. By casting the Chinese as gross, bestial savages at empire’s peripheries, the British justified the implementation of Western law and legal concepts as a means of bringing order and civility to China.

The imposition of English laws and an English political order in turn fueled China’s “century of humiliation,” that period of Chinese history that began with China’s crushing diplomatic defeat following the

evidence gathered in the People’s Republic of China’s infancy, how China’s historic experiences, both foreign and domestic, influenced contemporary attitudes).

¹² C. STEPHEN HSU, *Introduction to UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN* 3 (C. Stephen Hsu ed., 2003).

¹³ COHEN, 2 *PEOPLE’S CHINA*, *supra* note 11, at 6–7, 933.

¹⁴ *Id.* at 933.

First Opium War in 1842 and only ended after the expulsion of foreign powers from mainland China in 1949.¹⁵ As Cohen has aptly demonstrated, this third and most long-lasting consequence stigmatized the Chinese government and people.¹⁶ Indeed, China's current reticence to engage fully with the international legal order is directly tied to the "imperialist exploitation" suffered by the Chinese at the hands of the West during the nineteenth century.¹⁷ The *Kwok-a-Sing* decisions accordingly demonstrate how Britain utilized English law and legal decisions in order to consolidate its own power by rendering China politically, legally, and culturally inferior. This in turn provoked a lasting legacy of bitterness and a deep skepticism towards the Western international legal order that continues to define China's relationship with the West.

II. HISTORY & LITERATURE REVIEW

Contemporary legal and political thinkers attached great importance to the *Kwok-a-Sing* decisions. They featured prominently in various legal treatises beginning in the 1870s, with Edward Cox's voluminous series *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland*.¹⁸ Including the appeal of *Kwok-a-Sing* in the series gives credence to the concept of British legal imperialism, as the case, despite its origin in far-flung colonial Hong Kong, was appealed to the Privy Council in London, the center of empire. Its injection into the British court system clearly denotes that the imperial writ ran large, a fact underscored by Cox's ample discussion of the case in a text devoted to the courts of England and its closest (and arguably most rebellious) colony, Ireland. Another treatise devoted to the Privy Council, J.J. Beauchamp's *The Jurisprudence of the Privy Council*, recognized *Kwok-a-Sing* as the standard for all *piracy ex jure gentium* cases.¹⁹ The following year, F.T. Piggott commented upon

¹⁵ Jerome A. Cohen, *Chinese Attitudes Toward Intentional Law—and Our Own*, in *THE PEOPLE'S REPUBLIC OF CHINA AND INTERNATIONAL LAW: OBSERVATIONS* 108, 110, 284 (J. Cohen, H. Chieu & D. Johnston eds., 1967) [hereinafter Cohen, *Chinese Attitudes*].

¹⁶ Cohen has posited the idea of stigmatization in *Chinese Attitudes*. See *id.* at 111.

¹⁷ *Id.* at 110.

¹⁸ Cox, *supra* note 1, at 565.

¹⁹ J.J. BEAUCHAMP, *THE JURISPRUDENCE OF THE PRIVY COUNCIL: A DIGEST OF ALL THE DECISIONS OF THE PRIVY COUNCIL; A SKETCH OF ITS HISTORY; NOTES ON THE CONSTITUTION OF THE JUDICIAL COMMITTEE; A SUMMARY OF ITS PROCEDURES; AND ALSO THREE APPENDICES* 608 (1891) [hereinafter BEAUCHAMP, *JURISPRUDENCE*]. *Piracy jure gentium* literally translates to "piracy concerning laws of nations" (thanks to Catherine Sears for this translation). See also Cox, *supra* note 1, at 571 (reaffirming the contemporary definition of *piracy jure gentium* as "only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a

the history of extra-territorial jurisdiction and briefly discussed how the case defined extraterritoriality for the British system in Asia in *Extraterritoriality: The Law Relating to Consular Jurisdiction and Residence in Oriental Countries*.²⁰ In his seminal two-volume *The History of the Laws and Courts of Hong Kong: from the early period to 1898*, J.W. Norton-Kyshe commented upon *In re Kwok-a-Sing* more than any other piracy case in the compendium.²¹ The commentary regarding the proceedings at the magistracy courts and Supreme Court prove particularly valuable, as does the commentary on the character of Chief Justice John Smale, who presided over *Kwok-a-Sing* in the colony's Supreme Court.²²

Despite the importance that contemporaries placed upon the *Kwok-a-Sing* decisions, interest in the twentieth and twenty-first centuries has seen this once-monumental trial that grappled with such diverse issues as extradition, habeas corpus, extraterritoriality, and piracy relegated to a mere footnote of history. In fact by 1925, one scholar queried "Is the crime of piracy obsolete?" in a law review piece of the same name.²³ In answering with a resounding "Yes," Edwin Dickinson discussed *Kwok-a-Sing* in regards to extradition law and piracy, noting that the Supreme Court of Hong Kong twice refused to extradite Kwok-a-Sing, despite piracy's status as an international crime.²⁴ Unfortunately, Dickinson concluded his brief analysis of the *Kwok-a-Sing* decisions with a mere note that the Privy Council determined Kwok-a-Sing could stand trial on the charge of piracy by the law of nations.²⁵ This conclusion is both oversimplified and misleading, as the Privy Council refused to extradite Kwok-a-Sing, as Dickinson recognized, but also stipulated to his trial in a British court in Hong Kong. A reappraisal of what occurred is thus required.

Although other scholarly materials of the twentieth and early twenty-first centuries briefly mention Kwok-a-Sing, most do so only as a footnote in law review articles on maritime and piracy cases.²⁶ In fact the

felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy[.]").

²⁰ Sir FRANCIS TAYLOR PIGGOTT, *EXTRATERRITORIALITY: THE LAW RELATING TO CONSULAR JURISDICTION AND TO RESIDENCE IN ORIENTAL COUNTRIES* 47–48 (1892).

²¹ J.W. NORTON-KYSHE, 2 *THE HISTORY OF THE LAWS AND COURTS OF HONG KONG: FROM THE EARLY PERIOD TO 1898* (1898).

²² *Id.* at 186–87.

²³ Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 *HARV. L. REV.* 334–60 (Jan. 1925) [hereinafter Dickinson, *Crime of Piracy*].

²⁴ *Id.* at 354.

²⁵ *Id.*

²⁶ See, e.g., Guy Manchuk, *The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to Replace an Outdated, Inconvenient Doctrine*, 32 *TUL. MAR. L.J.* 221, 231 (Winter 2007); Robert J. Currie & Stephen Coughlan, *Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?*, 11 *CAN. CRIM. L. REV.* 141 (Feb. 2007).

only recent work to consider *Kwok-a-Sing* and its larger significance beyond mere piracy and extradition law is “Kwok-a-Sing, Sir John Smale, and the Macao Coolie Trade” by Peter Wesley-Smith.²⁷ Wesley-Smith arguably takes a human rights approach to the cases, focusing not upon the legal issues, but Chief Justice Smale’s commitment to the liberation of coolies. Indeed, Wesley-Smith posits that Smale refused Kwok-a-Sing’s extradition on two occasions due to his belief that the French crew of *La Nouvelle Pénélope* forced the coolies aboard the vessel against their will.²⁸ Accordingly, Smale viewed his refusal to extradite or try Kwok-a-Sing for crimes of murder and piracy as the morally correct decision.²⁹ Wesley-Smith’s article importantly assesses the larger considerations of *Kwok-a-Sing* in contemporary politics from a human rights perspective. Similarly, an evaluation of the *Kwok-a-Sing* decisions in regards to British legal imperialism and its effect on China’s role in the international legal and political orders would complement Wesley-Smith’s article. Moreover, it would also fulfill Professor Cohen’s opprobrium that “scholars of international law can do much more than they already have” to study diplomatic and political privileges and immunities in the nineteenth century.³⁰ This work proposes to fill both of these noticeable gaps.

III. THE THEORETICAL UNDERPINNINGS OF CONSTRUCTING DISPARITY

The British interest in China began in the late eighteenth century with the advent of the tea, silk, and opium trades. At a reception held during Lord Macartney’s first embassy to China in 1792–94, Emperor Qianlong haughtily remarked to King George III’s ambassador that “our Celestial Empire possesses all things in prolific abundance and lacks no product within its own border [and] there [is] therefore no need to import the manufactures of outside barbarians in exchange of our own produce.”³¹ Despite the initial discord, the two great empires of East and West began to trade with one another, though evidence suggests that China did not view Britain as a true equal to the Middle Kingdom.³² Equal or no, tensions between Britain and China exacerbated during the early nineteenth century, culminating in the First Opium War in 1839, which Britain waged following China’s refusal to export opium to British traders and, equally controversially, China’s confiscation of opium stores

²⁷ Peter Wesley-Smith, *Kwok-a-Sing, Sir John Smale, and the Macao Coolie Trade*, H.K.L.J. 124–34 (1993).

²⁸ *Id.* at 127–28.

²⁹ *Id.* at 133.

³⁰ COHEN, 2 PEOPLE’S CHINA, *supra* note 11, at 933.

³¹ STEVEN TSANG, A MODERN HISTORY OF HONG KONG 5 (2004).

³² *Id.* at 5–7.

in British factories in Canton.³³ In the words of British Foreign Secretary Palmerston, the war was meant “to efface an unjust and humiliating act, to recover the value of certain property plus expenses . . . and almost by and by to put England’s relations with the Middle Kingdom on a new and proper footing.”³⁴

Arguably, the Treaty of Nanking, signed by the British and Chinese governments in 1842 upon the cessation of hostilities, did indeed place Anglo-Sino relations on “a new and proper footing,” albeit an inherently controversial footing, with Britain assuming a position of power that the Qing Emperor Qianlong of some forty years earlier would not have thought possible. The Chinese, in fact, would suggest that the Treaty of Nanking was the first of the so-called unequal treaties that Western powers entered into with China during the nineteenth century. Aside from the agreement’s longstanding importance of ushering in a wave of unequal treaties and subordinating Chinese politics, culture, law, and society to those of its Western counterparts, the favorable trade terms granted to the British and the cession of Hong Kong Island to Britain proved the two most immediately significant results of Nanking. The first article of the treaty stipulated that the Chinese had to abolish the practice of “compell[ing] the British merchants trading at Canton to deal exclusively with certain Chinese merchants” at Canton and “all [other] ports where British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please.”³⁵ The second article allowed “that British subjects, with their families and establishments, shall be allowed to reside, for the purposes of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochow-fu, Ningpo, and Shanghai.”³⁶ The British government would in turn appoint:

Superintendants, or Consular officers, to reside at each of the above-named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that the just duties and other dues of the Chinese Government . . . are duly discharged by Her Britannic Majesty’s subjects.³⁷

This clause clearly illustrates the growing economic and political presence that Britain physically exercised in China. Moreover, the terms underscored that Britain would control all British trade in China, with the

³³ *Id.* at 9–10.

³⁴ *Id.* at 11 (spoken to Rear Admiral Sir George Elliott).

³⁵ Treaty of Nanking, art. V, U.K.-China, Aug. 29, 1842.

³⁶ *Id.* art II.

³⁷ *Id.*

Chinese operating as a mere appendage, informed of trade relations by British middlemen. Further articles, such as Article X's provision that all Chinese ports "be thrown open for the resort of British merchants, [and] a fair and regular tariff of export and import customs and other dues [promulgated]," also promised healthful economic terms for Britain.³⁸

Article III of the Treaty of Nanking became by far the most important article for both Britain's continued presence in China and the *Kwok-a-Sing* affair. Given the increased presence Britain would exercise economically and politically in China, it proved "obviously necessary and desirable that British subjects should have some port where at they may [maintain] and refit their ships when required, and keep stores for that purpose."³⁹ Accordingly, "his Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain & Ireland, the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors."⁴⁰ With the stroke of a fountain pen, Hong Kong Island became a Crown Colony. It would become one of the richest cities in the world and stand as a jewel in the crown of empire until its reversion to China in 1997. Yet political and legal control served as prerequisites to amassing such wealth, as an ordered, stable society assured traders and speculators that their investments would be honored.⁴¹ Article III proved tantamount to ensuring such control, as it asserted that Hong Kong "be governed by such laws and regulations as Her Majesty the Queen of Great Britain & Ireland shall see fit to direct."⁴²

Importantly, Article III made no stipulation about what type of government or administrative apparatus Hong Kong would have, but it clearly ensured that the English common law, in the grand tradition of Coke and Blackstone, would extend once more beyond the shores of Albion and enlighten an indigenous outpost, bringing civility and stability along with it. The explicit reference to law in Article III signifies the import Britain placed upon the law as a mechanism of building its empire and consolidating its wealth and power.⁴³ The *carte blanche* nature of Article III enabled colonial administrators in Hong Kong to erect courts and promulgate laws that would define the *Kwok-a-Sing* decision and further subordinate China's role in the international order. The Treaty of Nanking, therefore, laid the foundation for future Anglo-Sino relations by placing the Chinese in a politically and legally inferior position.⁴⁴

³⁸ *Id.* art. X.

³⁹ *Id.* art. III.

⁴⁰ *Id.*

⁴¹ TSANG, *supra* note 31, at 19–20.

⁴² Treaty of Nanking, *supra* note 35, art. III.

⁴³ A further discussion of this assertion follows in the following section on legal imperialism; see *infra* notes 45–50 and accompanying text.

⁴⁴ For a further discussion of how Britain subordinated China, see generally Cohen, *Chinese Attitudes*, *supra* note 15, at 284–85. See also WESLEY R. FISHEL, *THE END OF*

Britain's role in shaping and molding the Treaty of Nanking as well as future unequal treaties that ultimately affected the *Kwok-a-Sing* cases highlights the role of legal imperialism in Anglo intervention in nineteenth-century China. The articulation of legal imperialism first resulted in jurisprudential and political science debates of the mid-to-late twentieth century, an era that saw the final collapse of the European imperial order as numerous African, Asian, and Middle Eastern nations declared their independence. Scholars such as Theodore Becker, Sandra Burman, Barbara Harrell-Bond, Konrad Zweigert, Hein Kotz, and Martin Shapiro advanced the concept, though one of the most fluid, clear discussions of legal imperialism is John Schmidhauser's "Legal imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems."⁴⁵ Schmidhauser defines the basic theory of legal imperialism as one where conquering powers universally imposed law upon the indigenous population in an effort to maintain civil stability and order, consolidate economic penetration, and ensure that the invocation of indigenous law by the native population did not threaten the authority and power of the conqueror.⁴⁶ Unsurprisingly, legal imperialism is frequently connoted with European law, whether civil or common, as imbued upon colonial societies of "the Other."⁴⁷

Despite the relatively recent exploration of the theory, case studies have demonstrated the longevity of its actual practice.⁴⁸ In regards to Britain, its incursions into Ireland during the mid-sixteenth century laid the foundations for all future legal imperialist endeavors employed throughout its empire between the seventeenth and nineteenth centuries.⁴⁹ In Ireland, Britain legitimized its colonization by harkening both to England's common law tradition and the canon law of conquest and warfare as developed by Continental powers and applied to non-

EXTRATERRITORIALITY IN CHINA 7–11 (1993) (providing a dissection of how Western powers subordinated China with the terms of the Nanking Treaty).

⁴⁵ John R. Schmidhauser, *Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems*, 13 INT'L POL. SCI. REV. 321–34 (July 1992).

⁴⁶ *Id.* at 328.

⁴⁷ "Othering" or defining people as "the Other" began in the writings of GWF Hegel in the late eighteenth and early nineteenth centuries. According to Denys Hays, European imperialists quickly latched upon the concept as a way of identifying themselves as against "the Other" non-Europeans (or non-Westerners). See generally DENYS HAY, EUROPE: THE EMERGENCE OF AN IDEA 122 (2nd ed. 1968) (making "the Other" commensurate with "the idea of European identity as a superior one in comparison with all the non-European peoples and cultures"). Edward Said expanded upon this definition in his seminal *Orientalism*, in which he suggested, "there is in addition the hegemony of European ideas about the Orient, themselves reiterating European superiority over Oriental backwardness." EDWARD W. SAID, ORIENTALISM 7 (1979).

⁴⁸ See, e.g., ALLAN CHRISTELOW, MUSLIM LAW COURTS AND THE FRENCH COLONIAL STATE IN ALGERIA (1985); HANS S. PAWLISCH, SIR JOHN DAVIES AND THE CONQUEST OF IRELAND: A STUDY IN LEGAL IMPERIALISM (1985).

⁴⁹ PAWLISCH, *supra* note 48, at 35.

Europeans between the thirteenth and sixteenth centuries.⁵⁰ Thus, the frequent assertion that Ireland was Britain's "laboratory for empire" is not without merit.

In a macroscopic sense, Britain's utilization of other, Western legal traditions, such as Roman law and canon law, to justify imperialism illustrated the widespread tendency of European powers to borrow from various Western legal theories, traditions, and customs when justifying their incursions into non-European, or in the case of Ireland, "uncivilized," territories. Indeed, the series of unequal treaties that the great European powers, including Britain, France, and Russia, executed with China and Japan in the nineteenth century demonstrates this reliance on a blended, Western European legal tradition imposed on the barbarous "Other." Britain proved by far the most likely Western nation to unleash its domestic common law on its colonies and "spheres of influence" while simultaneously relying upon Roman law to justify the incursions.⁵¹ Yet other Western powers similarly implemented the late medieval/early modern model of the canon law of warfare and conquest to validate the destruction and replacement of non-European, indigenous legal societies.⁵² Such Euro-centric legal views and the universal reliance by Western powers on the Judeo-Christian legal tradition in effectuating and legitimizing their conquest of non-European cultures clearly indicates the assumption from the signing of the Peace of Westphalia in 1648 until Treaty of Versailles in 1918 that Western law proved the only law worthy enough to govern international relations. During this long span of European legal and political dominance, China negotiated and engaged with the West. Legal imperialism, therefore, dictated the inferior position from which China interacted with the Euro-centric legal order. In a more immediate context, it also illustrated how British courts, from a politically and legally superior position, manipulated the *Kwok-a-Sing* cases for Britain's own political gain.

Indeed, the vast legal machinery of the British Empire levied itself upon *Kwok-a-Sing* in early 1871, thereby beginning a two year drama that ultimately solidified Britain's preeminence in China. Records remain

⁵⁰ *Id.* at 37. In his study, Pawlisch suggested that the civil law of conquest derived from Roman law traditions. The Catholic Church built upon such traditions in the thirteenth century when it in turn established the canon law of warfare and conquest. In turn, Continental powers between the thirteenth and seventeenth centuries developed this Roman and canon law tradition of warfare and conquest into civil, Continental standards. The resulting canons held that barbarous and inferior peoples were subject to conquest and reform. Continental powers then applied such norms to barbarous, uncivilized, non-Europeans. England modified the civil law standard slightly in arguing that the Irish, despite their white appearances, were "barbarous and inferior" to the English.

⁵¹ John Schmidhauser, *Power, Legal Imperialism, and Diplomacy*, 23 L. & SOC. REV. 875 (1989).

⁵² *Id.*

unclear, but sometime in late 1870 or early 1871, British authorities arrested Kwok-a-Sing in Hong Kong as “a suspicious character and a person dangerous to the peace and good order of the colony.”⁵³ On February 7, 1871, Kwok-a-Sing appeared before Charles May, a magistrate judge in Hong Kong, who duly convicted the coolie for his actions onboard *La Nouvelle Pénélope*.⁵⁴ In delivering the verdict, however, May noted a communication that he had received that very morning from the Chinese government in Canton.⁵⁵ The missive requested that “the rendition of [Kwok-a-Sing] . . . as a subject of China, who has committed certain crimes and offences against the laws of China by participating in the murder of a portion of the crew of the French ship *Nouvelle Pénélope*.”⁵⁶

The extradition request and relevant law consulted by May in his proceedings derived from Hong Kong Ordinance No. 2 of 1850, itself a product of provisions governing extradition between China and British Hong Kong in the Treaty of the Bogue, signed on October 8, 1843, and, later, the Treaty of Tientsin, executed on June 29, 1858.⁵⁷ This basic structure of treaties and ordinances, all of which featured favorable terms for the British, underscored the British Establishment’s imperialist agenda in China as legitimized by legal means. Indeed, the ordinance and treaties granted British authorities sole control over extraditions without extending Chinese officials the opportunity to consult with subjects imprisoned in Hong Kong. Both contemporary Chinese government officials and modern British, American, and Chinese scholars have derided the Treaty of the Bogue and the Treaty of Tientsin as part of the great canon of unequal treaties that helped to fuel the century of humiliation.⁵⁸

A cursory glance at the language of the treaties and the ordinance that became such central features of the *Kwok-a-Sing* matter indicated the increasingly imperialist, inequitable tone of the laws. Article IX of the Treaty of the Bogue ensured the extraditions of both Chinese and British subjects from the other’s territory if an individual had committed a crime and taken refuge there.⁵⁹ As the article made clear,

⁵³ *Kwok-a-Sing*, *supra* note 1, at 181.

⁵⁴ *Id.* at 182.

⁵⁵ *Id.* at 181.

⁵⁶ *Id.* at 182.

⁵⁷ Hong Kong Ordinance No. 2, *supra* note 9; The Treaty of the Bogue, U.K.-China, Oct. 8, 1843 (Supplementary Treaty between China and Great Britain, signed at Hoomun-Chae, October 8 1843); The Treaty of Tientsin, U.K.-China, June 29, 1858 (Treaty of Peace, Friendship, and Commerce, between Great Britain and China, signed at Tianjin, June 26, 1858).

⁵⁸ FISHEL, *supra* note 44, at 2–6.

⁵⁹ Treaty of the Bogue, *supra* note 57, at art. IX (“In neither case shall concealment or refuge be afforded[.]”).

if lawless natives of China, having committed crimes or offences against their own Government, shall flee to Hong Kong, or to the English ships of war, or English merchant ships, for refuge, they shall, if discovered by the English officers, be handed over at once to the Chinese officers for trial and punishment.⁶⁰

Similarly, Article IX granted that:

if any soldier or sailor, or any other person, whatever his caste or country, who is a subject of the Crown of England, shall, from any cause or on any pretence, desert, fly, or escape into the Chinese territory, such soldier or sailor, or other person, shall be apprehended and confined by the Chinese Authorities, and sent to the nearest British Consular or other Government officer.⁶¹

The terms of the treaty thus indicated that a level of reciprocity applied to citizens of both countries. Yet equally important, the treaties contained the somewhat suggestive, and indeed patronizing, language of both class and conquest favored by the British Establishment.⁶² Certainly, the treaty provisions, in theory, applied equally to all British subjects. Yet explicit references to soldiers, sailors, and “others,” coupled with sureties that one’s “caste” or “country” of birth did not preclude them from the treaty’s terms, indicated how prominent Britons conceived of conquest as a class-based, socio-economic right.⁶³ Their duties to protect British subjects merely underscored the generally paternalistic air of the treaties.

Yet just fifteen years later, such reciprocal terms had all but evaporated in the Treaty of Tientsin, which abrogated the Treaty of the Bogue and its provisions.⁶⁴ No term within the treaty’s fifty-six articles discussed the extradition of British fugitives who had fled to China, a perplexing occurrence given the seeming disadvantage at which it placed Britain in exercising its legal might.⁶⁵ Despite this omission, however, Article XXI stipulated in a masterful display of strident rhetoric that “if criminals, subjects of China, shall take refuge in Hongkong, or on board

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² PAWLISCH, *supra* note 48, at 12.

⁶³ For a Marxist interpretation of British imperialist history that discusses this theory in far greater depth, see Mark F. Proudman, *Words for Scholars: The Semantics of ‘Imperialism’*, 8 J. HIST. SOC. 395, 401 (2008). See generally A.J.P. TAYLOR, *ESSAYS IN ENGLISH HISTORY* 30–32 (1976).

⁶⁴ Treaty of Tientsin, *supra* note 57.

⁶⁵ There has not been any explanation tendered for why the Treaty of the Bogue failed to provide an explicit extradition clause referring to British citizens found in China.

the British ships there, they shall, upon due requisition by the Chinese authorities, be searched for, and, on proof of their guilt, be delivered up.”⁶⁶ This provision similarly applied to any Chinese “criminal” who concealed himself in a house or ship in other British ports in China.⁶⁷ The categorization of the Chinese as criminals even before a court of law determined their guilt or innocence reflected the disdain of the British towards the Chinese.⁶⁸ The construction of the Chinese as criminals indicated that traditional legal customs enshrined in the English common law, such as the presumption of innocence before a showing of one’s guilt, did not have a place in Britain’s colonial rhetoric in China. Furthermore, as the treaty language suggested, many British officials feared that Hong Kong had become a “refuge” for Chinese criminals during the mid-nineteenth century, thereby contributing to a general degradation of the Crown Colony’s society.⁶⁹ Thus, by providing for the extradition of criminals, the Victorian propriety that permeated Britain and its colonies throughout the nineteenth century would remain intact.

By far the most immediate and important law governing the extradition of Chinese subjects who had fled to Hong Kong was Hong Kong Ordinance No. 2 of 1850.⁷⁰ Ordinance No. 2, promulgated after the Treaty of the Bogue but before Tientsin, effectively set forth the procedural mechanisms required for “the rendition for trial to officers of their own country of such subjects of China as have committed crimes or offences against their own Government, and afterwards taken refuge in Hong Kong.”⁷¹ In a foreshadowing of the Treaty of Tientsin, Ordinance No. 2 did not apply to British subjects who committed crimes in violation of British law and had taken refuge in China, but rather, applied solely to Chinese subjects who had fled to Hong Kong. To render its dissolute citizen homeward, Chinese officials had to issue a communication to

any magistrate or Court (other than the Supreme Court) desiring the arrest of any person being a Chinese subject, and then within the said colony of Hong Kong, and alleging that such a person has committed, or is charged

⁶⁶ Treaty of Tientsin, *supra* note 57, art. XXI.

⁶⁷ *Id.*

⁶⁸ Although it is possible that the provision merely refers to those Chinese subjects who had been tried and convicted in Chinese courts, explanatory notes do not exist to clarify. Moreover, as will be discussed, *infra*, given that Kwok-a-Sing was arrested pursuant to Article IX *without* having been tried in China, there is likely little merit to the contention that the colonial administration in Hong Kong acknowledged a Chinese judgment as “proof of guilt.”

⁶⁹ *Kwok-a-Sing*, *supra* note 1, at 198.

⁷⁰ Hong Kong Ordinance No. 2, *supra* note 9.

⁷¹ *Id.*

with having committed any crime or offence against the laws of China.⁷²

Upon receipt of the extradition request, a magistrate in Hong Kong conducted an investigation to determine the nationality of the accused and whether he had potentially violated any Chinese law. If these two criteria were fulfilled, the magistrate issued an arrest warrant, and the accused appeared before the court for an official determination of whether the individual “is a subject of China, and that there is probable cause for believing that the said person has committed such crime or offence” in violation of Chinese laws.⁷³ If so,

it shall and may be lawful for such magistrate or Court to commit such person for safe custody to prison, and to direct the gaoler to detain such person in prison until the said gaoler shall receive some order or orders from the Governor of Hong Kong relative to the further detention, discharge, or transmission of such person to the nearest Chinese authorities.⁷⁴

Despite the inherent inequality of the treaties, Hong Kong Ordinance No. 2 indicated that a rigorous standard existed to initiate extradition proceedings, indicative of the high esteem in which British authorities held the law as a means of regulating order at home and abroad. The texts of the treaties suggested that Britain had a vested interest in depopulating Hong Kong of unwanted, troublesome, and criminal Chinese but would not reciprocate in extradition by the signing of Tientsin.⁷⁵

Yet the stringent standards of Ordinance No. 2 reflected the inferior position from which the Chinese government operated within the British imperial landscape. The Chinese had to take the first, affirmative step and issue an arrest warrant to a British judge for an individual they suspected of criminal acts. The Anglo magistrate, by English—not Chinese—standards, then determined whether he believed the person was a Chinese subject and had violated a Chinese law, a daring measure given that English judges in Hong Kong received no legal training in Chinese legal standards, as the Privy Council would later note in its *Kwok-a-Sing* judgment.⁷⁶ Only after this initial hearing would British officials consider arresting the individual and officially charging him with a crime by repeating the entire process. Such bureaucratic extradition proceedings

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Kwok-a-Sing*, *supra* note 1, at 192.

were not *de rigueur* throughout the British system, as Pigott's "Extraterritoriality: the law relating to consular jurisdiction and residence in Oriental countries" highlighted that the *Kwok-a-Sing* process was anomalous to Anglo-Oriental relations.⁷⁷ Thus, between both the Anglo-centric proceedings for extradition and the needlessly protracted initial hearings required to issue an arrest warrant and determine guilt, the British could assert their dominance in Hong Kong, thereby illustrating to the Chinese that the United Kingdom, and not the Middle Kingdom, controlled the fates of Chinese citizens in the territory.

IV. THE FIRST EXTRADITION PROCEEDING

Against this backdrop, Magistrate Charles May applied Ordinance No. 2 in a most impartial manner and granted China's request for extradition. This indicated that British officials in Hong Kong adhered to the legal framework established by the ordinances and treaties, and did not abrogate the law in an effort to infuriate Chinese officials and assert British superiority in the region, regardless of the overall equality of extradition law. Magistrate May noted that:

upon investigation of the case, . . . there is cause to believe that the said Defendant is a subject of China, and has committed the said crimes against the laws of China by feloniously seizing the said ship at sea, and by murdering the captain and certain of the crew of the said ship on the 4th October last past at sea.⁷⁸

Moreover, "after the commission of the said crime [Kwok-a-Sing] did feloniously seize a boat belonging to the said ship and land at a place called Pakha, in Chinese territory on the 11th of October."⁷⁹ By May's estimation, Kwok-a-Sing's actions clearly warranted extradition to China in accordance with Ordinance No. 2 of 1850, and he accordingly commanded the superintendent of the Gaol of Victoria "to receive the said Defendant into your custody in the said gaol, and there to imprison him . . . pending the receipt of orders from His Excellency the Lieutenant-Governor as to his further disposal."⁸⁰

What happened next changed the nature of *In re Kwok-a-Sing* from a typical extradition proceeding to a clash between members of the Western legal order in both Hong Kong and London that ultimately resulted in the solidification of British colonial authority in the Crown

⁷⁷ PIGGOTT, *supra* note 20, at 19.

⁷⁸ *Kwok-a-Sing*, *supra* note 1, at 182.

⁷⁹ *Id.*

⁸⁰ *Id.*

colony and East Asia. Immediately after Kwok-a-Sing departed to Victoria Gaol to await his extradition to China, Kwok-a-Sing's lawyer submitted a writ of habeas corpus to discharge the coolie into the Crown colony. Sir John Smale, the cantankerous Chief Justice of the Supreme Court of Hong Kong and passionate advocate for the improved status and rights of coolies, approved the writ and in the process set off a fire-storm of opinion throughout the Western world as to the "correctness" of his action.⁸¹ Appointed Attorney General of Hong Kong in 1861 and Chief Justice of the Supreme Court five years later, Smale seized upon his elevation to the bench to campaign against the amalgamation of the legal profession, encroachment of the executive branch, gambling, social abuses, and most importantly, instances of perceived slavery in Southeast Asia.⁸²

The coolie trade had by this time become "a new form of slavery," as the great Western powers, still in need of cheap labor but unable to maintain slavery, increasingly relied upon colonial agents stationed in European ports throughout Asia and the subcontinent to coerce the indigenous population onto Western vessels bound for other destinations in Asia, Europe, North America, and the Caribbean.⁸³ Abolitionists and proto-human rights activists deplored the miserable conditions suffered by coolies, including malnourishment, cramped conditions aboard the ships, and hard labor in fields, factories, and railroad construction. In fact, the word "coolie" originated from a Hindi/Urdu word in Britain's wealthiest colony of India meaning "day laborer," while the Chinese equivalent, 苦力 ("ku-li"), translated to "bitterly hard [use of] strength."⁸⁴ As an activist in stark opposition to the coolie trade, Smale granted the habeas petition, which, unsurprisingly, the Attorney General of Hong Kong immediately challenged. In a dramatic irony appealing to a Greek tragedian, Chief Justice Smale presided over the hearing.

On March 29, 1871, the champion of the coolies delivered his judgment, a rambling, emotional thirteen page opinion of the crabbed-letter variety common in the nineteenth century.⁸⁵ Smale used the

⁸¹ *Id.* at 189.

⁸² Wesley-Smith, *supra* note 27, at 125–26.

⁸³ *Id.* See also ROBERT IRICK, CH'ING POLICY TOWARD THE COOLIE TRADE, 1847–1878, at 204–05 (1982).

⁸⁴ CONCISE OXFORD ENGLISH DICTIONARY 314 (11th ed. 2008).

⁸⁵ The judgment *In re Kwok-a-Sing*, Supreme Court of Hong Kong, 25 March 1871, was re-printed in its entirety by the *Hong Kong Daily Press* on Wednesday, April 5, 1871. This in turn was enclosed in a correspondence between Mr. D.H. Bailey in the American Consulate in Hong Kong and a Mr. Davis of the State Department in Washington, D.C., in a letter dated April 7, 1871. The correspondence has been reprinted in GOV'T PRINTING OFFICE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: TRANSMITTED TO CONGRESS WITH THE ANNUAL MESSAGE OF THE PRESIDENT 194–207 (1871) [hereinafter FOREIGN RELATIONS], available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=goto&id=FRUS.FRUS187172&isize=M&submit=Go+to+page&page=194>.

opportunity more as a platform to advocate the abolition of the coolie trade than to resolve legal questions of Empire, arguing that *La Nouvelle Pénélope* was a slave ship as proven by depositions. He alternately deplored the ship and its barracoons as “a slave warehouse, or an inclosure where slaves are quartered,” and stated that “between twenty and thirty of the coolies who were on the lower deck were crying, and exclaiming they had been kidnapped.”⁸⁶ In a stark departure from the legal questions of piracy that both Smale and the Privy Council would later consider, the Chief Justice stridently suggested that in fact the French crew of *La Nouvelle Pénélope* was guilty of piracy, not the Chinese coolies who commandeered the vessel, as the Frenchman held “these poor fellows . . . piratically as slaves.”⁸⁷

Given Smale’s personal predisposition against the coolie trade and slavery, he accordingly tailored his legal arguments to ensure the freedom of Kwok-a-Sing. In doing so, he carefully crafted a judgment that undermined the hitherto expanding British power in the colony’s laws and courts.⁸⁸ Smale suggested that since the Treaty of the Bogue, which had laid the groundwork for Ordinance No. 2 of 1850, ceased “to be in force, the provisions for rendition under it are to cease.”⁸⁹ Accordingly, “this construction must be adopted as to the Ordinance No. 2 of 1850, and that its operation ceased when the Treaty of the Bogue was first suspended and then absolutely abrogated.”⁹⁰ Smale astutely noted that the Treaty of Tientsin of 1858 “differed very much in detail from the Bogue Treaty” as to its extradition proceedings, as the latter failed to include a provision dealing with the extradition process.⁹¹ The Treaty of the Bogue, of course, had yielded Ordinance No. 2 to outline extradition criteria, but Smale reasoned that Ordinance No. 2 was null and void given the abrogation of the Treaty of the Bogue.⁹² He accordingly demanded that if the imperial authorities wanted to engage in extradition, the Hong Kong legislature first promulgate a new ordinance to render suspects, given Ordinance No. 2 moot status.⁹³

Smale proceeded to turn the remainder of the opinion into a clever hybrid between legal argument and political manifesto, suggesting that

⁸⁶ *Id.* at 204.

⁸⁷ *Id.* at 206.

⁸⁸ Prior to Smale’s decision, the colony had witnessed increasing solidification of British imperial power in the legal system. Initially, the government had restricted the remit of English law in the region, though as time went on and Hong Kong’s importance in empire increased, the law’s strength and jurisdiction did as well. See BEAUCHAMP, JURISPRUDENCE, *supra* note 19, at 608; Dickinson, *Crime of Piracy*, *supra* note 23, at 360. See also TSANG, *supra* note 31, at 19, 23.

⁸⁹ FOREIGN RELATIONS, *supra* note 85, at 197.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

murder was not the relevant crime at issue, but rather, “the crime, if anything, is piracy, and being justiciable here [in Hong Kong], if there be any crime, there is no ground for giving up the man.”⁹⁴ Smale’s argument illustrated a preference for undermining the colonial order by abrogating the prior ordinance and decrying the named crime as irrelevant. Moreover, his judgment indicated that Smale did not actually believe a crime had occurred, as he further wrote:

the prisoner was beyond question under unlawful coercion . . . [and] it is to me clear that according to English law a man under unlawful restraint of his personal liberty at sea, as well as on shore, has a right to take life to free himself from such constraint on his personal liberty.⁹⁵

Yet even if a crime, whether murder or piracy, had occurred, Smale steadfastly refused to extradite Kwok-a-Sing on two additional grounds. The first, purely legal ground saw the Chief Justice reasoning that the “right to rendition is confined to crimes committed within the country demanding it,” but given that that “the crime ‘charged’ was an act [of murder] committed on the high seas, and also on board what is said to be a French ship,” China did not have the right to demand extradition “because the crime, murder, for which rendition is said to be claimed, was committed at sea, and not in China.”⁹⁶ Although this resolved the issue in a purely legal framework, it may well appear as a blow to the Chinese.

Yet later in Smale’s opinion, the Chief Justice hinted at an additional motivation for refusing to extradite Kwok-a-Sing on the murder charge. In June 1870, some four months before the incident aboard *La Nouvelle Pénélope*, a series of kidnappings involving young children spread across China.⁹⁷ The culprits were assumed to be Catholic missionaries active in “recruiting” children, frequently with financial incentives to the children’s families, to the Roman cause.⁹⁸ Chinese officials met with their French counterparts, who had assumed responsibility and control of all Catholic missionary work in China following the Second Opium War, in the city of Tientsin on June 19.⁹⁹ A vituperative crowd of local Chinese gathered at the meeting and an eruption of violence ensued, leading to the deaths of thirty to forty local converts, twenty-one Europeans, and both the French consular officer and

⁹⁴ *Id.* at 198.

⁹⁵ *Id.* at 201.

⁹⁶ *Id.*

⁹⁷ J.K. Fairbank, *Patterns Behind the Tientsin Massacre*, 20 HARV. J. ASIA STUD. 480, 503 (Dec. 1957).

⁹⁸ *Id.* at 504.

⁹⁹ *Id.* at 489–90.

his advisor.¹⁰⁰ Relations soured between France and China, and they became increasingly strained between China and other Western powers following the Massacre of Tientsin.

Smale, fully aware of this incident, stated in the closing of his judgment that some sixteen of Kwok-a-Sing's fellow coolies aboard *La Nouvelle Pénélope* had not been so fortunate to escape to Hong Kong, but rather had fled to China where local officials, "all being under the order of the French consul at Canton" beheaded their own countrymen for their actions on *La Nouvelle Pénélope*.¹⁰¹ Smale quite clearly saw this action as retribution not only for the murder of the Frenchman aboard *La Nouvelle Pénélope*, but also, in a larger sense, as revenge for the massacre of French and other European officials and missionaries at Tientsin eight months earlier. In his monumental closing, Smale articulated the deteriorating political situation between China and the West, his vehement opposition towards Western motivations in China, and Kwok-a-Sing's symbolic role in the drama. "The rendition of the prisoner now before me, Kwok-a-Sing, has been asked doubtless in order that he may be added as one more [executed]," the Chief Justice wrote, "and so that one by one, and at length a great hecatomb of vengeance may be completed on China land—a lasting monument of the humanity, of the Christianity, of western civilization."¹⁰² The irony in Smale's eyes was not the Chinese inability to provide a fair trial, but rather that the French, who controlled the region of China to which Kwok-a-Sing faced extradition, would seek retribution, not justice. Western, civilized, Christian France would instead execute the coolie out of that basest of human motivations, revenge.

Smale continued his strategy of using a legal ground and combining it with dire political and societal warnings in his second basis for refusing extradition. The Chief Justice noted that "it is beyond doubt that political criminals are not to be given up [and] within the letter of the treaty [of Tientsin], neither is a Chinese subject to be given up if justiciable here, *e.g.*, for piracy."¹⁰³ By casting Kwok-a-Sing and his band of coolies as political prisoners, Smale helped to turn the conflict from a mere legal dispute over the hijacking of a European ship and the murder of its crew on the high seas to one that involved both political and legal questions. By making such a move, as the Chief Justice noted later in his opinion, "I hope that this matter will be, as I believe it will certainly be, duly investigated in Europe."¹⁰⁴ Moreover, Smale had turned the inherently unequal treaties upside down, by reasoning that Article XXI of the Treaty of Tientsin ensured that Chinese subjects would not face

¹⁰⁰ *Id.* at 480.

¹⁰¹ FOREIGN RELATIONS, *supra* note 85, at 207.

¹⁰² *Id.*

¹⁰³ *Id.* at 198.

¹⁰⁴ *Id.*

extradition to China if the crime for which they were charged was also a crime justiciable in Hong Kong. Murder, and piracy, given its international status, both constituted crimes within Hong Kong's jurisdiction. The wily Chief Justice had thus won his legal victory by simultaneously decrying the legal imperialist framework instituted by Britain in China while simultaneously using those same laws and treaties against the British Establishment.

As important as the resolution of legal questions and their political affects in Smale's judgment proved, the Chief Justice's language and appeal to liberal ideals also highlighted the subordinate role that China occupied in world affairs. In addition to his aforementioned criticism of the West's position in China, Smale cast the Chinese as "slaves" to Europeans.¹⁰⁵ In a reinforcement of liberal political philosophies as espoused by John Locke's social contract and the French motto *liberté, égalité, fraternité* during the eighteenth century, Smale argued that the "piracy" of the coolie slaves aboard *La Nouvelle Pénélope* was justifiable, as "the first law of nature, the right of self-preservation, of liberty equally with life, which is fully sustained by text-books and cases" demanded that the coolies revolt.¹⁰⁶ He added further legal substance to his compelling prose and syntax by effectively illustrating how the British had imported English legal mechanisms, including the common law, depositions, and testimony before a judge and jury, to assert their dominance over Chinese defendants in Hong Kong courts. Yet Smale took these hallmarks of British justice and, just as he had effectively subverted the treaties of the Bogue and Tientsin in his earlier remarks, suggested that,

however horrible was the scene of contest, and the carnage on board *La Nouvelle Pénélope*, the depositions disclose such acts of enslavement, and of illegal coercion on the part of the captain and his agents, all the testimony being *ex parte* out of the mouths of the coerced or hostile witnesses for the prosecution, as show that there was no violence or robbery beyond what was absolutely necessary to regain liberty.¹⁰⁷

This quest for liberty, as demonstrated by English depositions and testimony, clearly demonstrated "that this prisoner, Kwok-a-Sing, was guilty of no offence whatever cognizable by English law."¹⁰⁸ Smale, therefore, radically departed from the Victorian status quo of worshipping Britain's expansive empire in his damnation of the Western legal and

¹⁰⁵ *Id.* at 203.

¹⁰⁶ *Id.* at 201, 205.

¹⁰⁷ *Id.* at 201.

¹⁰⁸ *Id.*

political hegemony in China. Yet he also revealed himself as a standard Victorian gentleman in his patronizing defense of the coolies' actions against their imperial oppressors.

V. A SHOCKWAVE OF REACTION, AND A SECOND ARREST AND EXTRADITION PROCEEDING

Smale's important subversion of British and Western legal principles, in combination with the decision and legal reasoning of his judgment, was sure to provoke a reaction throughout the Western world. And so it did. American consular officials and diplomats, undoubtedly sensitive to the United States' own tumultuous relationship with slavery that had ceased a mere six years earlier with the end of the Civil War, expressed high praise for Smale's decision. As the United States consular official D.H. Bailey noted to one Mr. Davis of the State Department in Washington, D.C., "I have said the decision is remarkable, and it is, first because in effect it declares that ships employed in the Macao trade are engaged in piracy; second, that such ships are slave-ships engaged in the slave trade."¹⁰⁹ Bailey also expressed hope that "if Great Britain sustains the decision of Chief Justice Smale, the Macao coolie trade, with all its enormities, will be at an end."¹¹⁰ Yet Bailey allowed that such a decision would disrupt an "exceedingly profitable" trade for Britain and the Western powers, a consequence not welcome by many in the political or economic realms of the time.¹¹¹

Equally important in Bailey's letter are manifestations of the same patronization towards the coolies and Chinese found in Smale's judgment, however favorable both men's opinions of the Chinese and abolition of the coolie trade. Indeed, Bailey commented "that the whole coolie trade of China, at Macao, Hong-Kong, and elsewhere is so full of fraud and all sorts of iniquity as to make necessary some such startling decision to arouse Western civilization to a sense of its duty concerning this new and infamous slave trade."¹¹² Bailey's sentiment touched upon the same strand and belief inherent with Smale's judgment that the West, in all of its enlightened thought and liberal values, owed a *duty* to the Chinese and the voiceless coolies to abolish the trade. The Chinese alone could not halt this problem, the thinking went; it required the intervention of Western judges and Western politicians, schooled in Hobbesian rhetoric and Enlightenment thought as espoused by Rousseau, Voltaire, and Montesquieu. Such a belief system, however well-intended, served as one

¹⁰⁹ *Id.* at 194.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

additional element that contributed to the century of humiliation suffered by China at the hands of the West.

In sharp juxtaposition to the Americans' delight at Smale's decision stood the displeasure of the formidable British Empire. By 1870, Albion's seed had spread across the globe, stretching far beyond its early plantations in Ireland to the salt mines of India, the rainforests of Uganda, and the silk fields of China. The rainy archipelago in the North Atlantic whose landmass totaled 84,556 square miles had acquired an empire spanning some 10,000,000 square miles.¹¹³ Over 500 million people owed allegiance to Her Majesty the Queen, nestled away in Victorian luxuries at Whitehall in London, the pulsating center of the empire upon which the sun did not set. Also at Whitehall sat the Privy Council, the court of last resort for Britain and its innumerable colonies. A decision such as that reached by Sir John Smale in *Kwok-a-Sing* may have seemed insignificant if viewed solely within the context of Kwok-a-Sing's personal battle. But when considering Smale's subversive legal reasoning, subliminal messages, and strident rhetoric, the judgment had the ability to undermine the foundations of an empire.

Indeed, the imperialist position worsened following Smale's judgment. Between Kwok-a-Sing's arrest on February 7, 1871 and Smale's decision on March 29, the French government, as the government of the slain captain and crew of *La Nouvelle Pénélope*, sought to extradite Kwok-a-Sing from British authorities in Hong Kong.¹¹⁴ After Smale's judgment, however, and perhaps in testament to its strength, the French consul abandoned his claim.¹¹⁵ Still committed to seeing justice served, the Attorney General of Hong Kong seized upon Smale's remarks that piracy constituted the only possible charge with which to try Kwok-a-Sing and sought another arrest warrant charging Kwok-a-Sing with *piracy ex jure gentium* in the magistracy court of Charles May. May issued the warrant and determined that probable cause existed to charge that Kwok-a-Sing "piratically and feloniously did make an assault [on] the said ship, and the apparel and tackle of the said ship, [and] feloniously and violently did steal, take, and carry away" *La Nouvelle Pénélope* after "feloniously and willfully, and of their malice aforethought, kill and murder the said [crew]."¹¹⁶ May accordingly committed Kwok-a-Sing to the gaol to await "trial for the said offence at the next Criminal Sessions of the Supreme Court."¹¹⁷

¹¹³ TIMOTHY PARSONS, *THE BRITISH IMPERIAL CENTURY, 1815–1914: A WORLD HISTORY PERSPECTIVE* 3 (1999).

¹¹⁴ *Kwok-a-Sing*, *supra* note 1, at 186–87.

¹¹⁵ *Id.* at 187.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 187–88.

Ironically, Chief Justice Smale presided over the trial on May 10, 1871. Unsurprisingly, he discharged Kwok-a-Sing, but disposed of the case on a purely legal (and uncharacteristically pithy) basis, not discussing piracy and its legality at all, but rather holding that the second arrest for *piracy ex jure gentium* violated section 6 of the Habeas Corpus Act.¹¹⁸ The act provided that:

[N]o person or persons which shall be delivered or set at large upon any *habeas corpus*, shall at any time hereafter be again imprisoned or committed for the same offence . . . other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.¹¹⁹

Smale suggested that the offence mentioned in both the February 7 and May 10 warrants “is one and the same, and no other.”¹²⁰ He further noted that May’s magistracy court did not constitute a real court, but rather acted as a place of “preliminary inquiry.”¹²¹ The Habeas Corpus Act’s intended “court with jurisdiction” was that of the trial court, indeed, Chief Justice Smale’s court. Smale, in yet another subversion of the British justice system, discharged Kwok-a-Sing.

VI. AT THE HEART OF EMPIRE: THE PRIVY COUNCIL RENDERS JUDGMENT

Smale’s political calculations and subtle legal scheming met a formidable foe in the Privy Council, which accepted an appeal of the matter less than two years later. In rendering its decision *Attorney-General of Hong Kong v. Kwok-a-Sing*, the Council proved equally adept at legal sophistry and artful political subterfuge by reading the law in terms favorable to Britain and the Western legal order, and constructing the Chinese as politically, culturally, and legally inferior. The Privy Council enjoyed a legal and political prominence as the highest court in the world’s largest empire, hearing cases at its center, which Smale, a judge at empire’s peripheries, did not. This difference assisted in ensuring that *Kwok-a-Sing* became synonymous with British preeminence in China.

The careful progression of the judgment crafted British authority and law in China as superior. In first determining whether the vexing

¹¹⁸ *Id.* at 188.

¹¹⁹ AN ACT FOR THE BETTER SECURING THE LIBERTY OF THE SUBJECT, AND FOR PREVENTION OF IMPRISONMENTS BEYOND THE SEAS, 31 Car. 2, c. 2, § 6 (1679).

¹²⁰ *Kwok-a-Sing*, *supra* note 1, at 189.

¹²¹ *Id.*

Ordinance No. 2 applied to extradition warrants in Hong Kong despite the abrogation of the Treaty of the Bogue, the Lords Justices heard preliminary arguments from both the Attorney General and Kwok-a-Sing's counsel. Despite representing "opposing" interests, all of the counselors were English by birth and education, and ultimately adhered to and promulgated a legal imperialist agenda. For instance, in a response to a question posed by Lord Justice Mellish that, "I have an impression that a Crown colony has not jurisdiction to make such a law," the Attorney General of Hong Kong argued that "[Hong Kong] is a Crown colony, and the Queen can give any powers."¹²² This exchange demonstrated how the Privy Council and Attorney General single-handedly subordinated Hong Kong and its laws to those of Great Britain and the English common law, whose writ ran throughout the empire. Colonies had no power in and of themselves; they depended solely upon London, whose authority was paramount, for such power.

Even Kwok-a-Sing's counsel ceased suggesting that Ordinance No. 2 failed to apply, as Chief Justice Smale would have it, following the abrogation of the Treaty of the Bogue. Instead, he agreed that a legislative act passed in the wake of the initial *Kwok-a-Sing* judgment rendered "the new Ordinance . . . declaratory—that it declares that the Ordinance of 1850 always did refer to the Treaty of Tientsin."¹²³ Thus, a legislative ordinance passed by the Hong Kong Legislature, whose powers derived from the Crown in London, declared that imperial law, particularly imperial treaty law, reigned supreme. The concessions and exchanges of both the legal counselors and the Privy Council merely underscored this point.

This pattern of subordination, coupled with spectacular jingoistic syntactical salvos, continued throughout the foundational discussion of Ordinance No. 2, and proceeded into the resolution of the two issues.¹²⁴ In arguing that Ordinance No. 2 should not apply to all extradition cases, such as Kwok-a-Sing's, the coolie's counsel suggested that Britain take pity on his client "where the more humane laws of more civilized nations differ from those of China. It would be an extraordinary arrangement, if we gave up persons [to China] not guilty of offences under the English Law."¹²⁵ The attorney's message was clear: English law was civilized; Chinese law was not. By extraditing Kwok-a-Sing to China, the British

¹²² *Id.* at 190.

¹²³ *Id.* at 192.

¹²⁴ The two issues on appeal were essentially the grounds of the two respective arrest warrants issued in Hong Kong. The first warrant charged Kwok-a-Sing with murder of *La Nouvelle Pénélope's* captain and crew; the second warrant charged him with piracy.

¹²⁵ *Kwok-a-Sing*, *supra* note 1, at 192–93. It should be noted that this is a different argument from that presented by Smale, who suggested that the Chinese would render a fair judgment in regards to Kwok-a-Sing, but the influence of France on the courts in the region of China to which Kwok-a-Sing was to be extradited would result in injustice.

would effectively cast the coolie to an uncivilized nation of barbarians incapable of delivering justice. The counsel's appeal subordinated China and its "uncivilized" law to that of England, while simultaneously constructing the Chinese as a legally and culturally primitive society incapable of executing impartial justice.

Indeed, the Privy Council agreed with this general argument in resolving the first issue of whether Chinese law provided for the punishment of a Chinese subject who had murdered a foreigner in foreign territory. The Privy Council decried as too general Ordinance No. 2's clause requiring that an individual be extradited if he had committed "crimes and offences against the law of China."¹²⁶ In discussing its reasoning, the Privy Council remarked that, read literally and broadly, the clause suggested that "every Chinese who had done something which the law of China treats as a political offence, or who had done anything which the law of China treats as criminal, though the law of all European countries treats it as innocent, might be given up."¹²⁷ The Privy Council implied that Chinese law, in addition to its primitive nature, may also have been too harsh and perhaps even barbaric. Western law clearly departed from its Chinese counterpart in what it defined as criminal, and likely maintained more civilized, lenient standards befitting an enlightened population. The failure the British to *protect* the average Chinese from ostensibly harsher punishment in China would prove a shortcoming of not only British justice, but also duty and responsibility.¹²⁸ In consideration of these concerns, and in a further illustration of the supremacy of the Western legal order, the Council determined that "the words 'crimes and offences' ought to be confined to those ordinary crimes and offenses which are punishable by the laws of all nations, and which are not peculiar to the laws of China."¹²⁹ This bold implication that "the laws of all nations" meant the laws of civilized, Western nations effectively excluded China and condemned it as not comporting with the traditional legal order. The effect was to add to China's ever-increasing humiliation.

The assertion did more than subordinate and exclude China in a widely-published legal opinion; it also enabled the Privy Council "to consider whether there was evidence that Kwok-a-Sing had been guilty of crimes against the laws of China within the meaning of the Ordinance" that the Council had just clarified in condescending detail.¹³⁰ In reaching the conclusion that in comparable laws did not exist in China to punish Chinese subjects for the murder of foreigners in foreign territories, the

¹²⁶ *Id.* at 198.

¹²⁷ *Id.* at 197.

¹²⁸ DAVID CANNADINE, ORNAMENTALISM: HOW THE BRITISH SAW THEIR EMPIRE 10 (2001) (considering the psychology and rationales behind "Othering").

¹²⁹ *Kwok-a-Sing*, *supra* note 1, at 198.

¹³⁰ *Id.*

Privy Council noted that “up to a comparatively late period, England had no such laws.”¹³¹ The sentiment only added salt to the wound. The Lords Justice of the Realm had in fact implied that if England, the great civilizer and benefactor of the law, did not recognize crimes committed by its subjects upon foreigners abroad until the mid-nineteenth century, a “peculiar” and “ignorant” nation such as China most certainly would not have had such laws.¹³² Accordingly, Chief Justice Smale had correctly refused to extradite Kwok-a-Sing for murdering the French crew on *La Nouvelle Pénélope*.¹³³ Of course, in the collective eyes of the Privy Council, Smale’s liberty-littered reasoning proved wholly incorrect, but the outcome, as affirmed and clarified by the Privy Council, stood as a testament to the power of the English common law and, along with it, the British Empire.

The Privy Council employed much of the same jingoistic, patronizing reasoning in determining the second issue on appeal—whether Smale incorrectly released Kwok-a-Sing following the arrest warrant for piracy. In support of their determination that *prima facie* evidence suggested “that Kwok-a-Sing had committed an act of *piracy jure gentium* to justify his committal for trial for that offence at Hong Kong,” the Council related the “international” definition of piracy articulated by Sir Charles Hedges, Judge of the High Court of Admiralty in the monumental *Rex v. Dawson* decision. “Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty,” Sir Charles had opined.¹³⁴ Thus, “if the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy.”¹³⁵ Notably, the “international” definition quite clearly had Western origins, as evidenced in the discussion of the Lord Admiralty’s jurisdiction. In the opinion of their Lordships, “there was unquestionably evidence that Kwok-a-Sing was a party to violently dispossessing the master and carrying away the ship itself and the goods therein.”¹³⁶ Accordingly, “the only question can be whether there was sufficient evidence that the act was done with a felonious, that is piratical, intention,” and the answer to that question rested entirely within the purview of a jury in Hong Kong.¹³⁷

The Privy Council’s articulation of *why* Kwok-a-Sing should not have been released but rather remained in Hong Kong for trial without the possibility of extradition to China on the grounds of piracy, an

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 184.

¹³⁴ *Id.* at 199–200.

¹³⁵ *Id.* at 200.

¹³⁶ *Id.*

¹³⁷ *Id.*

international crime, illustrated how the Lords Justices constructed the Chinese as legally, culturally, and politically inferior to Britain and the West. Ordinance No. 2 and both the Treaty of the Bogue and the Treaty of Tientsin, three obvious canons of legal imperialism in China, clearly provided for the extradition of a Chinese subject who committed a crime or offence against the laws of China.¹³⁸ *Piracy ex jure gentium* was regarded as an international crime.¹³⁹ Further, both the governing Treaty of Tientsin and the abrogated Treaty of the Bogue both contained specific provisions requiring that Chinese authorities notify British officials of any piratical acts and “use every endeavour to capture and punish the said robbers or pirates, and to recover the stolen property.”¹⁴⁰ All of these provisions indicated that Chinese authorities not only recognized piracy as a crime, but also that the British had explicitly authorized the Chinese to punish their subjects for acts of piracy. Moreover, extradition ordinances and treaty provisions required the extradition of Chinese subjects who had committed acts of piracy, which as an international crime logically seemed “an offence against the laws of China.”¹⁴¹

Yet extraditing Kwok-a-Sing for piracy proved most undesirable for the Privy Council, as it represented an encroachment on British political, naval, economic, and legal authority in the region. More importantly, as Smale had noted in his first judgment, “[n]o mandarin would ask for the rendition of a Chinaman for killing a foreign kidnapper beyond the limits of China in order to punish him. National sympathy would rather reward him.”¹⁴² To avoid these pitfalls, the Privy Council accordingly distinguished “the acts of *piracy jure gentium* with which Kwok-a-Sing was charged . . . from those acts of piracy which they have before stated to be, in their opinion, within the Ordinance and the Treaties.”¹⁴³ Without offering any reasoning or evidence, the Privy Council “distinguished” Kwok-a-Sing’s particular brand of piracy as “an

¹³⁸ See Hong Kong Ordinance No. 2, *supra* note 9; Treaty of the Bogue, *supra* note 57; Treaty of Tientsin, *supra* note 57.

¹³⁹ *Kwok-a-Sing*, *supra* note 1, at 200.

¹⁴⁰ Treaty of Tientsin, *supra* note 57, art. XIX. See also Treaty of Tientsin, *supra* note 57, art. LII (“British ships of war . . . engaged in the pursuit of pirates, shall be at liberty to visit all ports within [China.]”); Treaty of the Bogue, *supra* note 57, art. XIV (appointing an English officer at Hong Kong to prevent piracy and illegal traffic).

¹⁴¹ Hong Kong Ordinance No. 2, *supra* note 9.

¹⁴² FOREIGN RELATIONS, *supra* note 85, at 206–07. It is important to understand that Smale distinguished in his opinion from what Chinese popular opinion would yield—that is, the “reward of national sympathy”—versus the actual result, which was likely execution because the French controlled the region of China to which Kwok-a-Sing faced extradition. Due to the contemporary tensions between China and France as a result of the Massacre of Tientsin and the *La Nouvelle Pénélope* incident, Smale reasoned that French authorities in the region would likely compel the Chinese officials, whom Smale saw as mere puppets, to execute Kwok-a-Sing. See BEAUCHAMP, JURISPRUDENCE, *supra* note 19, at 608; Dickinson, *Crime of Piracy*, *supra* note 23, at 360.

¹⁴³ *Kwok-a-Sing*, *supra* note 1, at 200.

offence against the municipal law of France, to which he was subject at the time, and not against the municipal law of China.”¹⁴⁴ This accordingly barred China from seeking his extradition through the relevant treaty provisions and the ordinance. Further, the Privy Council’s opinion created an insurmountable divide between East and West; effectively, Britain’s highest court had placed French law and jurisdiction above that of China, yet determined that a British court in Hong Kong would preside over the *Kwok-a-Sing* trial. The Western powers, regardless of their own relations (nineteenth-century relations between France and Great Britain were notoriously poor), stood in uniform opposition to China, its politics, laws, and culture.

In a final blow to China’s legal authority, the Privy Council remarked that:

if [Kwok-a-Sing] is punishable by the law of China, he is only so punishable because he has committed an act of piracy which, *jure gentium*, is justiciable everywhere . . . [yet] such an offence is not an offence against the law of China within the meaning of the Ordinance.¹⁴⁵

This final line of reasoning in the piracy issue harkened to the earlier, nationalist-fueled discussion that “offences against the law of China” proved too broad and could have ostensibly resulted in the extradition of too many innocent Chinese who had committed acts that the barbarous Chinese authorities recognized as crimes and would accordingly punish, but which the civilized West would not. The Privy Council’s trick in its resolution of the piracy issue, however, was a subversion of the reasoning. Although the motives of individual justices remain unclear, the reasoning and language in the Privy Council’s judgment barring Kwok-a-Sing’s extradition indicated the influences of paternalism and the augmentation of British political and legal power. In the subterfuge that has marked world politics for centuries past and will for centuries future, the Privy Council achieved its goals.

VII. THE BITTER LEGACY OF DISCORD

Although the Privy Council ordered that Kwok-a-Sing stand trial for piracy in Hong Kong, whether or not this trial occurred remains a mystery. Indeed, the various academic references to the case and its slow progression through the labyrinthine court system of the British Empire

¹⁴⁴ *Id.* Ostensibly, Kwok-a-Sing violated municipal French law because both the ship and murdered crew were of French origin. However, the Privy Council failed to fully develop this line of reasoning.

¹⁴⁵ *Id.*

concern themselves with pedantic discussions of the colonial extradition law.¹⁴⁶ Yet as the analysis of the various judgments and contemporary correspondences indicates, the actual language and text of the cases highlights the real fears experienced by contemporaries of Kwok-a-Sing in Hong Kong, mainland China, and London. These were people with concerns—at least some, legitimate—for their nations’ preeminence in a global push towards industrialism, the protection of voiceless coolies, and even their own life and freedom. For the Chinese, such concerns manifested themselves in the realization that the West used international law to consolidate power in the hands of the militarily mighty, while undermining culturally inferior states.¹⁴⁷

Kwok-a-Sing thus offers much more than just precedent on extradition law and *piracy ex jure gentium*. Rather, it provides a window into a past world whose events have helped to shape the modern narrative of China’s relationship with the West. It is only through reading and understanding what contemporary opinion in nineteenth-century Sino-Western relations was like that we can begin to understand China’s continued reticence to fully engage with the international order. Although Dutch East India Company officials apprised the Qing court of the “law of nations” in the late seventeenth century and such knowledge informed the signing of the Treaty of Nerchinsk with the Russians in 1689, the Chinese attitude towards international law during the early modern era remained, in the words of Ann Kent, “at worst, dismissive and, at best, instrumental.”¹⁴⁸ The Chinese ambivalence towards Western political powers, and with it international law, grew during the eighteenth and nineteenth centuries, as Qing officials referred to the British as 夷 (*yi*, or “barbarian”) in various diplomatic and legal documents.¹⁴⁹ The British in turn demanded in Article LI of the Treaty of Tientsin that “the character ‘T’ 夷 (“barbarian”) shall not be applied to the Government or subjects of Her Britannic Majesty, in any Chinese official document issued by the Chinese authorities, either in the capital or in the provinces.”¹⁵⁰ Ironically, Britain’s use of a treaty to compel the Chinese to halt their *pièce de résistance* further underscored how the West used its law to disenfranchise undesirable Chinese practices. China’s traditional skepticism towards the international legal order of European imperialists finds further reinforcement in Kent’s contention that China only began to

¹⁴⁶ See generally COHEN, *THE CRIMINAL PROCESS*, *supra* note 15; Wesley-Smith, *supra* note 27; FISHEL, *supra* note 44.

¹⁴⁷ Ann Kent, *China’s Changing Attitude to the Norms of International Law and its Global Impact*, in *CHINA’S “NEW” DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE?* 55, 56 (Pauline Kerr, Stuart Harris & Qin Yaqing eds., 2008).

¹⁴⁸ *Id.*

¹⁴⁹ Treaty of Tientsin, *supra* note 57, at art. LI. See also, Kent, *supra* note 147, at 56.

¹⁵⁰ Treaty of Tientsin, *supra* note 57, at art. LI.

use international law as a defensive mechanism against “the marauding West.”¹⁵¹ Measures such as the unequal treaties and stipulations requiring changes in Chinese practices coalesced with China’s defensive utilization of international law to yield a deeply ambivalent Chinese attitude towards the international order during the nineteenth century.

Compounding this general humiliation and skepticism towards Western powers that dominated nineteenth-century Chinese thought were suggestions by the most exclusive, Western court in the world that “the coolies had, by fraud or by threats on the part of other Chinese, been induced to go to the barracoon, and embark on board the ship against their will.”¹⁵² Indeed, the West justified its role in China by suggesting that the Chinese had contributed to the enslavement of their own people. The West—Britain, America, France—*had* to step in and control the situation politically, economically, and socially. The law, *Western* law, provided the best means to regulate this barbarous society. Paternalism accordingly served as a further justification for the imposition of inherently unequal laws, a damning component of nineteenth-century Sino-Western relations that continues to gnaw at the modern Chinese psyche.¹⁵³ As Kwok-a-Sing’s attorney argued before the Privy Council in an appeal to affirm Smale’s prior opinions and set Kwok-a-Sing free, “the coolies had reasonable ground for supposing that they were deprived of their liberty by the captain and crew of the ship; they took possession of the ship, and used a certain amount of violence with a view to recovering their liberty.”¹⁵⁴ This noble pursuit that pitted the coolies against their French captors required that the arbiter of justice, the enlightened English high court, “in estimating the amount of violence that would be reasonably necessary under those circumstances, . . . apply a different standard in the case of ignorant Chinese coolies [from] that which would be applied in the case of Europeans.”¹⁵⁵ Such distinctions and differences between the Chinese and the West as articulated by Europeans fueled Chinese contempt for the West.

The legacy of this scorn continues to pervade the Chinese conscience and tinge the relationship between East and West more than 140 years later.¹⁵⁶ China’s ambivalence towards international law found support in the Communist Party assertion in 1957 that “International law is one of the instruments of settling international problems. . . . However, if this instrument is not advantageous to our country . . . we will not use it

¹⁵¹ Kent, *supra* note 147, at 56.

¹⁵² Kwok-a-Sing, *supra* note 1, at 201.

¹⁵³ COHEN, *ESSAYS ON CHINA’S LEGAL TRADITION*, *supra* note 10, at 284–85.

¹⁵⁴ Kwok-a-Sing, *supra* note 1, at 193.

¹⁵⁵ *Id.*

¹⁵⁶ COHEN, *ESSAYS ON CHINA’S LEGAL TRADITION*, *supra* note 10, at 284–85.

and should create a new instrument to replace it.”¹⁵⁷ Such a deeply pragmatic, albeit skeptical, attitude towards engagement with the West has found multiple instances of support since the 1950s. Indeed, China’s frequent refusal to support United Nations-led interventions reflects, to many observers, Jerome Cohen and Allen Carlson among them, China’s concerns regarding state sovereignty.¹⁵⁸ Cohen has even gone so far as to suggest that, in light of the West’s manipulation of the law to disinherit China of its traditional glory, “[i]s it any wonder that Chinese leaders maintain a ‘vivid sense of outrage’ and manifest an almost obsessive concern with vindicating and preserving national sovereignty?”¹⁵⁹

Issues of sovereignty aside, Chinese film director Chen Shizheng suggested at the 2008 Summer Olympics in Beijing that “we Chinese carry the burden of our history with us and the question of Western humiliation is always unconsciously inside us. Thus we feel sensitive to any kind of slight and often have a very sharp reaction to perceived unfair treatment or injustices.”¹⁶⁰ The fact that China has demonstrated a progressive engagement with the West since the late 1980s, participating in environmental and economic summits and even joining the World Trade Organization in 2001, indicates a “profound transformation” in Chinese thought.¹⁶¹ Nonetheless, even scholars as optimistic as James Li Zhaojie allow that the old international regime and its antecedents in the nineteenth century affected China’s mentality as “victim-minded underdog.”¹⁶² As Chen allowed, “on an emotional level we cannot help but associate treatment in the present with past injuries, defeats, invasions, and occupations by foreigners.”¹⁶³ It is this continued association of past injustices at the hands of the West’s legal and political order that continue to affect Sino-Western relations. As Peter Hays Gries wrote in *China’s New Nationalism: Pride, Politics, and Diplomacy*, “[t]he West is central

¹⁵⁷ Chu-Li-lu, *Refute the Absurd Theory Concerning International Law by Ch’en T’ch’iang*, PEOPLE’S DAILY, Sept. 18, 1957 cited in Hungdah Chiu, *Communist China’s Attitude Toward International Law*, 60 AM. J. INT’L L., NO. 2, 245-248-49 (1966).

¹⁵⁸ Allen Carlson, *More Than Just Saying No: China’s Evolving Approach to Sovereignty and Intervention Since Tiananmen*, in NEW DIRECTIONS IN THE STUDY OF CHINA’S FOREIGN POLICY 217, at 217 (Alastair I. Johnston & Robert S. Ross eds., 2006); COHEN, 2 PEOPLE’S CHINA, *supra* note 11, at 1333, 1336.

¹⁵⁹ COHEN, ESSAYS ON CHINA’S LEGAL TRADITION, *supra* note 10, at 284-85.

¹⁶⁰ Interview by Orville Schell with Chen Shi-Zheng, *China: Humiliation & the Olympics*, N.Y. REV. BOOKS (Aug. 14, 2008), available at <http://www.nybooks.com/articles/archives/2008/aug/14/china-humiliation-the-olympics/>.

¹⁶¹ James Li Zhaojie, *Commentary on “China and the International Legal System: Challenges of Participation,”* 191 CHINA Q. 716 (2007).

¹⁶² *Id.*

¹⁶³ Schell, *supra* note 160.

to the construction of China's identity today; it has become China's alter ego."¹⁶⁴

The construction of that identity began with the first Western incursions into China by Dutch traders during the seventeenth century and was thoroughly honed by the British in their ruthless pursuit of economic and political self-interest during the nineteenth century.¹⁶⁵ In this context, the *Kwok-a-Sing* decisions serve as but one minute portion of a complex, multi-national tableau of clashing empires and ideologies. Yet in *Kwok-a-Sing* the vast array of laws, treaties, political concerns, human rights issues, and the omnipresent jockeying for global power that characterize the international political order, both then and now, all appeared. *Kwok-a-Sing* provides, therefore, a valuable paradigm from which to assess modern issues of Chinese reticence towards the Western political and legal orders. A thorough assessment of the legal and political framework implemented by British authorities in *Kwok-a-Sing* proves instrumental to understanding why China remains skeptical and derisive towards Western influence in Chinese affairs. The language of the treaties, ordinances, and opinion in *Kwok-a-Sing* further underscore a paternalistic tone that has not wholly left the Western-Sino debate regarding the proper treatment of individuals. As China looks towards a new, leading role in the international order in this century, it would behoove Western politicians, policymakers, businesspeople, lawyers, and academics to examine the West's past experience with China. For it is this past that China knows all too well, and the West all too little.

¹⁶⁴ PETER HAYS GRIES, CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY 35 (2004).

¹⁶⁵ TSANG, *supra* note 31, at 14 (positing that economic factors first drove Britain to engage with China).