

II

The Evolution of the Concept of Piracy in England

English Law and International Law

It was noted above that three fundamentally different conceptions of “piracy” gained currency during the 16th century among statesmen and jurists. One, put forth by Grotius, involved attaching the label “pirate” to armed bands or individuals whose primary object was plunder regardless of place. Its legal result, derived from the ancient Roman law dealing with the extension of Roman criminal jurisdiction to cover the acts of foreign “*latrones*” or “*praedones*” within the Empire, including its seas, was suppression at the whim of the state and trial of those captured under the municipal law of the captors. Another, urged by Gentili, incorporated the same results, but, instead of flowing from facts more or less objectively determined, flowed from political decisions of the decision-makers in each society as to what labeling system would best suit their needs, and achieved the legal and political results they preferred as a result of their choice of labels. The third involved the incorporation of the word “pirate” into municipal law and in England involved the application of the word and whatever legal results were determined to flow from it as a matter of English municipal law by the civilians in Admiralty, the Common Law judges of the King’s Bench, and, presumably, whatever was formally decided by the body with legislative authority outside of the complex legislative competence extended to judges in the guise of “discovering” the Common Law or Civil Law in English courts.

Where the Grotian and Gentili approaches either presumed the existence of a world state analogous to Rome, and thus saw no limit to municipal law territorial jurisdiction, or saw the world divided into separate sovereignties with “privateers” or even whole communities deriving their authority to act against strangers from a distribution of legal powers within the overall system, the Common Law judges in England thought municipal concepts of jurisdiction the essence of the situation and traced jurisdiction to the legal powers of the sovereign in England over his subjects and his territory. The English Admiralty judges thought of “piracy” as a word of art in English law that was useful in questions of property rights primarily; to dispose of the

claim to title that might be presented by a "privateer" licensed by a foreign sovereign in the case of goods recaptured by an English privateer claiming salvage from the original owner or claiming the full rights of property against an "owner" whose "rights" derived from foreign "privateers" or "pirates." The administrators of England thought of "piracy" as a word to cover mutinies and other shipboard violence within the jurisdiction of the administrator, the Admiral, whose prerequisites of office included a share of the profits of litigation and whose relationship to royal favor could be used as a counterweight to the independent Common Law courts. The Common Law judges thought of "piracy" as a special Admiralty word whose precise meaning could be developed by civilians, but which bore some relationship to petty treason and shipboard authority. The Acts of 1535 and 1536 placed Common Law judges and both Common and Civil Law trained administrators on the tribunals that had thitherto been dominated by civilians. The result was a reconsideration of all the basic rules and concepts, worked out in a series of cases with major constitutional implications in England because involving the distribution of legal powers between the Crown and the Common Law career judges and, in the case of the actions of the East India Company and other chartered organizations, the struggle between the Crown and Parliament for control of the profits of overseas activities by English bodies corporate.

Among the first things to fall was the notion adopted by Coke and Hale that "piracy" was a kind of petty treason; it fell with a political struggle, but with little analysis of the underlying jurisdictional and definitional questions. To understand the shift of meaning occurring at the end of the 17th century in the context of the political pressures involved in maintaining the fruits of the Glorious Revolution of 1688 despite efforts both on land and sea by the deposed James II and his French ally, Louis XIV, it is necessary first to consider some of the evolution of thought by civil lawyers as the naturalism of Grotius and the positivism of Gentili began to affect their conceptions of national jurisdiction in an age of expanding foreign trade.

As English commerce expanded, it first became important to come to grips with the question of the legal classification best fitted to unrecognized or unpleasant states and rebels with real military power. Gentili's experience showed that the asserted freedom of statesmen and lawyers to attach such labels as suited their needs was in fact limited by reality and the needs of stable commerce, if stable commerce were considered a value to be protected by the law and reality was important to the state whose merchants engaged in it. The position was well stated by Sir Leoline Jenkins, Privy Councillor to King Charles II, in a letter to the King dated 11 February 1680, concerning title to a British ship taken by an Algerine warship and then wrecked on the coast of Ireland. The technical question was whether the Muslim members of the ship's company should be treated as pirates and hanged, or as honorable soldiers. There had been no declaration of war between England and Algiers

effective at the time. Jenkins, a civilian who had served with distinction as a judge in the Admiralty courts and was reputed one of the most influential jurists in England,¹ took an eclectic approach:

As for the *Moors* and *Turks* that are so by birth, and were found on board . . . since the Government of Algiers is owned as well by several Treaties of Peace and Declarations of War, as by the Establishment of Trade, and even of Consuls and Residents among them by so many Princes and States, and particularly by your Majesty; they cannot . . . be proceeded against as Pirates . . . but are to have the Privileges of Enemies in an open War.²

His conclusion was thus based not only on convenience and policy as evidenced by consistent European practice and British consular practice, but also on an examination of what classification would best fit the facts more or less objectively determined. The policy arguments that might have been urged by an advocate like Gentili are not raised: There is no mention of the fact that Englishmen caught without license in Algiers or in English ships captured by Algerian raiders were enslaved at this time; and no policy argument based on the apprehension of reciprocal mistreatment or reprisals by Algiers against the English trading community there. Nor is there any doubt cast on the validity in England of a license or commission issued by the Dey; the question does not seem to have arisen.

Confirming this approach to the question of how to treat the Barbary states the great Dutch jurist of fifty years later, Cornelius Bynkershoek, used the same logic to come to the same conclusion:

. . . I do not think that we can reasonably agree with Alberico Gentili and others who class as pirates the so-called Barbary peoples of Africa, and that captures made by them entail no change in property. The peoples of Algiers, Tripoli, Tunis and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, now at war. Hence they seem to be entitled to the rights of independent states. The States-General [of the Netherlands], as well as other nations, have frequently made treaties with them³

As a practical matter, this resolution of the question of theory with regard to attaching the label “pirates” and its legal results facilitated the removal of the question from the policy arms of government in England to the courts. A more or less objective standard based on British (or Dutch) official behavior as a symbol of acquiescence and convenience, and on facts, was fixed in these opinions. Judges, whose training and constitutional place in municipal law made them conceive of their function as that of applying the law, given elsewhere, to facts presented as pertinent to established prescriptions of law and procedure, could determine who was a “pirate” and who a licensed “privateer” or commissioner of a Prince without the case by case referral to the Crown that Gentili’s approach would have required. The standard was also much more coherent than the high policy decision that was proposed by Grotius, which involved some kind of determination as to the purpose of the

foundation of the society purporting to license raiders. Instead, it found the authority to license raiders in evidence of how the society in question was treated by England in other matters and, in default of English precedent, how that society was treated by other actors in the European state system. While this approach was still far from certain and allowed a substantial measure of subjectivity when dealing, for example, with rebels or non-European “states” whose relations to any European “state” were ambiguous or negligible in quantity, in practice the questions could be handled with substantial ease within the normal processes of English municipal law.

Commissions: Privateers as “Pirates”; Positivism Rampant and Naturalism Resurgent in the 1690s

In 1688 King James had been forced to abdicate the English throne and flee to France and then to Ireland. There he issued commissions to privateers to raid English shipping, regarding the new government of William of Orange and Mary, the eldest daughter of James, as usurpers. Eight of his privateers were caught and in about July 1692 the Lords of William and Mary’s Privy Council resolved that they should be tried by an appropriate tribunal as “pirates.” That November the Lords of the Admiralty ordered Dr. William Oldys, the King’s Advocate of the Admiralty,⁴ to proceed against them on that charge. Oldys refused on the ground that their acts as commissioners even of a deposed King did not constitute “piracy” as he understood the term. The conclusion of the civil lawyers whom Oldys consulted⁵ agreed with this except for Dr. Littleton (about whom very little seems to be known other than that he succeeded Oldys as Admiralty Advocate at the conclusion of the episode now being recited) and Matthew Tindall.⁶ On 20 May 1693, the following opinion was formally presented by the civilians of Doctors’ Commons to the Admiralty Board on the question, “Whether Their Majesties’ subjects serving under the late King James’ commission ought not to be prosecuted as pyrats”:

Tho. Pinfold: They are not in law pyrates, nor ought to be prosecuted as such, as I conceive.

Wm. Oldys: I am of the same opinion.

Matt. Tindall: None can grant commissions for private men of war but they that have summum imperium, or a power of making peace and war for some state or nation. That the late King James, by having justly lost his kingdom, and being in the dominion and power of another, has not only lost the power of making peace and war, but without his [?] consent has not the power or freedom to send to or receive or protect the persons of any that are sent to him with a publick character to treat about peace or war, and is reduced to the state and condition of a private person. For he that has no government, nor a right to any, and also [is] in the power

of another, cannot but be a private person, and has no right to grant commissions to disturb the trade and commerce of a nation (with whom too he has no war); and those taken serving under his commission are to be dealt with as if they had no commission, and being subjects of their Majesties, are incapable to receive any commission to fight against their fellow subjects, though granted by a just authority, and, in my opinion, may be by the law of nations prosecuted as pirates.

Rt. Walton: I am of the opinion that by the law of nations no persons who act in the prosecution of an open war, and against some particular enemies only, are to be esteemed pirates. A pirate being such an one as commits acts of hostility against all men without distinction, and without the solemnities of war

Wm. Oldys: This was agreed on by all the King's Councill, both common and civill, that in case their opinions were required, whether it were advisable that these prisoners should be prosecuted for treason or pyracy, their opinions were in the negative, thinking it no ways advisable, and desired me to intimate as much to this honorable Board.

F. Littleton: I am of the opinion that their Majesties' subjects taken fighting under the late King James, his commission, against others their Majesties' subjects upon the high seas may be prosecuted as pyrates.⁷

In September 1693, Dr. Oldys was summoned before the Cabinet Council composed of the Lords of the Admiralty, the Earls of Nottingham, Devonshire and Pembroke, and Sir John Trenchard.⁸ Trenchard questioned Dr. Oldys about his opinion:

Dr. Oldish:⁹ Pirates are common enemies to all mankind, having no legal authority for what they do; but they shew a commission signed J.R. [Jacobus Rex (James the King)] dated at the court of St. Germaine's, together with articles and instructions annexed, in the same form as privateers have, giving caution and security to bring prizes, and judgment into the Court of Admiralty, before Thomas Shadford, at Brest, or elsewhere: this does no way agree with piracy, or the character of a pirate, who is a robber, and has thereby lost his right in the law of nations.

Sec. Trenchard: But king James has lost his sovereignty, in that he has parted with his crown, and consequently with the power of granting such commissions.

Dr. Oldish: A king may be deposed of his crown, but cannot lose his right. So says Grotius, 'Jus regis penes ipsius manet, utcunque possessionem amiserit.' A king, therefore, in case he be deposed of his kingdom by the law, he has a right to war, and if so, he has all the ways and consequences of war, amongst the rest, pignorations and reprisals, which is a power of granting letters of mart [*sic*] and reprisal.

Sec. Trenchard: This may be law, in case where the king is deposed; but what if the king abdicates?

- Dr. Oldish: If he did really abdicate, as did the emperor Charles the fifth, or the queen of Sweden, then he is no other than a private person, and cannot legally grant any commission. But whether a privateer, acting by commission granted him *de facto* by king James, not knowing that he had abdicated, whether such an error will excuse a *poena delicti*? For that a reputable power is equivalent to a real one in such a case.
- Sec. Trenchard: To clear this, doctor, we must examine the circumstances of the case, and see if they be such as may occasion and induce a common error, whereby many may be deceived, as well as privateers.
- Dr. Oldish: It is notorious to us, and all the world, that king James was once a lawful king, and acknowledged by us, and all the world, to be so; that when his army deserted him, he fled to his ally in France for aid; then he went into Ireland to recover his kingdoms, as his declaration sets forth; there he grants commissions: those who fought under those commissions, and were taken, were not used as thieves and robbers, but as prisoners of war; whereby his claim seemed to be allowed by his very enemies; and those persons who acted under him in Ireland were treated as enemies, not rogues, though they acted under no king but king James, and by his command; that upon their return to France, they repaired to king James, their king, and thought him as well impowered to grant commissions by sea as land, and upon receipt of commissions from him, came out 'animo hostili,' as privateers, 'non animo furandi,' as pirates: That a colourable authority remaining in king James, will excuse those who acted under him from being pirates, since the abdication was never published, nor so much as heard of in France; and since in piracy, which deserves 'ultimum supplicium,' if proved, all favourable allowance ought to be made, and a general acknowledgement of a false authority in another country (where the commissions were taken) will free them from a felonious intent in taking them, and consequently from piracy; for so it is, that king James is owned and reputed a king in France; and therefore in this case it is undoubted law, 'Communis error facit jus.'
- Lord Devon: What if Tourville should grant such commissions to any Englishman, were they not pirates who acted under him?
- Dr. Oldish: No, even the power of granting such commissions being excepted in his patent, yet by common intendment, as admiral, he can grant such commissions; and as it is not to be presumed, that private men should look into his patent, so neither ought they to suffer for not having seen it; it is sufficient for them, that he is reputed to have such power.
- Lord Devon: What if monsieur Pompone, or any other minister of state, should grant such commissions?
- Dr. Oldish: Why then it would not be good; for by common presumption, a secretary of state would not grant such commissions, that power being proper only to the admiral.

72 The Law of Piracy

Sec. Trenchard, and Lord Faulkland, in the great heat: I—pray, doctor, let us deal more closely with you, for your reasons are such as amount to high treason. Pray, what do you think of the Abdication?

Dr. Oldish: That is an odious, ensnaring question; however it may be, I think of the abdication as you do; for since it is voted, it binds at least in England; but those gentlemen were in a foreign country, and knew nothing of it; and though king James be not king here, yet the colour of authority remaining, and common reputation of him as king there, excuses them, as I said before.

Sec. Trenchard: What say you of the pirates under Anthony, King of Portugal?

Dr. Oldish: As to the case of the Frenchmen, under Anthony, king of Portugal, the book says, '*Traciati sunt non quasi justii hostes, sed quasi pirati qui sub Antonio militant;*' and the difference of this case appears in the reason of it: For there the Spaniards never owned Anthony as king; here it is quite otherwise, for king James was really and truly a king, owned by us, and all the world.

Sir Thomas Pinfold being asked what he had to say, declared himself of the same opinion. Dr. Newton and Dr. Walker,¹⁰ did not deliver their opinions, but desired time to consider of it. Dr. Newton said, it was against his conscience to have a hand in blood.

Dr. Littleton said, That king James now was a private person; we had no war with him, nor he with us; or if he designed to have any, *Aerarium non habet*, he is not in a capacity of making war, he can neither send nor receive ambassadors; and those who adhere to him, are not enemies, but rogues, and consequently those persons are not privateers, but pirates.

Dr. Tindall was of the same opinion with Dr. Littleton.

Dr. Oldish hereupon was removed from his place of king's advocate, and Dr. Littleton succeeded him, who tried the persons, and condemned them.¹¹

Tindall, in an *Essay Concerning the Law of Nations* considered this entire episode from his own point of view and added some further details. According to Tindall, after Oldys had made his telling point that those who followed the deposed King James II on land in Ireland were treated as enemies, not as criminals, by the English victors,

One of the Lords then demanded of him [i.e., Oldys], if any of their majesties' subjects, by virtue of a commission from the late king, should by force seize the goods of their fellow-subjects by land, whether that would excuse them from being guilty at least of robbery? If it would not from robbery, why should it more excuse them from piracy? To which he made no reply.¹²

A variant of the same point was addressed to Sir Thomas Pinfold and Oldys both:

Whether it were not treason in their majesties' subjects, to accept a commission from the late king, to act in a hostile manner against their own nation? Which they both owned it was (and Sir Thomas Pinfold has since, as I am informed, given it under his hand, that they are traitors). The Lords further asked them, if the seizing the ships and goods of their majesties' subjects were treason, why they would not allow it to be piracy? Because piracy was nothing else but seizing the ships and goods by no commission; or what was all one, by a void or null one; and said, that there could be no commission to commit treason, but what must be so: To which they had nothing to reply.¹³

It thus seems clear that to the Lords of the Admiralty and Council, "piracy" had retained some of the "treason" implications of Coke's analysis of some 60 years before: A word that could be attached to "traitors." The legal effect in a high treason case, as distinct from petty treason under Coke's analysis, was to substitute a trial by special Commission under the statute of 1536¹⁴ for the trial by the House of Lords or other less malleable court required by an accusation of high treason. This possibly cynical and extreme view of the utility of legal categories was apparently more than Tindall himself was willing to affirm, although he did not dispute it and represented Oldys and Pinfold standing mute before the Lords' argumentation. Tindall seems to have adopted entirely the position given by Sir Leoline Jenkins a generation earlier: That it was a matter of national discretion whose licenses to acknowledge, and that any taking not authorized by a license issued by an acknowledged "sovereign" could properly be called "piracy" at English law, and be visited with the legal procedures and punishment fitting that charge in England.

It does appear that by Tindall's and the Lords' analysis, only English people without a valid commission were precluded from asserting belligerent rights (as privateers) against other English people. The equation of "piracy" with "treason" rested on the notion that the accused criminal must be bound in loyalty to the government of England; that "piracy" could be the charge that flowed from a breach of that loyalty. Since foreigners not "denizens," habitually resident in England, are not so bound, the question was left open as to whether "piracy" could exist where there was no "treason," and the similar but easier question was posed, whether an Englishman could accept a commission from a foreign acknowledged sovereign to act against Englishmen.¹⁵

To the first of these questions, Tindall replied by reviewing the story of Dom Antonio and the Frenchmen with commissions from the French king who were executed as pirates by Spain.¹⁶

As to the story of Antonio, the doctor [Oldys] is (to suppose no worse) abominably mistaken in the very foundation. . . . It was the royal navy of France (which is very improbable did act by any authority but that of the French king's) set out . . . *regis sub auspiciis*, with which the Spanish fleet engaged, and had the good fortune, after a long and bloody fight, to route it, and took above five hundred prisoners, of which almost the fifth part were persons of quality, whom the Spanish admiral was resolved to sacrifice as pirates, because the French king, without declaring war, had sent them to the assistance

of Antonio: Against which proceedings the officers of the Spanish fleet murmured, and represented to their admiral, that they were not pirates because they had the French king's commission; but that they chiefly insisted on, was the ill consequence it would be to themselves, who, if they fell into the hands of the French, must expect the same usage. As to the French king's assisting Antonio without declaring war, they supposed, that before the sea fight, the two crowns might be said to be in a state of war, by reason of frequent engagements they had in the Low Countries. . . .¹⁷

Tindall then compared the legal position of Antonio with that of James after his abdication, finding that while the fighting was still going on the Spaniards allowed Antonio the same privileges on land as the English allowed to James in Ireland despite both Spain and England denying the royal prerogatives of the respective claimants to authority. He then treated the Spanish condemnation of French officers as illustrative precedent:

And if the Spaniards, by the law of nations, after Antonio was driven from his kingdom, might treat those that acted by his commission as pirates, why may not the English deal after the same manner with those that act by the late king's commission, since they look on him to be in the same condition as the Spaniards did on Antonio, without a kingdom, or right to one?¹⁸

From this careful phrasing, it seems that Tindall did not excuse the Spanish action insofar as it resulted in treating as pirates Frenchmen who held French commissions. Rather, he adopted the argument put forth by the Spanish fleet, that reasons of reciprocity and the factual existence of fighting in which either side's adherents might fall into the hands of the other compel a legal classification that gives protection to honorable soldiers fighting within the system; that that protection is lifted only when they remove themselves from the system by accepting a commission from a person not authorized under the system as perceived by the capturing authorities to give it.

In fact, the case of the eight Irish "pirates" was far more complex than appears from these discussions. It was alleged in the appeals petition of the eight to the House of Lords after they had been tried and condemned as "Pirates and Traitors" that they were all natives of Ireland and never left their allegiance to King James; that by the Statute of Treasons¹⁹ conviction can only be had by judgment of the King in Parliament; that they had a right to jury trial. Two of the petitioners, John Golding and Thomas Jones, argued that their commissions had in fact been issued with the consent of King James by the King of France. All averred that they had never come into any allegiance with the English government of William and Mary, thus cannot have committed treason against it. In their view King James, although defeated in his rightful territories, was still a King and ally of King Louis XIV of France: "That king James and the king of France being confederated together in war against England, it matters not in the judgment of the law of nations, under which of the confederates commission the subjects of either act;" they should be treated as land soldiers were and might yet again be

treated in Ireland, as honorable prisoners of war.²⁰ This argument, implying sound policy reasons for applying the laws of war to “rebels” (or “loyalists,” depending on whether Parliament or the king is regarded as the sovereign in England), shows how the Gentili-positivist approach could still be applied to reach the same practical result as the Grotius-naturalist arguments. Why one argument is more persuasive than another when both rest on the same jurisprudential premises is a matter of psychology and sociology more than logic, and it is not fruitful for present purposes to pursue this point further.²¹

It is difficult to unearth at this remove in time the reasons why the very broad authority under the statute of 1536 to try “treasons” as well as “piracies” was not conceived in 1693 to make it unnecessary to charge the eight privateers with “piracy.” There seem to be two likely explanations. One, resting on a technical reading of the Statute of Treasons,²² involves the possible desire of the prosecuting authorities and the Privy Council to avoid the distinctions between the person of the sovereign and his realm on the one side and the constitution of the state on the other as protected by the terms of the statute. Nobody pretended at that time that King James II and his supporters aimed to slaughter William of Orange or Queen Mary, the eldest daughter of James and the wife of William, who had been placed on the throne of England by actions in Parliament that were inconceivable in 1352, when the Statute of Treasons was enacted. The more likely explanation is that by the 1690s, about 150 years after the statute of 1536 had been enacted, the idea that its purpose had been to provide tribunals to consider cases peculiar to Admiralty jurisdiction, of which “high” treason was not one, had become rooted in common thought among lawyers. Coke, writing before 1634, had begun his chapter on matters covered by the statute of 1536 by referring only to “Piracy, Felonies, Robberies, Murders, and Confederacies committed in or upon the Sea, & c.”²³ He then quoted the statute, including its word “Treason,” but in his gloss upon its meaning concluded, in the light of the historical interpretation of the Statute of Treasons, and the clarifying statute 35 Henry VIII c.2 (1543),²⁴ that “it [treason] wanted trial, (as by the preamble of this statute is rehearsed) at the Common Law.”²⁵ Moreover, Coke raised a rather subtle technical difficulty when he concluded that after the Statute of Treasons, the robbery of an Englishman by an Englishman, which might have been “petit Treason” before, warranting the offender to be “drawn and hanged,” could no longer be considered treason.²⁶ Coke was innocent of an uncharacteristically anachronistic reference to “Piracy” as a discrete concept as of 1352 or earlier, when using the word to mean merely “robbery within the jurisdiction of the Admiralty,” as was apparently the point of the statute of 1536, but he seems to have been alleging a gap between the jurisdiction of the Common Law courts and the commissioners in Admiralty under the statute of 1536 in the case of “piracies” committed by those Englishmen who, for some reason, perhaps involving the technicalities

of the laws of feudal allegiance, were not acting *contra ligeanciae suae debitum*, against their obligations of loyalty. These are questions that by 1693 it might well have seemed better to leave unraised.

On the other hand, the solution found in the case of the eight Irish commissioners was clearly unsatisfactory, and in 1695 a statute was passed bringing “treason” directly into the Common Law procedures similar to the procedures envisaged by the act of 1536.²⁷ A Commission sat at the Old Bailey in 1696 to try Captain Thomas Vaughan under this statute, for treason.²⁸ The facts are very like the facts in the case of the eight Irish commissioners, but Vaughan was not accused of “piracy”; only of “treason” under the Act of 1352. The statutes of 1536 and 1695 were taken to permit a treason trial before an Admiralty tribunal. The case was considered important and the judges of the tribunal included Sir Charles Hedges (judge of the high court of Admiralty), Lord Chief Justice Sir John Holt (King’s Bench), Lord Chief Justice Sir George Treby (Common Pleas), Lord Chief Baron Edward Ward (Exchequer), Sir John Turton (Justice of King’s Bench) and others. Dr. Oldys appears in a minor role as one of the court’s advisers on Civil Law.

Being a treason trial, the principal point of contention was the nationality of the defendant, who asserted himself to have been born in the French island of “Martinico” and thus a Frenchman for purposes of receiving a privateer’s commission from King Louis XIV. Other evidence, which the jury found more convincing, tended to establish that he was Irish, thus within the “ligeance” of the crown of England. Conflicts of allegiance, and the idea of dual nationality, which had not been strange to Coke in contemplating the relations of French subjects of King John to English subjects and to King John himself,²⁹ were not discussed. But the issue of whether a commissioner could be a “pirate” did. Vaughan was accused of sailing with French subjects during a war between France and England. It then appeared that his crew was in the main Dutch (thus, apparently, subjects of William III as Prince of Orange) not French. Lord Chief Justice Holt questioned Mr. Phipps, Vaughan’s defense attorney:

L.C.J. If Dutchmen turn rebels to the state, and take pay of the French king, they are under the French king’s command, and so are his subjects. Will you make them pirates, when they act under the commission of a sovereign prince? They are then ‘Subditi’ to him, and so ‘Inimici’ to us.

Mr. Phipps. It does not take away their allegiance to their lawful prince. They may go to the French king, and serve him; yet that does not transfer their allegiance from their lawful prince to the French king, and make them his subjects. But however, to make them subjects within this indictment, they must be ‘Gallici Subditi;’ so they must be Frenchmen as well as subjects.

L.C.J. Acting by virtue of a commission from the French king, will excuse them from being pirates, though not from being traitors to their own state; but to all other princes and states against whom they do any acts of hostility, they are enemies: And their

serving under the French king's commission, makes them his subjects as to all others but their own prince or state. . . .³⁰

It would thus appear that having lost on all grounds in the case of the eight Irish commissioners, the point of view expressed by Dr. Oldys had won on all points three years later. Indeed, the victory went further, as the denomination of Lord Chief Justice Holt, a Common Law judge, to head the tribunal had a great impact on the forms of indictment, proof and other questions under the Act of 1695 where the civilians disagreed with his rulings; the arguments run throughout the report.³¹ And such questions as might under Tindall's rationale have been determined by simple assertion of the Crown, as whether there was a "state of war" between France and England at the key times (there having been no declaration of war by either side), were submitted to the jury as questions of fact. Despite the fact that Vaughan was convicted and hanged, the natural law Grotius-Oldys approach was winning when the tribunal was dominated by Common Law judges instead of being a council of successful political figures.

The disagreement represented by the conflicting views of Tindall and Oldys as to the proper definition of "piracy" for purposes of a prosecution under the statute of 1536 which, it will be remembered, uses the words "treason," "felony" and "robbery," but not the word "piracy" in its operative provisions, was not satisfactorily resolved for the future by the precedent of the convictions as "pirates" of the eight Irish commissioners of King James or by the statute of 1695 and the trial of Thomas Vaughan. Doubts as to the English conception of "piracy" as a form of "high treason" were partially resolved in 1700 by statute:

That if any of His Majesty's natural-born Subjects or Denizens of this Kingdom, shall commit any Piracy or Robbery, or any Act of Hostility, against others His Majesty's subjects upon the Sea, under colour of any Commission from any Person whatsoever, such Offender and Offenders, and every one of them, shall be deemed, adjudged, and taken to be Pirates, Felons and Robbers; . . . and suffer such Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.³²

That the British municipal law of treason should not have been clarified, but the British municipal law of "piracy" should have been clarified (or expanded) in this way is probably due to the ease of trials by Commission using Admiralty judges but Common Law procedures as set up by the statute of 1536. At least the cases of the eight Irish commissioners and Vaughan point that way. It appears to have been a choice based on good political grounds to avoid a trial in the Common Law courts and to permit pejorative adjectives to be thrown at some of the licensees of foreign sovereigns who claimed a right to act in disregard of English law as interpreted by the highest political authorities in England. It is noteworthy, however, that merely taking a foreign commission was not by itself deemed to involve "piracy"; only the

use of that commission against English subjects and denizens—those who were parties in the conceptions of the time to the social contract between nationals and residents of England on the one hand, and the sovereign on the other who was obliged by that tie to protect them. It is also noteworthy that the statute of 1700 does not purport to make foreigners acting in excess of foreign commissions into “pirates” at English law; only Englishmen acting against other Englishmen were deprived of the protection of a foreign commission. Since jurisdiction to make laws that are binding on a state’s own nationals wherever they may be was undoubted in the legislative organs of a state, and that principle of jurisdiction based on nationality has traces in the very earliest conceptions of social organization³³ and is sufficient to justify the English legislation, it would seem that the international law of piracy as posited by Grotius and Gentili, was irrelevant to the entire proceeding. What was involved was an English statute giving to an English tribunal subject-matter jurisdiction to try Englishmen for acts against other Englishmen. To the extent there is any implied reference in this statute to international law, it was merely as a technical limit the English were drawing to the legal capacity under international law of a foreign sovereign to license depredations against English shipping or, even more narrowly, to limit that sovereign’s capacity to remove Englishmen and other residents of England from the obligations arising out of their being parties to the English social contract.

English Commissions: Positive Grace v. Natural Justice

Another question remained to be considered by the English courts. That was the degree to which captures beyond the authority of an otherwise valid English commission constituted “piracy.” The property law implications of a “piratical” capture had been worked out by Caesar long before.³⁴ The new issue was whether action in excess of a commission was a crime, or a mere tort with civil (i.e., tort and property) but not criminal law consequences.

It might be well at this place to recapitulate the evolution of those commissions. There is clear evidence that by 1599 “piracy” was to become the crime at English municipal law of an English privateer even under valid English license who did not bring his capture in for English adjudication.³⁵ The means by which this was done were the insertion into every commission and bond beginning in 1602 of “an especiall article and clause to inhibite them [English privateers] from comminge either in the Streightes [of Gibraltar] or Barbarie, or for seeling anye of the goodes taken by them in anye other place then [*sic*] onlie within this realme of Englande.”³⁶ And in 1643 the Admiral the Earl of Warwick instructed his fleet:

[W]hen the shipp under your command shall apprehend any pyratts . . . you are to cause them to be kept in safe custody . . . [until] I may take course for the sending of the sayd shipp and goods into some of his Majestie’s ports, according to instructions to mee given in that behalfe.³⁷

There were, of course, other reasons for the licensing procedure than to assure payment of the Admiral's and the King's shares of belligerent captures and of "pirate" goods. In principle the regulations requiring a license from the King rest on the assumption that the King by withholding the license can forbid the activity for which the license is legally required. Thus, the assertion of a legal power to issue a license is not only a source of money directly, since payment can be demanded for the license itself, it is also an assertion of authority against the Parliament or other lawmaking body. And it is a means of asserting discipline over the general populace which, at times, might have been an end of itself.³⁸

Now, since by 1700 it had been English practice for over a hundred years to require a special license of anybody seeking to sail against "pirates"; and even merchant venturers appear to have been required to get those licenses, the natural law approach taken by some jurists³⁹ concluding that there was no need of a license to hang "pirates" when it was as a practical matter not feasible to take them to a port in which they could be properly tried, seems inconsistent with the formal assertions and practices of the administrators of England. It is, of course, possible, that the proprietors of the great companies went along with the approaches of the administrators because it was politic to do so, and that it was policy, not law, that determined the entire English superstructure of practice built on an underlying natural law of self-defense and property rights so valued by the naturalist common lawyers. But it is probably fruitless to speculate as to the most congenial theoretical models useful to make sense out of complex events. It is possible to accept the positivist view as to the "grace" involved in permitting action against enemies or pirates without a license⁴⁰ as easily as it is possible to accept the naturalist view implying that it would have been unjust, and possibly illegal in the grand scheme of natural law, for the Crown and its judicial officers to withhold that "grace."

In any case, in the prosecution of John Quelch,⁴¹ there is evidence that by 1704 the rumblings of natural law and "social contract" theory had become if not dominant at least significant in New England. Positivist theory emphasizes the legal power of a sovereign to grant a commission and withholds authority to act in any way from those individuals not able to find a license for their act in either the express grant of a license or in the implied grant of a license by action of Common Law or tradition; naturalist theory emphasizes the direct legal powers of individuals to protect their natural rights and views the sovereign, deriving his own legal powers from the consent of the governed under social contract theory, as either bound to grant the license (even retroactively) or unnecessary. Natural law jurists would allow individuals to protect their natural rights without any grant of legal authority from the political superstructure of society.

This jurisprudential distinction seems to be the bridge over which English municipal law as applied to “piracy” crossed into the realm of international law. A license from a sovereign might raise international law questions with regard to action against foreigners whose own sovereigns might seek to protect them, but where the “pirates” to be hunted under a license were nationals of the license-granting sovereign in ships of that sovereign or of no sovereign on the high sea, no international law issues are presented. And where the “pirates” are foreigners or anybody in a foreign sovereign’s vessel or in foreign sovereign’s territory, the questions raised by the “pirate hunter” pursuing his license beyond the reach of his own sovereign’s jurisdiction to enforce his own law regarding “piracy” are resolved by the normal means of pursuing the domestic remedies of the licensing sovereign (normally through prize court *in rem* actions to recover property improperly captured) or by war, at that time normally pursued through private licenses granted to aggrieved individuals by their offended sovereigns.⁴² An outline of the system seen through the naturalist eyes of Henry Marten (Judge of Admiralty, 1617-1671) in 1626 was prepared during a technical state of peace between England and Spain when nonetheless letters of marque and reprisal had been issued in response to alleged Spanish captures from English merchants:

[T]his commission is not of grace, but of justice; for it is intended that none have theis [these] Letters of Reprisall but such as have received losse & damage & wronges; to whome his Majestie, beeing not able otherwise to minister right and redresse of the wronges and losses (a duty incident to his royall function), doth in this kind and by his meanes, affoord justice and due satisfaction Were there a solemn warr between us and the King of Spayn, it is notorious that whatsoever wheresoever any subject could gett from the King of Spayne’s subjectes should bee his own *jure belli*, and not the Kings Now, because there is no such common or solemn warr, but a reprisall warr, this privilege or benefitt is restrayned to them who have such commissions of reprisall⁴³

The same notion expressed a generation later by the positivist Jenkins will illustrate the distinctions drawn here:

[P]iracy at sea is made up of the same ingredients as robbery on land; for it is piracy to assault a ship, carry away a ship or goods out of a ship, unless it be in necessity (in which case payment must be made and the victim able to spare the things taken).⁴⁴ Also a man is excused if he takes a ship or goods by a legall commission in time of war or by reprisalls; but otherwise he shall be esteemed a pirate⁴⁵

Where Jenkins’s general language would seem to label as “pirate” an unlicensed foreigner acting wholly outside of England and attacking ships only of third countries, Marten’s logic applied to the same case would seem to excuse the foreigner on the basis of natural justice if his sovereign had arbitrarily refused to issue the necessary commission. But since neither Marten nor Jenkins was focusing on the case of foreigners, it would be improper to read specific applications to foreigners into their generalities. It might be noted in passing that this excerpt from Jenkins appears to be the first

historically in which the notion appears that to be “piracy” the taking must be either from a second ship, or the ship itself must be taken from its rightful possessors; thus, that “piracy” might not be quite the same as “robbery within the jurisdiction of the Admiral’s courts” (which would include a forcible taking wholly within a single English vessel), but must involve some element of foreign jurisdiction or, more precisely, some gap in the normal jurisdictional rules applicable to English legal prescriptions. To the extent that his approach would find it to be “piracy” if an Englishman attacked a second English vessel at sea, which was, of course, precisely the case with regard to James II’s privateers, the border between international law and municipal law would seem to be very vague indeed. As noted above, the English handling of those cases involved the use of the municipal law regarding “piracy” and the utter rejection by the Lords of the Admiralty and Privy Council of the notion that international law or Civil Law might stand in their way. Presumably, Jenkins would have denied that the language quoted here from 1680 was intended to apply to such a case, but only to the case of unlicensed Englishmen attacking a foreign vessel or unlicensed foreigners attacking an English vessel; that in other cases either English municipal law applied without reference to any international complications, or, if English law were not applicable because all actors and victims were foreign, that it was not of English concern and the international law implications, if any, should be worked out in diplomatic correspondence and not by the English courts. Marten, on the other hand, would appear to have adopted an approach that would make the underlying “justice” of the attacker’s case a legal question for whatever tribunal was hearing it, and thus to bring the international legal order’s concepts of “justice” into play even in a municipal law trial.

The question of whether a foreign license had to be proved in an English court did not involve the *droits of Admiralty*, the Crown’s share in any privateer’s booty, nor did it involve the extent of the Crown’s or Parliament’s legal power to control the actions of Englishmen abroad. Thus, the political need for strict form was much less. The general coalescence of state authority over the acts of individuals was nonetheless important to the emerging commercial order. The issue of greatest importance to the new mercantile classes was that goods and vessels taken by a privateer be submitted to a tribunal for an *in rem* proceeding at which the owner could present his case, if for no other purpose than to satisfy his insurance company that the goods had in fact been taken under conditions covered by the insurance contract.⁴⁶ The English assertions of the importance of a valid commission were thus never applied with strictness to foreigners, and even as applied to the likes of Captain William Kidd (to be discussed below) appear to have been exaggerated. The situation was more or less definitively summarized in 1729 when a Majorcan Spaniard without a commission seized a British vessel as

part of the war between Great Britain and Spain. The King's Advocate was asked for an opinion as to whether the privateer without commission could properly be treated in England as a "pyrat." George Paul rendered an opinion in the negative:

That by the Laws of Nations (strictly considered) commanders of uncommissioned ships have no power or authority to take or seize the Vessels or Goods of a State in War, with their Sovereign, but such capture has never been deemed piracy, provided the ship taken, has been carried by the Captor, without fraud or delay, into the first proper port, belonging to his Prince, and there delivered without embezelment, to the officers of Justice, to be proceeded against as enemys goods; such ships and Goods are always rendered in Great Britain as the perquisites of the Admiralty, without any certain [?] [sic] profit or advantage to the seizor.⁴⁷

"A Pyrat," according to Dr. Paul, is "a Sea Thief" only. He suggested that the Spaniard be detained until it could be determined whether he delivered the captured goods and vessel to a proper port for legal condemnation.

Animo Furandi and Hostes Humani Generis

The dispute between Tindall and Oldys had other major implications for the public international law of piracy which were not resolved by the statute of 1700 bringing some "rebels" into the procedures applicable to "pirates" as a matter of English municipal law. The civilians led by Oldys had given two other distinct reasons than valid commissions why Vaughan and the other commissioners should not have been treated as "pirates," and those reasons stand regardless of the perceived invalidity of King James's commissions. They were (1) that it is an essential element of the English municipal law "crime" of "piracy" that the accused be acting for private motives ("*animo furandi*") and not as part of a struggle for political power; and (2) that the international law label by Coke's time was considered to require that the accused be acting against all lucrative targets—that he handle himself as "*hostis humani generis*"—and not the vessels of one flag or a narrowly prescribed group of allied flags alone. The first is not entirely incorporated into the concept of acting under a license since licenses, letters of marque and reprisal, had been considered necessary at English municipal law to authorize English takings of foreign goods or vessels from at least the 14th century, and that requirement had existed wholly independently of any motive requirement from the earliest records.⁴⁸ The idea that "*animo furandi*" was an essential element of the "crime" of "piracy" appears instead to derive from the English Common Law relating to "robbery."⁴⁹ If that is correct, then the requirement of predatory intent, taking for private gain as distinct from a struggle for public power, would be a result of the use of the word "piracy" in the nonoperative parts of the statute of 1536, and the growing identification of that word with the private acts, "robberies," which were the real subject matter of the statute. Whether the statute of 1536 itself intended this result is

doubtful. It may be remembered that the commission of 1511, by which Henry VIII authorized John Hopton to clear the area near English ports of “*praedones, pirates, exules, et bannitos*”⁵⁰ did not distinguish between those with private motives and those “exiles and outlaws” whose depredations might have been for public political purposes in France or elsewhere. It might also be remembered that until about 100 years after the statute of 1536 there was a serious legal question as to whether the takings by commissioners of the Barbary states’ rulers should properly be considered to be “piracy”; the public purpose of those takings, as seen from the point of view of the Barbary states and in light of the British privateering practices of this time continuing until the 19th century, cannot be seriously questioned. Goods taken by the Barbary commissioners were openly sold and the relationship of the fisc of those states to the practices of the commissioners cannot be doubted.

The evolution of the phrase “*hostes humani generis*” is also important to an understanding of the conception of “piracy” in public international law at the end of the 17th century. The phrase first appears printed in England in 1644⁵¹ reflecting usage no later than 1634 and in a form that seems to imply still earlier origins. The conception appears in Cicero,⁵² but in a narrowly restricted context relating to the politically significant communities of the Eastern Mediterranean of Cicero’s time and earlier who pursued a course of behavior similar to that of the Vikings of about 800 years later.⁵³ The evolution of this classical conception into a sense of outlawry was discussed above.⁵⁴ The idea apparently was that the laws of war, which even in classical days were “international” in the sense that gods who were not subordinate one to another were fighting through earthly representatives as equals under an overarching world order, were applicable to “*hostes*” in “*bello*,” enemies in war. “*Pirata*” were “*hostes*” in a permanent belligerent relationship to all communities, because they did not declare “war” before their attacks, and attacked all with whom they were not in treaty relationships or who were too strong to beat. This legal and practical situation had its impact on the law of property, particularly the law regarding property changes as a result of war, postliminium. In that single area, some analogy was drawn, apparently at least in part reflecting a pejorative view of those who interfered unpredictably with peaceful commerce as the Roman Empire consolidated its economic and political hold on the Eastern Mediterranean, between “*pirata*” on the one hand, and criminals at Roman law, “*praedones*” and “*latrones*,” on the other. Now, by the early 17th century in England the same concept was sought to be applied by analogy to the Western Mediterranean communities of Algiers, Tunis, Salee and Tripoli, the Barbary states. As the legal results of attaching the label “piracy” were conceived to be broader and broader, apparently to some publicists involving outlawry of the “pirates” for all purposes, the degree of political organization and economic importance of the Barbary states made it advisable to withhold the word (and thus its legal

results) from those politically stable and functioning communities. At the same time, the word “pirates” had begun to be attached to all who interfered without the backing of a substantial political and legal community in seaborne commerce. Thus, it seems that the word shifted its meaning from raiders with a substantial political organization in perpetual “war” with their neighbors, to common robbers at English municipal law. The phrase “*hostes humani generis*” apparently survived from the old concept, and was applied to the new, without thought as to the real meaning of the word “*hostes*” in Latin, and its legal consequences in public international law. Ironically, it was applied to distinguish rebels fighting without a declaration against those who considered themselves the legitimate government, from mere robbers and outlaws within the jurisdiction of the English Admiralty tribunals. Yet it was the first, the rebels, who were claiming the privileges of “*hostes in bello*,” enemies in war, and whose situation in fact bore some analogy to the concept of “pirates” in classical usage, while it was the latter, the robbers, who would have been called not “*pirata*” but “*praedones*” or “*latrones*” by Roman jurists and who were not “*hostes*” at all, but simply criminals by the rules applied in English tribunals. And it was the desire to heap contempt on rebels that they were labeled “pirates” and “*hostes humani generis*” by Tindall and those accepting his definitions by the end of the 17th century, while from those labels were drawn the legal results that they never had in classical days: Outlawry.

But Robert Walton in 1693 had argued that the phrase “*hostes humani generis*” was not a mere description or a technical phrase.⁵⁵ He seems to have drawn from it the idea that permanent and general predation was an essential element of the accusation of “piracy”; that the accused “pirate,” to deserve the word, must have robbed the merchants of all nations without discrimination by flag. It is tempting to read large conclusions from Walton’s short comment; it can certainly be suspected that Walton was well educated in the classics and was repeating the classical use of the word, making that its meaning in 1693 as a matter of public international law. If so, his conception seems to have been anachronistic. Did he mean for English tribunals set up under the statute of 1536 to try contemporary Vikings, such as Barbary states corsairs and Malayan nobles, for “piracy”? Or did he merely mean that in his view the word should not be attached to rebels or anybody else for whom the application of English municipal law relating to robbery at sea was not appropriate for other reasons?

One paradoxical conclusion seems inescapable: The phrase, “*hostes humani generis*,” the one phrase that all writers seem to agree should fit somehow in any definition or description of “piracy,” is the one phrase impliedly linking the 17th century conception of “piracy” to classical writings, and in no way fits the facts or the legal conclusions drawn by 17th century policy makers or tribunals from those facts.

The question was not firmly resolved as to whether it was proper to apply to rebels the English municipal law procedures created to handle “robbery” within the jurisdiction of English Admiralty. It apparently disturbed at least some jurists removed from the immediacy of politics to apply those procedures and words (and ultimate punishments) to people whose true transgressions were better described as treason or mutiny, crimes under English municipal law that might even be within the jurisdiction of the Admiralty tribunals in some cases, but which were not apparently considered to be among the “petty treasons” or “felonyes” covered by the statute of 1536. Disagreement also apparently remained with regard to the importance of a motive of private gain (*animo furandi*) as an essential element of the crime. And the phrase “*hostes humani generis*” appears to have remained in the minds of some a key to withholding the label “piracy” and its legal results from those who attacked the property of one or two nations only quite apart from the question of public authority for those attacks.

Other serious questions remained as to the precise definition of “piracy” at its least controversial level: The case of the private-gain motivated, all-prey attacking, unlicensed Englishman. The simplest case, *Rex v. Dawson* (1696), the one most frequently quoted for its charge to a grand jury defining “piracy,” is variously cited.⁵⁶ The charge was given by Sir Charles Hedges, judge of the high court of Admiralty. The tribunal was composed of the same eminent judges sitting in the Thomas Vaughan case,⁵⁷ which in fact was tried immediately after the Dawson case on the same day, 31 October 1696; Vaughan and two others (“J. Murphey” and “Tim Brenain”; they were not tried with Vaughan) were arraigned formally while the Grand Jury was hearing evidence after the charge by Judge Hedges quoted below.⁵⁸ The reason for the extraordinary galaxy of legal talent in Dawson’s case lay apparently not in the importance of the defendants, or because any particularly knotty legal issues, like the relationship of “piracy” to “treason,” were involved in the sordid tale, but the fact that at an earlier trial of the same defendants under the direction of Lord Chief Justice Sir John Holt, “the jury, contrary to the expectation of the court, brought in all the prisoners Not Guilty”! This new presentment was for other piracies, according to the report.⁵⁹ The key portion of the Charge follows:

Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the fact was committed; and the end will be known, if the evidence shall shew you what hath been done.⁶⁰

The breadth of the charge is apparent; presumably it has been so often cited because so broad. Under this charge, it would seem that violently taking another's goods all within a single vessel is "piracy," as is also "mutiny." It is not necessary to show the "*animo furandi*" by any evidence other than the taking itself; the "end" can be inferred from the facts surrounding the taking but an intention to "take" would seem to have been all that was needed to constitute "piracy."

Jurisdiction and Legal Interest

Naturalists v. Positivists (Again): *Molloy v. Jenkins*. Many questions remained on the fringes which assumed great importance to the evolving concept of "piracy" in Europe and its application to a rapidly expanding world community based on energetic trade. These questions resolved themselves into two basic ones: (1) What was the jurisdictional basis for English prescriptions over the acts of foreigners outside of the territorial jurisdiction of English courts; i.e., did English Admiralty jurisdiction extend to all "piracies," no matter where committed or by whom? and (2) Was there any legal authority left over, outside the court process, by which English commissioners could suppress without bringing to an English tribunal the acts of foreigners or Englishmen abroad that interfered with property rights and trade; i.e., was there to be anything left of the public international law of "piracy," or was the concept to be restricted to municipal law henceforth?

In his eloquent paean on the virtues of free trade and the evils of "piracy" in 1677, Charles Molloy set out his preferred answers. The jurisdiction of the tribunals established under the authority of the Act of 1536⁶¹ can be exercised against any Englishman, apparently on the basis of his nationality alone, who commits "Piracy, be it upon the Subject of any Prince or Republique in Amity with the Crown of *England*," and apparently without regard to place so long as it be within the jurisdiction of the English "Admiral" as established by English precedents.⁶² Foreigners could also be subjected to the same process, but only if there were some basis for English legal interest in their actions, such as the nationality of their victim being English⁶³ or if both the victim and the accused "pirate" are physically present in England and the matter has not already been clarified in the victim's own country, and the forms for personal accusations are used.⁶⁴ An additional basis for jurisdiction over the acts of foreigners was conceived to lie in the English claim to territorial jurisdiction over large parts of the seas:

Piracy committed by the Subjects of the *French King*, or of any other Prince or Republique, in Amity with the Crown of *England* upon the *British Seas*, are punishable properly by the Crown of *England* only, for the Kings of the same have *istud regimen dominium exclusive*, of the Kings of France, and all other Princes and States whatsoever.⁶⁵

The British Seas at this time were considered to extend “by long custom and usage” right up to the coasts of the Netherlands and France.⁶⁶ Obviously, the conception supported by Molloy was not of “universal” jurisdiction over the acts of foreigners abroad, but of jurisdiction in the normal English conception of the reach of national sovereignty. That included jurisdiction based on the nationality of the accused, on the territorial sovereignty over the place in which the event occurred (not the far reaches of the Admiral’s jurisdiction in English ships wherever they might be, but only within the British seas), the nationality of the victim,⁶⁷ and in a special procedure allowing a criminal-like action to be brought on private initiative but not to enforce the “King’s Peace”—and then only in default of opportunity for the victim’s own sovereign to adjudicate the matter.

As to incidents “on the *Ocean*,” i.e., beyond the reach of English jurisdiction as normally applied, Molloy considered that there was an almost unlimited scope for self-help:

If Piracy be committed on the *Ocean*, and the Pirats in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the main Yard end before a departure; for the old natural liberty remains in places where are no judgments.⁶⁸

... So likewise, if a Ship shall be assaulted by Pirats, and in the attempt the Pirats shall be overcome, if the Captors bring them to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors.⁶⁹

A somewhat different view of the English law was taken by Sir Leoline Jenkins. Under his rationale for allowing private justice to be meted out to “pirates” he appears to have considered the Admiral’s jurisdiction under English law to extend everywhere on the seas as if territorially based. But instead of requiring accused “pirates” to be brought in for adjudication, or restricting private punishment to cases where adjudication is denied by a foreign judge or impracticable for other reasons, and instead of relying on an underlying law of nature to authorize private punishment, he construed the English law to commission everybody a law officer:

There are some Sorts of *Felonies* and *Offences*, which cannot be committed anywhere else but upon the Sea, within the Jurisdiction of the Admiralty . . . the chiefest in this Kind is *Piracy*.

You are therefore to enquire of all *Pirates* and *Sea-rovers*, they are in the Eye of the Law *Hostes humani generis*, Enemies not of one Nation . . . only, but of all Mankind. They are outlawed, as I may say, by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.⁷⁰

Some time later⁷¹ Jenkins expanded on this theory to lay the ground for an extension of English Admiralty jurisdiction to what later became “universal” jurisdiction over “piracy:”

Every *Englishman* knows, that his Majesty hath an undoubted Empire and Sovereignty in the Seas that environ these his Kingdoms

But besides these four seas, which are the peculiar Care, and as it were, part of the Domaine of the Crown of *England*, his Majesty hath a Concern and Authority (in Right of his *Imperial* Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over: So that not the utmost Bound of the *Atlantick* Ocean, not any Corner of the *Mediterranean*, nor any Part in the *South* or other Seas, but that if the Peace of GOD and the King be violated upon any of his Subjects, or upon his Allies or their Subjects, and the Offender be afterwards brought up or laid hold on in any of this Majesty's Ports, such Breach of the Peace is to be enquired of, and tried . . . in such Country, Liberty, or Place, as his Majesty shall please to direct. So long an Arm hath GOD, by the Laws, given to his Viceregent the King, and so odious are the Crimes of *Piracy*, Bloodshed, Robbery, and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the remotest Corners of the World

This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in concurrence with all other Sovereign Princes that have Ships and Subjects at Sea.⁷²

This conception, that the territorial extent of the Admiral's jurisdiction *in English vessels* could become the basis for jurisdiction over foreigners *not* in English vessels whose acts do not directly affect English vessels, subjects or goods, although reserving to all other sovereigns the equivalent jurisdiction over all accused “pirates” (including, presumably, Englishmen committing their “piracies” from English vessels against either other Englishmen or third country nationals) seems rather much.

The problem of putting limits to the implications of Jenkins's position as a judge in Admiralty supporting the widest possible English jurisdiction arose when the practical position was reversed and Scots subjects of King Charles II were sought to be tried as “pirates” in the Netherlands in 1675. They had held licenses from England, which appear to have been exceeded; the question was whether the foreign court had jurisdiction to examine into the validity of those licenses and their legal extent. Jenkins, no longer a judge but deeply involved as a trusted Royal adviser, was asked for his legal opinion by Sir Joseph Williamson, the Secretary of State under King Charles II at the time charged with principal political responsibility for Anglo-Dutch relations.⁷³ The legal opinion, dated from Nimeguen on 3 April 1675, caught Jenkins on the horns of a dilemma, trying to reconcile his expansive view of English jurisdiction with his fundamental positivism by which the consent of other states affected must be construed from diplomatic correspondence, treaty or practice before the English jurisdiction can be exercised. He began by affirming his basic positivism, suggesting that the disagreement between England and the Netherlands about jurisdiction over the Scots privateers,

will never be decided; because there is no third Power that can give a Law that shall be decisive or binding between two independent Princes, unless themselves shall please to do it (which seldom happens) and then cannot be extended beyond the Cases expressed by that Treaty.⁷⁴

He then drew an analogy between this case and another in which a French merchantman had been tried in an English Admiralty court and although the master of the vessel had successfully escaped, his ship itself and the goods on board were confiscated as “pirate” goods, and a French formal objection rejected.

[T]he King and his Council were pleased to adjudge, he was sufficiently founded in Point of Jurisdiction, to confiscate that Ship and Goods and to Try capitally the Person himself, had he been in hold; the Matter of Renvoy [reference to foreign, in this case French, law] being a Thing quite disused among Princes; and as every Man, by the Usage of our *European* [*sic*] Nations, is justiciable in the Place where the Crime is committed; so are Pyrates, being reputed out of the Protection of all Laws and Privileges, and to be tried in what Ports soever they are taken.⁷⁵

This logic, asserting that the law of the place of the crime determines jurisdiction but that because “Pirates” are not protected by jurisdictional limits fixed by European practice among sovereigns, they can be tried in whatever port they are taken, seems insupportable; the jurisdictional quarrel was not between the English and the “pirate,” but between the English and the French sovereigns. Implicit is the denial of the exclusiveness of French jurisdiction with regard to events occurring on board a French ship, and there is no explicit reference to English victims or general English jurisdiction on the high sea to substantiate the conclusion. Instead, it treats jurisdiction as an assertion of sovereignty to be made on any territorial linkage between the accused and the “sovereign;” if nothing else, the place of arrest, which seems a minimal link that would exist in any case in which a criminal trial could be contemplated as a practical matter. It appears to reach that conclusion by supposing there to be a lacuna in the normal jurisdictional rules in the case of accused “Pirates,” cutting them off from the protection of their own sovereigns even before any act of “piracy” has been proved in a court. Since the jurisdiction seems unlimited, resting on the mere accusation of “piracy,” it amounts to making port calls by any vessel in a port ruled by a country other than the country of the vessel itself, a very dangerous business. The risks were probably increased by the notion that, as in the case recited by Jenkins, the ship and goods once denominated “pirate goods” were subject to total confiscation by the court itself.

But under this approach, it would have seemed that the Scots were properly tried by the Dutch authorities, and that is the opposite conclusion to the one Jenkins reached. The basis for distinguishing the two cases was to downplay the nationality link evidenced by the flag of the “pirate” vessel as a basis for interposition by the sovereign to protect his subjects, and to raise

the license, "Commission," issued by the foreign sovereign to a position of prime importance:

But as the Law distinguishes between a Pirate who is a Highwayman, and sets up for Robbing, either having no Commission at all, or else hath two or three, and a lawful Man of War that exceeds his Commission [including, apparently, a privateer; the case of the Scots privateers would not have been covered if Jenkins had intended his language to draw a distinction between privateering and naval activity]; so I think, Sir, you had Right to interpose for these Scots . . .; for tho' the Crimes were great and notorious, yet the Proceedings whereby they were laid open and proved to be such, being void and null, if the Judges did (as I am of Opinion they did) exceed the Bounds of their Power, it may be truly said, the Crimes are but *pretendu* [supposed], being the Proofs made of them are not *sufficient* in Law.⁷⁶

In the rest of the opinion, Jenkins finds two other arguments for English jurisdiction to the exclusion of the Dutch. First, that a treaty between England and the Netherlands, by not mentioning criminal trials in the article dealing with reparations for damages left nationality as the major jurisdictional link;⁷⁷ and second, that all ships in public service, whether naval, privateer, or impressed "out of the Thames," are to some degree the arms of the King, that taking them is "taking the King's Weapons out of their [the property owners', the Scots'] Hands *pro tanto*," and thus that proper recourse for those unjustly injured by the operation of those vessels is appeal to the King, not the exercise of foreign jurisdiction over them.⁷⁸

The treaty argument seems to depend on matters of interpretation with which the Dutch officials disagreed and which seem in other ways weak.⁷⁹ The King's Weapons argument would seem to apply to all vessels of English flag, as at least potentially the King's weapons because subject to English law which could order them at any moment into the King's service, thus to reverse the earlier argument distinguishing a French flag vessel sought to be protected diplomatically by France, and a French privateer that would be hypothetically the least French vessel that could legally be excluded from English jurisdiction by French interposition. The only thread that seems to run through the argument by Jenkins is that England wins all the time. It may thus be supposed to be an adversary's brief for the position most favorable to England, but its persuasiveness as an incisive analysis of the international law governing jurisdiction in cases of supposed "piracy" seems small.

The differences between Molloy and Jenkins, while appearing technical and simply two different ways of approaching a single reality with no practical implications, are really very significant indeed. Two quite different conceptions of the law applicable to "piracy" are involved; conceptions which reappear time and again in English and American courts and which account, in part, for the inconsistencies in later decisions. From Molloy's point of view, there is a "natural law" forbidding any person to deprive another of life or property without a higher motive supported by reason or the historical evolution of the overall system. Life and property being the

natural right of all, the taking of the life or property of another cannot be consistent with natural law unless some other natural right, superior to the rights of life or property of the victim, is involved. Such higher rights might exist in the law that authorizes each person to defend himself and his property even if it means depriving another—certainly if that other is the aggressor seeking to achieve a taking not justifiable on some equivalent basis. It is possible to speculate further as to Molloy's unexpressed thoughts, for example, to wonder if the protection of the property of another would justify the taking of the life of an innocent bystander. But such speculation leads to endless complications and is best left to the courts that find Molloy's basic attitudes appealing.

Jenkins, as a judge dealing in Common Law procedures as applied in Admiralty jurisdiction to criminal cases, and as a "political" Privy Counsellor to King Charles II, opposed Molloy's fundamental natural law approach with an emphasis on commissions and legal authority. From this point of view, there is no international law of "piracy"; only a municipal law authorizing its subjects to act against some people which that municipal law designates "pirates" on whatever basis it chooses. The limits to this approach seem analogous to the limits that reality and politics fixed on the approach taken by Gentili from the point of view of an international law expert, and it seems fair to label both "positivist" jurists. They both trace the legality of action to authorization by a state, which is conceived as exercising complete discretion on the basis of political factors to grant or withhold the legal labels or authorizations. The authorization determines the legality of action under the system that grants or withholds authorization; there is no question of morality, reason or motive on the part of either the "pirate" or the "commissioner" apprehending him.

There are so many implications to this split in fundamental orientation that a working out of the major ones is best left to works on jurisprudence. Only a few can be mentioned here. For present purposes, perhaps the most important is the utility of the Grotius (for that is where it first appears applied to the law of "piracy" as known today)-Molloy-natural law approach to Common Law and Admiralty tribunals. In the absence of a formal expression of public policy in a writing like a statute or treaty, a tribunal must be guided by reason in the light of higher principle, and the judges must be aware that their capacity to function as legislators, attaching legal labels and results for the sake of national interest, is severely limited by the structure of the forum and their own training and experience. Judges, bound by rules of evidence, and concepts of both substantive and procedural fairness to those accused of "crimes," cannot impose what they would like the law to be; they are bound by tradition and the English Constitution tracing back to Magna Carta and before to apply the law as it exists reflected in the traditions and habits of English society with only passing regard for what might be desirable for the

future. To them, appeals to reason and higher principles recognized in the legal tradition are liberating, and justify departures from the harshness of rules that unmitigated would require the punishment of a person who is morally innocent.

On the other hand, to legislators, whether in Parliament or acting directly for the Crown as ministers or members of a council with discretion to make law, or as naval officers or merchants seeking to protect their lives or property or the lives or property of those who rely on them for protection, the notion that deep analyses of the underlying values of society must be undertaken before a “pirate” can be properly hanged is absurd. A simple rule that life and property can legally be protected from any assault is attractive, and the notion that any responsible person is commissioned by the operation of law, whether via a commission issued by the Crown’s officers or by direct operation of the King’s will without a written commission, is irresistible. The world is simple and authority lies in the substantial people possessed of property who undertake hazards for profit which the society considers beneficial to all. If there are complications, then legislators or counsellors can confront them as a matter of policy and change the rules to take account of them. To practical men of affairs, and statesmen and merchants, particularly sea captains, are practical men of affairs because the political and economic system in England favors practical men of affairs for those functions in society, the Jenkins approach is the only one that makes sense.

The Courts

Jurisdiction. As to jurisdiction and the nationality of the victims, in *Rex v. Dawson*,⁸⁰ aside from repeating some of the language of the statute of 1536, Hedges developed Leoline Jenkins’s jury charge of the previous generation.⁸¹ Hedges wrote:

The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court.⁸²

He ends with a rousing appeal to patriotism and glory to encourage the jurors to do all they could “to the end that by the administration of equal justice, the discipline of the seas, on which the good and safety of this nation entirely depends, may be supported and maintained.”⁸³ The grand jury brought in bills against the defendants, who were then tried, convicted and hanged.⁸⁴ Their defenses were to the facts, seem unconvincing as reported, and raised no further legal issues.

Again, Hedges's language seems to reach very far. He did not address the issue of whether an Englishman was authorized by implied commission or by universal natural law to hang pirates wherever caught, nor did he really address the question of universal jurisdiction: The applicability of English conceptions of piracy as a crime to foreigners acting beyond the reach of English territorial claims. In the case before him, no foreigners were defendants and no extraordinary powers in uncommissioned pirate-captors were at issue. Thus the entire proceeding can be rationalized as the application of English municipal law to Englishmen through the normal processes of English judicial administration, and the unqualified assertions of wider authority are mere puffery.

The most enlightening case of the "classical" series dealing with national jurisdiction over foreign "pirates" is the notorious trial in 1705 of Thomas Green before the High Court of Admiralty of Scotland.⁸⁵ The procedures of Scotland followed the forms of the Civil Law; the statute of 1536 did not apply directly as an act of Parliament in Scotland since the union of the crowns was not until the accession of James I/VI to the throne of England in 1603, and the Acts of Union uniting the Parliaments of England and Scotland were not passed until 1706-1707,⁸⁶ two years after Green's trial.

Captain Green was an Englishman, master of a ship owned by the Company of Scotland Trading to Africa and the Indies in competition with the English East India Company. He sailed with a commission authorizing him to attack and suppress pirates, issued by King William III.⁸⁷ He and his crew, on arrival in Edinburgh to report to their owners on a voyage to Africa and India, were arrested for "piracy" and an elaborate series of factual allegations made to the effect that they had plundered another Scottish vessel near Calicut, sunk the vessel and tossed its crew over the side to remove witnesses. Green and his accused English crewmen were convicted and Green, his first mate and one other man were hanged, apparently to appease a mob. It was later discovered that the supposed victims were alive and well in India and that the supposed "piracy" had never in fact occurred;⁸⁸ all the testimony about it was explicable on other grounds, such as currying favor with the mob.

From the point of view of this study, the important part of the case was its handling of the jurisdictional question. Green was not a Scot, nor was his ship considered a Scottish ship for purposes of jurisdiction, nor was any act connected with the supposed "piracy" committed in Scotland. The tribunal did not rest its jurisdiction on the Scottish nationality of the supposed victims, although for popular opinion in Edinburgh that seems to have been the most important connection between Green and Scots law. The tribunal took a higher line, adopting the argument of the "pursuer" (prosecuting attorney):

That though the competency of the judge in criminals be ordinarily said, to be found either *in loco delicti* (the place where crime was committed) or *in loco domicilii* (place of habitation of the delinquents) or *in loco originis* (the place of their birth) yet there is a superior consideration, and that is the *locus deprehensionis* (place where they were taken) where

the criminal is found and apprehended, which doth so over-rule in this matter, that neither the *locus domicilii* . . . nor the *locus originis* . . . doth found the judges competency, *nisi ibi reus apprehendatur* (except the criminal be apprehended there). And so it is that here the pannels [defendants] were and are apprehended, which happening in the cause of piracy, a crime against the law of nations, and which all mankind have an interest to pursue, wherever the pirates can be found; the Procurator Fiscal's [Prosecutor's] interest to pursue is thereby manifest, and the pannels being here apprehended, cannot decline the admiral's jurisdiction as incompetent.⁸⁹

This logic represents an assertion of universality of jurisdiction in the case of "piracy" that goes far beyond the precedents. The normal rule was apparently conceived to be that the tribunals of the *locus delicti* had competence; which is a reflection of the "territorial" basis of jurisdiction familiar to international lawyers. In the Green case it would have supported English jurisdiction on the basis of the analogy between a vessel and territory of the flag or licensing state.⁹⁰ Prescriptive or legislative jurisdiction based on residence or nationality (*locus domicilii* or *locus originis*) of the defendant, it was correctly argued, is not sufficient to give a particular court competence unless the defendant is physically before the tribunal, i.e., in these pre-extradition days, one of those places is also the place in which the defendant was apprehended and detained (*locus apprehendatis*). But the leap from the place of physical detention supporting jurisdiction based on residence or nationality, to finding prescriptive jurisdiction in the place of physical detention with no other contact, is a giant leap supported in the pursuer's logic only by the assertion that "piracy" is a crime against the law of nations and that all mankind have an interest in pursuing it. This legal interest in pursuit (i.e., in prosecution), the legally essential link between the incident and the application of local law to it, the link that gives to a Scottish tribunal the competence to hear the case without being considered an officious intermeddler in matters of no concern to Scots law, is asserted to rest on the characterization of "piracy" as a crime against the law of nations. From that characterization is said to flow universal competence, including the competence of a Scots tribunal.

Commissions Become Evidentiary Instead of Determinative. The great case setting the English pattern concerning the need of an Englishman for an English "commission" was the trial in 1701 of William Kidd.⁹¹ Apparently Captain Kidd was well-known in England, and there is clear evidence that there had been business dealings of some sort between him (Kidd was a native Londoner) and the Earl of Bellamont, "Governor of New England," an Irish peer.⁹² The degree to which those dealings might have involved the Governor in the profits of Kidd's adventures is not clear, but Kidd was formally a privateer, operating under two commissions sealed in the name of King William III, and it would have been entirely proper for the King's representative in any colony to be on convivial terms with a successful privateer.

Kidd's two commissions were dated 26 January 1695 and 11 December 1695. The first specifically involved Kidd in the New World:

To our trusted and well-beloved Captain William Kidd, commander of the ship Adventure-Galley, or to any other the commander for the time being, greeting. Whereas we are informed that captain William Mase or Mace, and other our subjects, native inhabitants of New-England, New-York, or elsewhere, in our plantations in America, have associated themselves with diverse other wicked and ill-disposed persons, and do against the law of nations, daily commit many and great piracies, robberies, and depredations upon the seas in the parts of America and in other parts, to the great hindrance and discouragement of trade and navigation, and to the danger and hurt of our loving subjects, our allies, and all others navigating thereon upon their lawful occasions: Now know, that we being desirous to prevent the aforesaid mischiefs, and, as far as in us lies to bring the said pirates, free-booters, and sea-rovers to justice, have thought fit, and do hereby give and grant unto you the said captain William Kidd (to whom our commissioners for exercising the office of our lord high-admiral of England, have granted a commission as a private man of war . . .) . . . and unto the officers, mariners, and others, who shall be under your command, full power and authority to apprehend, stop, and take into your custody, as well the said captain Thomas Too, John Ireland, captain Thomas Wake, and captain William Mase or Mace, as all such pirates, free-booters and sea-rovers, being either our own subjects or of any other nations associated with us, which you shall meet upon the coast or seas of America, or in any other seas or place with their ships and vessels, and also such merchandizes, money, goods, and wares as shall be found on board, or with them, in case they shall willingly yield themselves: And if they will not submit without fighting, then you are by force to compel them to yield. And we do also require you to bring, or cause to be brought such pirates, free-booters, and sea-rovers, as you shall seize, to a legal trial; to the end they may be proceeded against according to law in such cases And we hereby strictly charge and command that you shall answer the same [accounting for every ship and pirate taken] at your peril, that you do not in any manner harm or molest any of our friends or allies, their ships, or subjects, by colour or pretence of these presents, or the authority there granted⁹³

The second recites that there have been injuries and acts of hostility committed by the French king and his subjects upon English subjects, that "many and frequent demands" had been fruitlessly made for redress and reparation, that the Privy Council had ordered "that general reprisals be granted against the ships, goods, and subjects of the French king." It then grants:

Commission to, and do[es] license and authorise the said Wm. Kidd to set forth in warlike manner the said ship called The Adventure-Galley, under his own command, and therewith by force of arms to apprehend, seize, and take the ships, vessels and goods belonging to the French king and his subjects, or inhabitants within the dominions of the said French king, and such other ships, vessels, and goods, as are, or shall be liable to confiscation, and to bring the same to such port as shall be most convenient, in order to have them legally adjudged in our high court of admiralty, or such other court of admiralty as shall be lawfully authorized in that behalf⁹⁴

Kidd was first charged with the murder of William Moore, a gunner of the *Adventure-Galley*; uncontradicted testimony had Moore muttering about Kidd

not seizing a near-by Dutch ship, and Kidd, apprehensive of mutiny by a crew bent on turning to piracy, bashing Moore on the side of the head with a handy iron-bound bucket and cracking his skull. The incident occurred off the Malabar Coast (southwest India) and the defense of imminent mutiny was contradicted by several crewmembers called as witnesses testifying that the threatened mutiny by Moore and others wanting to turn pirate had been quelled some weeks before the killing.

The jury took only an hour to deliver a verdict of guilty under a charge relating solely to the English law of murder by Lord Chief Baron Ward.⁹⁵

The next day, Kidd and his companions were tried together for "piracy." The incident involved the capture "piratically and feloniously" of a merchant ship, the *Quedagh* [Kedah] *Merchant*, of unknown flag, "upon the high sea . . . about ten leagues from Cutsheen [Cochin], in the East-Indies, and within the jurisdiction of the admiralty of England." The events were alleged to have occurred on 30 January 1697 and the year after.⁹⁶

Three of the prisoners, James Howe, Nicholas Churchill and Darby Mullins, sought to take advantage of a pardon proclaimed by William III⁹⁷ but failed on the ground that they had surrendered themselves to an English officer other than one of the four Commissioners named in the Proclamation. Indicative of the attitude towards Kidd in London when the pardon was proclaimed in 1698, the pardon covered all within the area east of the Cape of Good Hope who had been guilty of "piracies or robberies committed by them upon the sea or land" and who surrendered to the named Commissioners within the period fixed by the proclamation, but specifically excludes "Henry Every alias Bridgman, and William Kidd."⁹⁸

Kidd sailed from New York in 1696 and flew a French flag when chasing the *Quedagh Merchant*.⁹⁹ His defense was that the *Quedagh Merchant* had a French pass and that he was commissioned to take French vessels; also that his crew had threatened to mutiny if he did not take the *Quedagh Merchant*.¹⁰⁰ But he could not produce the French pass (which he claimed was being withheld by the Earl of Bellamont) and the court seemed disinclined to believe him. The court also seemed to believe that the commission to seize French property did not extend to the property of "Armenians" even if they had French passes.¹⁰¹ In his charge to the jury, Lord Chief Baron Ward emphasized what he regarded as Kidd's repeated acts not consistent with the terms of his commissions:

Could he have proved, that what he did was in pursuance of his commissions, it had been something: but, what had he to do to make any attack on these ships, the owners and freighters whereof were in amity with the king? This does not appear to be an action suitable to his commission. After he had done this, he came to land, and there, and afterwards [*sic*; obviously "afterwards"] at sea, pursued strange methods, as you have heard. The seeming justification he depends on is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by . . . [W]e are confined to the *Quedagh Merchant*; but what he did before, shews his mind and intention not to act by his commissions, which warrant no such things . . .

Now this is the great case that is before you, on which the indictment turns: the ship and goods, as you have heard, are said by the witnesses to be the goods of the Armenians, and other people that were in amity with the king; and captain Kidd would have them to be the goods of Frenchmen, or at least, that this ship was sailed under French passes. Now if it were so, as Capt. Kidd says, it was a lawful prize, and liable to confiscation; but if they were the goods of persons in amity with the king, and the ship was not navigated under French passes, it is very plain it was a piratical taking of them. . . . If he had acted pursuant to his commission, he ought to have condemned the ship and goods, if they were a French interest, or sailed under a French pass; but in his not condemning them, he seems to shout his aim, mind, and intention, that he did not act in that case by virtue of his commission, but quite contrary to it; for he takes the ship, and shares the money and goods, and, was taken in that very ship [Kidd had transferred from the leaky *Adventure-Galley* to the sound *Quedagh Merchant*] by lord Bellamont, and he had continued in that ship till that time, so there is no colour or pretence appears, that he intended to bring this ship to England to be condemned, or to have condemned it in any of the English plantations, having disposed of the whole cargo. . . .¹⁰²

Turning to the other prisoners, the charge to the jury first focused on the three who had, by documents of indenture and witnesses proved themselves to be servants of Kidd and others on the voyage:

Now, Gentlemen, there must go an intention of the mind, and a freedom of the will, to the committing a felony or piracy. A pirate is not to be understood to be under constraint, but a free agent It is true, a servant is not bound to obey his master but in lawful things, which they say they thought this was, and that they knew not to the contrary, but that their masters acted according to the king's commission; and therefore their case must be left to your consideration, whether you think them upon the whole matter guilty or no. . . .¹⁰³

As to the rest,

[W]e were, say they, under the captain, and acted under him as their commander: and, gentlemen, so far as they acted under his lawful commands, and by virtue and in pursuance of his commissions, it must be admitted they were justifiable, and ought to be justified: but how far forth that hath been, the actions of the captain and their own will best make it appear. It is not contested, but that these men knew, and were sensible of what was done and acted, and did take part in it, and had the benefit of what was taken shared amongst them: and if the taking of this ship and goods was unlawful, then these men can claim no advantage by these commissions. . . . [I]f you are quite satisfied that they have knowingly and wilfully been concerned or partaken with Capt. Kidd in taking this ship, and dividing the goods, and that piratically and feloniously, then they will be guilty within this indictment. . . . Whilst men pursue their commissions they must be justified; but when they do things not authorised, or never acted by them, it is as if there had been no commission at all. . . .¹⁰⁴

The verdict under this charge was guilty all, including Kidd, except for the three servants, Robert Lamley, William Jenkins and Richard Barlicorn.¹⁰⁵

A trial on four further indictments was held, and after that another trial on yet two more indictments, all relating to the taking of various specific ships not French or piratical within the sense of the two commissions. The results were the same as before, with the three servants acquitted and Kidd with six

of his crew convicted. The charges to the juries by Mr. Justice Turton follow the lead of the charge by Lord Chief Baron Ward. The major emphasis of the evidence is to show which of the accused profited from the shares distributed by Kidd after the sale of the captured valuables, the three servants either not being shown to have received any share at all, or to have received a half share which it is alleged they turned over immediately to their masters who were Kidd himself, Abel Owens (the cook) and George Bullen (the mate). Kidd and his six convicted crew members were then hanged.¹⁰⁶

It appears that as to the substance of the "crime" of "piracy," the charge given by Justice Hedges was not repeated, but its substance, that "piracy" was simply English Common Law "robbery" within the jurisdiction of the Admiralty, was assumed without any analysis. The essential elements of the crime are there, and no discussion of its borders was necessary or attempted. The murder of his own crewman by Kidd was not charged as "piracy" but directly as "murder." Whether this was done because the entire action occurred in a single vessel under the English flag (and thus no need was felt to refer to a legal word of art that might imply international significance) or because all the actors, accused and victim, were English, or any other reason, is not made clear. The same procedures were used by the tribunal in dealing with this charge as in dealing with the charges of "piracy" in the other two trials, thus it seems likely that the "felony" term of the statute of 1536 was being used, under which the procedures for "piracy" and for "felony" trials regarding events within the jurisdiction of the Admiralty were identical.¹⁰⁷

It seems significant that the action in excess of his commission did not appear immediately to have involved the crime of "piracy." In Lord Chief Baron Ward's charge to the jury, much was made of the failure of Kidd to bring the captured *Quedagh Merchant* in for legal condemnation in accordance with the terms of the commissions, but nothing is made of the possibility that acting under the commission a mistake might have been made regarding the subordination or French connection of the captured ship. The argument regarding the possible immunity of the goods of merchants who are subjects of nations in amity with the King of England was directed at Kidd's apparent knowledge that they were not French or piratical (thus there being no possibility of an act under the commissions which was excessive because simply mistaken as to facts), and Kidd's ignoring the directions of his commissions with regard to the disposition of his captures. Apparently, errors might lead to loss of the prize in condemnation proceedings, and there was every likelihood that egregious errors would result ultimately in revocation of the commission as a practical matter. But such errors were not regarded as enough to make a good-faith capture into a "piratical" act. The problem was to prevent privateers using their commissions as a license to take everything and then try to buy off the innocent victims of their taking cheaply one by one if ever a victim found the privateer in a port with an English tribunal in it. The

solution was to label such takings “piracy” when the privateer himself did not allow the victim the opportunity to present his case in an English prize court before the goods were sold and the proceeds distributed among the crew of the privateer.

In fact, this solution was inconsistent with history and practical convenience outside of the overstated rhetoric of the Kidd case itself. Illustrative examples of non-piratical takings in excess of or without commissions abound. On 16 December 1664 the Privy Council issued a General Reprisal Order in the name of Charles II authorizing retroactively the capture of Dutch vessels already taken without license by English privateers at the start of the second Anglo-Dutch War.¹⁰⁸ At the start of the third Anglo-Dutch War in 1672, Sir Leoline Jenkins sitting as a Judge in Admiralty allowed an English captor his privateer’s share of a Dutch capture despite the lack of a commission, saying it was “out of grace” and because the captor was “then in the service of the king.”¹⁰⁹ But all captures of enemy vessels during wartime were presumably “in the service of the king,” and by this logic there would be very few cases in which commissions would be necessary at all, principally cases in which the accused “pirate” was merely setting sail in violation of other regulations, or was accused of “piracy” after an unsuccessful attack or attempt on a vessel later shown not to have been an enemy vessel.¹¹⁰ Thus it appears that the requirement of a license or commission to exercise belligerent rights of capture at sea in the 17th century was not as rigid as some of the later rhetoric about license requirements make it appear. Kidd’s problem was less his exceeding his license than in his converting the captured property to his own use without legal condemnation procedures required not only by the terms of the usual license (and his own commissions), but by any conception of legal rights of property that distinguishes between mere possession and other rights commonly associated with property, such as rights to future possession and rights to use even without possession. If this is correct, then a great deal of Lord Chief Baron Ward’s charge to the jury in the Kidd case is exaggerated, and the final phrases¹¹¹ read in the context of the times do not make criminal all those acts not authorized by a commission, but make the commission to do some things relevant merely with regard to motive and other legal implications of things done without the authority of a commission; that is not a rigid positivist position, but almost a legal platitude.

In the Kidd case, the essence of the distinction between a commissioner exceeding his authority and a “pirate” was conceived to be whether the accused took the captured valuables in to a proper tribunal for condemnation. If he did, regardless of the ultimate decision as to the legality of the capture, he was no pirate. If he did not, he would appear to have been a pirate as far as English municipal law was concerned. The action in excess of a commission that would turn a privateer to a pirate was

not a question of whose goods or ships he might take, but what he did with them after the taking.

This interpretation of *Rex v. Kidd* is confirmed by a short review of the use of licenses as a “police” tool of the centralizing government of England under the Tudors. This subordination of private “police” activity to public authority had begun in the earliest days of commissions aimed at hunting “pirates.” It may be remembered that in 1511 King Henry VIII had commissioned John Hopton to

seize and subdue all pirates wherever they shall from time to time be found; and if they cannot otherwise be seized, to destroy them, and to bring all and singular of them, who are captured, into one of our ports, and to hand over and deliver them . . . to our commissioners.¹¹²

It was also pointed out that in a series of commissions and proclamations beginning in 1575 Queen Elizabeth had authorized various high officials to license privateers to capture “pirates,” but had consistently maintained that no changes in title to any goods or vessels could occur unless the items had been first submitted to an English court for condemnation or equivalent legal proceeding;¹¹³ that to the extent the legal opinion of David Lewes in 1579 concluded that by the law of the sea any person might seize pirate goods without any commission, that opinion was ignored by the highest administrators in England;¹¹⁴ that in 1589 an Order in Council declared that no title to goods derived from capture at sea unless decreed by an Admiralty court;¹¹⁵ and that an Englishman could find himself in serious legal difficulties if he purported to hunt pirates without a commission after that time.¹¹⁶ In those cases in which a prize was taken with the English captor’s license under some cloud, as long as the prize was brought in to an English port for condemnation, there does not appear to be any case in which the captor faced significant difficulties.¹¹⁷

On this view of things, it was impossible to maintain the jurisdictional provisions of the statute of 1536 unamended, because taking the captured valuables to England for Admiralty condemnation was clearly impracticable, and sale without such proceedings would open the privateer to a charge of “piracy” even if he had done his best to assure the legitimacy of the taking. Moreover, for trials under the statute on a charge of “piracy,” removal of the accused and witnesses to England was expensive and time consuming. And, as in the case of the possible dereliction by the Earl of Bellamont with regard to the French pass *Kidd* alleged to have been found in the *Quedagh Merchant*, serious injustice might be done to accused “pirates” simply through the vicissitudes of bureaucracy and transportation in the early 18th century (and, indeed, for two hundred years thereafter).

This last difficulty was solved by a statute usually dated to 1700¹¹⁸ authorizing the holding of Admiralty Commissions to try “pirates” outside of England. That statute repeats the substantive terms of the statute of 1536 and

adds provisions authorizing the establishment of colonial Admiralty courts, which could hear property cases in the usual Admiralty fashion. But, even more significantly from the point of view of this study, it uses the word "pirates," for the first time in England, as a statutory word of art, prescribing punishment as "pirates" for those subjects or denizens of England who commit any act of hostility against other subjects of His Majesty at sea under color of a commission issued by a "forreigne prince or state or pretense of authority from any person,"¹¹⁹ and any captain or seaman betraying his trust.¹²⁰ This general language seems to include within the English definition of "piracy" acts within a single vessel not involving robbery, such as mutiny and barratry (embezzlement of ship or cargo by a captain or other person with limited rights of disposal). It thus revived the Coke-Hale definition of "piracy" as a form of "petty treason" including "mutiny."¹²¹

This statute was amended many times as the English (British, after 1707 and the Act of Union with Scotland)¹²² modified their municipal law in various technical ways not pertinent to this study.¹²³ The next major adjustment of British municipal law to raise the question of the relationship between that law and the international law relating to "piracy" was not until 1825, when a bounty paid out of public money was authorized for the destruction of foreign "pirates."¹²⁴

It is possible to conclude from the fact that the prescriptions of that statute were restricted to English subjects or denizens that the statute did not purport to incorporate into English law any particular rules of international law. It did not seek to define "piracy" in any sense that would imply an English assertion that the crime called "piracy" for purposes of English tribunals was equally punishable by those tribunals if the "criminal" were a foreigner acting outside the territory of England—or even within England.

"Piracy" or "Felony" in English Law as Adopted in American Courts. The first known trial under the authority of the Act of 1700 was held in the new world. Captain John Quelch and some of his crew were tried in Boston beginning 13 June 1704.¹²⁵ Nine separate articles were levied against Quelch and his men with regard to actions taken by them against Portuguese victims (England being then at peace with Portugal) in November 1703 to February 1704. The points of similarity in eight of the nine charges against Quelch are the identical recitals:

For that you, the said John Quelch, with divers others, . . . at or near [such a place] . . . by force and arms, upon the high sea (within the jurisdiction of the admiralty of England) [parentheses *sic*] piratically and feloniously did surprize, seize and take [a described vessel] . . . belonging to the subjects of the king of Portugal, (her majesty's good ally) [parentheses *sic*] and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take [described articles of stated value].

The ninth article is the only one that separates “feloniously” from “piratically” and therefore seems significant. The difference is in the last clauses which say:

... and then and there, within the jurisdiction aforesaid, did feloniously kill and murder the commander thereof, and wounded several others, and out of her piratically, by force and arms, did take and carry away [various listed items] contrary to the statutes in that case made and provided.

The reference to statutes in the last line seems to relate only to this ninth article, and, if so, its meaning is obscure. If it is intended to apply to all the preceding articles charged against Quelch, it seems mere form; there is no express indication which precise statutes are intended, presumably the statutes of 1536 and 1700.

It appears to have been the conception of the officials making the articles, that “piratically” referred to the taking of property by force and arms, and that meshes with the idea of “piracy” being the Admiralty term for robbery as stated by Sir Charles Hedges in his 1696 charge to the jury in the Dawson case. Killing does not appear to have been considered part of “piracy,” but to be included in the “felony” as well as the “murder” term of the statute of 1536. Since neither “murder” nor “robbery” of a stranger was a “felony” in 1536 and the statute of 1536 in fact does not use the word “piracy” in its substantive provisions, and uses the words “robberies and murders” directly,¹²⁶ this evolution of form with regard to the words “piratically” and “feloniously” needs some explanation. Apparently, the statute of 1700, having adopted the word “piracy” into the legal vocabulary in a way directly pertinent to the Quelch case, “piratically” was adopted in the articles to reflect the new statutory language relating to jurisdiction, and “feloniously” to reflect an evolving definition transferring the “petty treason” label to some serious crimes in which the legal results of “petty treason” were sought to be applied without all the feudal-status baggage of the phrase.

The opening statement of Paul Dudley, Attorney General and Her Majesty’s (Queen Anne’s) Advocate for the Court of Admiralty, to the commissioners holding the trial indicates how far English thought had come, building on the misinterpreted excerpts of Roman opinion to make a municipal crime of “piracy,” and then call it part of international law:

The prisoner at the bar stands . . . charged with several piracies, robberies and murder, committed by himself and his company, upon the high sea (upon the subjects of the king of Portugal, her majesty’s good ally) the worst and most intolerable of crimes that can be committed by men. A pirate was therefore justly called by the Romans, *hostis humani generis*: And the civil law saith of them, that neither faith nor oath is to be kept with them; and therefore if a man that is a prisoner to pirates, for the sake of his liberty promise a ransom, he is under no obligation to make good his promise; for pirates are not entitled to law, not so much as the law of arms; for which reason it is said, if piracy be committed upon the ocean, and the pirates in the attempt happen to be overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment,

by hanging them at the mainyard; a sign of its being of a very different and worse nature than any crime committed upon the land; for robbers and murderers, and even traitors themselves, may not be put to death without passing a formal trial. . . .¹²⁷

Aside from other errors or exaggerations, the notion that “pirates” could be hanged by whoever catches them in an attempt seems inconsistent with the terms of Kidd’s commission to hunt down “pirates,” which is certainly typical in this regard. That commission required Kidd “to bring, or cause to be brought, such pirates . . . as you shall seize, to a legal trial” whether the pirate was taken in battle or otherwise.¹²⁸ Dudley’s notion also seems inconsistent with the very idea that a commission was necessary to hunt “pirates,” and, although the lack of a commission in many cases could be cured retroactively through a grant or by judicial reasoning, the centralizing positivist jurists and administrators from the time of Queen Elizabeth, a century and a quarter before, had insisted on the legal form being acknowledged. Dudley followed naturalist logic identified in this area with Charles Molloy. He appears to have felt that natural law rights of property and self-defense, possibly coupled with the sense of collective defense of property and life believed by naturalist philosophers of the time to underlie a hypothetical “social contract”¹²⁹ on which all political structures must rest for their natural law power to exercise law-making authority, were enough to justify the hanging of “pirates” defined as violators of those natural rights. But why he chose to express those sentiments before this court in this case is not known. The formal need for a commission before an Englishman could, by the municipal law of England, legally hunt pirates had been well established in practice by 1704.

Quelch’s defense went to the facts and the form of trial under the statute of 1536. On those points his arguments were rejected and he was convicted. No question about the essential elements of the offense of “piracy” was raised nor any jurisdictional argument.¹³⁰

The trials of the men associated with Quelch indicate some additional undercurrents associated with the conception of “piracy” in 1704. Three black slaves had been forcibly taken from their owners by Quelch and served as cooks and in other non-combatant capacities in the crew. Presumably they had no share of the spoils. They were acquitted. The record does not indicate the basis the court felt that it had to apply any system of law to these men, who, by the law of Boston at the time were not subjects of England. The Queen’s Advocate (Dudley?) following the naturalist approach adopted for the Quelch trial, addressed the point:

[T]he three prisoners now at the bar are of a different complexion, it is true, from the rest that have been arraigned upon these articles; but it is very well known, that the first and most famous pirates that have been in the world were of their colour;¹³¹ and negroes, though slaves, are as capable of taking away the lives and estates of mankind, as any freemen in the world. . . .¹³²

The implication, that international law applied to all men regardless of their legal status of bondage under any particular municipal law, and that “piracy” was a crime under a naturalist version of international law, does not appear to have been the subject of any comment at the time. The positivist counter-model, that the English law of “piracy” under the various statutes of the realm applied to slaves as to free men as a matter strictly of English law, was not posed either.

Six Englishmen members of Quelch’s crew were then tried and convicted of “piracy” despite their testimony that they took no active part in the captures. The tribunal pressed them on two points: (1) Did they ever protest against the action; and (2) Did they take a share of the spoils. The evidence was that they made no protest and did share in the takings. Several other members of the crew then changed their not guilty pleas to guilty, and two other trials were held; all were sentenced to death. There were two final acquittals; one, the ship’s clerk who appears to have been sick throughout the entire voyage and took no part in the captures and received no share of the takings; the other, a servant boy only fifteen years old who was adjudged not guilty as a matter of the court’s indulgence.¹³³

The Classical Publicists: Zouche to Bynkershoek

The “Law of Nations.” The phrase “law of nations” in 1705 was itself ambiguous. Richard Zouche, an English Admiralty judge and civilian, distinguished in 1650 between “the law of nations” and “the law between nations.” The latter, which he called in Latin “*Jus inter Gentes*,” he regarded as the descendant of the Roman “*Jus Feciale*” and “has to do with the conditions of kings, peoples, and foreign nations, in fact with the whole law of Peace and War.” The former, the “law of nations,” he defined as:

[T]he common element in the law which the peoples of single nations use among themselves; . . . the law which is observed in common between princes or peoples of different nations.¹³⁴

This use of language would imply that to the degree “piracy” is regarded as a crime against the “law of nations,” it is merely an act proscribed by the laws of all separate states; the fact that an act is forbidden by all states does not address the problem of officious intermeddling—of one state applying its version of the law through its tribunal to a person acting beyond the range of that state’s legal interest.¹³⁵

To natural law jurists, there are two ways to bridge this gap in logic. One is to eliminate the distinction between the “law of nations” and the “law between nations” posited by Zouche. That had been the course taken by Samuel Pufendorf in 1660 on the argument that the substance of both systems of law rested on “reason” alone, and that therefore there could be no differences in the law based on differences in the character of the actors, which he regarded as small:

... [T]he Law of Nations . . . in the eyes of some men, is nothing other than the law of nature, in so far as different nations, not united with one another by a supreme command, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature. On this point there is no reason for our conducting any special discussion here, since what we recount on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person. Aside from this law, we are of the opinion that there is no law of nations. . . .¹³⁶

From this point of view, the problem of intermeddling could be avoided by regarding each country's law applying to "piracy" as a national means of applying the underlying natural law to individuals who have transgressed it; there would be universal "standing" to apply national law because the national law is a mere expression of the universal natural law applied by one subject of that law (the state) to another (the individual "pirate"). The special interest of the state derives from the universality of the system.

Another way to bridge the gap in logic was the way expressly adopted by none at this time, but implicit in much naturalist writing, to call the right to commerce a "natural right" justifying "war" with states impeding commerce between willing partners.¹³⁷ If war against states could be justified on the basis of interference with the natural right to trade, *a fortiori* it would seem that those obstructing such trade without commissions issued by the authority of states through their governments could be blown away. If war against them was not legally appropriate, then the "pirates" were not protected by the laws of war and could simply be hanged when captured. From this point of view, the criminal law procedures by which "pirates" were condemned and hanged were mere municipal law safeguards against the abuse of the authority every man had to destroy those who obstructed trade, "pirates."

It is noteworthy that both these lines of legal thought rest on calling "piracy" a crime under the law of nations, the "law of nations" being conceived as a natural law system binding on all men in all places because based on reason.¹³⁸

The relationship between municipal law and international law so central to an understanding of the conception that "piracy" should be suppressed and that the normal jurisdiction of municipal law tribunals would not suffice to suppress it when foreigners and possible foreign commissions were involved, was never fully resolved during the 18th century. Individual jurists certainly had their own favorite jurisprudential models into which they fit "piracy" for the sake of particular cases, legislation, or treaties. But the fundamental orientation of the "positivists," to whom all questions seemed best considered as questions of national policy, and the orientation of "naturalists," to whom all questions seemed best considered as questions of international justice and natural rights, were irreconcilable.

The Growth of Positive Law Concepts as an Implication of National Sovereignty. Those who tried to raise their sights above the jurisprudential

dogmas of various advocates and political demands of practical statesmen and their national constituencies, restricted their analyses to the specifics of individual cases and incidents, leaving overall patterns to others. Typical of this, and most influential in later times, was Cornelius Bynkershoek, a Dutch jurist whose major work, *Questionum Juris Publici*, appeared in 1737.¹³⁹ In addition to arguing on the basis of positivist, policy-oriented logic that the Barbary states were not “piratical” in any legal sense,¹⁴⁰ he began with the proposition that “those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands.”¹⁴¹ In later passages he uses the word “pirates” only in connection with those who sail, but he leaves unanswered the question as to whether “pirates” who, once having sailed, commit depredations only in raids ashore, are punishable as if their depredations were at sea—whether the word “pirate” applies to all who begin their depredations from a ship or those who make a mere sea-departure without a license from some Dutch port regardless of the place of their depredation. To avoid the problem he asserts a simple positivist position based on Dutch municipal law: “[W]e punish as pirates those who sail out to plunder the enemy without a commission from the admiral, and without complying with . . . the rules of the Admiralty of . . . 1597.”¹⁴² He then cites other Dutch statutes as authority for terming “pirates” those Dutchmen who sail under a commission from a foreign prince or of several princes.¹⁴³ His supporting argument, that “it is indeed very reasonable that those should be treated as pirates” because “if this were permissible they might plunder neutrals and bring our state into war with other nations,”¹⁴⁴ argues the Dutch municipal legal policy to be reasonable to curb the depredations of Dutch nationals even if those Dutchmen are not “criminals” (because licensed by a sovereign) at international law. But Bynkershoek did not assert that The Netherlands had a duty at international law to restrain the licensed activities of Dutchmen abroad. Ultimately, Bynkershoek’s logic does not unite international and municipal law, but asserts the dominance of policy for international affairs and municipal law as the basis for controlling Dutch nationals abroad. Support for this analysis lies in Bynkershoek’s adverting to the fact that

There are also various other persons who are punished as pirates on account of the atrocity of their crimes, though they are not actually pirates, as for instance those who sail too near the land contrary to the prohibition of the sovereign, . . . commit frauds in matters of insurance . . . and also those who cut the nets of the herring-fishers. . . .¹⁴⁵

It is interesting confirmation of arguments presented earlier with regard to the evolution of English conceptions that the word “pirate” seems to have been used in a promiscuously pejorative sense in the late 16th century, and had its meaning narrowed somewhat in 1696, presumably in coordination with the English war against Louis XIV over the exile of James II at that time.¹⁴⁶ But the narrowing was not in the direction only of making “piracy” the proper

legal term for robbery within the jurisdiction of the Dutch Admiralty; it also followed the English view that certain forms of licensed activity involving depredations by foreigners against foreign vessels might be denominated "piracy" and treated as criminal by the municipal law of the prescribing state. Where the English prescriptions arising out of the struggle over the Stuart exile had focused on the legal power of the English government to consider null a commission issued by an unrecognized "sovereign" (James II) or to consider as "piratical" even in the absence of legislation the taking by an Englishman of a license from the King of France to raid English shipping, the Dutch legislation cited by Bynkershoek rested on Dutch jurisdiction to prescribe with regard to belligerent action by foreign-licensed foreigners in neutral Dutch coastal waters. It seems that once the conception was accepted that the word "piracy" would be a useful pejorative that could be applied with capital legal results by an act of municipal legislation, the evolution of the word was away from "normal" municipal law crimes (whether at sea or not) and towards the political activities of individuals. Under the system of letters of marque and reprisal by which some political activities were highly profitable to individual adventurers, the word "piracy" seems to have been used to identify such adventurers with motives of base profit when they were fighting for causes not approved by the municipal legislators, and the definitions of "pirates" as "robbers within the jurisdiction of the Admiralty courts" were simply expanded to catch those adventurers in the legal web. In this evolution, the net-cutters and insurance fraud criminals proved to be too small to remain enmeshed in that web, and the older laws came to seem an historical oddity as the connotations of the word "pirate" changed.

Bynkershoek also discussed the jurisdictional issues. He asserted that a foreigner committing depredations on Dutch property could properly be tried by a Dutch tribunal "if he is arrested among us," but suggested that if he had a commission, even if he had exceeded it, there would be some doubt. He referred to a negotiation between the Dutch and English in 1667 concerning the disposition at law of privateers who had not stopped after their commissions expired at the end of the second Anglo-Dutch War:

The English contended that the sovereign who had given the letters ought to have jurisdiction; the envoys of the States-General urged that those who committed hostile acts without a legitimate commission from their sovereign, should be treated as pirates. That it was the law of nations that such could be punished by any sovereign into whose hands they chanced to fall. . . . The French envoys at that time concurred in this view, and this principle was accordingly adopted by the English and the States-General.¹⁴⁷

Since only the sovereigns whose subjects were victims of the unlicensed depredations were involved, and there is no suggestion that France should have prosecuted English privateers whose victims were only Dutch, it is difficult to say just how far this sweeping assertion was intended to carry. No cases are cited of "pure" universal jurisdiction by Bynkershoek or any other

writer of this time despite the broad statements and possible cases, like the embarrassing Green case in Scotland,¹⁴⁸ from which the appearance of support in practice could have been derived. The broad assertions coupled with the refusal to support them with possible cases, and the total absence of statutory support for judges' or prosecutors' grand assertions in this regard, seem anomalous.

Bynkershoek expressed some doubt that a privateer exceeding his commission was necessarily a "pirate," and seemed to regard the procedure by which the sovereign issuing the commission would be the sovereign whose tribunals should hear the case as the best solution. This is not explained except by citation to a peace-treaty of 1662 between France and the Netherlands in which it was agreed that only the sovereign furnishing a commission should hear any cases of prize resting on the validity of the commission.¹⁴⁹ From his point of view, if that sovereign turned the prize back to its prior owner, there would be no issue to resolve, while if the unauthorized taking were upheld, whatever problems might arise could be discussed as a possible international delict between the two sovereigns involved. This seems to treat the question of commissions as simply an issue of property law, not of "piracy" at all. Since a guilty intention is required for any criminal conviction, perhaps that is a sensible approach; but it is surely more congenial to "positivist" administrators than to "naturalists" concerned with "justice" and the application of the "law of nations."

Bynkershoek also dealt directly with the question of jurisdiction, terming "difficult" the question of whether a foreigner who has committed depredations upon other foreigners could be tried by Dutch courts. He stated it as a dilemma:

If . . . the laws ordain that no one may sell ships and goods captured on a foreign commission, except when condemned at a port of the sovereign issuing the commission, it might seem unjust to give an action against the captor, either to the government, on a criminal charge, or to the foreign owners of ships and goods, for the damage suffered. Both foreigners ought to have the same rights. . . . And yet it would be hard and unexampled to deny access to the courts to the owners of the ships and goods who found their property here in the hands of a foreigner who might depart at any moment. And if you grant that, you can hardly refuse the captor.¹⁵⁰

There is substance to this argument if "piracy" were essentially a matter of licenses, as Bynkershoek and the other positivists conceived it. There seems little substance when the argument is applied to totally unlicensed depredations; and that is a question disposed of in England by the Statute of the Staple in 1353,¹⁵¹ which Bynkershoek did not address.

The Classical English Synthesis: Blackstone and Wooddeson. The English law was summarized in its classical form by both Sir William Blackstone and Richard Wooddeson, the first and third Vinerian Professors of English Law at Oxford University. Blackstone, publishing in 1765-1769,¹⁵²

took a basically naturalist view of the “law of nations” adopting the underlying concept that the “law of nations” is essentially the national law of many states and not the law between states:

But since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine cases, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.¹⁵³

Blackstone considered that there were three offenses that could properly be termed crime-like “offences” against the law of nations: (1) Violations of safe conducts (i.e., *laissez passer*), (2) infringement of the rights of ambassadors, and (3) piracy. His brief comments on piracy mix natural law and positive law concepts in a strange amalgam:

Lastly, the crime of piracy, or robbery and depredation upon the high seas, a pirate being, according to Sir Edward Coke, *hostis humani generis*.¹⁵⁴ As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: So that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property. . . .

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But by statute, some other offences have been made piracy also. . . .¹⁵⁵

To understand Blackstone’s thought, and the American thought that grew out of the immense influence of Blackstone’s *Commentaries* in the early days of our Republic, it must be borne in mind that his use of the phrase “law of nations” assumed the supremacy of municipal law in particular whatever the basis in policy, reason or historical practice for the identity of prescriptions applied by the courts of different nations. Moreover, his use of the phrase “common law” is certainly not the same as the technical usage of Lord Coke, to whom the “Common Law” of England meant the law applied by English “Common Law” courts, as distinguished from the other laws applied in England by Admiralty, Equity and other of the King’s courts. To Blackstone, the law merchant was part of the law of nations adopted into the English “common

law” because interpreted and applied throughout England by English courts; to Coke the law merchant was applied in the courts of the Staple by administrators appointed for the purpose, and was not part of the Common Law system in England.¹⁵⁶ Similarly with “piracy.” Thus Blackstone’s calling piracy an offense by common law means merely that it was an offense punishable in England by English courts, and to the degree not based on statute, was capable of being refined and modified by judicial interpretation.

Blackstone’s social contract naturalism seems to leave all the questions of Bynkershoek unanswered. If the right of a community to exercise its jurisdiction over a “pirate” rests on an *a priori* rule of self-defense, as Blackstone said, then that jurisdiction rests on the state exercising it being a state victimized by the particular “piracy” that is the subject of the trial: that state must have had its “person or personal property” invaded by the “pirate.” Furthermore, the law of self-defense in England and many other places is very limited in its application, essentially to cases of inescapable threat; it does not authorize universal policing of a community by a strong policeman without authority derived from community consent through the positive law. It does not justify officious intermeddling or universal jurisdiction in the absence of a legal interest in the case.

Finally, the arguments based on war imply that the law of war applied to relations between “pirates” and the rest of mankind. That would comport with Roman writings, but does not seem to have been what Blackstone really had in mind, since criminal trials are not the result of capture in war. In sum, the simple language of Blackstone in this area disguises the legal complexities really involved without giving any orientation that would help lawmakers or attorneys find their way through the thickets of the law.

Richard Wooddeson, the third Vinerian Professor of English Law at Oxford, began lecturing in 1777, and his monumental treatise derived from thirteen years of lecturing was published in three volumes in 1792 (volume I) and 1794 (volumes II and III).¹⁵⁷ To Wooddeson, the law of nations was not merely the law of each state conforming in substance to the law of other states. It included also what Zouche called the law between states:

The law of nations is adopted and appealed to by civilized states, as the criterion for adjusting all controversies proper to be so decided. This is the rule by which the property of captures at sea is determined, more especially when the subjects of independent powers are interested in the litigation. In such case neither the customs of the British admiralty, nor British acts of parliament, can, as such, be of sufficient authority and avail. But the law of nations is part of the law of England.¹⁵⁸

From this point of view there does not appear to be much distinction between the law of nations in Blackstone’s sense and the law between states, and it would seem as if Wooddeson were prepared to use that law, whatever it was, as a looming omnipresence hovering over English law as a basis for interpreting, and perhaps overriding, the customs of the Admiralty and even acts of Parliament.

Turning to piracy directly, Wooddeson defined it: "Piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or state."¹⁵⁹ His authority for that statement was Jenkins and Molloy, whose generalities he quoted raising some technical issues that seem of marginal importance to this study.¹⁶⁰ He agreed with Bynkershoek and Jenkins that the Barbary states cannot be "piratical" in any meaningful legal sense,¹⁶¹ applying Cicero's definition of a state: "They have a fixt domain, public revenue, and form of government." In support of this conclusion he cited European state practice of treating the Barbary communities as states with which they "sometimes carry on war, sometimes stipulate for peace, with them as with other nations."¹⁶²

The major contribution of Wooddeson to the evolving conception of "piracy" came from his notion of general international law, the law of nations,¹⁶³ being a single system including not only the law between states and the strictly positivist coordinated law of many states, but also a degree of coordination between the two. The issue on which he focused was whether a license which was technically inapplicable, and therefore could not be used to exculpate a captain of a charge of "piracy," was really necessary if in fact the captain did not hold himself out to be an enemy of all mankind, robbing indiscriminately, or, indeed, robbing anybody at all, since he took all his captures in to proper courts for prize adjudication. There was, therefore, a taking of possession of the property of others, but not of full property rights; not of a right to transfer title. It was, in a sense, Sir Francis Drake's case, raised to a new level of sophistication:

His majesty granted letters of reprisal to sir Edmund Turner and George Carew against the subjects of the States General, which grant was called in by proclamation, and superceded [spelling *sic*] under the great seal. Then Carew, without Turner, having deputed several to put in execution the said commission, who acted under it accordingly, and being indicted for piracy, it was resolved by all the judges and the rest of the commissioners then present, that the procedure of the captain and his mariners was not a felonious and piratical spoliation, but a capture in order to adjudication [*sic*], and tho' the authority was deficient yet not being done *animo depredandi*, they were acquitted.¹⁶⁴

Wooddeson approved of this result, commenting that "This case is a strong proof of the efficacy of a public or national commission," implying that had the case been left to positivist-minded administrators concerned with assuring the supremacy of the commission-granting (and withdrawing) authority, the result would have been different, and, to the extent different, unjust. To Wooddeson, then, to be "piracy" there had to be a taking that was both unlicensed and *animo depredandi* (or *animo furandi*, to use the more familiar phrase); the common law "robbery" elements had to be there as well as the positive law departure from authorization. To further isolate the definition and remove from it the positivist emphasis on commissions, Wooddeson notes

that in another case in 1782, an indictment of a British subject (Luke Ryan) on a charge of “piracy” for taking a Dutch commission was in fact not an indictment “for piracy, generally, by the law of nations, but for that being a natural born subject he piratically, & c., *against the form of the statute*” [emphasis *sic*] did various things. Where the positivist officials might have wanted to extend the pejorative name and legal results of “piracy” to this action of a British subject which had been forbidden by municipal statute, to a naturalist like Wooddeson, the use of the word was merely polemical when added to a statutory charge that was not directly related to his conception of “piracy” under the hovering principles of universal justice he included within his conception of the law of nations.¹⁶⁵

Searching for other cases in which the form of the commission was not the key to attaching the name and legal consequences of “piracy,” Wooddeson referred to Palachie’s Case as recited by Coke in his *Fourth Institute*.¹⁶⁶ Wooddeson’s conclusion is sweeping and undoubtedly correct, that in order to be “piracy” in England, the taking must have been committed without color of belligerent rights. Even in England itself, he point out, “[T]he law of nations is . . . understood to tolerate at least the forfeiture and capture of enemy’s ships and goods in time of open hostilities, without the sanction of a *special [sic]* commission.”¹⁶⁷ A general proclamation would suffice, and, indeed, what court to which “enemy” goods or ships were submitted for prize proceedings would really refuse to support an English captor acting pursuant to English policy and submitting his takings for proper distribution? No such case has been found.

The implications of this position include a logical shift and coming together of the relative jurisprudential positions of positivist and naturalist thinkers. By regarding the requirement of a “commission” as simply a special English municipal law provision interpreted strictly against English depredators pursuing a “reprisal war”¹⁶⁸ but loosely in case of a general public war, and not applying at all in English courts in cases of belligerency between foreign powers alone,¹⁶⁹ the basic positivist scheme could be maintained. But the sweeping assertions of Jenkins and other early positivists are revealed as far too broad. On the other side, demanding that the English Common Law of robbery and its requirement of *animo furandi* be applied before any taking, commissioned or not, could be deemed “piracy” in the absence of statute calling something else “piracy,” and regarding the English law in this phase as a mere municipal law expression of underlying natural law principles, undercut the search for a natural law of “piracy” and diminished the impact of natural law principles of self-defense and property rights on the definition. To the degree that English law was conceived as the embodiment of natural law, the municipal law of England as expressed through the sort of authoritative pronouncements in statutes and cases familiar to positivist jurists and statesmen made it possible to derive the supposed international law

of “piracy” from English precedents and make it appear part of a universal “law of nations” in the Zouche-Blackstone sense. The principles of international law could then be regarded as not a limit on English law, but as English law itself which all other countries were bound to follow because the sources and logic of English law were universally valid even if English jurisdiction was limited. Wooddeson’s logic must have seemed very persuasive to both natural law and positive law English jurists.

As to universal jurisdiction and legal interest, Wooddeson was cautious:

A charge of piracy may properly be exhibited in any country, to which either the party accused, or the owner of the goods, belongs. But whether the law of nations will allow the fact to be tried in a country where they are both aliens, and which therefore seems to have nothing whereon to ground the reasonableness of its jurisdiction, is left undecided by the judicious Bynkershoek [*sic*].¹⁷⁰

He did support universal jurisdiction in principle on the ground that the seas are within the territorial jurisdiction of all princes, and given the right nationality of the vessels or persons involved, offenses on the high seas could certainly be tried in any port under tribunals deriving their competence from municipal law. But that logic seems to miss the point by confusing various kinds of jurisdiction. The Dutch Admiral might have jurisdiction equal to that of the British Admiral on the high seas, but his prescriptions with regard to events wholly within a British ship in those seas would have been hotly rejected by a British court; and Dutch intermeddling in a legal dispute between Great Britain and France would have been resented even (especially) if the action giving rise to the dispute occurred entirely on the high seas (however defined). In sum, the reference to territoriality as the basis for universal jurisdiction does not reach the true issue, which is legal interest in the case.

The wider assertions of British legal interest, amounting in a sense to assertions of British jurisdiction to rule all the seas to the exclusion of inconsistent foreign law even on board foreign vessels, grew in the nineteenth century and found their limits. But before analyzing those assertions and their limits, it is important to understand the other great stream of jurisprudential thought and practical action growing out of English writings and precedents; the law and policy regarding “piracy” of the newly independent United States of America.

Notes

1. William Wynne, *The Life of Sir Leoline Jenkins* . . . (1724), Vol. I, pp. xii–xiii, x1; 10 DNB 739–742.
2. Wynne, *op. cit.*, Vol. II, p. 791.
3. Cornelisz Bynkershoek, *Questionum Juris Publici* (1737), Book I, ch. XVII (Tenney Frank, transl.) (CECIL 1930), Vol. II, p. 99. See text at notes 139–151 below. The passage in Gentili’s works that Bynkershoek cites is the first of the Spanish Advocate’s Pleadings analyzed in the text at note I-105 above. There is no mention of Gentili’s altered views.
4. William Oldys (spelled Oldish in the Report in 12 *Howell’s State Trials* 1269) is described as “an eminent civil lawyer” in 14 DNB 1013. Despite the outcome of the discussion to be retold below, in which Dr.

Oldys was himself nearly accused of treason by some members of the Cabinet Council, and was removed from the list of Advocates of the Admiralty, he survived well, and had enough reputation to run (unsuccessfully) for Parliament as a member for Oxford University in 1705. He died aged 72 in 1708. *Id.*

5. The civil lawyers, i.e., lawyers expert in Admiralty, Ecclesiastical and Roman law, were regarded as expert also in international law. The most learned, all with Doctoral degrees (D.C.L. from Oxford or LL.D. from Cambridge) organized themselves in what was called "Doctors' Commons" and were frequently consulted by the Crown on questions of international law. See 3 McNair, *International Law Opinions* (1956) 408-420.

6. Tindall's (spelled Tindal in 19 *DNB* 883; his biography is at pp. 883-885) career was interesting. He turned Catholic during the reign of James II and abandoned that religion for the Church of England at about the time James was deposed and Catholicism became unpolitic again. He was only 36 years old at the time of this incident in 1693. Oldys was near 60.

7. 2 Marsden, *Documents* . . . 146-148. Tindall's opinion is listed with the majority although in substance he certainly dissented. Is it possible that he falsified this entry after the opinion was formally presented?

8. Secretary of State and member of the Privy Council. Trenchard was a very active politician who had had to flee the country in 1685 when his involvement in the Monmouth revolt against Charles II was discovered. A devout Protestant, he was bitterly opposed to King James and his supporters. 19 *DNB* 1123-1125.

9. See note 4 above.

10. It has been impossible with reasonable effort to identify these civil lawyers.

11. 12 *How. St. Tr.* 1269-1275. The actual proceedings in the trial are not provided. The eight Irish "pirates" were named John Golding, Thomas Jones, John Ryan, Darby Collings, Richard Shivers, Patrick Quidley, John Slaughter and Constantine de Hartley.

12. An original copy of Tindall's Essay has not been found. This version, cited to pp. 25-30 of the *Essay*, appears in 12 *How. St. Tr.* 1271-1274 as a very long footnote. The quoted passage is in col. 1272. The same excerpt is printed (with some minor editorial differences) in 2 Marsden, *Documents* 142-146.

13. 12 *How. St. Tr.* 1271.

14. 28 Hen. VIII c. 15 (1536), reproduced in Appendix I.A below.

15. It is interesting that Coke's analysis and Hale's adoption of it as recorded in the 1685 edition current in the 1690s was not mentioned in this discussion. See Coke, *Third Institute* 113; 1 Hale *Pleas of the Crown* (1685 ed.) 23, 77-78. Presumably the reason was that the civilians were focusing on "piracy" as a question of the legal power of foreign sovereigns to issue privateering licenses, and whether a contender for the English crown could be considered a foreign sovereign in England when acting as if he were the sovereign of England in disregard of the constitution under which his acts were being measured. That is an interesting legal question, but did not involve the English municipal law of treason directly; indeed, Charles I having been beheaded for "high treason" in 1649 under a definition that supposed him to be levying war against the kingdom, the jurists of 1693 did not want to raise the question again. The Lords and Common Law people involved presumably did not want to be reminded that Coke defined "piracy" as a species of "petty," not "high," treason, and thus the entire category would seem to have been irrelevant to criminal charges brought against those whose real offense was felt to be "high treason." See text at notes 19 sq. below.

16. This was, of course, the incident referred to by Gentili and discussed in Chapter I at note I-100 above. The same passage of Gentili is cited by Tindall.

17. 12 *How. St. Tr.* 1273-1274.

18. *Id.*, col. 1274.

19. 25 Edw. III statute 5 c. 2 (1352), 2 Pickering, *The Statutes at Large* 50-52 (1762). See note I-201 above.

20. 12 *How. St. Tr.* 1275-1279. The quoted passage is in col. 1278.

21. The appeals petition was rejected by the House of Lords and of the defendants, "some of them, if not all, were executed." *Id.*, col. 1280. Some clue as to the emotional issues at play in that rejection might be seen in Tindall's *Essay*, which concludes by comparing King James's claim to continued political authority to "the charms, or indelible characters, the Papists say, are inseparable from the persons of their priests," saying such a persistence of powers, "whatever it be in ecclesiasticals, is no small bigotry and fanaticism in civil affairs. And it is the height of folly, madness, and superstition, to believe that the people, who have entrusted some one amongst them with power for no other end but for protecting them, can, upon no account whatsoever, resume it." *Id.*, col. 1274. It might be suggested, however, that to treat the struggle as ended in fact with the Parliament victorious was premature in 1693.

22. See note I-201 above.

23. Coke, *Third Institute* 111.

24. 5 Pickering, *op. cit.* 199 (1763):

Foreasmuch as some doubts . . . have been moved, That certain kinds of treasons . . . committed out of the King's majesty's realm of *England*, and other his Grace's dominions, cannot ne may be [sic; by?] the common laws of this realm be enquired of, heard and

determined within this said realm of England . . . [Enact] That all manner of offences, being already made and declared . . . treasons . . . and done perpetrated or committed . . . by any person or persons out of this realm of *England*, shall be from henceforth enquired of, heard and determined before the King's justices of his bench . . . or else before such commissioners, and in such shire of the realm, as shall be assigned by the King's majesty's commission, . . . in like manner and form to all intents and purposes, as if such treasons . . . had been done . . . within the same shire . . . Provided . . . that if any of the peers of this realm shall be indicted of any such treasons . . . [they shall have] trial by their peers . . . as hath heretofore been accustomed.

25. Coke, *Third Institute* 113.

26. The text of the pertinent part of Coke's short analysis is in note I-201 above.

27. 7 Will. III c. 3 (1695) 9 Pickering, *op. cit.* 389 sq. (1764). The "Act for regulating of trials in cases of treason and misprison of treason" takes the odd form of setting forth the requirement of two witnesses to the overt act unless the defendant confess or refuse to plead, and provides for jury trials (and trial of peers before the House of Lords) in capital cases. The trials were still held by royal commissioners as judges and it is difficult to understand how the new procedures differ from the ones established in 1535 and repeated in 1536 for "treasons" along with "robbery and felony" cases, except that the jurisdiction of the new "treason" commissioners was not restricted by statute to the traditional Admiralty jurisdiction. The aim of the new statute seems to have been less to catch James's (and Louis XIV's) licensed privateers acting at sea, than to catch Englishmen (and Irishmen) adhering to James in France.

28. 13 *How. St. Tr.* 485. Among the many points argued in the case was the question of the tribunal's jurisdiction to hear a treason indictment. The discussion was short but illustrates the technical problems:

Mr. Phipps [Vaughan's defense attorney]. Then next I am in your lordship's judgment, whether the statute of 28 of Hen. 8, by which captain Vaughan is tried, is in force, and be not repealed by the 1st and 2nd of Philip and Mary, which saith, that all trials, in cases of treason, shall be at the common law. Now, by the common law, before the statute of 28 Hen. 8, treason done upon the sea was tried before the admiral, or his lieutenant; and my lord Coke, in the 12 Rep. in the case of the admiralty, saith, the jurisdiction of the admiralty is by the common law. By the statute 33 [*sic*; 32? 35?] Hen. 8, c. 4, treason committed in Wales, might be tried in what county the king would assign; but since the statute of Philip and Mary, it must be in the proper county; so that we are in your lordship's judgment, whether the statute of 28 Hen. 8 be in force; and whether, since the statute of 1 and 2 Philip and Mary, treasons done upon the sea, ought not to be tried before the admirals or anciently at the common law [instead of before a special tribunal appointed by the crown to replace admiralty courts in some cases only].

L.C.J. [Lord Chief Justice Sir John Holt of King's Bench, President of the tribunal]. This is treason by the common law, and the trial is by the method of the common law.

Mr. Phipps. It is true that my lord Coke, and other authorities say, that the statute 35 Hen. 8, for trying treasons committed beyond sea, is not repealed by the statute of 1 and 2 Philip and Mary; but they do not say that this [part of ? the] statute is not repealed by the statute of Philip and Mary; and the books being silent in this, is the reason why I propose this question for your lordships' judgment.

L.C.J. It is no more a question than the trials of foreign treason, and then the determination of the trials upon the 35th [Hen. 8?] determines the question upon this.

That is the complete discussion related to the point. *Id.*, cols. 533-534. The statute of 1 & 2 Philip and Mary is apparently 1 & 2 Philip and Mary c. 10 (1554) (6 Pickering, *op. cit.* 53 (1763)), sec. VII of which provides that "all trials . . . for any treason, shall be had and used, only according to the due order and course of the common laws of this realm . . ." (p. 54). Other statutes pertinent to the evolution of the procedures for handling "treason" in England, such as 32 Hen. VIII c. 4, and 33 Hen. VIII c. 20, 23, seem too far removed from this study for further discussion. The statute cited by Phipps, 33 Hen. VIII c. 4, is hopelessly irrelevant. It deals with the repair of decayed houses in England and Wales. The statute dealing with treasons committed beyond the sea is 35 Hen. VIII c. 2 (1545).

29. See note I-201 above, reference to the "Normans, who had revolted in the reign of king John," Coke, *Third Institute* 113.

30. 13 *How. St. Tr.* 503.

31. *Id.* *passim*, esp. cols. 495-499, 534-535. Dr. Oldys played a prominent part in pressing the civilian viewpoint.

32. 11 & 12 Will. III c. 7 sec. viii (1698-1699); dated to 1700 in 10 Pickering, *op. cit.* 320 (1784) and normally referred to that latter year. It is indexed in the official *Chronological Table of Statutes* as 11 Will. III c. 7 (1698). Reproduced in Appendix I.B below.

33. See, e.g., The Journey of Wen-Amon to Phoenicia (c. 1100 B.C.?) in 1 Pritchard, *The Ancient Near East* (1958) 16-24.

34. See text at notes I-170 sq. above.

35. See text at note I-192 above, Proclamation of 1599.

36. Lord Admiral Charles the Earl of Nottingham to Sir Julius Caesar, 1 Marsden, *Documents* 320-321.

37. *Id.* 522 at 523.

38. See, for example, the Proclamations of 23 June 1603 by James I declaring

[T]hat all such our men of warre as now be at sea, having no sufficient commission . . . , and have taken . . . any ships or goods of any subject of any prince in league and amitie with us, shall be reputed and taken as pirates, and . . . shall suffer death . . . according to the ancient lawes of this realme.

1 Marsden, *Documents* 342 at 343. The object of this Proclamation was to enforce the new peace with Spain. There is no known ancient English law of "piracy" to justify the last sentence of the Proclamation, and the use of the word seems consistent with James's flinging it about to everybody not obeying his orders. See text above at notes I-85 and 86.

39. See below.

40. See text at note 109 below.

41. See below.

42. See, e.g., the French letter of marque of 1693 authorizing a privateer not only to capture English and Dutch ships, but also to "*courir sus* [*sic*] aux Pirates, Corsaires, et gens sans aveu." 2 Marsden, *Documents* 140. Presumably Captains Golding, Jones and Vaughan had commissions in this form. See text above at notes 20 and 28 sq. On the evolution of privateering from a private act to avoid belligerency to a belligerent right of a sovereign, see note I-176 and works cited there.

43. 2 Marsden, *Documents* 427-428.

44. This trace of a natural law license to take necessities from the rich comes not from natural law or from Jenkins, but is merely Jenkins's paraphrase of the provision of 27 Hen. VIII c.4 and 28 Hen. VIII c.15 sec. iv. See also Molloy, *De Jure Maritimo*, Book I, ch. IV, para. xviii(2) at p. 41.

45. Charge to a Grand Jury at Admiralty Session in Southwark, 18 February 1680, 167 Eng. Rep. 561. This charge does not appear to have been among those collected by Wynne, *op. cit.* note 1.

46. As to the availability of insurance at this time for "all events and for all disasters," see Defoe, *Moll Flanders* (1722) (Signet ed. 1964) 280. Defoe pretended that the book was a first-person account by a whore written in 1683. It has frequently been asserted that the tale was intended in the usual form of the time as a satire on the emerging merchant classes in England and North America.

47. 1 McNair, *Law Officers' Opinions* 266-267.

48. See text at notes I-143 sq. above.

49. Once again, it is not proposed to follow this interesting side-trail; to trace the history of the concept of "piracy" is enough for one book without also attempting the history of "robbery." The phrase "*animo furandi*" appears as an essential element of the Common Law crime of "larceny," of which "robbery" is an aggravation according to 1 Hale, *Pleas of the Crown* 61, 71. Curiously, the phrase does not appear in Hale's direct discussion of either "robbery" or "piracy." Its first known technical use in English law was ironically in Bracton's (c. 1250) Latin treatise in which the English Common Law crime of "theft" is translated with the Latin word "*latrocinium*," which in turn was later translated back into English as "larceny"—thus, it seems, contributing to the confusion between "*pirata*" and "*latrones*" by indirectly over a period of some 400 years finding the former to be at English law a mere sub-category of the latter. Bracton did not mention "*pirata*" while recording in the reign of Henry III with regard to "*latrocinium*," "*sine animo furandi non committitur* [without the intention of stealing it is not committed]." 2 Pollock & Maitland, *History of English Law* 494, 499. The Latin word "*furandi*," translated "of stealing" above, itself contains a complex idea of illegality and taking which it is impossible to analyze further in this place. The word "*animo*" in Latin is in the ablative case and means "with intent." The dative is the same, "*animo*." The nominative singular is "*animus*" and the accusative is "*animum*."

50. See text at note I-156 above.

51. See note I-61 above.

52. See notes I-49 and I-50 above.

53. The analogy between Vikings and classical "*pirata*" was drawn no later than 1337. See text at note I-64 above.

54. See text at notes I-93 sq. above.

55. See colloquy in text at note 7 above.

56. The most common is *Rex v. Dawson and others* (1696), 13 How. St. Tr. 451. It is cited in East, *A Treatise of the Pleas of the Crown* (1804), as *Rex v. May, Bishop and others*. The defendants were Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis and John Sparkes.

57. See text at notes 28 sq. above.

58. 13 How. St. Tr. 453, 457, 529 sq.

59. The issue was one of double jeopardy, of course. The report is less than satisfactory on this point; the places and names of the principal victims of the defendants' depredations, and the witnesses for the prosecution, seem very similar in the two trials insofar as reported.

60. 13 How. St. Tr. 454-455.

61. 28 Hen. VIII c. 15. The text is set out in Appendix I.A.

62. Molloy, *op. cit.*, Book I, ch. IV, para. vii at p. 37.

63. *Id.*, para. viii: "And so it is, if the Subject of any other Nation or Kingdome, being in Amity with the King of England, commit Piracy on the Ships or Goods of the English . . ."

64. *Id.*, para. xiv at p. 39:

"If a Spaniard robs a French Man on the High Sea, both their Princes being then in Amity, and they likewise with the King of England, and the Ship is brought into the Ports of the King of England, the French Man may proceed *criminaliter* against the Spaniard to punish him, and *civilliter* to have Restitution of his Vessel: but if the Vessel is carried *intra Praesidia* of that Prince, by whose subject the same was taken, there can be no proceeding *civilliter*, and doubted if *criminaliter*; but the French Man must resort into the Captor or Pirats own Contrey, or where he carried the Ship, and there proceed."

65. *Id.*, para. x, p. 38.

66. Letter from Sir Leoline Jenkins to Admiral Sir Thomas Allen dated 8 October (1674?), 2 Wynne, *op. cit.* 699-700.

67. This basis for "normal" jurisdiction appears to have dropped out of the customary international law regarding the extent of national jurisdiction, or at least become doubtful, by the 20th century. See The Lotus Case, Permanent Court of International Justice (P.C.I.J.), Ser. A, No. 10 (1927), and the "voluminous literature inspired by this case," 2 Hudson, *World Court Reports* 20. This is not the place to pursue this interesting subject further.

68. Molloy, *op. cit.*, para. xi, p. 38.

69. *Id.*, para. xii.

70. 1 Wynne, *op. cit.*, 1xxxv-1xxxvi, Charge given to an Admiralty Session within the Cinque Ports, 2 September 1668.

71. The precise date is unclear; Wynne does not give it. Since the title "Sir" is used, and Wynne does not use the title with regard to Jenkins's writings before 1669, when Sir Leoline was knighted, and Jenkins left the Admiralty bench in 1674, some time between 1669 and 1674 is indicated.

72. *Id.*, pp. xc-xci, Charge given to an Admiralty Session held at the Old Bailey.

73. Williamson's biography is capsulized in 21 *DNB* 473-478.

74. 2 Wynne, *op. cit.* 713 at 714.

75. *Id.*

76. *Id.*

77. Which treaty is not specified by Jenkins. It appears to be the Treaty of Breda, 21/31 July 1667, 10 CTS 255. Jenkins refers to an Article 35, which seems to bear some relationship to Article 35 of a Treaty between France and the Netherlands which was made applicable also to England by Article III of the Treaty of Breda. 10 CTS 278, 281.

78. 2 Wynne, *op. cit.* 714-715.

79. Article XX of the Treaty of Peace and Alliance between Great Britain and the Netherlands, Breda, 21/31 July 1667, 10 CTS 231, specifically provides for the "condign punishment" of "Pirates and Sea Rovers" regardless of nationality. Interestingly, the reproduction in the CTS omits the English translation of the Latin text of this (and several other) articles. The English text quoted here is from an unattributed volume, *Extracts from the Several Treaties Subsisting Between Great Britain and Other Kingdoms and States . . .* (1741) 132, apparently a shipboard reference work for English naval commanders. Obviously, the compilers of this work believed the Treaty of Breda's provisions regarding the punishment of "pirates" were continuing in force. In the original Latin, the phrase "Pirates and Sea Rovers" is "*Piratae et Praedones*," 10 CTS 242.

80. Cited at note 56 above.

81. Text at note 72 above.

82. 13 How. St. Tr. 455.

83. *Id.* 457.

84. *Id.* 483.

85. 14 How. St. Tr. 1199.

86. 6 Anne c. 40 (1707); Scottish Act 5 Anne c. 7 (1706).

87. 14 *How. St. Tr.* 1238.

88. *Id.* 1311-1312.

89. *Id.* 1224.

90. The roots of this conception and its incorporation into English law through the adoption of the maritime Laws of Oleron are mentioned in the text at note I-150 above.

91. The Trial of Captain William Kidd, at the Old-Bailey, for Murder and Piracy upon the High Seas; and of Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loff, Hugh Parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, for Piracy, May 3 and 9, 1701, in 14 *How. St. Tr.* 123.

92. *Id.*, cols. 123-125 note, summarizing the Journal of the House of Commons 16 March, 1700 - 16 April, 1701 in which there appear many actions and resolutions relating to the accusations against Captain Kidd and the role of the Earl of Bellamont in confiscating Kidd's papers and sending only a selection of them to England with the ship bearing Kidd and his accused crewmembers. Kidd appears to have tried to bring Lord Bellamont to court in England alleging irregularities in his actions as Governor of New York (not "New England"). The Crown intervened to defend Bellamont and the cause never was heard. 2 Salk. 625. The removal of the case appears to have become a precedent on a technical aspect of English administrative law. 2(ii) Anson, *The Law and Custom of the Constitution* (4th ed., by A.B. Keith 1935) 334. Bellamont's name is misspelled in note 1 on that page and in Anson/Keith's table of cases; the correct spelling appears in Salkeld's Reports.

93. 14 *How. St. Tr.* 171-173.

94. *Id.*, cols. 169-170. This entire commission is as interesting and as tightly drafted as the previous one, but relating to privateering in time of war rather than to piracy, its technical language is not directly pertinent to this study.

95. *Id.* 146. There is some inconsistency in the report, which also mentions that verdict being brought in during the second trial (for piracy) the next day. *Id.* 153.

96. *Id.* 147. The exact location is obscure. There is a Cochin port in the Malabar coast of India, and a Cochin district in what is now Vietnam, but no Cochin (or Cutsheen) is known in the islands now part of Indonesia or the East Indies as normally intended about 1700. Cochin in India was apparently intended. The *Quedagh Merchant* is described later in the proceedings as "a Moorish ship," and the merchants on board as "Armenians." *Id.* 155. The capture is dated to February 1697 in that place. Indeed, there seem to be several inconsistencies between the charge and the actual facts as uncovered during the trial, but apparently those discrepancies were not considered significant by the court and the defendants did not make much of them. For good or ill, the trial procedures in England at that time were considerably more favorable to the prosecution than in the United States today.

97. The text is given at *id.* 149-150.

98. *Id.* 150. Every (Bridgman) was mentioned prominently in the Dawson case also, cited note 56 above, but was never captured.

99. *Id.* 158.

100. *Id.* 169.

101. *Id.* 180. It is not proposed to cite all places in the transcript of the trial in which these points were made; the transcript makes exciting reading but, like most trial records, is repetitive and must be read in its entirety to understand all the points of dispute and their relative importance to the trial. This study is focused on the legal definition of "piracy" alone.

102. *Id.*, 183-184.

103. *Id.*, 185.

104. *Id.*, 185-186.

105. *Id.*, 186-187.

106. *Id.*, 234. George Bullen does not appear in the proceeding.

107. Kidd asked to have Dr. Oldys, the Civil Law expert, appointed one of his defense counsel for the murder trial, and, after some procedural argument on another point (whether he had to plead before counsel would be permitted to address the court), that was done. *Id.* 127. Oldys appeared actively arguing for Kidd during the trial. *Id.* 132 (arguing that if the ships he took had French passes "there was just cause of seizure and it will excuse him from piracy"), 133 (concerning a procedural point regarding notice of the charge and that money to obtain witnesses should have been permitted Kidd), etc.

108. 2 Marsden, *Documents* 48-49.

109. *Id.*, 82.

110. If it were shown to have been an enemy vessel, it is hard to see that any legal proceedings would be brought before an English tribunal since there would have been no loss to provoke even a private restitution claim by an English or neutral skipper. If it were shown to have been a neutral or English vessel, the lack of commission would likely have seemed damning in an English tribunal, while the possessor of a commission might well have been able to argue mistake, in those days of false flags.

111. Text at note 104 above.

112. See text at note I-156 above.

113. Text at notes I-182 sq. above.
114. Text following note I-187 above.
115. See above at note I-190.
116. See note I-191 above.
117. The incident of Sir Francis Drake's submitting his unauthorized prize to Queen Elizabeth is well known. The conventional wisdom that Drake sailed without a commission to take Spanish and Portuguese prizes, but bought the Queen's retroactive consent by submitting his spoils to her personal disposal, may reflect court gossip more than fact at least with regard to Drake's raid on Nombre de Dios and his round the world expedition. There are traces of secret permissions uttered by the avaricious Elizabeth although an open commission would have risked an unwanted war with Spain. See Nuttall, ed., *New Light on Drake* (Hakluyt Society, 2nd Ser., Vol. 34) (1914) 54-56 (Sir Francis's cousin John's account of Sir Francis's reception by Queen Elizabeth in 1573; John's account was delivered under questioning by the Spanish Inquisition in Lima, Peru, in 1587 regarding the Nombre de Dios raid); 429-430 (letter of 22 October 1580 from Elizabeth to her treasury official, Edmund Tremaine, to grant Drake 10,000 pounds out of his own spoils just brought in, but adjuring him to strictest secrecy). Cf. Wagner, *Sir Francis Drake's Voyage Around the World* (1926) 25-26 (summarizing the probabilities); 445-446 (copy of the commission from Elizabeth to Captain Edward Fenton dated 2 April 1582 indicating the usual form, authorizing the captain to administer justice on board his ships, but silent as to captures or the administration of justice to pirates or any foreigners). In 1593 Lord Howard, the Lord High Admiral, wrote to Sir Julius Caesar of a Spanish ship taken to Plymouth by one of Drake's captains, "to let you know the premises, and to require you that the want of a commissione maybe noe let unto the same." ¹ *Marsden*, Documents 281-282.
118. Cited note 32 above; text reproduced in Appendix I.B.
119. *Id.*, sec. 7.
120. *Id.*, sec. 8.
121. "Barratry" is not mentioned as such in the statute. It would have been included as "petty treason" or "felony" as a breach of trust. See notes I-134, I-165 above.
122. Cited note 86 above.
123. E.g., 4 Geo. I c. 11 (1717), ending the "benefit of clergy" for "pirates" ("benefit of clergy" refers to special procedures to remove the clergy (at times, any literate person) from the jurisdiction of the normal Common Law courts); 8 Geo. I c. 24 (1721) making it a crime to "consort" with pirates; 18 Geo. II c. 30 (1744) minor amendments to the Act of 1700; 46 Geo. III c. 54 (1806) allowing Commissions under the Act of 1536 to be held in any overseas British colonies; 7 Geo. IV c. 38 (1826) refining the Act of 1806; 7 Will. IV & 1 Vic. c. 88 (1837) making a technical adjustment to clarify a doubt about whether attempted murder was capital by making it so when accompanied by "piracy."
124. 6 Geo. IV c. 49 (1825). See chapter IV.B.2 below. The Act is reproduced in Appendix I.C below.
125. 14 *How. St. Tr.* 1067.
126. See Appendix I.A below. The relevant passage is quoted in the text at note I-164 above.
127. 14 *How. St. Tr.* 1073. Of course, "pirates" were not called by the Romans "*hostis humani generis*." See note I-201 above. As to oaths given to pirates, see notes I-49, 50 and 51 above and the text that follows them. In fact, in relations with "*pirata*" in classical times the law of arms was followed. See generally text at notes I-22 sq.
128. Text quoted at note 93 above.
129. The "Mayflower Compact" of 1620 can be seen as an application of this "social contract" theory in practice, although the most eloquent statement of social contract theory that has survived, Hobbes, *Leviathan* (1651), was not published until some thirty years later.
130. 14 *How. St. Tr.* 1084-1087.
131. It is not known what incidents are referred to. Presumably some form of popular nonsense was being alleged without basis in fact or literature.
132. 14 *How. St. Tr.* 1089.
133. *Id.* 1090-1095.
134. Zouche, *Iuris et Iudicii Feccialis* (1650) (J.L. Brierly transl.) (CECIL 1911) Part I, sec. i, p. 1.
135. It has become conventional wisdom that Jeremy Bentham first made this distinction in English. See Woolsey, *Introduction to the Study of International Law* (1860, 3d ed. 1871) sec. 9 at p. 26-27). As Woolsey points out, the conceptual distinction between the *jus gentium*, the common law of all countries, and the *jus inter gentes*, the law between nations, was well known at Roman law and Bentham's contribution, if any, was merely to introduce the phrase "international law" as a label for the second concept. In fact, Bentham does not focus on this distinction at all in the works in which the phrase "international law" was first used. 2 Bentham, *The Works of Jeremy Bentham* (John Bowring, ed.) (1838-1842, 1962) 535. The first of the four essays in which the phrase appears was written in 1786 and the last in 1789, but none of them was printed until Bowring's edition of the complete works a generation later. *Id.* 536. Nussbaum refers the phrase to a slightly later work of Bentham, the *Introduction to the Principles of Morals and Legislation* (1789) (Nussbaum, *A Concise History of the Law of Nations* (Rev'd ed. 1954) 136), and calls it "one of his [Bentham's] happiest linguistic innovations." *Id.* If so, it is

hard to see why Nussbaum himself titled his great *History* as he did. Bentham himself seems to have oversimplified the jurisprudential relationship between, on the one side, rules of conflict of laws and the common municipal law of all states (today considered a branch of public international law only in certain narrow contexts, like the municipally enforced laws of war, prize law and some parts of Admiralty; see the *Zamora* [1916] A.C. 77, opinion by Lord Parker of Waddington), and, on the other side, the law between states:

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re nata* [fig., for that purpose], to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*¹ [1. The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence . . .].

Bentham, *Introduction to the Principles of Morals and Legislation* (1789) (printed with *A Fragment on Government*, Wilfrid Harrison, ed., 1948) 426. Bentham's rather glib dismissal of the legal obstacles that the theory of sovereign immunity places in the way of private suits against foreign sovereigns seems not to be based on any logic or historical precedent of his time.

136. Pufendorf, *Elementorum Jurisprudentiae Universalis* (1660) (ed. of 1672) (W.A. Old Father, transl.) (CECIL 1931), Definition XIII sec. 24. Compare with Rachel, *De Jure Naturae et Gentium Dissertationes* (1676) (J.P. Bate, transl.) (CECIL 1916), Dissertation Second, sec. III:

"For if there be any Law observed among many peoples, but no obligation springing therefrom obtains among them so that by its bond they are constrained into a Society and kept therein, that is not Law of Nations at all and ought not to be so called, but it is a Civil Law common to many peoples and belonging to them as individual peoples. Now Grotius saw this rightly and pointed it out; but here and there he falls in with the common but quite unjustified usage and calls that Law the Civil Law of many peoples, or a kind of Law of Nations."

Rachel, positivist in his main lines of thought, considered it "quite wrong to confuse the Law of Nations with the Law of Nature." *Id.*, sec. IV.

137. Cf. Grotius, *De Jure Praedae Commentarius* (1604) (Williams & Zeydel, transl.) (CECIL 1950), passages referred to in note I-126 above; Wolff, *Jus Gentium Methodo Scientifica Pertractatus* (1747, 1764) (Joseph H. Drake, transl.) (CECIL 1934), secs. 200-201; Vattel, *Le Droit des Gens* (1758) (Charles G. Fenwick, transl.) (CECIL 1916), Book II, ch. ii, secs. 23-24. It is noteworthy that Vattel does not address "piracy" directly. Privateers without commission he wrote could be treated on capture as "robbers or brigands [*des voleurs ou des brigands*]" while those with commissions were properly considered "prisoners captured in regular warfare [*prisonniers, faits dans une Guerre en forme*]." *Id.* Book III, ch. xv, sec. 226, Vol. II p. 199; Vol. III, p. 318. His discussion of privateering (*id.* sec. 229) addresses only those who abused their licenses for personal gain instead of justice, as unable "to remove the stain of infamy [*ne peut laver leur infamie*]," but he does not call them "pirates" or brigands. He does not address the infamy of those who pursue the same ends without commissions.

138. Wolff dealt with the problem of an expanded knowledge of political societies outside of Europe, and the apprehension that not all men found the interference with peaceful commerce to be unreasonable, by hypothesizing the entire "society of men united for the purpose of promoting the common good by their combined powers" as a "supreme state" governed by its own unwritten constitution. Wolff, *op. cit.*, Prologomena secs. 9-11. He considered individuals as bound equally with states to the whole system. *Id.*, sec. 12. But he excluded from the supreme state nations which, without naming any, he called "barbarous and uncultivated." *Id.* secs. 52-53, 168-169. This approach raises many theoretical problems, particularly when it is remembered that Wolff expressly notes that all nations are imperfect, and that there is no right of war against a "barbarous" state merely on account of its barbarity (*id.* sec. 169)—thus implying that there is yet another, even more "supreme," state linking the "supreme state" of civilized nations to barbarous states in a single system. But this is not the place to analyze Wolff's full thought.

139. Bynkershoek, *op. cit.* note 3 above.

140. *Id.*, text at note 3 above.

141. *Id.*, 98 (English translation); Vol. I, p. 122: "*piratarum praedonumque vocabulo intelliguntur.*"

142. *Id.*, Vol. II, p. 98 (English translation); Vol. I, p. 122: "*Unde, ut piratae, puniuntur, qui ad hostem depredandum enavigant sine mandato Praefecti maris . . .*"

143. *Id.*

144. *Id.*

145. *Id.*, Vol. II, p. 99, citing Dutch (and pre-independence Habsburg) laws of 1570 (insurance), 1580 (herring-fishers) and 1696 (French privateers too close to Dutch territory). The Dutch word used in these statutes was not "piracy" but "zeerovery." *Id.*, Vol. I, p. 126.

146. See text at notes 17 sq. above. William III of England was, of course, William, Prince of Orange, the *Stadhouder* of the Netherlands. The line of succession in England diverged from that of the Netherlands after his death, England having invited him to rule only because he was the Protestant husband of James's daughter Mary. Under this arrangement, William ruled England alone as William III after Mary's death in 1694, but was succeeded by Anne, Mary's younger sister, who died without surviving children in 1714. George I of Hanover succeeded Anne in that year as the nearest relative of the Stuart line (he was a great-grandson of James I).

147. Bynkershoek, *op. cit.*, Vol. II, pp. 101-102. It is not clear whether this negotiation is the same as that detailed in the text at notes 73 sq., in which Sir Leoline Jenkins took the view in 1675 that the Treaty of 1667 had a different meaning than that stated here by Bynkershoek.

148. See argument in text at notes 85 sq. above.

149. Bynkershoek, *op. cit.*, Vol. II, p. 102. The treaty is in 7 CTS 141. Article XVII (pp. 146-147) comes closest to what Bynkershoek says, but I have found no provision that says it clearly.

150. Bynkershoek, *op. cit.*, Vol. II, pp. 102-103.

151. See note I-176 above.

152. Blackstone, *Commentaries on the Laws of England*, was published in four volumes. Only the fourth is pertinent to this study; it was published in 1769. The identical text is used in the edition published in Worcester, Massachusetts, in 1790, which is the one from which these excerpts are taken as more likely to have influenced American judges in the early 19th century, particularly Justice Story. See chapter III below.

153. 4 Blackstone, *Commentaries* (1769, 1790) 67.

154. See notes I-61 and I-201 above.

155. 4 Blackstone, *op. cit.* 71-72.

156. Coke, *Fourth Institute* (1644) *passim*.

157. All the excerpts below are taken from 2 Wooddeson, *A Systematical View of the Laws of England* (1794), Lecture XXXIV, "Of Captures at Sea."

158. *Id.*, 421.

159. *Id.*, 422.

160. Such as whether an attempt at "piracy," the mere assault, not being "robbery" was properly considered to be "piracy." Jenkins and Molloy each has passages relating to this, Jenkins asserting the attempt to be enough, according to Wooddeson, Molloy taking the other position on the basis of statute law in many jurisdictions. But Wooddeson's citation to Molloy (Molloy, *op. cit.* sec. 18) seems unrelated to the point, and in another place (sec. 13) Molloy argues that an unsuccessful assault will still carry criminal penalties—the distinctions being technical ones as to whether members of the crew are all principals or only accessories in the crime. This does not seem a significant issue for present purposes. An exhaustive analysis of the technical questions, treating the English treatises and cases as if determinative of international law, is *In re Piracy Jure Gentium* [1934] A.C. 586. See note V-101 sq. below.

161. Wooddeson, *op. cit.* 423.

162. *Id.*, 423-424.

163. On the shift of language from "law of nations" to "international law," see note 135 above.

164. *Id.*, 426.

165. *Id.*, note "n" at the foot of p. 426. Wooddeson records that Ryan was convicted but pardoned, which seems to illustrate the point of jurisprudence: Convicted under positive law relating to commissions; pardoned as an act of grace under natural law principles relating to moral fault.

166. See last sentence in note I-196. Oddly, Wooddeson cites p. 152 instead of 154 of Coke's *Fourth Institute*. There is language in p. 152 to support the citation, but not as direct as the language from p. 154 quoted in note I-196 above, since under the recitation of the case by Coke in p. 152 it is noted that Palachie in fact had a commission.

167. Wooddeson, *op. cit.* 432.

168. See classifications of Henry Marten, in the text at note 43 above.

169. This must have been so as a practical matter, since only the prince issuing a license could have the legal power to interpret his own grant. That, of course, is the problem hinted at but not expressed very clearly by Bynkershoek in discussing the practice of referring all belligerent captures back to the courts of the licensing sovereign. See text at note 149 above.

170. Wooddeson, *op. cit.* 427.