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Piracy and the American Sovereign Imaginary

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Abstract

Between 1815 and 1830, the western Atlantic experienced a surge in maritime piracy. The United States was confronted with the ancient specter of *hostis humani generis*, the enemy of all, which threatened the safety and prosperity of the young maritime nation. Questions emerged: Who was responsible for policing international waters? Where and how ought American law be enforced on the open sea? Should all pirates be condemned to death, or should some be spared? What must be done to prevent piracy around the globe? The answers to such questions given by Americans—from Supreme Court justices to local newspaper editorialists—formed an enduring image in public culture of the nation-state's functions and limits, which I call the sovereign imaginary. "Piracy and the American Sovereign Imaginary" considers the relationship between piracy and the sovereign imaginary in early nineteenth-century American public culture. Nineteenth-century piracy is not often studied by scholars of maritime history. This study explores how Americans between 1815 and 1830 experienced piracy as part of their everyday lives, and how those experiences were used to articulate different understandings of state power. Furthermore, analyzing the rhetoric of piracy reveals elements of the sovereign imaginary that continue to haunt American politics, law, and policy in the present. Part 1 compares theories of postsovereignty, or the belief that the power of the sovereign nation-state has begun to wane over the past half-century, with the rhetoric of universal jurisdiction in US pirate law in the nineteenth century. I argue that universal jurisdiction, a legal doctrine allowing any state to prosecute any pirate, reveals strains of postsovereign thought in nineteenth-century American culture that challenge the temporality of postsovereignty theories. Part 2 analyzes the ways in which violence and sovereignty are linked in contemporary theories of the sovereign decision, and subsequently compares those theories to nineteenth-century attitudes toward

the use of the pardoning power to save criminals from execution. I argue that the use of the pardoning power in early American piracy cases reveals alternative dispositions of the sovereign decision that aim to save lives from state violence.

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Contents

Introduction

In 1837, Charles Ellms published *The Pirates Own Book*, a thick volume detailing the "lives, exploits, and executions of the most celebrated sea robbers." Through what book historian Michael Winship describes as "cut-and-paste and borrowing," Ellms told a diverse set of pirate tales, covering multiple historical periods and places around the globe.[1] There is no discernible logic governing the book's organization, but the first story is one of the oldest, describing the "Danish and Norman Pirates" of the fifth century who helped to found Ireland. Chapter titles promise salacious tales from the so-called Golden Age of Piracy (roughly 1650–1730), such as the "Life, Atrocities, and Bloody Death of Black Beard," while others are more muted, such as two chapters about women pirates, "Life and Exploits of Anne Bonney" or "Adventures and Heroism of Mary Read." Ellms included an early account of "Mistress Ching," today better known as Ching Shih, a Chinese pirate distinguished not only by the fleet under her command—reportedly the largest in history, with a crew of 70,000 hands—but also because she was one of the few great pirates to retire, rather than die at sea or at the gallows.[2] Bound in brown leather, its spine embossed with a golden skull and anchor, and its pages littered with detailed and beautiful illustrations, the physical book was as striking as the stories it contained. Praising its material quality and the style of its illustrations, one reviewer in the *Boston Courier* wrote in July 1837 that *The Pirates Own Book* "is of a character to excite and perhaps gratify curiosity."[3] An understatement is there ever was one.

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[1] Michael Winship, "Pirates, Shipwrecks, and Comic Almanacs: Charles Ellms Packages Books in Nineteenth-Century America," *Printing History,* n.s. 9 (2011): 9.
[2] Charles Ellms, *The Pirates Own Book; or, Authentic Narratives of the Lives, Exploits, and Executions of the Most Celebrated Sea Robbers [. . .]* (Boston: Thomas Groom, 1837). For additional information on Ching Shih, see Yung-lun Yüan, *Ching hai-fen chi: History of the Pirates Who Infested the China Sea from 1807 to 1810*, trans. Charles Friederich Neumann (London: Oriental Translation Fund, 1831).
[3] *Boston Courier*, July 6, 1837, Readex *America's Historical Newspapers* (hereinafter AHN).

In many ways, Ellms's anthology is an updated version of the urtext of modern pirate history and literature: *A General History of the Robberies and Murders of the Most Notorious Pyrates*, the first volume of which was published in 1724 London under the pseudonym Captain Charles Johnson.[4] The *General History*, as it is known among pirate scholars, is significant for its overwhelming influence on later texts and because many of the piracies it describes occurred only a few years before the book was published. Not only did it introduce readers across the anglophone world to pirates they had not known of before, but it also expanded the histories of many freebooters whose lives had graced the pages of metropolitan newspapers throughout the early eighteenth century.[5] Ellms copied, with some updated language and minor editing, many of his Golden Age stories directly from the *General History*.[6] He also mimicked the book's concern with its present. Indeed, *The Pirates Own Book* includes several tales of pirates whose crimes were reported as news, not history, in its original audience's lifetimes.

Atlantic piracy in the early nineteenth century is infrequently studied by scholars or popular historians when compared to its Pacific cousin or to the piracies of the Golden Age. In contrast to the nearly mythological representations of pirates like Blackbeard in the *General History*, the stories of nineteenth-century pirates are unglamorous. In his 1932 book *The History of Piracy*, which is itself a twentieth-century update of the *General History* in many ways, historian Philip Gosse had this to say about Atlantic piracy from the prior century:

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[4] Charles Johnson, *A General History of the Robberies and Murders of the Most Notorious Pyrates […],* (London: Printed for Ch. Rivington, J. Lacy, and J. Stone, 1724).

[5] Assessing the historical accuracy of the *General History* is common in pirate scholarship. See, for example, Neil Rennie, *Treasure Neverland: Real and Imaginary Pirates* (Oxford: Oxford University Press, 2013).

[6] For an example of Ellms's copying technique, compare the discussion in Henry Avery in both texts: ibid., 45–64; Ellms, *Pirates Own Book*, 25–37.

> These new pirates were worse than any that had existed before. The earlier pirates, with all their black faults and their cruelty, were not without some trace of humanity, and on occasion could fight bravely. These new pirates were cowards without a single redeeming feature. Formed from the scum of the rebel navies of the revolted Spanish colonies and riff-raff of the West Indies, they were a set of bloodthirsty savages, who never dared attack any but the weak, and had no more regard for innocent lives than a butcher has for his victims. The result is a monotonous list of slaughterings and pilferings from which scarcely one event or a single character stands out to strike a spark from the imagination.[7]

Gosse does admit that "perhaps the only picturesque villain of the lot is Jean Lafitte," the commander of the Baratarian pirates, who plundered ships, trafficked slaves, and murdered many in the Gulf of Mexico for decades in the early part of the century. His fleet was also responsible for turning the tide against the British in the Battle of New Orleans during the War of 1812.[8] Lafitte is the first nineteenth-century pirate Ellms included in *The Pirates Own Book*. The others, such as Don Pedro Gibert (whom Gosse does discuss at length) and Charles Gibbs, match Gosse's generalization much more closely. Nevertheless, Ellms must have believed, as the author of the *General History* had a century earlier, that his audience would be just as interested in stories of contemporary pirates as they were in the older tales. Although not nearly as well written as its forbearer, *The Pirates Own Book* is just as significant, because it reveals that piracy was a part of American life in the early nineteenth century, not only as a literary trope, or as a historical curiosity, but as a lived experience. Rather than dismiss nineteenth-century pirates because they failed "to strike a spark from the imagination" for

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[7] Philip Gosse, *The History of Piracy* (New York: Longmans, Green, and Co., 1932), 213.
[8] See Ellms, *Pirates Own Book*; William C. Davis, *The Pirates Lafitte: The Treacherous World of the Corsairs of the Gulf* (New York: Harcourt, 2005); Jack C. Ramsay Jr., *Jean Lafitte: Prince of Pirates* (Austin, TX: Eakin Press, 1996).

Gosse in 1932, we ought to ask instead: In what ways did nineteenth-century pirates capture the American imagination?

At the center of nearly every pirate story—whether factual, fictional, or somewhere in between—lies a conflict between the pirates and their primordial enemy, the sovereign. The relationship between the pirate and the sovereign was so important to Ellms that he, again copying from the *General History*, devoted the introduction of *The Pirates Own Book* to a concise history of pirate law in England and the United States.[9] The drama of pirate stories often reaches its climax through literal conflict, as pirates like Blackbeard fought for their lives against the naval forces of Atlantic maritime powers, resulting in a spectacular death at sea or a more publicly infamous death at the gallows. But the conflict between pirates and sovereigns carries figurative dimensions as well. Western thinkers have defined sovereigns and pirates against one another for millennia. Perhaps the most famous example comes in a story told by Augustine in *The City of God Against the Pagans*, written in the early fifth century; a story whose origin Augustine locates in now-lost portions of Cicero's philosophical dialogues on the commonwealth, written around 50 BCE.[10] Augustine's text reads:

> It was a pertinent and true answer which was made to Alexander the Great by a pirate whom he had seized. When the king asked him what he meant by infesting the sea, the pirate defiantly replied: "The same as you do when you infest the whole world; but because I do it with a little ship I am called a robber, and because you do it with a great fleet, you are an emperor."[11]

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[9] Ellms, *Pirates Own Book*, vi–ix. See also Jonathan M. Gutoff, "The Law of Piracy in Popular Culture," *Journal of Maritime Law and Commerce* 31 (2000): 643–48.
[10] Cicero, *On the Commonwealth*, in *On the Commonwealth and On Laws*, ed. James E. G. Zetzel (Cambridge: Cambridge University Press, 1999), 67 (bk. III, § 22a).
[11] Augustine, *The City of God Against the Pagans*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 1998), 145 (bk. IV, chap. 4, § 4).

Augustine admits a material identity between the conduct of the pirate and emperor, differentiated only by scale, which reveals the fundamentally rhetorical nature of both piracy and sovereignty: they are legal and political concepts constituted through distinction *and* definition.[12] But rather than being confined to a dialectic, Augustine's quotation suggests the existence of a third party who defines the other two. "I am called a robber . . . and you are an emperor," the pirate says, but called so by whom?

In this dissertation, I argue that piracy captured the American imagination in the early nineteenth century in part because thinking, learning, and talking about piracy allowed Americans to make sense of the evolving sovereignty of the young United States. Between 1815 and 1830, piracy threatened the economic, social, political, and legal stability of the country, both domestically and internationally. To respond to this challenge, Americans at all levels of society—from Supreme Court justices and senators, to sea captains and religious leaders, to merchant sailors and newspaper editorialists—crafted attitudes toward the limits of state power that together became what I call a "sovereign imaginary." This phrase, borrowed from Charles Taylor's theory of the modern social imaginary, is ambiguous by design: "[It] is what enables, through making sense of, the practices of a society."[13] The analysis of a sovereign imaginary is thus rhetorical, since it examines *how* nation-state power is enabled through symbolic processes of meaning-making. The imaginary is not, however, confined to the realm of the idea; indeed, quite the opposite is the case.[14] A sovereign imaginary is

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[12] On the rhetorical power of definition, see Edward Schiappa, *Defining Reality: Definitions and the Politics of Meaning* (Carbondale: Southern Illinois University Press, 2003); David Zarefsky, "Presidential Rhetoric and the Power of Definition," *Presidential Studies Quarterly* 34 (2004): 607–19. See also Robert Elliot Mills, "The Pirate and the Sovereign: Negative Identification and the Constitutive Rhetoric of the Nation-State," *Rhetoric and Public Affairs* 17 (2014): 105–35.
[13] Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2003), 2.
[14] For a more materialist theory of rhetoric which touches on many of these themes, see Ronald Walter Greene, "Another Materialist Rhetoric," *Critical Studies in Mass Communication* 14 (1998): 21–40.

experienced and articulated in all aspects of everyday life that require interacting with the nation-state. Thus, the analysis of this imaginary must address the legal, political, and social practices of the culture out of which it is formed.

Rather than a description of how state power if configured or limited, sovereignty is a navigational concept that allows the nation-state to move within domestic and international contexts. By its very nature, sovereignty is flexible, and it can be elusive. Hence I treat sovereignty as an attitude toward the limits of state power, rather than a normative definition of those limits. Sovereignty can be more or less permissive, structured, and expansive, just as it can be more or less cruel, merciful, and protective. As with a navigator on a ship who must make sense of various symbols—the reading of a sextant, the position of the stars, and drawings of a map—to guide a ship on its course, sovereignty involves making sense of various aspects of nation-state power to enable certain forms of state action. In that sense, a sovereign imaginary can never be confined to those discussions that are explicitly *about sovereignty*; rather, whenever state power is confronted, in practice or in theory, the sovereign imaginary appears.

There is an inherent danger in trying to understand piracy and sovereignty as a dialectical pair within a broader social imaginary. To work through the ambiguities of one element, the other must be stabilized. In specific terms, one can analyze the formation of a sovereign imaginary through piracy, or a pirate imaginary through sovereignty, but it would be difficult, if not impossible, to do both at the same time. The danger is primarily methodological, since unraveling piracy and sovereignty together would require too many pages for a single study, and too many internal qualifications in the argument to produce adequately concrete analysis. For this project, I treat piracy as the more stable category by defining it exclusively as a criminal act under national and international law. Although this decision will allow for a more nuanced and direct study of the

sovereign imaginary, it is not without its consequences, because it conceals an extraordinary ambivalence toward piracy in the period.

Nineteenth-century popular culture in the United States was caught between two competing figurations of the pirate: one horrific and the other romantic. One was as likely to see the pirate represented as a bloodthirsty villain in league with the devil as to find the pirate written as the protagonist in a love story or the heroic champion of individual freedom. Some scholars see the distinction between these two figurations as transitional rather than tensional. This is the view of British historian David Cordingly, who argues that the image of pirates as "romantic outlaws" arose only as "the threat of piracy receded."[15] The most famous works of romantic pirate fiction in the period were written in Britain. Cordingly identifies Lord Byron's 1814 epic poem *The Corsair*, initially published in London, as the work which secured the romantic image's international popularity.[16] *The Corsair* tells the story of Conrad, a privateer turned pirate who takes up arms against a society that has rejected him, in a heroic struggle for his and others' freedom. The poem was read widely on both sides of the Atlantic, but many Americans erroneously believed that Conrad was based on Jean Lafitte, one of the pirates Ellms wrote about in *The Pirates Own Book*.[17]

Although the horrors wrought by pirates may have been of declining relevance in Great Britain when *The Corsair* was published, those horrors were still fresh in American minds. In the early decades of the nineteenth century, the United States witnessed an explosion of piracy. The nation had fought two wars against the so-called Barbary Pirates by 1816, and the revolutionary wars in Central and South America caused a resurgence of piracy in the Caribbean between 1815 and

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[15] David Cordingly, *Under the Black Flag*: *The Romance and the Reality of Life Among the Pirates* (New York: Random House, 1996), xx.
[16] George Gordon, Lord Byron, *The Corsair, a Tale* (London: Thomas Davison, 1814).
[17] Davis, *Pirates Lafitte*, 471–72.

1830. US newspapers routinely printed detailed accounts of pirate attacks, and transcripts of trials and pirate confessions proved to be very popular material for presses across the country. Critics of piracy's romantic image feared that it might seduce men into lives of crime, or entice women to chase adventure—or, more accurately, *adventurers*—at sea. As one Bostonian wrote of Minna Troil, a heroine who falls in love with pirate captain Clement Cleveland in Sir Walter Scott's 1822 novel *The Pirates*, "The whole delineation of her character is dangerous and delusive to a young and romantic mind; and we believe that many a visionary heroine would infinitely prefer becoming a Minna Troil in 'The Pirate,' to imitating the modest, sensible, tender, persevering, and Christian—but, alas! homely—Jeannie Deans in 'The Heart of Mid-Lothian.'"[18] The romantic image was, however, largely confined to pages of literary fiction and poetry, and to the performance stages of major cities, which showcased works such as Bellini's 1827 opera *Il pirata*, first performed in New York in 1832.[19] Nevertheless, the romantic representation proved extremely popular.

Ellms implicitly acknowledges the tension between the romantic and the horrific in the preface of *The Pirates Own Book*. "In the mind of the mariner," he begins, "there is a superstitious horror connected with the name of the Pirate; and there are few subjects that interest and excite the curiosity of mankind generally, more than the desperate exploits, foul doings, and diabolical career of these monsters in human form."[20] He contrasts this view with a more romantic one, discussing the association between piracy and a life of relaxation among the "lofty forests of palms and spicy

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[18] "The Pirate, by the author of 'Waverly, Kenilworth, &c.,'" *Christian Observer* (Boston, MA) 22 (April 1822): 244; Walter Scott, *The Pirate* (Edinburgh: Archibald Constable and Co., 1822).
[19] The first American production of *Il pirata* premiered at New York's Italian Opera House on December 5, 1832, led by manger Lorenzo Da Ponte. See "Italian Opera House," *American* (New York), December 4, 1832. Da Ponte, the famed librettist of Mozart's operas *Don Giovanni*, *Le nozze di Figaro*, and *Così fan tutte*, published English translations of Felice Romani's original Italian libretto for *Il pirata*; see Lorenzo Da Ponte, *The Pirate: A Melo-Drama, in Two Acts, as Performed at the Chestnut Street Theater*, 2nd ed. (Philadelphia: Turner and Son, 1833).
[20] Ellms, *Pirates Own Book*, 3.

groves of the Torrid Zone," concluding that "It would be supposed that his [the pirate's] wild career would be one of delight." Yet Ellms immediately rejects the romantic image, arguing that the conscience of a criminal will ultimately win out. As is clear in this quoted verse:

> "Conscience, the torturer of the soul, unseen,
>
> Does fiercely brandish a sharp scourge within;
>
> Severe decrees may keep our tongues in awe,
>
> But to our minds what edicts can give law?
>
> Even you yourself to your own breast shall tell
>
> Your crimes, and your own conscience be your hell."[21]

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[21] Ibid., 5. These lines have an unusual origin. They are typically attributed to Ellms, or to Scottish minister Thomas Dick's *The Philosophy of a Future State* (Brookfield, MA: E. and G. Merriam, 1829), 79. Neither author cites the verse's source. However, the lines appear in an earlier volume, James Ewell's *The Medical Companion [. . .]*, 5th ed. (Philadelphia: Printed for the author, 1819), 195. Ewell, who quotes the lines in a chapter on anger, attributes them to seventeenth-century English poet John Dryden.

However, Dryden does not appear to be the sole author of the text. In fact, it is likely composed of two verses pulled from separate, but contemporaneous, sources. The final four lines—"Severe decrees . . . be your hell"—are used in Act V of Dryden's 1675 play *Aureng-Zebe*. See John Dryden, *Aureng-Zebe: A Tragedy* (London: T.N., 1676), 67. The first two lines—"Conscience . . . scourge within"—are used in Charles Cotton's 1685 translations of Montaigne's *Essays*. See Charles Cotton, *Essays of Michael Seigneur de Montaigne [. . .]*, vol. 2 (London: T. Baffet, 1685), 60. Specifically, they are a translation of a line from the Roman poet Juvenal's Satire XIII, *"Occultum quatiens animo tortore flagellum*" (ln. 195), which Montaigne had quoted in his chapter on conscience. Coincidentally, Dryden himself published a translated volume of Juvenal's Satires in 1693, although Satire XIII in that volume was translated by Thomas Creech. See John Dryden et al., *The Satires of Decimus Junius Juvenalis, Translated into English Verse, by Mr. Dryden, and Several Other Eminent Hands [. . .]* (London: Jacob Tonson, 1693). Creech's rendition of the line quoted in Montaigne is entirely dissimilar to Cotton's (267, ln. 248–51).

These texts are thematically connected by discussions of conscience and guilt, and specifically in some cases, the conscience of a parricide. This is true of the lines from *Aureng-Zebe* and the portion of Montaigne in which he quotes Juvenal. Indeed, Ewell and Dick reproduce, without attribution, a paragraph from Cotton's translation of Montaigne in which the Frenchman discusses the conscience of Bessus the patricide. Ewell, but not Dick, cites the beginning of Creech's translation of Juvenal on the conscience of sinners. Dick, but not Ewell, quotes another portion of *Aureng-Zebe*, which he this time attributes explicitly to Dryden. It is certainly possible that Ewell and Dick both referenced a third text on conscience or parricide that included the combined lines from

With this verse, Ellms connects piracy to the sovereign law of the state and to the disciplinary law of nineteenth-century enlightenment social philosophy, through which the internalization of social norms produces proper behavior through self-regulation.[22] Indeed, Ching Shih's exceptional life aside, the adventures of real pirates almost always ended in confrontation with the sovereign, the result of which was death. Hardly a romantic, Ellms makes clear that the dark stories anthologized in *The Pirates Own Book* might "excite the curiosity" of his readers, but they also would provide valuable moral instruction, which includes respect and understanding for the law.

The introduction that follows the preface to *The Pirates Own Book* is dedicated to untangling the complex histories of pirate law. Ellms's citations, both explicit and implicit, are wide-ranging. He quotes from American statutes and Supreme Court opinions, from the treatises of British jurists, and even from Augustine's *City of God*. He sketches a history of antipiracy that stretches from the fragments of Ancient Greek texts to courtrooms of the modern United States, and although his treatments of these sources range from technical interpretation to impressionistic summary (likely an effect of his "cut-and-paste" compositional technique), as a whole, the introduction imparts a sense that pirates have had an essential connection to sovereign law, both materially and conceptually, for all of Western history. Pirates are thus figured as the primordial enemy of humanity. Ellms, copying William Blackstone, cites Sir Edward Coke's 1644 claim that pirates are *hostis humani generis*, the enemy of all, which is likely a corruption of Cicero's 44 BCE phrase *communis hostis omnium*, the

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Dryden and Cotton as a single verse, or that Cotton and Dryden separately borrowed lines from an earlier text, and it is also possible that Dick copied from Ewell's original misquotation.

Unfortunately for the authors of the *Christian Observer*, parts of the combined verse appear in two recent American romance novels with pirate characters: as dialogue in Rona Sharon's *My Wicked Pirate* (New York: Zebra Books, 2006), 103; and as an epigraph to Katharine Ashe's *How to Be a Proper Lady* (New York: HarperCollins, 2012). Ashe was indispensable in tracking the provenance of the combined verse, as she properly attributes the first two lines to Juvenal's Satire XIII.

[22] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

enemy of human community.[23] In both cases the pirate is the universal enemy of humanity. This universalization is brought into the nineteenth century, as Ellms paraphrases Joseph Story's opinion from the Supreme Court case *United States v. Smith* (1820) in the opening lines of the introduction, writing: "By universal law of nations, robbery or forcible depredation upon the 'high seas,' *animo furandi*, is piracy."[24] To be sure, it is not likely that all readers of *The Pirates Own Book* would have the legal literacy to recognize the many implicit citations in the introduction. Ellms nevertheless provided his readers with a historical and theoretical framework with which to interpret the legal relationships of pirates and sovereigns. This would certainly help those readers understand the conclusions of many pirate stories in the anthology. It would also help them interpret the piracies that had taken place over the past twenty years of American life.

Atlantic Piracy in the Nineteenth Century

Charles Gibbs, whose story is included in *The Pirates Own Book* (and the less famous *Pirate's Own Song Book*), is in many ways typical of early nineteenth-century Atlantic pirates.[25] Gibbs was born in Rhode Island around 1794. According to his published confession, he was a restless child, leaving home at the age of fifteen against the advice of his parents, to begin a life at sea. He claimed to have served on the USS *Hornet* during the War of 1812, which prepared him for maritime combat but would have also made him a capable merchant sailor. In 1816, he joined the crew of the American schooner *Maria*, commissioned as a privateer by Buenos Aires in its revolutionary war

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[23] Sir Edward Coke, *The Third Part of the Institutes of the Law of England [. . .]* (London: M. Flesher, 1644), 113; Cicero, *On Duties*, trans. Walter Miller, Loeb Classical Library 30 (Cambridge, MA: Harvard University Press, 1913), 384 (bk. III, § 29).
[24] Ellms, *Pirates Own Book*, vi; *United States v. Smith,* 18 U.S. 153 (1820), compare at 161.
[25] Ellms, *Pirates Own Book*, 98–119; *Pirates Own Song Book* (Philadelphia: Turner and Fisher, n.d.), American Antiquarian Society (AAS), Worchester, MA. AAS records indicate that the pamphlet was likely published between 1841 and 1899.

against the Spanish Empire. It was on the *Maria* that Gibbs first sailed beneath the black flag. After sailing from Boston to the South American coast, the crew mutinied, killed the officers, and took the ship on a piratical cruise around the Caribbean. The transformation of a sailor from merchant to privateer to pirate was incredibly common in the early nineteenth century; but for Gibbs, it is what occurred *after* the mutiny that made his story extraordinary enough for immortalization. Gibbs confessed to more than eight piracies, first as crewman, then officer, and finally captain of the *Maria*; and over the course of those attacks, he claimed, he participated in the murders of nearly four hundred people. Between 1819, when he first returned to the United States, and 1830, when he committed his final act of piracy, Gibbs tried his hand at various jobs, from grocer to mercenary. In December 1830, Gibbs found himself as a passenger on the schooner *Vineyard*, which sailed from New Orleans to Philadelphia. He discovered that the *Vineyard* carried a cargo of "54,000 dollars in specie" and orchestrated a successful plot to pirate the ship, which resulted in the murder of its captain and first mate. Gibbs sailed the schooner to New York, where it ran aground on Long Island. His misdeeds were eventually discovered, and he was captured, tried, and convicted of piracy in New York's federal district court. He was executed by hanging five minutes after noon on April 22, 1831.[26]

The beginning and end of Gibbs's pirate career coincide with the resurgence and decline of Atlantic piracy in the nineteenth century. Like Gibbs, many pirates began their careers on privateers, commissioned by the revolutionary governments of Spanish American colonies to capture and plunder enemy merchant vessels as prize. Not only did the colonies fight against the Spanish Empire

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[26] *Mutiny and Murder: Confession of Charles Gibbs [. . .]* (Providence, RI: Israel Smith, 1831), 14. The material on Gibbs in *The Pirates Own Book* is copied nearly verbatim from this confession. See also *Trial and Sentence of Thomas J. Wansley and Charles Gibbs, for Murder and Piracy, on Board the Brig Vineyard* (New York: Christian Brown, 1831); Joseph Gibbs, *Dead Men Tell No Tales: The Lives and Legends of the Pirate Charles Gibbs* (Columbia: University of South Carolina Press, 2007).

for their independence, but they also fought against each other to secure a dominant position in South America.[27] Buenos Aires, now Argentina, emerged as a particularly popular employer of US vessels and their crews. Although privateers were governed by international law (and their plunder by prize law), and although the commission only authorized takings from a specific set of enemy nations, there was no direct state control over which ships a privateer might attack on any given cruise. Privateers often blurred the lines between legal and illegal takings, and if there were not enough enemy ships to plunder, they would often turn to piracy to fill their coffers. Moreover, American shipowners would conceal the fact that a merchant ship was simultaneously engaged as a privateer, and captains would change plans on a whim once at sea, which meant that many sailors joined ships without knowing they were functionally engaged in war. These deceptions, magnified by the generally oppressive behavior of captains authorized by maritime law, led many crews to mutiny, as Gibbs had done in 1816, and turn to a life of piracy on their own terms.[28]

The path from privateer to pirate was also common in the Golden Age, and it took the combined might of European navies to end the scourge in the early eighteenth century.[29] By 1816, after the conclusion of the War of 1812 and both Barbary Wars, the United States possessed sufficient naval power to join the fight against piracy. Naval vessels regularly patrolled the western Atlantic, and a specially created antipiracy unit even sailed the Gulf of Mexico from 1822 to 1825.[30]

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[27] John Lynch, *The Spanish American Revolutions, 1808–1826*, 2nd ed. (New York: W. W. Norton and Company, 1986).
[28] David Head, *Privateers of the Americas: Spanish American Privateering from the United States in the Early Republic* (Athens: University of Georgia Press, 2015). See also Matthew Taylor Raffety, *The Republic Afloat: Law, Honor, and Citizenship in Maritime America* (Chicago: University of Chicago Press, 2013).
[29] Marcus Rediker, "'Under the Banner of King Death': The Social World of Anglo-American Pirates, 1716 to 1726," *William and Mary Quarterly* 38 (1981): 203–27; Marcus Rediker, *Villains of All Nations: Atlantic Pirates in the Golden Age* (London: Verso, 2004).
[30] James A. Wombwell, *The Long War Against Piracy: Historical Trends*, Combat Studies Institute Occasional Paper 32 (Fort Leavenworth, KS: Combat Studies Institute Press, 2010), 36–56.

One historian estimates that between 1820 and 1830, more than 10,000 sailors turned to piracy in the Caribbean, plundering more than 500 vessels. The estimates for the number of pirates captured by different navies in the same period, however, are much more modest: 79 vessels and 1,300 sailors for the United States, 13 vessels and 291 sailors for Great Britain, and 5 vessels and 150 sailors for Spain.[31] With 1,300 pirates captured at sea over ten years, and many more captured on land after traveling to the United States on their own, the American judicial system faced a monumental task: trying and punishing these pirates for the crimes they had committed.

Article 1, Section 8 of the United States Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations." In 1790, the Congress passed a law giving jurisdiction over piracy to the federal circuit courts and defining the crime as murder or robbery committed on the high seas or other select bodies of water, outside of the jurisdiction of any state. The punishment under the statute was death.[32] The language of the law appears consistent with British common law, as formalized by William Blackstone, and with the more nebulous set of international legal norms known as the law of nations. One particularly interesting aspect of the law of nations is the doctrine of universal jurisdiction, which afforded every state the right to try and punish any pirate that agents of that state came across. For a young nation emerging as a naval power, how universal jurisdiction was interpreted and applied in the American context was an issue of considerable legal importance. Not only would it define the scope of US power internationally, but it would also shape attitudes toward the imposition of American domestic law on foreigners. As more and more pirates began appearing

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[31] Francis B. C. Bradlee, *Piracy in the West Indies and Its Suppression* (Salem, MA: Essex Institute, 1923), 22–23.

[32] An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 113–14 (1790).

in American federal courts, defense lawyers tested every aspect of the 1790 statute in hope of finding freedom for their clients. By 1822, at least a dozen pirate cases had reached the Supreme Court. The opinions of Justice Story, Chief Justice John Marshall, and others in these cases shaped and reshaped American attitudes toward sovereignty and jurisdiction, even prompting the Congress to create new, expansive antipiracy laws in response to limiting judicial rulings.[33]

Pirate trials challenged Americans to consider the limits of their nation's power in more areas than jurisdiction. Death was the only punishment for piracy authorized by the 1790 statute and its successors in the nineteenth century. President James Monroe, who held the office from 1817 to 1825, received countless petitions to reprieve and pardon sailors convicted as pirates. These petitions are evidence of a general, public ambivalence toward capital punishment in the early nineteenth century, which was magnified in the context of piracy because no other punishment was permissible. Furthermore, American law made no distinction between principal and accessory actors in piracy cases, and thus anyone who participated in *any* aspect of a piracy was held responsible for *every* constituent act. Americans across the nation were confronted with significant questions about the role of the state in the execution of its laws, the state's use of violence to achieve other social ends, and even the role of the presidency in offering clemency to convicted criminals.

The practices of the judicial world were not foreign to the everyday lives of many Americans. Indeed, criminal and legal affairs took center stage in early nineteenth-century popular culture.[34] Presses throughout the country worked tirelessly to satisfy the public curiosity about pirates, printing copies of trial transcripts, accounts of pirate attacks, pirate autobiographies and confessions, and

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[33] An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, 3 Stat. 510, 513–14 (1819).

[34] Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge, MA: Harvard University Press, 2000); Steven Robert Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge: Cambridge University Press, 2010).

execution pamphlets and broadsides. The columns of newspapers and periodicals were filled with news of dangerous seas. Although *The Pirates Own Book* was published several years after the last of the Caribbean pirates faced the gallows, it was born out of a literary culture replete with maritime horror. Pirates attacked the machinery of commerce, they stole and destroyed property, they assaulted, raped, and murdered their victims. And they did it all outside of any nation's territory, without the protection of any national government, with no authorization but their own. By confronting this horrific figure of *hostis humani generis*, Americans made sense of the state power, both internationally and domestically, and put that power into practice. These are thus the conditions under which the pirate shaped the American sovereign imaginary.

Interhistory and the Sovereign Imaginary

In the past fifty years, the phrase *hostis humani generis* has received renewed attention, not only from writers of pirate fiction but from jurists, scholars, and activists as well. Universal jurisdiction and the law of nations feature prominently in modern human rights discourse, as lawyers and judges have relied on pirate law as a historical precedent for new forms of international criminal law. The expansion of human rights law, which has enabled the prosecution of criminals by national and supranational bodies for crimes committed outside of their territorial jurisdictions, is part of a broader shift in global culture away from the rigidity of the nation-state formation. Adopting the term "postsovereignty," many scholars argue that the waning power of sovereignty has been caused by several factors unique to the last half-century, including rapid technological development, enhanced global communication networks, evolving tactics of governance, and expanding transnational commerce. Ancient theories like sovereignty no longer account for the realities of an

increasingly globalized world, some say, and thus nation-state sovereignty has begun to recede into the twilight of history.[35]

For others, concepts like *hostis humani generis* help make sense of global terrorism in the twenty-first century. There are copious similarities between piracy and terrorism: both are criminal acts, both typically involve violence, both are carried out in international environments, and both are rejected by dominant cultures. In some cases, scholars have examined historical piracy in hope of learning important tactical lessons about fighting international criminals.[36] Others see antipiracy law as a generative interlocutor for antiterrorism law.[37] And still others have trod a more rhetorical path, analyzing *hostis humani generis* as a catachresis that enables the sovereign to "deploy the lexicon of war with relation to a state of affairs to which it is not technically applicable."[38] Not only have historians and other scholars tried to make sense of the terrorist by analogy to the pirate, but that analogy also has played an important role in shaping official responses to terrorism, including the rhetoric of US presidents.[39] In contradistinction to those who advance the theory of postsovereignty, in which the institutions of the state are disempowered or dissolving entirely, many of those who study pirates as terrorists do so to refine, enable, or even amplify state power. For them, the pirate analogy is a means of intensifying sovereignty, not abating it.

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[35] Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation," *Harvard International Law Journal* 45 (2004): 183–237; Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996); Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010).
[36] Donald J. Puchala, "Of Pirates and Terrorists: What Experience and History Teach," *Contemporary Security Policy* 1 (2004): 1–24.
[37] Eugene Kontorovich, "A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists," *California Law Review* 98 (2010): 243–75.
[38] Jodi Greene, "Hostis Humani Generis," *Critical Inquiry* 34 (2008): 691.
[39] Carol Winkler, *In the Name of Terrorism: Presidents on Political Violence in the Post–World War II Era* (Albany: State University of New York Press, 2006), 71, 88–89.

The interaction between historical piracy, modern postsovereignty, and present terrorism has been taken up recently by Amedeo Policante in his 2015 book *The Pirate Myth: Genealogies of an Imperial Concept.*[40] Policante argues that theorists of international law, and the sovereigns who put those theories into practice, used the specter of *hostis humani generis* to expand imperial and colonial power—a configuration similar to the practices of Western countries in the war on terror.[41] His work is important in part because he studies two aspects of sovereign power that are often treated separately: the historical foundation of the globalized present in early modern theories of international law, on the one hand, and on the other, a sustained critique of the intimate connection between violence and sovereignty. In this, Policante stands on the shoulders of German political theorist Carl Schmitt, whose studies of international law in *The* Nomos *of the Earth* and of the sovereign "state of exception" in *Political Theology* have prompted a shift in humanities scholarship toward the study of international law as a tool of imperial violence.[42] Although Policante's postcolonial politics are largely incompatible with Schmitt's avowed preference for dictatorship, both scholars are part of a critical tradition that focuses on the formation of international law in theoretical, rather than practical, terms. That is, they are primarily interested in pirates and sovereigns as abstractions, as theoretical possibilities, as concepts operating within a schema of ideas. And yet, the articulations of pirates and sovereigns have never been confined to the realm of

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[40] Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (London: Routledge, 2015).
[41] In this regard, Policante follows Hardt and Negri's theory of empire. See Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000). See the discussion of property in Michael Hardt and Antonio Negri, *Commonwealth* (Cambridge, MA: Harvard University Press, 2009).
[42] Carl Schmitt, *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europaeum, trans. G. L. Ulmen (New York: Telos Press, 2006); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005). See also Carl Schmitt, "The Concept of Piracy (1937)," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2 (2011): 27–29.

theory. Piracy has always been a material phenomenon, and attitudes toward piracy and sovereignty were developed in response to real, not only theoretical, piracies.

In this dissertation, I hope to retrieve piracy from the realm of the theoretical—whether that theory concerns law, politics, society, or even literature. This is not to say that theory ought to be abandoned; rather, by analyzing piracy as an aspect of the American sovereign imaginary, I tie theory to the practices of historical people who encountered pirates in their everyday lives, and for whom those pirates posed a problem—whether personal, social, political, or legal—that required a response. Accomplishing this necessitates exploring the discursive field surrounding criminal piracy in the early nineteenth century, a field which emerged at multiple levels of social life, including: juristic texts, diplomatic correspondence, execution sermons, pleas for clemency, confessions, and statutory language. This discursive field reveals that by thinking through the problems posed by pirates, Americans between 1815 and 1830 articulated an image of the United States as a sovereign nation. In that process of articulation, which is both thinking through and speaking about, the practices of the state changed considerably, and the law itself faced constant revision. Although discourse about pirates was often driven by theoretical concerns, what differentiates this study from Policante's is a specific focus on how rhetorics of piracy operated within their own contexts: how they altered the lives of women and men, how they were received, and what their motives were.

The sovereign imaginary of the early nineteenth century was not, however, historically isolated. The resurgence in popularity of *hostis humani generis* in politics, law, and scholarship suggests that aspects of that imaginary continue to haunt the present. Paraphrasing Fredric Jameson's theory of "formal sedimentation," Ian Baucom writes that "particular genres arise as the means of resolving, or at least coding, the concrete experiences and ideologies of their particular historical moments," and when those genres survive after those moments, they do so "by carrying within

themselves, as a sort of ghostly after effect the signature ideologies of their formative moments, which they then rewrite onto subsequent historical moments in which they are deployed."[43] The discursive field of piracy out of which the sovereign imaginary emerged hardly qualifies as a literary or rhetorical genre, in part because the field is unified by subject and not form. However, when the enactment of sovereign power is made sense of (imagined) through a figure as specific and powerful as *hostis humani generis*, experiences and ideas accrete to it and can indeed travel beyond their historical conjuncture. This is especially clear in auto-referential fields such as law, where the recovery of past meaning is a central hermeneutic strategy.

The analysis of *hostis humani generis* specifically, and piracy more broadly, in contemporary thought on terrorism, or human rights law, or state violence, has not yet adequately identified the residues of piracy that linger today. Finding the ghosts of pirates in our present sovereign imaginary is of critical importance, because they may suggest important alternatives within policy, law, and scholarship to the paths we currently tread. To put the past and the present in dialogue with one another is not to suggest, however, that their historical connection is linear. Rather, I see the relationship as interhistorical: a connection between periods whose primary relationship is not causality but identification. Such a perspective forgoes the almost unidirectional determinism suggested by Baucom's reading of Jameson in favor of a dialogic conception of historical relation. Two aspects of the present American sovereign imaginary have formed a dialogue with nineteenth-century images of piracy: first, the transition from sovereign exclusivity to postsovereignty; second, the theorization of sovereignty as inherently and thoroughly violent. The dissertation is thus divided into two parts, organized around these two themes.

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[43] Ian Baucom, *Specters of the Atlantic: Finance Capital, Slavery, and the Philosophy of History* (Durham, NC: Duke University Press, 2005), 19.

In part 1, I discuss the apparent decline of Westphalian sovereignty—under which states exert exclusive, absolute, complete, and enduring juridical control over a bounded national territory—in the era of globalization. Specifically, I argue that "postsovereignty" is not unique to the past half-century of human history, as many other scholars suggest. In chapter 1, I analyze contemporary theories of postsovereignty, dividing them into two forms: the neoliberal, which involves the transfer of state power to non-state institutions, and the nationalist, which concerns the interactions between nation-states and other national and supranational entities. I argue that postsovereignty should not be thought of as a temporal distinction, but rather as a dynamic within state power itself. The nation-state is always in flux between conditions of sovereign exclusivity and postsovereignty, and incorporating that flux into our analyses of sovereign power helps unravel some of the complexities and contradictions of the theory.

In chapter 2, I analyze the rhetoric of universal jurisdiction in American pirate law between 1818 and 1821 to reveal strains of postsovereign thought at work in the early nineteenth century. I discuss three decisions—*United States v. Palmer* (1818), *United States v. Klintock* (1820), and *United States v. Smith* (1820)—in which the US Supreme Court interpreted the limits of American jurisdiction over pirates. I link these decisions to naturalist and positivist theories of international law from Alberico Gentili, Hugo Grotius, and Emer de Vattel, to understand how sovereignty and jurisdiction were connected through the statelessness of pirates. I argue that the rhetoric of universal jurisdiction developed in these cases suggests that Westphalian sovereignty and postsovereignty operated as dynamic poles within the nineteenth-century American sovereign imaginary, a claim which challenges the temporality of current postsovereign theories.

In part 2, I turn from the international to the domestic in exploring the relationship between violence and Carl Schmitt's theory of the sovereign decision. For Schmitt, sovereignty is a juristic

concept which lies at the foundation of every legal order and takes the form of a "decision on the exception." This decision is exceptional in two senses: it arises in response to a situation which existing law is not prepared to answer (exception as emergency) and subsequently suspends that law to preserve the existence of the state (exception as special case). In chapter 3, I offer an interpretation of Schmitt's theory of the exception as a structural account of state power derived from the work of early modern French philosopher Jean Bodin. There have been many attempts to incorporate decisionist sovereignty into an account of American policy in the war on terror, most notably by Giorgio Agamben and Judith Butler. I argue that these theories suture decisionism to violence completely, foreclosing the possibility of imagining versions of decisionist sovereignty that might save life rather than destroy it. In contrast, I suggest that the sovereign's prerogative power to offer clemency is one example of decisionism that precludes violence by its very nature.

In chapter 4, I examine the case of the *Plattsburgh* pirates, a group of men who were tried and convicted of piracy in Boston in 1818. At the request of several Protestant ministers, President James Monroe reprieved the pirates for one month, an act which sparked a considerable debate in Boston's newspapers over the use of the prerogative power, the nature of state violence, and the dispositions of the sovereign. I argue that a rhetorical analysis of this debate illustrates, first, how Schmittian decisionism operates in the American sovereign imaginary, and second, that a sovereign decision can create an exceptional case by offering protection from the violent processes of institutional law. I argue that a dispositional interval exists within the decision that shapes the course of sovereign action. This interval severs the necessity of any link between sovereignty and violence, forging it as a contingent one instead. I conclude with a call for scholars to reconsider sovereign action as a possible remedy for the horrors of modernity.

How to Be a Rhetorical Pirate

In both parts of the dissertation, I analyze texts using a rhetorical hermeneutic. Angela G. Ray, borrowing from both James Boyd White and Kenneth Burke, defines rhetoric as a form of symbolic action:

> *[R]hetoric* . . . [is] "that art by which culture and community and character are constituted and transformed." [White's] functional definition resonates with Kenneth Burke's claims that it is through the use of symbols that human beings represent themselves as selves, band together in groups, and create and destroy boundaries among those groups. It is by rhetorical action that cultures are made.[44]

Ray's characterization highlights one quality that distinguishes rhetorical analysis from other forms of textual analysis: rhetoric examines *how* texts work within and upon a given, historically situated context. Neoclassical scholars, for example, study persuasive effect, while others study the material effects of structural power and yet others study modes of identification.[45] A sovereign imaginary is part of the culture out of which it emerges, but it shapes that culture as well. Both processes take place through symbolic action, and thus the analysis of a sovereign imaginary is inherently rhetorical.

As a mode of symbolic exchange, the primary form of rhetorical action is articulation, or the joining together of otherwise disconnected things without combining them.[46] Articulation can be

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[44] Angela G. Ray, *The Lyceum and Public Culture in the Nineteenth-Century United States* (East Lansing: Michigan State University Press, 2005), 2.

[45] Herbert A. Wichelns, "The Literary Criticism of Oratory," in *Studies in Rhetoric and Public Speaking in Honor of James Albert Winans*, ed. A. M. Drummond (New York: Century Co., 1925), 181–216; Barbara Biesecker, "Rethinking the Rhetorical Situation from Within the Thematic of Différance," *Philosophy and Rhetoric* 22 (1989): 110–30; Kenneth Burke, *A Rhetoric of Motives* (Berkeley: University of California Press, 1969).

[46] This view is influenced by Heidegger's discussion of articulation and ontology and Stuart Hall's discussion of articulation and ideology. See Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper and Row, 1962); Stuart Hall, "Signification,

structural, as demonstrated by the arrangement of elements in various rhetorical tropes.[47] It can also be expressive, which involves bringing structural articulation into the realm of appearance through the production and use of signs and symbols. Each rhetorical object is a set of structural and expressive articulations, but it is also articulated again to the wider constellation of its cultural and historical context. It is precisely because the structural and expressive levels are not reducible that diverse arrays of objects can be made recognizable in relation to one another, and thus form something like a "whole way of life," to borrow Raymond Williams's description of culture.[48]

Thus, the point of departure for rhetorical analysis is an inquiry into the ways that meaning is made, especially in intersubjective contexts. As Martin Heidegger argued in his analysis of Aristotle's *Rhetori*c, the shared labor of speaking and listening is "the *basic mode of being of life*, namely, *of being-in-a-world*."[49] From Cicero to Vico to Burke, rhetorical theory has foregrounded the interactivity of communication beyond its representative or propositional content. How the boundaries of that interaction are drawn, how the rhetorical situation is circumscribed, depends on the situation itself and also on the disposition of the critic. In this dissertation, the rhetorical situation of piracy in the early nineteenth century is limited in some ways and expansive in others. Methodological limits have

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Representation, Ideology: Althusser and the Post-Structuralist Debates," *Critical Studies in Mass Communication* 2 (1985): 91–114.

[47] Structural articulation is more than the classical Roman notion of arrangement. As Christian Lundberg describes it in his reconstruction of Lacan's theory of rhetoric, the "economy of tropes" is the condition of possibility for the production of symbolic knowledge. That is, without structural articulation, there would be no language or subject. Christian Lundberg, *Lacan in Public: Psychoanalysis and the Science of Rhetoric* (Tuscaloosa: University of Alabama Press, 2012). See also Ernesto Laclau, "Articulation and the Limits of Metaphor," in *A Time for the Humanities: Futurity and the Limits of Autonomy*, ed. James J. Bono, Tim Dean, and Ewa Plonowska Ziarek (New York: Fordham University Press, 2008), 61–82.

[48] Raymond Williams, *Culture and Society, 1780–1950* (New York: Columbia University Press, 1983).

[49] Martin Heidegger, *Basic Concepts of Aristotelian Philosophy*, trans. Robert D. Metcalf and Mark B. Tanzer (Bloomington: Indiana University Press, 2009), 16. See also Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy, 2nd ed. (Oxford: Oxford University Press, 2007).

circumscribed the archive geographically (a focus on the United States), temporally (between 1815 and 1830, roughly), and substantively (the juridical, not romantic, image of pirates). Within these limitations, I have assembled an archive of texts that might seem peculiar to scholars from other disciplines: it spans from the lofty prose of international legal theory to the mundane announcements of execution broadsides, and much more in between. I give as much weight to a newspaper announcement of a reprieve as I do to the opinions of Supreme Court justices. My methodological commitment to treating each text as a compositional element of a wider whole reflects the theoretical commitment to the sovereign imaginary, in which every encounter with the sovereign contributes to the process of thinking through state power. The labor of imagining the sovereign is thus distributed, not only between institutions or among great thinkers, but to everyone within a given culture.

Part One

Imagining International Sovereignty

Chapter 1

The Postsovereign Imaginary

In the run-up to the 2016 presidential election, Republican nominee and eventual US President Donald Trump made building a wall along the border between the United States and Mexico a centerpiece of his campaign for the nation's highest office. "I would build a great wall," he said during his candidacy announcement in June 2015, "and nobody builds walls better than me." For Trump, the wall is a solution to what he sees as an ongoing crisis in the United States caused by the increasingly unencumbered transnational movement of people, capital, and commodities called globalization. In his campaign Trump criticized both the economic and security risks posed by mobility. Economically, he argued, the United States has been routinely "beaten" in international trade by countries like China, Japan, and Mexico. They flood US markets with cars, clothing, people, and other commodities, while Americans only manage to export their wealth in the forms of overseas corporate operations, jobs, and investment capital. In terms of security, Trump claimed that the United States has become "a dumping ground for everybody else's problems." Migrants are "sent"—apparently with intention—over the nation's borders extralegally, bringing with them drugs, crime, and terrorism. "We don't have victories anymore," he lamented in the first moments of his candidacy, but all of that would change once he built a "great, great wall."[1]

Public reactions to Trump's walling proposal were varied. As evidenced by his eventual success in the presidential election, many believed that Trump was the only candidate prepared to defend US domestic security and economic success. Others claimed that his beliefs, especially those

[1] Donald J. Trump, Announcement of presidential campaign, New York, NY, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid.

concerning ethnic and racial minorities, exposed and activated latent xenophobic and racist strains of American public culture. For example, in an August 2016 speech, Democratic candidate Hillary Clinton condemned the "emerging racist ideology" of the so-called alt-right political movement, which she linked directly to Trump's anti-globalization rhetoric. Providing examples from his past and present behavior, Clinton argued that Trump's campaign traded in ultra-nationalist, often racial, prejudice. "Look at [Trump's] policies," she warned, "they would put prejudice into practice."[2]

Such criticism of Trump's campaign, his politics, and their reflections in American public culture are crucial. However, limiting the diagnosis of the political conditions of possibility for Trump's presidency to critiques of prejudice leaves unexamined a fundamental feature of his politics that unites his sometimes disorganized approaches to international relations and global mobility. Namely, Trump's platform does not rest on the ultra-nationalist claim that globalization poses an inherent existential threat to the United States; rather, it is founded upon a belief that the federal government has ceded control over globalizing forces to foreign nations and supranational entities. In other words, Trump's politics are motivated by a belief that the sovereign authority of the United States has weakened to the point of collapse.

Adopting such a perspective on his campaign explains why Trump's policy proposals—like building a wall between the United States and Mexico or banning Muslims from entering the country—focused on amplifying the administrative capacities of the federal government to limit movement across the nation's borders. In the campaign announcement in which he proposed the wall to limit supposedly dangerous immigration, for example, Trump was quick to highlight his discussions with US border agents, emphasizing their role in determining the "right" kind of people

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[2] Hillary R. Clinton, Campaign speech, Reno, NV, August 25, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/08/25/hillary-clintons-alt-right-speech-annotated/.

to be allowed entry. The wall, then, is not meant to seal the border completely; instead, it acts as a distinguishing mechanism through which the state can know, administer, and regulate the border.

As in the United States, ultra-nationalist movements have gained considerable political ground across the globe. In Asia, for example, Indian Prime Minister Narendra Modi's Bharatiya Janata Party put Hindu-nationalist ideology at the forefront of state policy after its 2014 electoral victory.[3] In western Europe, a wave of far-right anti-globalization political parties has gained strength—largely fueled by opposition to immigration from the Middle East and North Africa, the Syrian refugee crisis, and increasing economic interdependence—which has caused European states to grapple with the same admixture of xenophobia and resurgent claims to sovereign right that characterized Trump's campaign.[4] Thus far the most tangible result from such movements has been the June 2016 referendum in the United Kingdom in which voters chose to exit the European Union. Although it will be years before the practical implications of "Brexit" are known, public motivations for the vote are more clear. It appears that many throughout Britain feared that their national government was no longer in charge of decisions regarding movement—both human and economic—into and out of the country. Moreover, many voters rejected Britain's subservience to the European Union's supranational governing authority. As Andrew Solomon wrote for the *New Yorker*, "Having lost its own empire some time ago, England refused to participate in what many U.K. nationals came to see as someone else's."[5] Britain's vote, like Trump's wall, seeks to

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[3] Pankaj Mishra, "Modi's Idea of India," *New York Times*, October 24, 2014, http://www.nytimes.com/2014/10/25/opinion/pankaj-mishra-nirandra-modis-idea-of-india.html?_r=1.

[4] For a discussion of one such movement in the European context, see Dominique Reynié, "'Heritage Populism' and France's National Front," *Journal of Democracy* 27 (2016): 47–57.

[5] Andrew Solomon, "A Perilous Nationalism at Brexit," *New Yorker*, June 28, 2016, http://www.newyorker.com/news/daily-comment/a-perilous-nationalism-at-brexit.

consolidate control over national borders in an attempt to separate the nation from the rest of the world.

The political popularity of anti-globalization is an effect of what scholars have identified as "postsovereignty," or the waning power and significance of the nation-state over the past half-century. But more than a reaction to changing conditions, the hypersovereign politics of these anti-globalization movements in fact constitutes postsovereignty as such. As Wendy Brown notes, "'Post' indicates a very particular condition of afterness in which what is past is not left behind, but, on the contrary, relentlessly conditions, even dominates, a present that nevertheless also breaks in some way with this past."[6] Thus postsovereignty refers to sovereignty's weakening and simultaneous intensification. As a consequence, it is not enough to analyze Trump's campaign or "Brexit" as critiques of multicultural cosmopolitanism, because what we are witnessing is a fundamental shift in the form of government itself. Power that was once concentrated in the state has been dispersed to new institutions ranging from corporations to supranational organizations, from universities to terrorist groups. Nation-states appear to have lost their monopolies over territories, populations, and commerce—even over violence. This is not to say that the state is vanishing; rather, many claim that the ideology of nation-state sovereignty, under which the state alone exerts absolute, complete, and enduring juridical control over a bounded national territory and a definite population, has begun to buckle and mutate under pressures from the ideological shifts of late capitalism. Trump's wall, and his promise to "make America great again," are examples of postsovereign politics par excellence.

Scholarship on postsovereignty is dominated by the trope of novelty. As the quotation from Brown indicates, many perceive the postsovereign present to be a "break" from some past that is more or less continuous with itself. This break is given many names—globalization,

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[6] Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010), 21.

transnationalism, cosmopolitanism, neoliberalism, the age of global terror, and late capitalism, among others—but regardless of the conceptual differences attached to these names, they all have in common some basic belief that the world is experiencing conditions, problems, and questions never before faced at once. Although there is empirical evidence to support claims to the newness of our present, an obsession with the "break," with novelty itself, is not benign. To put the matter succinctly: the rhetorical dominance of novelty risks our losing sight of the ways in which we have always been postsovereign. Part 1 of this dissertation argues that the "postsovereignty" of the late twentieth and early twenty-first centuries poses challenges similar to those faced by Americans—a term I use to refer to people who identify themselves as living in or hailing from the United States—battling maritime piracy in the early nineteenth century. If we are to apprehend properly a political phenomenon like Donald Trump's presidency and its implications for nation-state sovereignty, I believe that we must first understand the reactions, strategies, and beliefs of our past that haunt the present.

This chapter offers a critical analysis of the postsovereign imaginary. I begin by arguing that contemporary scholarship describes two distinct forms of postsovereignty: the neoliberal form and the nationalist form. The neoliberal form concerns the dispersion of sovereign power from the state to non-state institutions, whereas the nationalist form concerns the deteriorating function of the "nation" as a limit on sovereign power. Although these forms often overlap, I argue that there is sufficient difference between them to warrant analytic separation. Through an extended analysis of the nationalist form, I argue that the present American (post)sovereign imaginary is fraught with contradictions, especially so in the use of law as a tactical and strategic tool in fighting the war on terror. These contradictions, I conclude, suggest that postsovereignty may not be a temporal

distinction at all, but may in fact describe an internal fluctuation within the theory of sovereignty itself.

The Twilight of Sovereignty

In 1992 the former chairman of Citibank Walter Wriston delivered a speech to the Harvard Club of New York entitled "The Twilight of Sovereignty." He sought to explain how expansions in global communication, facilitated by rapid technological development, heralded the decline of nation-state sovereignty. He defined sovereignty through exclusivity: "The actions of the sovereign are not subject to contradiction by any other power."[7] Global communication, he argued, has linked the world to such an extent that states have lost control over flows of information and thus can no longer reasonably expect to act without contradiction. This is most certain in the case of economic activity, because connectivity provides new means of capital mobility and, as Wriston famously said, "Capital will go where it is wanted and stay where it is well treated."[8] Beyond the economy, Wriston argued that telecommunication will profoundly affect geopolitics because global networks are able to catalyze public sentiment against the disastrous policies of sovereign states. "The world is watching," Wriston cautioned. "The world looks and reacts and brings pressure on everything from the destruction of rain forest, the allegations of global warming, the disposal of toxic waste, to the violation of human rights anywhere on the planet." Indeed, Wriston was so convinced by the transformative effects of global communication that he suggested the international broadcast of Ronald Reagan's 1988 speech at Moscow State University facilitated the collapse of the Soviet Union. "All of this," he offered in judgment, "is good for freedom."[9]

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[7] Walter Wriston, "The Twilight of Sovereignty," *RSA Journal* 140 (1992): 569.
[8] Ibid., 574.
[9] Ibid., 576.

The world in which Wriston spoke was experiencing a boom in what Larry Diamond refers to as the "third wave of democratization."[10] Fueled in part by the communication flows Wriston identified, the increasing political and economic openness of these new democratic states was evidence for him of waning state power. However, he was careful to note that the twilight of sovereignty is not the end of the state: "This is not to say that sovereign power will disappear—it will not, but what it does mean is that no government, over time, can act alone not subject to contradiction."[11] His definition of sovereignty as noncontradiction is a standard one, but its rhetorical effects are considerable. The state in Wriston's analysis appears jealous and selfish, an institution continuously working to maintain the breadth and depth of its power despite the change occurring around it. This characterization, however, ignores the increasing interpenetration of governance and economic rationality, and thus the increasing cooperation between the state and economic actors that has taken place in Western nations since the 1970s, or what scholars call "neoliberalism." It is now common to see states voluntarily reduce their sovereign control over previously governed spheres of life, whether through deregulation or power transfers. But it would be a mistake to suggest that the waning of sovereign power found in neoliberalism is identical to the overthrow of a sovereign through political revolution, despite Wriston's lumping the two together as evidence of sovereignty's decline. Thus it is necessary to draw a distinction between two different forms of postsovereignty: the neoliberal form and the nationalist form.

Neoliberal Postsovereignty

[10] Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (New York: Holt, 2008), 41–51.
[11] Wriston, "The Twilight of Sovereignty," 576.

Neoliberal postsovereignty describes relationships between states and non-state formations. It is the form most characteristic of Wriston's argument. For example, he argues of globalization: "When a system of national economies linked by government regulated trade is replaced—at least in part—by an increasingly integrated global economy beyond the reach of much national regulation, power changes hands."[12] Because Wriston does not explain how one economic regime is "replaced" by another, one is left with a sense that postsovereign globalization has been somehow smuggled in under the sovereign's nose. As Saskia Sassen notes, however, the truth of the matter is somewhat different. She argues that sovereignty in the age of globalization is best conceptualized as a series of displacements rather than as a loss of state power. The modes of governance that once belonged exclusively to the state are now distributed to other institutions, whether supranational, civil, or private. And nation-states have been more or less willing to facilitate that process.[13]

In his lectures at the Collège de France in the late 1970s, Michel Foucault painted a similar picture of state power in transition. Foucault marked a change in governance, beginning in the nineteenth century, from what he called "sovereign power," or the juridical right of the state to kill, to "biopower," or government's capacity to foster life. This new form of governance, he said, takes as its object aggregating abstractions, such as the health of the population, the growth of the economy, and so forth. Properly managing something as capacious and complex as an economy required more capacity than the state alone possessed, and thus governing was transformed into a distributed practice involving new institutions, new forms of knowledge, new technical skills, new languages, and new operators.[14] Rather than forcing behavior through laws carrying the penalty of

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[12] Ibid., 575.
[13] Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996), 27–30.
[14] These concepts are principally developed in two lectures: Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, ed. Michael Senellart, trans. Graham Burchell

death, modern biopolitical states use a more indirect and delicate touch to prompt populations and economies to flourish. Nikolas Rose and Peter Miller name this new form of governance "action at a distance."[15] For example, by directing tax dollars to academics studying HIV demography, the state is able to influence networks of knowledge production whose outcomes can be used by community organizations to develop and deploy new programs for managing exposure to the virus. This "action at a distance" either complements or replaces legal coercion (e.g., compulsory HIV testing or quarantining) by mobilizing non-state actors as government within the social body. Such a network of power is by its very nature decentered, which reduces the direct power of the state.

Government for Foucault is not an institution; rather, government is a set of practices for shaping life, which makes the state's role contingent rather than necessary. Ties between government and state are strongest in the case of law, which is the bastion of sovereign power, and weakest in the capillary networks of knowledge and pressure found in biopower. Thus, even if biopower coordinates a retraction of direct state power, the state's investment in law and other coercive governing techniques ensures its survival.

Because the state often facilitates the dispersion of government, it maintains significant control over the postsovereign landscape. Aihwa Ong's study of neoliberalism and sovereignty in East and Southeast Asia provides useful examples of this somewhat contradictory phenomenon. Ong identifies zones of "graduated sovereignty" throughout Asia, or the "effects of a flexible

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(New York: Picador, 2007); and Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, ed. Michael Senellart, trans. Graham Burchell (New York: Picador, 2008). See also Michel Foucault, *The History of Sexuality,* vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 135–59; Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003).

[15] Nikolas Rose and Peter Miller, "Political Power Beyond the State: Problematics of Government," *British Journal of Sociology* 43 (January 1, 2010): 271–303.

management of sovereignty as governments adjust political space to the dictates of global capital, giving corporations an indirect power over the political conditions of citizens in zones that are differentially articulated to global production and financial circuits."[16] China, for instance, has created various subnational zones governed by unique laws and special relationships to the central government. Cities and regions designated "special economic zones" maintain liberal tax and trade laws in an attempt to encourage and concentrate foreign commerce and investment.[17] In contrast, Hong Kong is a "special administrative zone," which operates as a semi-sovereign that is nevertheless part of the national framework of the People's Republic of China. This arrangement has preserved civil and economic liberties, as well as democratic governance, which would have been otherwise lost upon the city's transition from British to Chinese rule in 1997. Both types of zones are unique articulations of Chinese domestic law, international pressure, and geography, but they are only possible under the active management of the central government.

Classical accounts of globalization such as Wriston's suggest that market pressures will homogenize global politics as states compete for the same fickle, hyper-mobile capital resources. Ong refers to this as the "political integration" of international neoliberalism. However, her research illustrates that the practical effects of neoliberal postsovereignty are not uniform. In the United States, for example, deregulation is typically organized around issues (e.g., airline travel, sexuality, campaign finance), whereas China has included space and place as primary criteria in limiting sovereign power. These differences can have profound effects on everyday life. Graduated sovereignties have led to political repression, lower wages, resource exploitation, unsafe working conditions, and displacement from homes—all done in the name of corporate, not civic, interest.

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[16] Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Durham, NC: Duke University Press, 2006), 78.
[17] Ibid., 97–118.

The differential development of neoliberal postsovereignty thus foregrounds the critical role of the state in crafting responses unique to its nation. Even if a governing technique results in reduced state power, the state maintains control; hence Sassen's insistence that postsovereignty is a displacement and not an elimination.

Nationalist Postsovereignty

In contradistinction to the neoliberal form, "nationalist postsovereignty" describes relationships between a given nation-state and other national formations. Wriston notes that the early 1990s witnessed "an explosion of the nation state in two directions." Some states explode "downward" into smaller nationalist partitions, and others explode "upward" into new supranational organizations. To this list we ought to add the permutation or suppression of sovereignty through bilateral or multilateral arrangements, such as a status of forces agreement in a nation under occupancy by a foreign military. Each of these postsovereign "explosions" changes the effective juridical power within a given region, which is to say that the existing state loses to some other entity the exclusive power to make and enforce law within a particular nation. The policies of contemporary ultra-nationalist political movements that seek to shore up national power, whether by exiting a supranational organization or building border walls, are responses to nationalist postsovereignty.

In essence, nationalist postsovereignty calls into question the *nation* side of the nation-state dyad; however, the relationship between sovereignty and "the nation" is not altogether clear at first glance. Classical theories of sovereignty tend to define the nature of power rather than its scope. Consider Jean Bodin's definition in the first book of *Les six livres de la république,* published in 1576: "Sovereignty is the absolute and perpetual power of a commonwealth . . . that is, the highest power

of command."[18] It is a total, individual, inalienable, and enduring power to rule. But to rule over what? And over whom? And where? Such attempts to define sovereignty's scope are oxymoronic, since the power is unlimited by definition. But this is not to say that sovereignty is without contest. Bodin was concerned with challenges to sovereign power that might arise within the commonwealth, so worried in fact that he dedicated an entire chapter to discussing the sovereign's "marks," or the manifestations of power that enable a subject to identify the sovereign as such (the power to make law, wage war, levy taxes, etc.).[19] This preoccupation with false sovereigns defines an important feature of Bodin's theory of sovereignty that can be easily overlooked. With the exception of war powers, his theory appears to lack conceptual reference to an international system. He takes the commonwealth for granted as the fundamental unit of sovereign power, and thus the question of competing sovereigns is resolvable either through negation (the false sovereign) or replacement (war). There is little room for cooperative international relations in such a world, and there is little use for a concept like "nation" independent of the commonwealth.

For our purposes, "nation" means something simple but specific: a nation is a definite population and territory that can be governed by a state.[20] Recoding Bodin's theory of sovereignty in the nation-state context would yield a definition that includes the state's absolute and *exclusive* political and legal authority over the nation. How nations come into being (historical associations, cultural heritage, colonial legacy, convenience, etc.) is largely irrelevant here, as long as the nation serves its primordial function: to unify and distinguish. Nations unify as a matter of course by

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[18] Jean Bodin, *On Sovereignty*, ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 1.
[19] Ibid., 46–88.
[20] This "simple" definition ignores much of the historical specificity with which the nation form came to be. See Etienne Balibar, "The Nation Form," in *Race, Nation, Class: Ambiguous Identities*, by Etienne Balibar and Immanuel Wallerstein, trans. Chris Turner (New York: Verso, 1991), 86–107.

bringing discrete persons and territories into a single system. They distinguish by excluding all other people and geographies from that system. Thus, the nation serves a limiting function: it circumscribes the subject of a sovereign's power spatially and personally.

Emer de Vattel's influential definition of sovereignty, popularized in the late eighteenth century, suggests that the nation is thus the basic unit by which international systems discriminate between sovereigns. In *The Law of Nations,* he wrote:

> Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are the moral persons who come to live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.[21]

Two features of Vattel's definition are important for our purposes. First, nations are sovereign only if they are independent from all other entities. Thus, postsovereign configurations such as Hong Kong's would not qualify, since the special administrative zone is not independent of the People's Republic of China. Second, sovereignty is always an international status; that is, nation-states are only sovereign when they are recognized as such by other nation-states. All states must follow the law of nations, which for Vattel is an international natural law to which all are inherently subject, but sovereign nations otherwise maintain an exclusive authority and right to govern themselves as they

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[21] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 83 (bk. I, chap. 1, § 4). This text consists of an edited and updated version of Joseph Chitty's 1883 English version, which is itself an edited version of an earlier anonymous English translation. See pp. xxi–xxiv for a discussion of the text's provenance.

see fit. Sovereignty thus produces an international system of independently governed nations that mutually enjoy an equal status and whatever privileges flow from it. In Vattel's theory the nation thus constitutes and marks the sovereign's limit. Nationalist postsovereignty calls that limit into question.

Unlike neoliberal postsovereignty, which moves from the consolidation of state power to its dispersion, the nationalist version is less coherent. Some scholars take globalization as the starting point for the deprecation of the nation-form. These studies tend to focus on the economic and political effects of denationalized territories. They highlight institutional permutations such as deregulation, international treaties, and supranational conglomerations as the primary vectors through which the nation loses its limiting function. Others scholars begin with war. Their work privileges violations or degradations of sovereign exclusivity by focusing on unequal relationships between hierarchized sovereigns actualized through sanctions, military force, and other disciplinary technologies. This is not to say that globalization does not also involve issues of national security, or that war is immune from considerations of economic and political interdependence; however, the two valences of nationalist postsovereignty reveal fundamentally distinct changes in the structure of the nation-state.

Globalization

The globalization approach often highlights the interaction between neoliberal and nationalist postsovereignty, of which Hong Kong's special administrative status is a good example. The desire to maintain political, economic, and social liberties in the city forced Chinese officials to create the special relationship between national and subnational authorities. This type of quasi-sovereignty is not uncommon. Former colonies and overseas territories throughout the world are

variously incorporated into large national frameworks, typically for economic benefit or military protection. An opposite but homologous movement has occurred at the supranational level. Throughout the twentieth century, nation-states banded together to form economic, military, political, and legal organizations aimed at coping with and promoting interdependence. Examples include the United Nations, the World Trade Organization, and the International Criminal Court. What is at stake in all of these developments is not the distribution of state power among non-state actors as we see in neoliberalism, but rather an end to the nation-state's exclusive control over territories and bodies.

Sassen argues that globalization has "denationalized" territory through a combination of neoliberal deregulation, such as Ong's graduated sovereign zones, and supranational governance whose breadth is considerably larger than a single state. Like territory, persons too are increasingly denationalized. Ong, for example, writes about the "flexible citizenship" of Asian businesspeople who hold passports from multiple countries and craft citizen identities that are not reducible to any particular national configuration.[22] This entrepreneurial tendency is also a matter of state practice. In 1985, several western European governments entered into the so-called Schengen Agreement, which eased border controls and visa requirements between the signatories in an effort to encourage transnational movement throughout the continent. In 1999 the Amsterdam Treaty incorporated Schengen into European Union law, making the agreement applicable to all member states except for the United Kingdom and Ireland, who opted out. Consider the following from the original agreement's preamble. The signatory states are:

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[22] Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham, NC: Duke University Press, 1999).

> AWARE that the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals for the Member States and in the free movement of goods and services.
>
> ANXIOUS to strengthen the solidarity between their peoples by removing obstacles to free movement at the common borders . . .[23]

The aim of the document appears to be the unity and solidarity of the "peoples" of European nations, which are achievable through the increased interaction of persons, commodities, and services. Importantly, the jealous policies of sovereign nation-states are considered "obstacles" to unity, as if the national form itself blocked the natural potential of many peoples to become one. It is thus not enough simply to characterize policies like the Schengen agreement as capitulating to the market forces of globalized capital, although they certainly do so. There is more at stake. The borders between nations, the geographic markers of their unity and division, are blown apart. Distinctions between peoples are invoked and revoked in the same movement. What we find in agreements such as these is not the twilight of the state, which still remains in power, but the twilight of the national form as such.

That said, postsovereignty is not solely realized in supranational conglomerations. Wendy Brown suggests that it takes the guise of hypersovereignty as well. Border walling operations, she argues, are indicia of national sovereignty's twilight. Due to the increased interdependence of globalized markets, states fail to exclude things and people from their territories by the sheer force of sovereign authority alone. And so walls are built to shore up the sovereign's crumbling power.[24]

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[23] The Schengen *acquis* – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (2000), as reproduced in *Official Journal of the European Union,* L 239 (2000): 13–18.

[24] Brown, *Walled States*, 24–25; Brown refers to this as "hypersovereignty" on p. 67.

Trump's proposed wall between the United States and Mexico is justified on precisely these lines. In his campaign announcement, he treats immigration as an administrative crisis: "But I speak to border guards and they tell us what we're getting. And it only makes common sense. They're sending us not the right people. . . . We have no protection and we have no competence, we don't know what's happening. And it's got to stop and it's got to stop fast."[25] Trump subordinates the exclusionary role of the wall to a managerial one: it would improve the state's administrative capacity to ensure that people—the *right* people—can move across borders. In addition to xenophobia, Trump's fear of "wrong" immigrants flows through a general fear that the state has lost control of the nation's people. And thus, pace Brown, the incorporeal power of the sovereign becomes physical in its death throes.

But there is an important distinction between Brown's account of border walls and Trump's justification for them. Put in Althusserian terms, Brown's postsovereignty is overdetermined by the complex systems of globalization and the indirect nature of neoliberalism, which thus renders it a partial survival of an ancient form in modern times.[26] Trump, in contrast, sees sovereignty in full force everywhere *but* the United States. Postsovereignty is a failure specific to the nation. For him, there are identifiable agents behind the erosion of American power—other nation-states. Mexico "sends" people across the border. China and Japan "beat" the United States in trade deals. The postsovereign condition of the United States is not, then, the manifestation of a global shift in governance away from exclusive nation-state power; rather, for Trump it is a failure to cope with a direct foreign threat. To be sure, Trump does not develop this claim in any depth. But his insistence on the agency of the nation-state points toward a dimension of nationalist postsovereignty that is

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[25] Trump, Announcement of presidential campaign, New York, NY, June 16, 2015.
[26] Louis Althusser, "Contradiction and Overdetermination," in *For Marx*, trans. Ben Brewster (New York: Verso, 1969), 49–92.

less often addressed in the literature focused on globalization: the capacity of one state to subjugate another without subsuming its attendant nation. In other words, there exists a form of postsovereign capture whose sole object is a given state's sovereignty, which is the domain of war.

War

Unlike globalization, which causes the denationalization of territories and peoples, wars in the twenty-first century have decoupled a state's claims to sovereignty from the nation it would govern. Stuart Elden's exhaustive study of territory in the war on terror is instrumental here. He discusses, inter alia, the doctrine of "contingent sovereignty," or the relatively new belief among foreign policy administrators and scholars that a state's sovereignty is contingent upon its meeting certain "fundamental state obligations."[27] These obligations are nebulous, but Elden provides two examples: maintaining political control and maintaining the monopoly on violence. Under the doctrine, a state's failure to meet these obligations is sufficient ground to justify foreign intervention, whether humanitarian, military, economic, or otherwise. The wars in Iraq and Afghanistan at the beginning of the twenty-first century serve as prime examples. The failure of those states to secure their nations, either by allowing terrorist organizations to flourish within their borders or by failing to control weapons of mass destruction, justified military intervention to stabilize them both. The US-led coalition canceled the exclusive sovereign authority of the existing Iraqi and Afghani governments and invaded both nations, but did not claim either as territory or political subject. Instead, "nation building" ensued.

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[27] Stuart Elden, *Terror and Territory: The Spatial Extent of Sovereignty* (Minneapolis: University of Minnesota Press, 2009), 162, quoting Stuart Patrick from the Department of State.

Elden argues that the war on terror poses two problems for the integrity of national territory. First, as in the case of Iraq and Afghanistan, sovereignty is made contingent rather than absolute, enduring, and inalienable (as it was for Bodin). Importantly, however, this contingency is unevenly distributed. An "international community" of privileged states reserves the right to delegitimize sovereigns and cancel their power, while not subjecting themselves to the same precarious status. This creates a hierarchy of sovereignties. The policy outcomes of second-tier sovereigns are controlled by the interests of the first tier, a relationship which calls into question the parity of mutual recognition that Vattel and others saw as the foundation of international relations between sovereigns.[28] As for the second problem, Elden writes, "challenges to territorial boundaries are seen as inherently violent and therefore likely to be recoded as terrorism by dominant powers."[29] In the case of the Israeli occupation of Palestine, for example, Palestinian challenges to Israeli borders are often coded as terrorism rather than interstate conflict. Labeling them in this way not only denies Palestinian claims to sovereignty, but for many observers and commentators it also delegitimizes the entire struggle against occupation. The Kurdistan Works Party in Turkey has suffered a similar fate, despite the fact that its non-terrorist activities constitute a legitimate political claim to territorial and state sovereignty.[30] Unlike Sassen or Brown, who see denationalization as the

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[28] "Territorial integrity . . . is therefore under increased pressure. The notion of earned sovereignty is another way of compromising or circumscribing the powers that some political entities are allowed to have. Palestine must accept less than Israel; Kosovo must not be allowed to set a precedent for secession; the Kurds must remain part of Iraq, if only nominally; sovereignty in Iraq, Palestine, Afghanistan, or Iran cannot be allowed to lead to outcomes that are disliked by the United States and its allies. And yet, while the sovereignty of some states is in question, other states are increasingly looking to retain or regain it from international agreements they previously made." Ibid., 169.

[29] Ibid.

[30] For an empirical study of the political legitimacy of terrorist organizations, see Robert A. Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2006).

primary trajectory of postsovereign territory, Elden argues that contemporary international relations deterritorialize *and* reterritorialize, undoing and re-creating sovereign enclosures at will.

Behind war's challenges to territory lies an important feature of nationalist postsovereignty: the replacement of an enduring international sovereign regime with contingent juridical formations. Especially in the case of the war on terror, law is now both a tactic and a strategy to enhance and deflate sovereign power. The various ways in which law is deployed in war can be complex and contradictory. In some cases, sovereign states suggest that enforcing international law justifies unilateral military action. In others, sovereigns may assert municipal authority over territories and peoples that are not their own. (*Municipal* is a contrastive term of art used to distinguish the laws of a nation, or its subsidiaries, from international law.) Or international and municipal enforcement may be mixed together. Three cases from the early twenty-first century—intervention in the Syrian civil war, the legal category "enemy combatant," and the assassination of Osama bin Laden—illustrate three ways in which the United States recently has used law, both municipal and international, to put international sovereignty in flux.

In 2011 civil war erupted in Syria, with multiple factions rebelling against the regime of President Bashar al Assad. The war is ongoing at the time of writing, and casualty estimates now reach into the hundreds of thousands. The American response to the conflict has been mixed. Publicly, the United States has limited its intervention to economic sanctions directed toward Assad's regime and providing small arms to rebel groups, but many politicians and pundits have called for direct military intervention. On August 20, 2012, President Barack Obama stated publicly that the use of chemical weapons was a "red line" for US military intervention.[31] After reports

[31] Barack Obama, Remarks by the President to the White House Press Corps, Washington, DC, August 20, 2012, https://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps.

surfaced in 2013 alleging the use of chemical weapons on civilians, US legislators quickly drafted a joint resolution authorizing the president to use military force in Syria to "respond to," "deter," and "degrade Syria's capacity to" use chemical weapons, and to prevent their transfer to "terrorist groups or other state actors."[32] Justifications for intervention include humanitarian concern, violations of US municipal law, regional stability, and national security. The resolution also stipulates that the use of chemical weapons violates multiple international treaties. Presumably, then, enforcing these regulations is enough to allow unilateral military intervention.

Although this admixture of municipal and international law is common in contemporary rhetorics of foreign intervention, the Syrian case is unique due to the constraints placed on the executive's use of the military. The resolution explicitly prohibits the use of American forces "on the ground in Syria for the purpose of combat operations."[33] When combined with the calls to enforce municipal US law and international law, US military intervention approximates judicial enforcement more than it does occupation or assistance. As authorized in the resolution, the United States could not take control of Syrian territory, nor could it overthrow the Assad regime—as was the case in Iraq and Afghanistan—but it could make sure that international norms remained in force, and it could constrain the practical sovereignty of the Assad regime in order to protect civilian life. It is as if the United States would merely facilitate revolution in Syria rather than participating in it on the ground. Nevertheless, despite Obama's insistence on the "red line" of chemical warfare, this particular resolution was never passed.

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[32] Authorization of the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons, S.J. Res. 21, 113th Congress (2013), https://www.Congress.gov/bill/113th-Congress/senate-joint-resolution/21/text.
[33] Ibid.

The Syrian case is overcoded in rhetoric of the war on terror. For example, the United States maintains municipal laws whose explicit goal is to promote Lebanese sovereignty by ending Syria's sponsorship of the accused terrorist organization Hezbollah.[34] Such state-to-state interactions are but one part of America's global strategy. Indeed, the United States has created an entire legal architecture whose priority is the enforcement of American law on foreign citizens without regard to their national affiliation. The most notable case is the law surrounding "enemy combatants." To understand the origins of the enemy combatant as a legal category, one must begin in the days following the attacks of September 11, 2001. On September 18 the US Congress passed a joint resolution authorizing the use of military force against those responsible. Its major provision reads as follows:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[35]

The authorization does not constitute a formal declaration of war, the passage of which would have begun an interstate conflict between the United States and another sovereign. Instead, the resolution enables the use of military force to prevent a future terrorist attack against the United States. It is striking that the document does not name a specific enemy, leaving that determination up to the executive branch. Nor does it carry any temporal, geographic, or tactical limits. In effect, Congress authorized the use of US military force anywhere in the world so long as it is necessary and

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[34] Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482 (2003).
[35] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

appropriate to ending terrorism. The resolution's justifications are both preemptive and retaliatory; it aims to defeat attacking enemies *and* subjugate their futures. There is no stated condition for victory. But, most importantly of all, it enables the sovereign to wage war against persons and organizations, in addition to states.

Laws of war are written assuming that they structure interstate conflict. Those laws make sense of and interact with individual persons through their national status. The enemy has civilians who ought not be touched, lawful combatants who should be treated as prisoners of war, and unlawful combatants whose actions can be tried in military courts.[36] The law apprehends persons through their nationality because the entire nation is the enemy. In the case of the war on terror, in contrast, the enemy was a practice—the incitement of terror. Thus it was necessary for the United States to draft an entirely new legal landscape that could make sense of persons through practices, something like criminal law. One of the earliest pieces of this new juridical order appeared in November 2001, when President George W. Bush issued a directive outlining guidelines for the capture and treatment of a special subset of detainees who would become known as "enemy

[36] See the following discussion in the US Supreme Court's opinion in *Ex parte Quirin* (1942), a case that ruled on the appropriate trial venue for unlawful combatants in World War II. "By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Ex parte Quirin*, 317 U.S. 1 (1942). Although the phrase "enemy combatant" is used in this quotation, it here refers to a citizen of a belligerent state, not a denationalized terrorist.

combatants."[37] The directive details their identity—captive terrorists and those who assisted them, excluding US citizens—and places them under the control of the Secretary of Defense. It goes on to stipulate that captives may be held anywhere within or without the United States, will be tried in military tribunals, and will be treated humanely, but it offers no limit on the length of their detention.[38]

It is understandable that the United States would require new laws to grapple with the phenomenon of global terrorism. Despite the state's attempt to frame the war on terror through the traditional categories of interstate conflict, it is clear that those categories are deficient. In this case, there was need to reorient the primary identifier of the enemy from nationality to practice, since it is a war on the practice of terrorism that Congress had authorized. This need makes obvious the postsovereign nature of the war itself. A considerable portion of Bush's directive outlines the structures and procedures for the military tribunals in which enemy combatants would face trial.[39] The Manual for Military Commissions, a document authorized by Congress but created by the Department of Defense, functions as a kind of criminal and judicial code for enemy combatants that governs these tribunals. The current version lists nearly forty crimes with which a detainee might be charged, including perfidy, terrorism, spying, sexual assault, and perhaps somewhat ironically,

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[37] Although the phrase "enemy combatant" was likely inspired by the use of the same in *Ex parte Quirin*, the two are conceptually separate. *Quirin* uses it to describe a member of the belligerent nation who commits acts of war without a uniform. Congress defined the meaning of lawful and unlawful enemy combatants in 2006. See Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[38] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; Presidential Military Order of November 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

[39] The Supreme Court objected on the grounds that the system lacked explicit congressional authorization, which Congress subsequently granted while also denying the detainees habeas corpus, the right to contest unlawful detention in court. The court again ruled this final provision unconstitutional. *Hamdan v. Rumsfeld*, 548 U.S. 559 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

torture.[40] With this judicial system in place, the United States can charge and convict foreign nationals under a criminal code whose authority flows not from international law or international norms but from the municipal law of the United States. When combined with the denationalization of the enemy, the United States has effectively extended its criminal jurisdiction to any person it suspects of practicing terrorism, unless that person is a citizen of the United States.

Although it has armed itself with this expanded personal jurisdiction, the United States must navigate a world that remains largely dominated by the systems of international sovereignty. For example, it maintains numerous status of forces agreements (SOFAs) with other sovereign states. These agreements govern the conduct of the American military in foreign nations. Because these agreements can have such significant implications for military activity, the lawyers who craft and interpret them have, both literally and figuratively, joined the front lines of the conflict.[41] But SOFAs cannot cover every contingency, and there are cases in which a country like the United States has chosen to violate the sovereignty of another nation in order to enforce its municipal law. There is no better example of this than the 2011 assassination of Osama bin Laden.

After years of searching, bin Laden was located in a compound in Abbottabad, Pakistan. US officials wanted to capture of kill him, but they faced a dilemma: the SOFA between the US and Pakistan only allowed for air strikes, not ground force operations. Moreover, Obama's administration feared that Pakistan would deny the United States permission to capture or kill bin Laden if asked. Instead, the administration chose to proceed with a raid without informing Pakistan or asking the government's permission. In other words, American officials decided to deploy

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[40] United States Department of Defense, *Manual for Military Commissions*, 2010 edition, http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf.
[41] For an extended discussion of how law shapes military activity in the war on terror, see John Morrissey, "Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror," *Geopolitics* 16 (2011): 280–305.

military forces in the territory of a friendly sovereign nation without consent to capture a criminal enemy declared as such by the municipal laws of the United States.

Although the specific legal justifications for the raid have never been officially provided, unofficial accounts have become public.[42] It appears that White House lawyers settled on the "unwilling and unable" exception to sovereign integrity to justify the incursion of US military forces into Pakistan. The exception is similar to conditional sovereignty in that it allows a state to pursue extraordinary military action in a foreign nation's territory to stop an imminent threat to security if that nation's government would otherwise be unwilling or unable to do so.[43] With that doctrine in hand, US military forces entered Pakistani territory without permission and, based solely on American law, executed Osama bin Laden. Without litigating the validity of the "unwilling or unable" doctrine as it was applied in this case or as a general practice of international law, we can draw an important conclusion. The US raid calls into question any idea that the nexus of territory and population, the nation, constitutes a hard limit on the state's enforcement of its laws. The United States chose to enforce its municipal law in a foreign land while claiming sovereign right neither over Pakistan's territory nor over Osama bin Laden as a citizen. Unlike the cases of Iraq or Afghanistan, the United States did not declare Pakistan non-sovereign, nor did it seek to assist in revolutionary conflict as it would have in Syria. Instead, it simply expanded its jurisdiction to include Pakistani territory, superimposing American law over Pakistani law.

When considered together, it appears that these three cases—intervention in Syria, the enemy combatant, and the assassination of Osama bin Laden—reveal the absolute incoherence of

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[42] Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (New York: Little, Brown and Co., 2015), 260–66.

[43] For a discussion of the doctrine, see Ashley S. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law* 52 (2012): 483–550.

the American sovereign imaginary in the early twenty-first century. Despite the singularity of *the* war on terror, of which all three cases are part, the function and formulation of sovereignty in US law is rife with contradiction. At the same time that the federal government champions a strong conception of sovereign exclusivity in Lebanon, it violates the sovereign integrity of Pakistan, a wartime ally. As the United States claims a right to apply its municipal law to denationalized non-citizens, it champions the inviolability of international law as justification for intervening in a civil war and formulates bilateral agreements with sovereign states. Sovereignty in the war on terror is simultaneously contingent and absolute, a protected status and an impediment to justice, an inalienable right and a privilege. Despite their differences, however, a common thread in these cases is the role of law as a vehicle through which the sovereign imaginary is articulated. The war on terror has seen not only the interpretation and reinterpretation of existing laws, but also the creation and proliferation of entirely new legal regimes to cover the contingencies of global terrorism. Thus, it is not enough to treat law as one means through which the sovereign imaginary is expressed; rather, the deployment of law constitutes the imaginary itself. In these three cases, the heavy reliance on municipal law applied beyond US territory and population illustrates a commitment to a thick conception of sovereign right for the United States, and a much weaker one for other nation-states.

Unlike neoliberalism, which moves in a more or less coherent direction toward the distribution of sovereign power to people and institutions outside of the state, nationalist postsovereignty is complex and contradictory. Perhaps these contradictions only exist at the level of tactics; that is, perhaps there exists a strategic unity to explain each contradictory case at once. If there is, however, it cannot be a common abrogation of state power or the maintenance of a co-equal system of international sovereignty. There seems to be no uniform commitment to the sanctity

or violability of the right to rule. This differential treatment of sovereignty speaks to the heart of the postsovereignty thesis: a simultaneous intensification and disintegration of the national limit.

The Postsovereign Era?

Whether it takes the form of transnational agreements, military interventions, border walls, or flexible citizenship, nationalist postsovereignty maintains a common theme: the degradation of the nation as the basic unit of international sovereignty. Advocates of postsovereign novelty see a world no longer exclusively carved up into discrete units. Instead, they find it increasingly covered by overlapping, contested, fluid, or destroyed sovereign limits. The early twenty-first century has certainly been witness to considerable change, and it is a period in which the globalization and war valences of nationalist postsovereignty often overlap. Brown's analyses of border walls illustrate how often a single policy objective can be motivated by multiple denationalizing forces at the same time. Indeed, in his candidacy announcement Trump rather breathlessly moved from international trade to immigration to terrorism as justifications for his wall. This combination of justifications suggests not only that multiple valences of nationalist postsovereignty are involved, but also that the pressures of neoliberal, globalized capitalism are at play as well. Although Brown does not express it in the terms I have here, the unity of these various threads is precisely why border walls are her example par excellence of the postsovereign condition of the early twenty-first century.

Brown's analysis of the temporality of "post," that it describes a phenomenon that breaks with its past but remains captured by it, operates at two levels. Most obviously, it describes a present sovereign imaginary that is a confluence of two opposing yet simultaneous forces. And yet, the present is a definite time, one that is historically distinct from a past that was fully sovereign. Brown's analysis, along with Sassen's, Ong's, and to a lesser extent Elden's, offer limited

descriptions of what that past was, its temporal boundaries, and its conditions. They take for granted the existence of a period in human history in which the United States, the West, and indeed the entire globe was "sovereign." Brown brackets this sovereign period between the 1684 Peace of Westphalia and the emergence of globalization and neoliberalism sometime after the 1960s. Although she acknowledges that sovereignty "has always been something of a fiction in its aspiration," she nevertheless argues that "the fiction is a potent one that has suffused the internal and external relations of nation-states since its consecration" in Westphalia.[44] The temporal novelty of postsovereignty seems like a claim that ought to be proven, rather than stipulated.

The risk in obsessing over the novelty of postsovereignty is twofold. First, it may produce historical blindness, and not Paul de Man's productive blindness "that is able to move toward the light only because, being already blind, it does not have to fear the power of this light."[45] Rather, to treat postsovereignty as a primarily temporal distinction may lead us to ignore the ways in which the past influences the present, which may in turn obscure avenues of critique and action through which we might respond to the present. Second, it may in fact lead to a misunderstanding of the relationship between sovereignty and postsovereignty. There is an alternative conceptualization of postsovereignty, however, one that approaches the "post" not as a temporal distinction but an internal one. What if we were to think of postsovereignty as a feature of sovereignty? In other words, what if the right of a state to rule was characterized by a fluctuation between consolidations and explosions of absolute power? Consider the three examples of law in nationalist postsovereignty described above. In each of them, the United States attempted to make the phenomenon of global

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[44] Brown, *Walled States*, 22.
[45] Paul de Man, "The Rhetoric of Blindness: Jacques Derrida's Reading of Rousseau," in *Blindness and Insight: Essays on the Rhetoric of Contemporary Criticism,* 2nd ed. (Minneapolis: University of Minnesota Press, 1983), 106.

terrorism cognizable through law, and especially municipal law for the enemy combatant and the assassination of Osama bin Laden. If postsovereignty is truly new, then the juridical structures which constitute it ought also to be new. The contradictory approaches to sovereignty seen in these cases should also be new. However, as I argue in the next chapter, a set of legal challenges similar to those faced in the war on terror were also faced by American jurists in the early nineteenth century as they attempted to craft a legal framework through which the United States could combat maritime pirates. This suggests that postsovereignty is not unique to the present conjuncture but is at the very least a recurring phenomenon, if not a constituent element of sovereignty itself.

Chapter 2

The Rhetoric of Universal Jurisdiction:

Pirates, Privateers, and the Origins of a Postsovereign Imaginary

According to the standard tale, the twilight of sovereignty began when technological advances made global communication widespread and accessible. The transition away from the post–World War II sovereign "bargain," as it were, which emphasized popular sovereignty as a condition of sovereign legitimacy while reinforcing the Westphalian solidity of the nation-state, appears to have begun sometime in the 1970s. At the same time legal regimes, although still national in character, were increasingly confronted with pressures specific to international business regulation.[1] Changes in the nature of war took place around the same time, with conflicts in Korea and Vietnam inspiring Congress to pass the War Powers Resolution in 1973, which required the president to seek congressional approval for military deployments lasting longer than sixty days in the absence of a war declaration.[2] According to one line of thinking, then, sovereignty reigned for more than three hundred years, from the Peace of Westphalia in 1648 to the beginning of globalized neoliberalism in the 1970s. Thus it would appear that postsovereignty is a condition unique to the last half-century of global culture. In the previous chapter, I suggested that postsovereignty was not such a novel phenomenon, and it is the charge of this chapter to substantiate that claim.

Consider, for example, the features of nationalist postsovereignty that have undermined the certainty of national borders. Concerns over territorial jurisdiction have fascinated scholars since the dawn of international law. In many cases the limits of jurisdiction are sutured to the national border,

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[1] Martin Shapiro, "The Globalization of Law," *Indiana Journal of Global Legal Studies* 1 (1993): 37–64.
[2] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

and thus territory and legal authority are coextensive. In other cases, such as those arising in the non-territory of the ocean, the answers are more complex.[3] For example, in order to determine who should try cases of piracy, defined as robbery committed on the high seas, early modern jurists developed a doctrine known as universal jurisdiction. The doctrine holds that any act of piracy can be tried by any nation regardless of that nation's connection to the crime. In effect, it grants total, simultaneous, and overlapping jurisdiction over all piracies to every nation. Thus, despite its origins at least as early as the sixteenth century, universal jurisdiction retains many of the characteristics of nationalist postsovereignty.

In this chapter, I argue that universal jurisdiction is a primordial element of sovereign right that complicates the temporality and coherence of the standard postsovereign narrative. The analysis illustrates the possibilities offered by abandoning the category of the nation as the basic unit of international sovereign systems and replacing it with the more fluid concept of jurisdiction. This replacement makes it possible to resolve the complexities and contradictions inherent in nationalist postsovereignty, providing a clearer understanding of present international systems, relations, and actions. The argument opens with a short historical and conceptual introduction to universal jurisdiction, followed by the analysis of three US Supreme Court opinions concerning universal jurisdiction over foreign piracies: *United States v. Palmer* (1818), *United States v. Klintock* (1820), and *United States v. Smith* (1820). Each case offers a different approach to universal jurisdiction: *Palmer* rejects the doctrine, *Klintock* incorporates it into American domestic law, and *Smith* argues for it as a feature of the law of nations. All three cases involve facts with a similar feature, namely that the men at trial for piracy claimed to be privateers rather than pirates. Thus, at the heart of each case lies a

[3] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2009).

debate over the definition of piracy and its distinction from privateering. I argue that the way in which each case resolves this debate, while simultaneously articulating a vision of nation-state sovereignty in light of universal jurisdiction, is evidence of a fundamental tension between sovereign exclusivity and nationalist postsovereignty within the American sovereign imaginary of the early nineteenth century. This tension, I conclude, is in many ways identical to the tensions felt in the twenty-first century.

Hostis humani generis

Universal jurisdiction is an element of international law that grants jurisdiction over certain criminal matters to any and every state. As Theodor Meron puts it, "The true meaning of universal jurisdiction is that international law *permits* any state to apply its laws to certain offenses even in the absence of territorial, nationality, or other accepted contacts with the offender or the victim."[4] In effect, the doctrine empowers states to apply their municipal laws—that is, those laws relating to civil power—beyond the national limit, but only in a certain set of cases. Originally, universal jurisdiction was reserved for the crime of piracy. In 1589 Italian legal scholar Alberico Gentili connected piracy to universally enforceable law, writing:

> It is right to make war upon pirates, and the Romans justly took up arms against the Illyrians, Belearians, and Cilicians, even though those peoples had touched nothing belonging to the Romans, to their allies, or to any one connected with them; for they had violated the common law of nations. And if a war against pirates justly calls all men to arms because of love for our neighbor and the desire to live in peace, so also do the general

[4] Theodor Meron, *War Crimes Law Comes of Age: Essays* (Oxford: Oxford University Press, 1998), 251.

> violation of the common law of humanity and a wrong done to mankind. Piracy is contrary to the law of nations and the league of human society.[5]

Like Emer de Vattel, who was undoubtedly inspired by him, Gentili understands the international community as a differential yet equal system of nation-states governed by universal law derived by nature. Pirates violate that common law, which justifies nations going to war with them even if there exists no territorial, personal, or other connection. In other words, piracy is an existential criminal threat to international sovereignty. But Gentili highlights three other motivations for universal jurisdiction over piracy: neighborly love, national security ("desire to live in peace"), and injury to humankind. This final motivation is reminiscent of the claim, derived from Cicero, that pirates are *hostis humani generis*: the enemy of all.[6] For Cicero, pirates are not lawful enemies because they cannot be trusted, and thus "with [them] there ought not to be any pledged word nor any oath mutually binding," which prevents pirates from participating in just wars as lawful enemies.[7] Thus it is the failure to respect oaths, and the concomitant denial of mutual respect, that justifies the exclusion of pirates from the society of nations.

Dutch jurist Hugo Grotius refined and supplemented Gentili's thought on universal jurisdiction. In 1609 he published a treatise outlining his theory of *mare liberum*, or the freedom of the seas, which asserted both a right and a need for unobstructed ocean travel. In effect, he said, the high seas were international space that could not be claimed as territory by any single sovereign. In an essay written around 1615 that defended his thesis, Grotius argued for a distinction between

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[5] Alberico Gentili, *De iure belli libri tres*, vol. 2, trans. John C. Rolfe (Oxford: Oxford University Press, 1933), 124 (bk. I, chap. 25).
[6] In *De officiis* Cicero uses the Latin *communis hostis omnium* to describe pirates. *Hostis humani generis* is a more modern formulation of the same. Cicero, *On Duties*, trans. Walter Miller, Loeb Classical Library 30 (Cambridge, MA: Harvard University Press, 1913), 384 (bk. III, § 29). See also Jody Greene, "Hostis Humani Generis," *Critical Inquiry* 34 (2008): 683–705.
[7] Cicero, *On Duties*, 385, 387 (III.29).

exclusive and universal jurisdiction with reference to the capture, trial, and punishment of pirates: "I think a distinction should be made between that jurisdiction which is competent to each in common and that which is competent to each one properly speaking. All peoples or their princes in common can punish pirates and others who commit delicts on the sea against the law of nations."[8] He went on to note that this does not mean that sovereigns cannot create their own laws or treaties governing the seas, but they cannot expect such laws to apply to foreign nations, nor can those laws supersede or contradict the universal jurisdiction over pirates derived from the law of nations.[9] Vattel elaborates Grotius's position by arguing that any actor depriving a nation of the right to access the sea is the enemy of all maritime nations because "it infringes their common right. . . . If any one openly tramples it under foot, they all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty towards themselves, and towards human society, of which they are members."[10] Although Vattel is here describing state actors, it stands to reason that the same principle applies equally to pirates who would deprive vessels of their right to sail freely.

From Cicero to Gentili to Grotius we can identify two distinct origins for universal jurisdiction: first, pirates violate the law of nations by failing to maintain oaths; second, pirates operate in international space, and their activities equally threaten the right of each nation to the freedom of the sea. Vattel introduces a third element: heinousness. He writes:

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[8] Hugo Grotius, *The Free Sea*, ed. David Armitage, trans. Richard Hakluyt (Indianapolis: Liberty Fund, 2004), 128.

[9] For an in-depth analysis of the figure of the pirate in Grotius's work, see Michael Kempe, "Beyond the Law: The Image of Piracy in the Legal Writings of Hugo Grotius," *Grotiana* 26–28 (2007): 379–95.

[10] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 251 (bk. I, chap. 23, § 283).

> Although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.[11]

Vattel does offer one caveat to this principle, namely, that if the nation against which the crime is committed seeks to try the malefactor itself, the capturing state, if different, ought to surrender the criminal since the victim-nation's interest in justice is greater. However, he does not incorporate this courtesy as an element of the *right* to universal jurisdiction. The authority to try and punish these "villains" flows only from their violation of the tranquility brought by the law of nations.

Unlike his predecessors, Vattel believed that pirates were not the only enemy of humanity and thus subject to universal jurisdiction. And he would not be the last expand the list of activities that fell under the term's rubric. One narrative of the doctrine's expansion has become particularly popular in legal scholarship, and the index of M. Cherif Bassiouni's influential history of universal jurisdiction offers a concise list. Universal jurisdiction begins as the basis for criminal prosecutions of piracy, then slavery, war crimes, crimes against humanity, genocide, apartheid, and torture. To this list we ought to add the prosecution of human rights violations by multilateral tribunals.[12] The Nuremberg Trials at the end of World War II have served as precedent for many of these

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[11] Ibid., 227–28 (I.19.233).

[12] M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law* 42 (2001): 81–162. See also Yana Shy Kraytman, "Universal Jurisdiction: Historical Roots and Modern Implications," *Brussels Journal of International Studies* 2 (2005): 94–129.

expansions, including the more recent attempts to include both airplane hijacking and terrorism as crimes of universal jurisdiction.[13] Each expansion is guided by a belief that criminal law can put an end to increasingly deadly and depraved—villainous—acts that would otherwise go unpunished. In 2001, a group of scholars and jurists met at Princeton University and penned a manifesto aimed at establishing principles for the use of universal jurisdiction in international law. Its introduction opens with a challenge: "During the last century millions of human beings perished as a result of genocide, crimes against humanity, war crimes, and other serious crimes under international law. Perpetrators deserving of prosecution have only rarely been held accountable. To stop this cycle of violence and to promote justice, impunity for the commission of serious crimes must yield to accountability. But how can this be done, and what will be the roles of national courts and international tribunals?" The *Princeton Principles on Universal Jurisdiction*, as the document is called, sees universal jurisdiction as one tool by which states might hold perpetrators accountable.[14] Unlike the doctrine expressed by Grotius and Vattel, who saw universal jurisdiction flowing from natural law, the *Principles* take a positivist approach, crafting law as a tool to achieve specific ends. If this is the trajectory that universal jurisdiction will take, then the possibilities for its expansion are limitless. Despite these developments, however, piracy continues to serve as an important historical and conceptual touchstone for scholars and jurists who seek to apply the doctrine of universal jurisdiction today.

But scholars have raised an important question about these so-called new universal jurisdiction cases, specifically in the use of piracy as a precedent. Eugene Kontorovich notes that

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[13] Kenneth C. Randall, "Universal Jurisdiction Under International Law," *Texas Law Review* 66 (1988): 785–841.
[14] Stephen Macedo, ed., *Princeton Principles on Universal Jurisdiction* (Princeton, NJ: Program in Law and Public Affairs, Princeton University, 2001), 23, http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

new universal jurisdiction cases are based on analogic reasoning: piracy is subject to universal jurisdiction because of its heinous nature; thus new crimes should also be subject to universal jurisdiction based on similar heinousness. For example, terrorism's heinousness is "like" piracy's heinousness, hence the former should be a crime under universal jurisdiction like the latter. Recall that Gentili and Grotius offer other justifications for universal jurisdiction over piracy, namely a violation of the law of nations and national security. But the piracy analogy reduces the logic by which piracy is subject to universal jurisdiction to its singular heinousness, which in turn becomes the principle by which new crimes can be incorporated under the doctrine.

Kontorovich finds the analogy to be highly suspect. After establishing how the piracy analogy "sustains" new universal jurisdiction claims, he argues that it is invalid for two reasons. First, states authorized privateers to do essentially the same things as pirates, but the former remained legal while the latter were not. "The recognition that piracy and privateering involved the same types of conduct and yet had radically different legal consequences indicates that pirates were not universally condemned because of the *nature* of their actions, but rather for failure to comply with the formalities of licensing."[15] Second, heinousness cannot be the standard because states criminalized behavior on land identical to piracy without reference to universal jurisdiction. "While piracy was certainly a serious crime, it was not thought to be the worst, and thus heinousness fails to explain its universal cognizability."[16] Importantly, Kontorovich does not argue that piracy does or ought not fall within the realm of universal jurisdiction based on these observations. Rather, he argues that they render hollow the "heinousness" foundation of new universal jurisdiction, which in turn calls into question the legitimacy of the doctrine's expansion. To the degree that "heinousness"

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[15] Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation," *Harvard International Law Journal* 45 (2004): 211.
[16] Ibid., 223.

was used to describe piracy at all, he suggests, it was merely rhetorical invective and not substantive legal principle.

Whether or not the expansions of universal jurisdiction are legally sustainable through the piracy analogy is a question for jurists to decide. However, the objections Kontorovich raises are troubling. His analysis ignores crucial features of the sovereign imaginary out of which his historical evidence emerged. Because pirates were not commissioned by sovereigns, and because they committed their crimes in the non-territory of the sea rather than on land under the direct territorial jurisdiction of a given state, piracy was treated as a unique crime worthy of unique jurisdiction. Through an extended analysis of the texts and contexts of the US Supreme Court's decisions regarding piracy and universal jurisdiction—especially those that concern the distinction between piracy and privateering—I will argue that pirates' statelessness, not the phenomenology of their conduct, was the reason that piracy was so reviled. My argument is not inconsistent with Kontorovich's overall claim that the use of the pirate analogy in specific cases of new universal jurisdiction is unsustainable. However, it may yet provide an alternative foundation for the continued relevance of the doctrine to whatever horrors await us in the twenty-first century.

The Rhetoric of Universal Jurisdiction

Privateering, or the use of privately owned ships as vessels of war, was a prominent practice in Western maritime conflict from as early as the thirteenth century until the 1856 Declaration of Paris, which established an international norm abolishing the practice.[17] There is no denying that privateering and piracy often resembled one another. In both cases, vessels armed for war would

[17] N. A. M. Rodger, "The Law and Language of Private Naval Warfare," *Mariner's Mirror* 100 (2014): 5–16; Jan Martin Lemnitzer, *Power, Law and the End of Privateering* (New York: Palgrave Macmillan, 2014).

attack, capture, and plunder merchant vessels sailing on the high seas. However, privateers were commissioned to plunder by a sovereign state. The commission was a formal legal document, also known as a letter of marque or a *lettre de course* (*corsair* is another name for privateer), and thus the broadest distinction between pirates and privateers rests on their legal status. But the distinction can be drawn more precisely. Not only were privateers sanctioned by sovereigns, but their takings—known as prizes—were also regulated by the state. Prize courts vetted and legitimated privateer bounties to ensure that they met the terms of the commission, and the issuing state was often entitled to some or all of the spoils. Thus, more than merely "legal piracy," privateering was an institutionally secured tactic of maritime conflict. Moreover, unlike pirates who threatened every vessel, a privateer's targets were limited by the sovereign's commission. Specifically, privateers could only attack vessels of those nations with which the commissioner was at war. Like military contractors in the present, then, privateers functioned as a private extension of the state's forces participating in public conflicts between sovereigns.

Vattel speaks favorably of privateers, especially those motivated by the "hatred of oppression, and the love of justice, rather than the desire for riches." He draws a sharp distinction between privateers fighting alongside a sovereign in a just war and those who use the commission as a cover to commit piratical acts against neutral vessels. "The thirst for gold is their only inducement," he writes, "nor can the commission they have received efface the infamy of their conduct, though it screens them from punishment."[18] This last comment is curious, because it suggests that the sovereign would protect a privateer who committed a piracy while possessing a commission. Whether such absolution held in practice or law is an interesting empirical question; however, the statement undoubtedly shows Vattel's belief in the extraordinary powers granted to a

[18] Vattel, *Law of Nations*, 614 (III.15.229).

warring sovereign. His comments on privateering appear in book III of *The Law of Nations*, whose subject is war, whereas his comments on universal jurisdiction come in book I, whose subject is "nations themselves." This suggests that, according to Vattel, universal jurisdiction is not a right that flows from interstate relations (the subject of book II) but is rather an essential condition of sovereignty as such.[19]

In his refutation of the pirate analogy, Kontorovich argues that privateering and piracy are phenomenologically indistinguishable. "Privateering did not differ from piracy in the substantive nature of the conduct, but only in the attendant formalities."[20] He marshals considerable historical evidence—including legal cases, policy proposals, and romantic poetry—to illustrate that Western attitudes in the eighteenth and nineteenth centuries supported this view. However, the distinction between piracy and privateering was never reducible to the *actus reus*. Instead, the distinction lies precisely in the legal legitimacy of the act. Vattel's discussion makes this clear. His favor for privateers motivated by "hatred of oppression, and the love of justice, rather than the desire for riches," extends only to his approval of their temperament, not the legitimacy of their actions. Again, Kontorovich's argument only seeks to prove that moral revulsion was not the principle by which piracy was subject to universal jurisdiction, and thus for him the equal hatred of pirates and privateers *despite* their unequal legal treatment is sufficient. He writes:

> But consider the offenses that, by analogy to piracy, have come within the ambit of NUJ [new universal jurisdiction]: genocide, torture, rape, and apartheid. None of these offenses could be redeemed by state authorization or licensing; the acts are innately and always evil.

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[19] Vattel argues that pirates perpetrate "illegitimate war." He writes: "These two species of war, I say,—the lawful and the illegitimate,—are to be carefully distinguished, as the effects and the rights arising from each are very different." Ibid., 507–8 (III.4.67).
[20] Kontorovich, "Piracy Analogy," 214.

> Piracy was obviously regarded as belonging to a lesser, ordinary class of evils, more like murder than war crimes. So piracy was regarded as heinous in a weak sense, along with many other offenses. It is hard to see how this could provide a basis for singling out piracy as the sole universal offense.[21]

But this argument is based on a questionable assumption, namely that the mechanism by which heinousness is determined is identical in the present to what it was in the past. In other words, if torture is heinous because it is an example of extraordinary violence and indifference to human life, then that is the standard by which piracy must also be judged. It is for this reason that Kontorovich dismisses legality as a justificatory condition ("the acts are innately and always evil"). However, recall Cicero's original declaration against pirates from which universal jurisdiction flows: "For a pirate is not included in the number of lawful enemies, but is the common enemy of all. With him there ought not be any pledged word nor any oath mutually binding."[22] The pirate's status as the enemy of all derives not from any particular horror wrought upon victims but rather from his or her failure to maintain the bond of trust and respect necessary to participate in just relations. Indeed, what would be heinous about piracy as distinct from privateering is the pirate's rejection of the condition of sovereignty as such.[23]

Rather than treating the simultaneous acceptance of privateering and rejection of piracy as proof of the latter's normalization, as Kontorovich does, it is necessary to understand how such a tension could be sustained in the first place. Of clear significance is the distinction between

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[21] Ibid., 217–18.
[22] As quoted and translated in Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009), 16.
[23] Robert Elliot Mills, "The Pirate and the Sovereign: Negative Identification and the Constitutive Rhetoric of the Nation-State," *Rhetoric and Public Affairs* 17 (2014): 117–29. See also Heller-Roazen, *Enemy of All*, 9–22.

sovereign privateers and non-sovereign pirates. But how was that distinction supported in the early nineteenth century? And what were its terms? The Supreme Court decided two cases that address this distinction in the context of universal jurisdiction: *United States v. Palmer* (1818) and *United States v. Klintock* (1820). In the *Palmer* decision, the court rejects the doctrine of universal jurisdiction in order to prevent the United States from having to try several Spanish American privateers as pirates, a move that would have complicated implications for American foreign policy. In *Klintock*, the court recuperates universal jurisdiction by treating pirates as stateless enemies. A third case, *United States v. Smith* (1820), argues for universal jurisdiction over pirates as an ontological element of sovereign right. In this section, I analyze the rhetoric of universal jurisdiction in these three cases to determine how and why privateering was considered a legitimate practice of the state while piracy was condemned as a crime against all nations.

El Congreso: Palmer's Forgotten Context

In 1818 the US Supreme Court issued an opinion in the case *United States v. Palmer*, one of the most important cases in American pirate law to address the question of universal jurisdiction. At issue in the case were three questions: (1) What is piracy? (2) Is there statutory authorization for universal jurisdiction over foreign pirates in the United States? and (3) Can a court of law determine whether or not a nation is sovereign for the purposes of determining whether a piracy has occurred? In the secondary literature on pirate law, the first two questions are often discussed as principled legal argument regarding American maritime jurisdiction, while the third question is ignored almost entirely. This interpretive choice carries a heavy consequence, because it brackets an important contextual feature of *Palmer* that cuts to the heart of the distinction between piracy and privateering. Essentially, the piracy at issue in *Palmer* was not obviously a piracy at all; in fact, the case concerns

the taking of a Spanish vessel by an American-owned privateer commissioned by the government of Buenos Aires, a colony fighting a revolutionary war against the Spanish Empire. Hence the issue of sovereign legitimacy arose: If the United States found the attacking ship to be a privateer, then it was de facto recognizing Buenos Aires as sovereign, and if it condemned it as a pirate, then sovereignty would be denied. Legal scholars rarely if ever frame the decision in this way, but doing so provides a clearer picture of the case and reveals the important connections between sovereignty and universal jurisdiction within the American sovereign imaginary.[24]

Most accounts of the facts in *Palmer* are limited to those provided in the Supreme Court's opinion, which were in turn apparently drawn from the findings of a circuit court jury. The version of events is straightforward. John Palmer, Thomas Wilson, and Barney Colloghan "with force and arms, upon the high seas, outside the jurisdiction of any particular state . . . did piratically and feloniously set upon, board, and enter a certain ship called the *Industria Raffaelli*," assault its crew, and steal the ship and its cargo of commodities and specie worth approximately $97,000.[25] Accounts from other sources suggest something more complicated.

Palmer, Wilson, and Colloghan were sailors on the *El Congreso*, a privateer based out of Baltimore captained by Joseph Almeida, a man notorious among Spanish sailors for his success as a

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[24] In what is the most comprehensive treatise on American pirate law to date, Alfred P. Rubin discusses both the universal jurisdiction issues and the sovereign recognition issues, but treats them as separate matters. See Rubin, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988), 141–42, 157–60.

[25] The stolen cargo is enumerated in the opinion as follows: "five hundred boxes of sugar, of the value of twenty thousand dollars of lawful money of the said United States; sixty pipes of rum, of the value of six thousand dollars; two hundred demijohns of honey, of the value of one thousand dollars; one thousand hides, of the value of three thousand dollars; ten hogsheads of coffee, of the value of two thousand dollars; and four bags of silver and gold, of the value of sixty thousand dollars, of the like lawful money of the said United States of America." *United States v. Palmer*, 16 U.S. 610, 611–12 (1818).

Spanish American privateer in the early nineteenth century.[26] Commissioned by the government of Buenos Aires, the *Congreso* cruised the Atlantic in search of Spanish merchant vessels to attack, capture, and claim as prize. The early months of 1817 saw Almeida and his crew meet with much success, leaving a slew of plundered and scuttled Spanish ships in their wake. It was on July 3 of that same year that the *Congreso* fell in with the *Industria Raffaelli* near the Madeiran archipelago in the eastern Atlantic. Laden with valuable specie and New World commodities, the *Raffaelli* had sailed under Spanish colors on a course from Havana to Cadiz by way of Tenerife in the Canary Islands. When the two ships met, the *Congreso*'s crew captured the *Raffaelli* and its cargo, claiming both for Buenos Aires. With the prize firmly under his control, Almeida dispatched the *Raffaelli* with a skeleton crew and tasked them with navigating the vessel to South America and ensuring that the bounty was delivered and their ownership of it legally secured.

However, the *Raffaelli* never made it to South America. Accounts of what caused the change in course differ. Initial reports suggest that dwindling supplies of food and water forced the prize crew to abandon their course and sail instead for a closer friendly port in the eastern United States for resupply. (Although US laws generally restricted Spanish American privateers from docking in US ports to trade, sell, or acquire cargo, special exemptions were made in emergency situations such as reprovisioning.) Later reports claim that the prize crew rose up against the captain and mates, seized control of the ship, and steered it into US waters with the hope of smuggling the cargo

[26] For additional information on Captain Almeida, see Jeffrey Orenstein, "Joseph Almeida: Portrait of a Privateer, Pirate & Plaintiff, Part I," *Green Bag: An Entertaining Journal of Law* 10 (2007): 307–25; Jeffrey Orenstein, "Joseph Almeida: Portrait of a Privateer, Pirate & Plaintiff, Part II," *Green Bag: An Entertaining Journal of Law* 12 (2008): 35–52. See also David Head, *Privateers of the Americas: Spanish American Privateering from the United States in the Early Republic* (Athens: University of Georgia Press, 2015), 123–24.

ashore.[27] Regardless of which account is more accurate, the outcome was the same: the *Raffaelli* arrived along the North American coast sometime in early September 1817.

Shortly thereafter members of the prize crew appeared in Portsmouth and Boston, their purses flush with enough gold and silver to draw the interest of federal authorities. Suspecting the sailors to be pirates, the US marshal in Boston detained and questioned several members of the prize crew, apparently releasing all but Palmer, Wilson, and Colloghan.[28] These three were set to face indictment and trial for piracy once the federal circuit court in Boston began its October term. As the men waited in prison, the Spanish consulate began the process of legally repossessing the *Raffaelli* and its cargo for their Spanish claimants.[29]

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[27] Exploiting such legal and logistical loopholes allowed privateers successfully to sell their cargoes in the United States without returning to their commissioning nation's ports. For discussions of these tactics and for historian David Head's take on the *Industria Raffaelli* incident, see Head, *Privateers of the Americas*, 80–84.

[28] For its part, the *Raffaelli* was discovered empty and abandoned near Portland, Maine. The ship had been disguised as the *John of Norfolk* by a piece of canvas with that name placed over the true name of the ship painted on its bow. Prior to abandoning the ship, the prize crew had split the cargo among several merchant vessels, with hopes of passing the merchandise off as legitimate and thus salable in the United States.

[29] The majority of this narrative is drawn from several newspaper articles published in Boston and Portsmouth. Of the three, the *Oracle*'s account was the most widely reprinted, with news of the capture spreading throughout New England and the Mid-Atlantic states. *Boston Daily Advertiser*, September 11, 1817, AHN; *Independent Chronicle and Boston Patriot*, September 13, 1817, AHN; *Columbian Centinel* (Boston), September 13, 1817, AHN; *Oracle* (Portsmouth, NH), September 13, 1817, AHN. For the conflicting story regarding the *Raffaelli* on its voyage back to the Americas, see "More of the Spanish Ship," *Newburyport (MA) Herald*, September 16, 1817, AHN. The details regarding the *Rafaelli*'s canvas disguise were first reported in Portland's *Gazette* as a note to its reprint of the *Oracle*'s article. "From the Portsmouth Oracle of Saturday," (Portland, ME) *Gazette*, September 16, 1817, AHN. Texts with citations followed by "AHN" were obtained from Readex's *America's Historical Newspapers* database.

There are several detailed depositions included in various libel cases connected to the event. Although I have not yet consulted those primary source materials, the story here is consistent with descriptions of them in secondary literature. See Kevin Arlyck, "Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822," *Law and History Review* 30 (2012): 245–78.

News of the *Raffaelli*'s capture and the prize crew's detention spread quickly throughout the maritime states. Public opinion appears to have been split on the fates of the sailors. Some argued that the men were obviously criminals fit for death. A writer in New York's *Evening Post* said that "there remains little doubt" that the crew "are a set of pirates." This led the *Post* to conclude:

> We are glad that at length, the practice of piracy has attracted the notice of the proper authorities. In vain has the Evening Post been crying aloud for more than a year against this national sin. It is high time the most vigilant activity should be employed, and the most rigorous measures pursued to arrest these buccaneers and bring them to an exemplary punishment; nothing short of this will satisfy the claims of justice.[30]

These comments were published in late September, almost a month before Boston's federal court would begin its session. The newspaper was apparently willing to condemn Palmer, Wilson, and Colloghan as pirates and call for their deaths without a trial. Despite such strong early reactions, writers in the public press began to side more readily with the accused as the trial drew near. In November, after a grand jury returned an indictment for piracy against the three men, the following appeared in the *Boston Patriot:*

> To the surprise of almost every one, the three men belonging to the crew of the South American privateer Congresso [*sic*] have been indicted on the high charge of *piracy*, and it is expected that the trial will commence this day. We cannot believe that any jury of this humane metropolis will construe their offence in the heinous light in which it is placed by the indictment. However irregular may have been their proceedings, it is believed that they were not of sufficient enormity to deserve the dreadful punishment of DEATH![31]

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[30] "Piracy," (New York) *Evening Post,* September 20, 1817, AHN.
[31] *Independent Chronicle and Boston Patriot*, November 4, 1817, AHN.

Setting aside the use of "heinous" in connection with piracy here, note that the *Patriot* specifies that the *Congreso* was a privateer. The "irregularities" likely refer either to the fact that the ship and its crew wound up in the United States rather than in South America or the alleged mutinous activity on the return voyage. Regardless, central to the difference between the *Patriot*'s and *Post*'s reactions to the event is the distinction between privateering and piracy. Their disagreement illustrates the permeability of the categories in the early nineteenth century.

Despite its permeability, the distinction was of considerable consequence, not only for the fates of the men at trial (privateering was legal, after all) but also for the position of the United States in the revolutionary conflicts between the Spanish Empire and its South American colonies. In 1817 the United States remained neutral, and as a consequence the US government did not recognize Buenos Aires as an independent sovereign, nor would it do so until 1822.[32] Convicting the *Congreso*'s crew as pirates for the capture of a Spanish ship could have been seen as a tacit assertion that the United States sided with Spain, since the Buenos Airean government's commission did not have the power to legitimize the *Congreso*'s takings. On the other hand, if the United States officially classified the *Congreso* as a privateer and refused to prosecute the crew, then it might be believed that the government had sided with the colonies against Spain. The trial of Palmer, Wilson, and Colloghan thus took place under tenuous and complex diplomatic conditions, conditions that caused the case to proceed rather strangely.

The three men were indicted and tried for piracy on the same day, November 4, 1817. The proceedings ran late into the evening, but around 10:00 P.M. the jury returned a verdict of not guilty.

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[32] Jay Kinsbruner, *Independence in Spanish America: Civil Wars, Revolutions, and Underdevelopment*, 2nd ed. (Albuquerque: University of New Mexico Press, 2000), 105–6.

The jurors apparently agreed that the men were privateers and that the capture of the *Raffaelli* was legal. As the *New-England Galaxy* reported a few days later:

> It was argued, that they had the right to make such captures, that they were the acknowledged enemies of Spain, struggling, as the United States formerly did, for their independence. That our government was neutral between parties, and it was therefore improper to interfere; that at the same time the jury pronounced the prisoners guilty, they would pronounce the sentence upon their forefathers who were engaged in similar transactions. A pirate was defined to be the enemy of all mankind, but it was contended, the prisoners did not come within the definition, for they suffered *all other* vessels but *Spanish* to pass unmolested.[33]

Several important claims are made here. First, the article suggests that the members of the jury were aware of the geopolitical implications of their verdict and made their decision with foreign policy in mind. This is especially important because that context is not mentioned in the formal statement of facts in *Palmer*, but it does help make sense of the court's ultimate decision. Second, the *Galaxy* explicitly distinguishes privateers from pirates in two ways: a right to capture and limitations in targets. The definitional statement in particular illustrates that the pirates were the enemy of all because they would attack any ship, which puts them at war with every nation. There is a link drawn between American independence and the contemporaneous conflicts in South America, which suggests that this particular case concerns a claim to sovereignty identical to the one that sustains the United States as an independent nation-state. In other words, the not-guilty verdict is predicated upon a respect for sovereignty itself.

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[33] "Trial for Piracy," *New-England Galaxy and Masonic Magazine* (Boston), November 7, 1817, AHN.

The final sentence of the *Galaxy*'s report, which was published three days after the trial, reads: "We understand another indictment is pending against the same prisoners for a similar offence."[34] The second trial took place on the same day that this text was published, November 7. No official records of the indictment or proceedings have yet been found, but two important sources provide some clues. On December 12, Henry Clay, then the Speaker of the House of Representatives and a staunch supporter of South American independence, delivered a speech asking the House to consider requesting clarification from the executive branch as to what laws might be necessary to ensure that South American colonies were treated fairly considering the neutrality of the United States. In support of his argument, he provided an example from a recent trial in Boston, as reported in the *Annals of Congress*:

> Persons sailing under the flag of the provinces had been arraigned in our courts and tried for piracy, in one case after having been arraigned, tried, and acquitted of piracy, the same individuals on the instigation of a Spanish officer or agent, had been again arraigned for the same offence. . . . We admit the flag of these colonies into our ports, said Mr. C.; we profess to be neutral; but if our laws pronounce that the moment the property and persons under the flag enter our ports, they shall be seized, the one claimed by the Spanish Minister or Consul as the property of Spain, and the other prosecuted as pirates, that law ought to be altered if we mean to perform our neutral professions.[35]

Several elements of this description are corroborated by newspaper accounts. The trial, acquittal, and retrial have already been mentioned. The influence of a Spanish agent is corroborated by a libel notice published in Boston's *Columbian Centinel* in November of the same year, where "libel" in this

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[34] Ibid. See a similar announcement in "Trial of the Seamen of the Congress," *Independent Chronicle and Boston Patriot*, November 7, 1817, AHN.
[35] *Annals of Congress*, 15th Cong., 1st Sess., December 3, 1817, 401–4.

case is a lawsuit brought against property to determine its ownership. This case, which was one of several brought on behalf of the Spanish consulate to recover the *Raffaelli*'s cargo, concerned the ship itself and some specie carried by Colloghan. George Blake, the US Attorney in Massachusetts and the prosecutor in the first trial, is listed in the notice as the "Proctor for Don Juan Stoughton, Consul to his most Catholic Majesty the King of Spain."[36] In one of the only studies to consider *Palmer* from the perspective of privateering, if only briefly, Kevin Arlyck notes that such arrangements were not uncommon for public officials, and he details a rather extensive relationship between Blake and Stoughton. It was during this period, Arlyck notes, that Spanish officials in the United States exerted extraordinary political pressure on the federal government to illegalize American privateering on behalf of South American colonies, which was matched by extensive legal proceedings across the maritime states.[37] Clay seems to suggest that Stoughton, or Blake on his behalf, pressured the federal circuit court in Boston into refiling piracy charges against Palmer, Wilson, and Colloghan, although no specific evidence of such pressure has yet been found.

The second trial does not appear to have consisted of much. In his dissent in the *Palmer* decision, Supreme Court Associate Justice William Johnson writes, "The [lower court] transcript contains nothing but the indictment and impaneling of the jury. No motion; no evidence; no demurrer ore tenus, or case stated, appears upon the transcript, on which the remaining questions could arise."[38] In the absence of proceedings, it is likely that the circuit court judges simply sent a series of questions directly to the Supreme Court for review.

From this reconstructed history we can draw an important conclusion. The question of whether or not the *Congreso* was a privateer or a pirate was central to public, legal, and political

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[36] "Marshal's Notices," *Columbian Centinel* (Boston), November 12, 1817, AHN.
[37] Arlyck, "Plaintiffs v. Privateers."
[38] *United States v. Palmer*, 641.

discussions of the event. This much is clear. The answer to that question is significant because it would determine whether the three men at trial would live as privateers or die as pirates. More importantly for our purposes, however, the question is linked directly to the recognition of nation-state sovereignty. To name them privateers would offer some legitimacy to Buenos Aires's claim to sovereignty, although it would only be partial. The Supreme Court resolves the question in two distinct ways, which is the subject of the following section.

But first, a note on Palmer, Wilson, and Colloghan's fates: On April 11, 1818, the men appeared in federal court by a writ of habeas corpus issued at the motion of James T. Austin and Harrison G. Otis, their attorneys. John Davis, one of the two judges who presided over the piracy trials, held that in light of the decision in *Palmer,* the men could not be charged under US law. The *Independent Chronicle and Boston Patriot* noted, "And they were accordingly discharged from imprisonment."[39]

Motive in United States v. Palmer

Eleven legal questions are raised in the *Palmer* opinion, four addressing the "construction of the 8th section of the [1790 Crimes] Act," which defines the punishment for piracy, and seven concerning the sovereign recognition of rebelling colonies.[40] From a hermeneutic standpoint, there is substantial difference between the two sets of questions. The first four ask for direct statutory interpretation, a practice familiar to justices, whereas the remaining seven require speculation on American foreign policy and international legal theory. It should come as no surprise to learn, then,

[39] "Law Intelligence," *Independent Chronicle and Boston Patriot*, April 11, 1818, AHN.
[40] The first two concern the definition of piracy and its punishment in the 1790 statute; the next two concern US jurisdiction over foreign vessels and persons; and the final seven concern the recognition of revolutionary governments. *United States v. Palmer*, 611–17.

that the second set of questions have received very little attention in the secondary literature on *Palmer*; nor should it be unexpected that the court believed its ruling on the first four questions to be dispositive, noting that it "will probably decide the case to which it is intended to apply."[41] If one is only interested in the legal precedent established in *Palmer,* then the court's opinion on the first four questions should suffice; however, if we are to understand the opinion's motive, in Kenneth Burke's sense of that term, then the analysis must take account of the final seven questions rather than ignoring them.

By *motive* I mean something specific: discourse that follows an act in order to justify, explain, rationalize, or otherwise make the act thinkable in a particular way. This type of motive is in contradistinction to its psychological version, or the set of internal desires or drives that impel someone to act.[42] Motive in Burke's sense is necessarily rhetorical, since it brings an act into the realm of social being through symbolic exchange, typically in language. In *Palmer*, the "act" in question is the court's interpretation of the 1790 criminal statute such that it can dispose of the case. Thus the court's response to the first four questions constitutes the "act" in question. The motive, then, is the rhetorical gesture by which one can make sense of that act. Here one ought to distinguish between a discrete motive, which in this case is the justificatory framework for the interpretation internal to it (i.e., the evidence and arguments that support the interpretation), and the general motive, or the rhetorical architecture by which to make sense of the interpretation in its social, political, cultural, and legal contexts. Legal analyses of *Palmer*, and legal analysis tout court, are concerned almost exclusively with discrete motive, which explains why the final seven questions are often ignored. Indeed, one could phrase the difference between my approach and Kontorovich's as

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[41] Ibid., 634.
[42] William Benoit, "A Note on Burke on 'Motive,'" *Rhetoric Society Quarterly* 26, no. 2 (1996): 67–79.

the difference between analysis of general and discrete motives. My discussion of the case will thus begin by addressing the dispositive ruling in *Palmer* and then move to put the decision, and indeed the entire affair, in its general motivational context.

The law governing piracy in the United States flows from the Constitution. Article I, Section 8, Clause 10 reads: "[The Congress shall have the power] to define and punish Piracies and Felonies committed on the high seas, and offences against the law of nations." This "law of nations" is none other than the set of universal natural laws and customary municipal laws discussed by Gentili, Grotius, Vattel, and other theorists. The only limit placed on the congressional power to punish pirates is geographic: the federal government has authority on the "high seas," which the Supreme Court exhaustively defines as the area outside of cannon range of foreign nation-states and the littoral waters of individual states of the union.[43] Because the only functional limit is domestic, the Constitution does not prohibit universal jurisdiction over piracy, should the Congress choose to incorporate that jurisdiction into statutory law.

In 1790 the Congress passed "An Act for the Punishment of Certain Crimes Against the United States," which among other things defines piracy and its punishment. The eighth section, which is the first to deal with piracy and constitutes the substantive law, reads in part:

> Sec. 8. *And be it [further] enacted*, That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a country, would, by the laws of the United States, be punishable with death . . . every such offender

[43] For a discussion of what constitutes the "high seas" in relation to US federalism, see *United States v. Bevans*, 16 U.S. 336 (1818). The court later held that the phrase "outside the jurisdiction of any particular state" in the 1790 statute references states of the union, not nation-states. *United States v. Furlong*, 18 U.S. 184, 200 (1820); this case is also known as *United States v. Pirates*. See also *The Appollon*, 22 U.S. 362, 371 (1824).

> shall be deemed, taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death.[44]

A plain language reading of the statute—especially the phrase "If any person or persons"—suggests that the Congress had incorporated universal jurisdiction over piracy into American statutory law. This statute was enforced without commotion until *Palmer*. All four of the dispositive questions in that case were aimed at this section and the definition of piracy and the scope of jurisdiction it covered.

Palmer's first questions seek clarification on the definition of piracy in the statute, specifically with regard to its lack of grammatical clarity.[45] The concern was thus: Was the phrase "which, if committed within the body of a country, would, by the laws of the United States, be punishable with death" additive (with "any other offence"), or did it also characterize the crimes listed before it as well ("murder or robbery")? The distinction is important because, if it characterizes all crimes, then robbery was not cognizable under the statute, since its punishment was not death when committed on land. This exact issue had plagued circuit court judges throughout the United States, including Chief Justice John Marshall, and opinions were divided.[46] In *Palmer*'s majority opinion, authored by Marshall, the court held that murder and robbery did not need to be capital offenses on land to be punished as piracy at sea under the statute. And the common law definition of robbery was

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[44] An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 113–14 (1790).

[45] For his approach to this section of the decision, see Kontorovich, "Piracy Analogy," 225–26.

[46] *United States v. Hutchings*, 26 F. Cas., 440 (1817). The *Hutchings* case had facts very similar to *Palmer*. Marshall, who presided over this trial, heard questions almost identical to those resolved by the Supreme Court, which suggests some degree of concordance across the cases. With regard to the grammatical question, Marshall noted to the jury that two circuit court judges had issued opposing opinions as to the statute's construction, and thus the matter was uncertain. After instructing them that any uncertainty as to fact or law was grounds to acquit, the jury returned a not-guilty verdict after ten minutes of deliberation.

sufficient to define the act.[47] Thus robbery, murder, and any offense subject to capital punishment on land, when committed on the high seas, qualified as piracy in the 1790 statute.

The next questions concern the jurisdiction of the United States over foreign persons and vessels. The majority opinion introduces the issue this way:

> The question, whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States, is not without its difficulties. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?[48]

It is important to note that regardless of how the court ultimately ruled, the justices clearly acknowledge the existence of universal jurisdiction and the right of the United States to act under it, given the proper statutory authorization. This particular stipulation illustrates that the interpretation of *Palmer* is fundamentally positivist in nature; that is, the authority to try and punish pirates flows not from naturally derived principles but from the laws formally articulated by the nation itself. Although natural law principles were used to justify universal jurisdiction, in this case it would appear that the court is satisfied to address it as a matter of state law. The court, thus, was concerned about the scope of the 1790 statute. "The words of the section are in terms of unlimited extent. The words 'any person or persons,' are broad enough to comprehend every human being." Noting that

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[47] The second question raised to the court was the definition of robbery. The majority held: "Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined in common law." *United States v. Palmer*, 630.

[48] Ibid., 630–31.

jurisdiction is one limiting factor, the court acknowledges that limits can also be derived from "those objects to which the legislature intended" the law to apply. Thus the court's inquiry becomes more precise: "Did the legislature intend to apply those words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?"[49]

No. The court bases its interpretation on the title of the 1790 act itself, which suggests that the statute seeks to punish "certain crimes against the United States." Clearly distinguishing crimes under municipal law and crimes against national sovereignty, the opinion claims: "It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."[50] The court offers several hypothetical examples to prove its point, the most robust of which reads:

> But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.[51]

Again the court does not deny the possibility of US jurisdiction in these cases, despite the fact that allowing it would create overlapping jurisdiction with the foreign sovereign in question, but merely suggests that the "general words of a statute" are not sufficient pretext to create such a regime. Although it was violable, the sanctity of exclusive sovereign jurisdiction remained strong. The court

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[49] Ibid., 631.
[50] Ibid.
[51] Ibid., 632–33.

required a more robust statement by the Congress—and certainly more robust than the phrase "any person or persons"—to extend US sovereign jurisdiction over the affairs of other states.

And thus the court issued its dispositive holding: "The court is of the opinion that the crime of robbery, committed by a person on the high seas, on board any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States."[52] Following this, Palmer, Wilson, and Colloghan were granted the freedom they had earned in their first trial. Because the *Congreso* was believed to be foreign-owned, and because the *Industria Raffaelli* was a foreign ship, the US Circuit Court in Boston did not have the necessary jurisdiction to try the men for piracy under the 1790 statute.[53]

The ruling in *Palmer* significantly limited federal jurisdiction over maritime crimes, a controversial move. Secretary of State John Quincy Adams wrote a particularly harsh critique of the decision in a May 1819 diary entry. The decision was "founded upon captious subtleties in Palmer's case," and the opinion was an example of "judicial logic—disingenuous, false, and hollow." "If human language means anything," he wrote, "Congress had made general piracy by whomsoever and wheresoever upon the high seas committed, cognizable by the Circuit Court. The law has been in force from 30th April, 1790. Foreign pirates, for piracies committed in foreign vessels, have been

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[52] Ibid., 633–34.

[53] It turns out, however, that the *Congreso* was not quite so foreign. In March 1817, Captain Almeida had been summoned to federal court for a libel hearing brought at the direction of the Spanish envoy Luis de Onis. The charge sought the forfeit of the *Congreso*, formerly known as the *Orb*, for violating US neutrality laws in the course of its privateering activity. Almeida came prepared with documentation showing that the vessel was owned by Don Juan Pedro Aguirre, a revolutionary citizen of Buenos Aires, and documentation indicating that the ship's commander (Almeida) was a citizen of Buenos Aires. However, the ship was in fact owned and outfitted, at least in part, by Baltimore shipping interests, and Almeida was also a citizen of the United States. Nevertheless, the courts were fooled, and Almeida and the *Congreso* were set free. See Orenstein, "Joseph Almeida, Part I," 318–20.

tried and hung by its authority, and now the Supreme Court have discovered that 'any person or persons' means only citizens of the United States, and that piracy committed by foreigners in foreign vessels is not punishable by the laws of the United States." Although his contempt is palpable, and despite his frustration with the court's rhetorical construction of the statute, his characterization of the holding is not quite accurate. The court reserved jurisdiction in cases in which the perpetrators or victims were US citizens or vessels, a slightly more expanded scope than the one Adams suggests. Nevertheless, his opinion was apparently shared by others in the federal government, and Adams notes with approval: "At the last session of Congress a new Act was passed, to patch over this enormous hole in the moral garment of this nation made by this desperate thrust of the Supreme Court, and general piracy was made expressly punishable by the Circuit Court."[54]

How one ought to characterize the *Palmer* opinion in the long arc of American jurisprudence on universal jurisdiction is not clear at first glance. Alfred Rubin, who has written the most comprehensive treatise on American pirate law to date, situates the decision at the center of a struggle between positivist and naturalist international legal theory. He notes that in the early nineteenth-century "international legal order," a reasonable connection to a crime—known as standing—was necessary to apply municipal law to maritime captures. He writes: "United States v. Palmer appears to be the first case in which a systematic treatment of the question [of standing] was attempted in the context of a real case." The court found that the United States did not have standing in the *Palmer* case, "despite the apparent positivist decision by the Congress of 1790 to disregard the international legal order in authorizing American courts to suppress undefined

[54] Diary entry for May 11, 1819, in John Quincy Adams, *Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795–1848*, ed. Charles Francis Adams, vol. 4 (Philadelphia: J. B. Lippincott and Co., 1875), 362–63.

'piracy.'"[55] Rubin's interpretation explains the opinion's discrete motives—the elements justifying the decision—and the somewhat incredulous tone of the opinion's rejected hypothetical applications of the 1790 statute (if broadly interpreted) lead one to believe that the opinion sought to limit Congress's expansive view of US standing in international cases. However, why such a holding was necessary in the first place is not explained. Perhaps it was due to the internal motivations of individual justices, their preferences for positivism or naturalist law, and/or their beliefs about the role of a young United States in the international scene. There is little evidence in the opinion itself to support any one of those positions. But there is evidence of another motive, this one rhetorical in nature, in the answer to the final seven questions concerning the judiciary's capacity to recognize other nation-states as sovereign.

The opinion notes that the limiting construction of the 1790 statute is sufficient to dispose of the case, but Marshall chose to address the final seven questions related to sovereign recognition nonetheless. The majority opinion states that US sovereign recognition of the Spanish American governments was generally a political rather than a legal issue. Yes, the decision would have legal implications, especially when trying to distinguish pirates from privateers, but the majority opinion argues that it was a decision to be left to the legislative and executive branches of the federal government. However, because recognition was a central issue in disputes over piracy and privateering, the court offered some guidance:

> It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against the enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful,

[55] Rubin, *Law of Piracy*, 143–44.

> and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial party.[56]

In this period, Spanish officials in the United States pressured federal prosecutors in maritime states to bring indictments for piracy against privateers with Spanish American commissions. In essence, those cases required juries (1) to determine whether the governments had legitimate authority to issue commissions, (2) to decide whether those commissions were legitimate in the absence of proper diplomatic certifications, and (3) effectively to choose whether or not the United States would treat those governments (through their agents) as sovereign and independent. The final sentence of the quotation makes clear that Marshall and the others in the majority were uncomfortable with the prospect of juries and judges making important foreign policy decisions in the course of fulfilling their judicial duties. By rejecting US jurisdiction over the *Congreso*, the court had essentially insulated the judicial branch from having to make such decisions at all. Moreover, in cases where the United States retained jurisdiction through *Palmer*—that is, in cases involving domestic vessels and citizens—courts could likely indict the American owners, officers, and sailors of a privateer with violations of neutrality laws, rather than bringing indictments for piracy. The court had nullified the attempts of Spain and its American allies to secure piracy convictions against Spanish American privateers, which became the general motive for the decision in *Palmer*.

Rubin and others have noted that the *Palmer* opinion relies on a positivist conception of jurisdiction. Legal positivism holds that law is socially constructed. It is not grounded by reason or moral claims; rather, it finds its justifications in text and custom. As the name suggests, positivists approach law as it is posited, thereby ascertaining what the law *is* rather than what it *ought* to be. Positivism is often contrasted with natural law theories, which hold that laws are informed and

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[56] *United States v. Palmer*, 635.

validated by sets of universal moral, rational, and/or ethical principles (e.g., fairness). The dispositive holding in *Palmer* is positivist precisely because it relies on statutory construction via legislative intent to determine the scope of American jurisdiction. Consider, for example, the original caveat the court provides ensuring universal jurisdiction: "The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States."[57] The "power" flows not from abstract principles or human reason but from constitutional authorization. The full scope of American jurisdiction is a political issue, and the legal holding in *Palmer* merely determined that the language of the 1790 statute was not sufficient to justify violating an otherwise thick conception of sovereignty.

Both the positivist discrete motive and the geopolitical general motive point in the same direction, namely, that the distinction between piracy and privateering rests precisely upon the question of sovereign integrity. Through the reasoning laid out in the opinion, had the United States exerted federal jurisdiction over the *Congreso*, it would have violated both the territorial sovereignty of Spain by trying crimes that had occurred within Spanish territorial jurisdiction (aboard a Spanish ship) and Buenos Aires' incipient claim to sovereignty by naming its privateers as pirates. As a consequence, universal jurisdiction is put in diametric opposition to the exclusive jurisdiction of a sovereign state. In other words, *Palmer* challenges the claim that universal jurisdiction is a primordial element of sovereign right. However, as Adams's rebuke of the ruling suggests, the court's opinion leaves one question largely unanswered: If not in this case, then to what crimes would the doctrine of universal jurisdiction apply?

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[57] Ibid., 630.

A Rebirth of Universal Jurisdiction in United States v. Klintock

A mere two years after *Palmer*, the Supreme Court offered a substantially different interpretation of the 1790 statute in *United States v. Klintock* (1820).[58] The case involved the purported privateer *Young Spartan*, which bore a commission to attack Spanish vessels, authorized by Louis-Michel Aury, a man who, according to the facts stated in the court's opinion, was "styling himself as Brigadier of the Mexican Republic and Generalissimo of the Floridas."[59] Somewhere near Cuba, the *Young Spartan* came upon the *Norberg*, a Danish vessel reportedly on a course from Havana to Hamburg. The *Spartan*'s crew smuggled Spanish papers aboard the *Norberg*, "discovered" them there, declared the ship to be Spanish, and seized it under Aury's commission. After abandoning the *Norberg*'s crew on an island off the Cuban coast, one of the *Spartan*'s sailors assumed the identity of the *Norberg*'s captain and sailed for Savannah. The *Norberg* reached the Georgian port on April 23, 1818—coincidentally the same day that the *Savannah Republican* printed news of Palmer, Wilson, and Colloghan's release from federal custody—and the unnamed captain, under false identity and using the ship's original Danish papers, was able to pass the *Norberg*'s cargo through American customs and post it for sale.[60] The *Spartan*, captained by American citizen Ralph Klintock, approached Port Royal, South Carolina, on June 17 with a Spanish prize ship *La Pastora*. Federal authorities dispatched the revenue cutter *Dallas* from Savannah to intercept the *Spartan* under suspicions that it

[58] For consistency, I will use the court's preferred spelling of the defendant's name: Ralph Klintock. Newspapers, in contrast, typically spelled the last name "Clintock."
[59] *United States v. Klintock*, 18 U.S. 144, 145 (1820).
[60] "Law Intelligence," *Savannah Republican*, April 23, 1818, AHN. The *Republican* apparently reported on the *Norberg*'s suspicious behavior on May 13, although no original copy of the newspaper for that date has been found. For an apparent reprint of the article, see *Times* (Charleston, SC), May 15, 1818, AHN.

was smuggling goods into the United States. After searching the vessel, the captain of the *Dallas* seized the *Spartan* and sailed it to Savannah, confining the privateer crew in the city's jail days later.[61]

Although it was for the capture of the *Norberg* that Ralph Klintock was tried and convicted, it was by no means the only nefarious activity of which he was accused. On June 19, Baltimore's *American and Commercial Daily Advertiser* published an excerpt from the logbooks of the American schooner *Col. George Armstead*, which detailed a murder and robbery committed by privateers from a vessel later determined to be the *Young Spartan*. According to the log, on June 4 the *Armstead* came upon the *Spartan* and a freshly captured *La Pastora* near Cuba. When the *Armstead* was "within pistol shot of the ship [*Spartan*], she hoisted the Swedish flag, rounded to, and fired a broadside on us." At Klintock's demand, the *Armstead* sent several crew members to the *Spartan* bearing logbooks, while two of the *Spartan*'s crew plundered the American ship and assaulted the sailors. Once the robbery was complete, the *Spartan*'s crew opened fire on prisoners from both captured vessels. The captain of the *Pastora* was shot and killed. The *Spartan* sailed away with its Spanish prize and left the *Pastora*'s crew aboard the looted *Armstead*. Although the identity of the privateer was originally unknown, several silver spoons that were stolen from the *Armstead* were found in Klintock's cabin aboard the *Spartan* when it was boarded by federal authorities from the *Dallas*.[62] Klintock admitted to the theft but denied any hand in abusing the *Armstead*'s crew or killing the *Pastora*'s captain.[63] The story from

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[61] "Smuggling Detected," *Savannah Republican*, June 20, 1818, AHN. Captain Jackson of the *Dallas* did not bring enough men to capture the eighteen-strong *Spartan* crew, and thus he allowed the men to sail to shore in one of the privateer's boats. At least some of the men were subsequently caught and jailed by June 23. See *American Beacon* (Norfolk, VA), July 7, 1818, AHN, citing a lost June 23 issue of the *Republican*.

[62] *American and Commercial Daily Advertiser* (Baltimore, MD), June 19, 1818, AHN. The extract from the log identifies the belligerent vessel as the *Dolphin* captained by a Mr. Barnes, although it was later determined that the vessel was the *Young Spartan* captained by Klintock. See *Baltimore Patriot*, July 8, 1818, AHN, describing the initial connection between the cases reported by the *Savannah Republican*. naming Klintock as the captain.

[63] *American Beacon* (Norfolk, VA), July 10, 1818, AHN.

the *Armstead*'s logs was reprinted throughout the maritime states, and although it was not the crime at issue in the Supreme Court decision, the harrowing account would have been all too familiar to American newspaper readers in the early nineteenth century. The details offer a glimpse into the horrors wrought by pirates, which in turn provides us a sense of why they were believed to be the enemies of all.

Klintock's federal court trial for the piracy of the *Norberg* took place on December 22, 1819. As one newspaper noted, "The testimony of the witnesses developed a scene of infamy calculated to excite the horror and indignation of every individual present."[64] Klintock was convicted, and his counsel immediately made plans to file an appeal based on the precedent set in *Palmer*. The Supreme Court rejected the argument and upheld Klintock's conviction. He was sentenced to death, with his execution set for April 28, 1820.[65] President James Monroe gave Klintock an initial reprieve from execution until June 28, followed by an indefinite reprieve, and ultimately granted him a full pardon in June 1821.[66]

The Supreme Court case itself was straightforward. The court did not acknowledge the legitimacy of the Mexican Republic ("a republic of whose existence we know nothing") and thus denied Aury's power to grant a privateering commission to the *Young Spartan*. However, the court held that no commission could justify what Klintock and his crew had done: "The whole transaction taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas."[67] Like *Palmer* before it, the case in *Klintock* hinges on the differing legality of privateering and piracy.

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[64] "Case of Piracy," *Columbian Museum and Savannah Daily Gazette*, December 23, 1819, AHN.
[65] "Address," *Columbian Museum and Savannah Daily Gazette*, April 17, 1820, AHN.
[66] "Pardon and Reprieve," *Southern Patriot* (Charleston, SC), June 24, 1820, AHN; *City Gazette* (Charleston, SC), June 28, 1821, AHN.
[67] *United States v. Klintock*, 150.

Captures *jure belli*, "by the law of war," are takings authorized by sovereigns, whereas captures *animo furandi*, "with intent to steal," are unlawful. The court clearly believed that the *Young Spartan* was a pirate vessel, but the nationality of its owners was unknown. And because the *Norberg* was a foreign vessel, it was unclear whether or not the circuit court could hear the case given *Palmer*'s limits on jurisdiction over crimes committed upon foreign vessels. Rather than setting the man free, however, the court chose to distinguish the facts of the *Klintock* case from those in *Palmer*. In order to qualify as properly "foreign," the court wrote in *Klintock*, a ship "must be at the time sailing under the flag of a Foreign State, whose authority is acknowledged."[68] Since the Mexican Republic was not recognized by the court, the *Young Spartan* was not foreign; instead, the court found that the ship was operating without any state flag. This situation was entirely distinct from the *Palmer* facts, as the court explained:

> The court is satisfied that general piracy, or murder, or robbery, committed in the places described in the 8th section [of the 1790 act], by persons on board a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and punishable by the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences

[68] Ibid., 151.

> committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.[69]

This portion of the *Klintock* opinion returned universal jurisdiction over piracy to the circuit courts, at least in part. Although the 1790 statute did not authorize the courts to try cases where both the attacking and victimized ships were flying foreign flags, it did authorize cases in which the attacking vessel had no national character at all. The belief that pirates were fundamentally "stateless" was a common theme in international legal theory, although the conditions under which a ship and its crew become stateless were not quite clear. Nevertheless, the status of statelessness appears to rely on the difference between *jure belli* and *animo furandi* captures, especially if the latter constitutes piracy as such.

In contradistinction to *Palmer*, the court's opinion in *Klintock* relies heavily on the natural law conception of jurisdiction. Although the positivist distribution of authority to states (i.e., sovereignty on flagged vessels) still holds, the opinion recognizes a right universal to all states to try and punish those "acting in defiance of all law, and acknowledging obedience to no government whatever." Phrases such as this are common in natural law theories of universal jurisdiction, and they typically come at the expense of "thick" descriptions of sovereign exclusivity, finding consensus among nations to be more powerful than the declaration of any one state. Whereas universal jurisdiction in *Palmer* is posited in the Constitution, here it is derived from "the penal code of all nations," for piracy is a crime "committed against all nations."

Thus *Palmer* and *Klintock* appear to frame the question of universal jurisdiction through competing, if not contradictory, mixtures of positivism and naturalism. *Palmer* recognizes the sanctity of the exclusive sovereign right of any nation-state to try and punish crimes committed against its

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[69] Ibid., 152.

population or within its territory. *Klintock*, in contrast, recognizes that piracy is a crime against all nations, and thus any incident of it is enough to create standing for universal jurisdiction. But whatever conflict might exist between the two orientations is resolved when one considers the general motive in *Palmer*. The opinion in that case was generally motivated to prevent the judicial branch of government from de facto making foreign policy decisions about US neutrality in the revolutionary wars between the Spanish Empire and Spanish American colonies. Although the standard interpretation of the decision—a positivist denouncement of American universal jurisdiction—may describe the court's dispositive holding, the full context of the opinion's third section illustrates that limiting the scope of American power was more of a means than an end. As the court makes clear in *Klintock*, the *Palmer* decision only applies to cases in which both the aggressor and victim vessels bear national flags. The *Klintock* decision avoids this constraint by denationalizing pirates altogether. Thus, that opinion incorporates a naturalist approach to universal jurisdiction into a positivist interpretation of the statute by claiming that crimes against all nations are by definition crimes against the United States. As a consequence, *Klintock* does not undermine the thick conception of sovereign exclusivity or the positivist approach to the 1790 statute articulated in *Palmer*.

The 1819 Statute and the Circumstances of United States v. Smith

Klintock was decided two years after *Palmer*, and in the intervening period the Congress chose to reestablish American universal jurisdiction on its own by passing new antipiracy legislation in 1819. Known as "An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy," it reestablished US jurisdiction over "any person or persons whatsoever" who committed

piracy. Unlike the statute of 1790, however, the 1819 act's definition of piracy was drawn from the law of nations:

> Sec. 5. *And be it further enacted*, That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.[70]

Leaving the definition of piracy to the law of nations was not without its controversies. Obviously, the statute does not make clear what the definition is, but it also does not provide any guidance as to what the "law of nations" would be in the first place. Cases were quickly brought before the courts under the statute, and Marshall in particular expressed concerns about how the definition of piracy ought to be constructed. In 1820 a case made its way to the Supreme Court seeking clarification on the definition of piracy in the law of nations, and questioning whether or not the Congress was authorized to defer to that definition in the first place. Known as *United States v. Smith* (1820), the facts of the case were similar to those in *Palmer*. Because the case originated in the Virginia circuit court, which was Marshall's jurisdiction, and given his concerns over the statutory language, he instructed the jury to issue a limited verdict concerning only its findings of fact, leaving the interpretation and application of the statute to the Supreme Court. The jury verdict reads as follows:

> We, of the jury, find, that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of the private armed vessel called the Creollo, (commissioned

[70] An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, 3 Stat. 510, 513–14 (1819).

> by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officers, left the vessel, and in the said port of Margaritta, seized by violence a vessel called the Irresistible, a private armed vessel, lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the Irresistible, appointed their officers, proceeded to sea on a cruize, without any documents or commission whatever; and while on that cruize, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned.[71]

The verdict concludes by saying that if these facts are piracy under the 1819 act, then the men are guilty; if not, the jury would find them not guilty.

Although the jury's account appears to be an accurate description of events, the details given as evidence in the circuit court trial provide additional context for the case.[72] The *Irresistible* was originally captained by John Daniel Danels, a notorious privateer whose conduct often blurred the line between piracy and privateering.[73] He had secured contradictory commissions for the ship, one from Buenos Aires in the war with Spain, and another from General José Gervasio Artigas, a revolutionary leader in what would become Uruguay who was himself at war with Spain, Buenos Aires, and Portugal. The ship had sailed from Baltimore, took prize from several Portuguese vessels,

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[71] *United States v. Smith*, 18 U.S. 153, 154–55 (1820).
[72] For a general overview of the case, see Joel H. Samuels, "The Full Story of United States v. Smith, America's Most Important Piracy Case," *Penn State Journal of Law and International Affairs* 1 (2012): 320–62.
[73] Fred Hopkins, "For Flag and Profit: The Life of Commodore John Daniel Danels of Baltimore," *Maryland Historical Magazine* 80 (1985): 392–401.

but left all Buenos Airean ships unmolested. When it arrived at the Venezuelan island of Margarita, Danels apparently pledged himself and the crew of the *Irresistible* to the Venezuelan cause. The plan was to secure an additional vessel and attack a nearby Spanish port. The *Creollo*, which also sailed from Baltimore under a Buenos Airean commission, docked in Margarita soon afterward. Apparently Danels convinced the captain of the *Creollo* to join his Venezuelan mission. According to court testimony, "The vessel [*Creollo*] was sold, and they [the sailors] had none to return home in, and were told the governor of Margaritta meant to press them. Captain Daniels had told some of the crew, whom he wished to enlist with him in the service of Venezuela, to which he had become attached, that if they did not join him, he would have them put into the fort, and fed on bread and water."[74] Not wanting to join the venture, the *Creollo*'s crew mutinied, rowed to the faster *Irresistible*, took control of that ship, and set sail. Once Danels learned of these events, he gave chase in his ship the *Nereyda*.[75] John F. Ferguson assumed command of the *Irresistible*, and its piratical cruise commenced.

The *Irresistible* encountered several vessels, including Dutch, American, and Spanish ships, and stole from several of them. One sailor testified that the crew had been instructed not to steal American goods, perhaps in an attempt to avoid US jurisdiction, although some American jewelry was apparently taken. The incident mentioned in the jury verdict and indictment took place near Cape San Antonio, Cuba. The *Irresistible* came upon a brig flying the Spanish flag, boarded it, and stole $2,300. Although a precise account of the full takings is not known, it appears that most items were trifling. The *Irresistible* sailed for Chesapeake Bay, where the ship was abandoned and the crew dispersed. Ferguson, an Englishman, and several other members of the pirate crew were captured

[74] *United States v. Chapels et al.*, 25 F. Cas. 399 (1819).
[75] Head, *Privateers of the Americas*, 129.

and tried in Baltimore's circuit court. The remaining captured men were gathered in Richmond for trial, and it is that case which became the *United States v. Smith*.

In 1820 the Supreme Court ruled that the *Irresistible*'s conduct was piratical, and thus its crew was convicted of piracy. Many were sentenced to death and prison, but only the captain, John Ferguson, and first mate, Israel Denny, were hanged, despite a pardon petition on their behalf receiving thousands of signatures. And although execution dates had been set, the remainder of the crew would not make the final march to the gallows. By 1822 President James Monroe had extended full pardons to the living members of the *Irresistible*'s pirate crew.[76]

Universal Jurisdiction and the Law of Nations in United States v. Smith

However similar the facts may be between *Palmer* and *Smith*, the opinions in the two cases are extraordinarily different. Whereas Marshall, a positivist, penned the opinion in *Palmer*, the naturalist Joseph Story authored the court's decision in *Smith*. Whereas *Palmer* is primarily an exercise in statutory construction, *Smith* provides broad readings of international law as the basis for the opinion. Whereas *Palmer* limits US jurisdiction, *Smith* articulates an expansive vision of American power. Whereas *Palmer* gives a thick conception of sovereign exclusivity and distributed sovereign right, *Smith* offers a vision of a united international society holding concordant opinions on the crime of piracy.

The questions raised in *Smith* are threefold: (1) Can the Congress leave the definition of piracy to the law of nations? (2) What is that definition? and (3) Does the account of events presented in the jury verdict fit the definition? The court disposed of the first question in short order. As the opinion notes: "To define piracies in the sense of the constitution, is merely to

[76] Mills, "The Pirate and the Sovereign," 126.

enumerate the crimes which shall constitute piracy; and this may be done either by reference to the crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted."[77] The court believed that the Constitution was agnostic as to how the definition of piracy might be obtained, and although the 1819 statute was vague, a definition of piracy did exist in the law of nations with concordance between authors sufficient to render it both usable and appropriate.

But what, precisely, is the law of nations? Grotius distinguishes it from two other types of law, natural law and municipal law. Natural law is derived from reason, and its capacity to enjoin action or prohibition is moral in character and divine in authority.[78] Municipal law "is that which emanates from civil power. The civil power is that which bears sway over the state. The state is a complete association of free men, joined together for the enjoyment of rights and their common interest." The law of nations, in contrast, is "the law which has received its obligatory force from the will of all nations, or of many nations . . . it is found in unbroken custom and the testimony of those who are skilled in it."[79] The law of nations is thus not formalized, and it can even be unwritten, but it functions as a basic code for nation-state conduct. Grotius acknowledges that not all writers see a distinction between the laws of nations and nature, a sentiment emphasized in the title of Vattel's major work, *Le droit des gens; ou, Principes de la loi naturelle, appliqués à la conduit aux affaires des nations et des souverains* (*The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*), in which he describes the law of nations as the law of nature applied to

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[77] *United States v. Smith*, 160.

[78] "The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God." Hugo Grotius, *De jure belli ac pacis libri tres*, vol. 2, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), 38 –39 (bk. I, chap. 1, § 10.1).

[79] Ibid., 44 (I.1.14.1–2).

states. Story, for his part, argues that the content of the law of nations can be ascertained by reading scholarly texts, state customs, and judicial decisions concerning international conduct, which aligns with the Grotian account. And thus Story provides a definition for piracy from those sources: "There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; . . . all writers concur, in holding, that robbery or forcible depredations upon the sea, animo furandi, is piracy."[80]

This definition is close to the naturalist one in *Klintock*, but rather than simply asserting it, Story provides a seventeen-page footnote filled with diverse citations to texts from scholarly, judicial, and customary sources. His interpretation of Grotius alone spans nearly four pages. In the main text of the opinion, the argument supporting the definition is relatively short, especially when compared to the analysis in *Palmer*. The discrete motive in *Smith* is to illustrate concordance in definitions of piracy from the law of nations, English common law, and maritime law. As Story writes in summary:

> So that, whether we advert to the writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have,

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[80] He precedes the statement with this: "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professionally on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *United States v. Smith*, 160–61.

> therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery on the sea.[81]

His description of common state practice is especially interesting. It illustrates that piracy is a crime of universal jurisdiction, a jurisdiction shared and acted upon by all states. Moreover, he suggests that it is customary to try and punish pirates regardless of a state's connection to the crime, at least so long as the pirates are in amity with their victims. The amity proviso illustrates that pirates rob from those with whom they are not at war, in the strict sense of that term, which is what elevates a pirate from a mere criminal to *hostis humani generis*. The universality of universal jurisdiction reveals that positive law is unnecessary to justify state action against pirates; instead, the justification is prior to the establishment of a nation's civil code. Although some writers, such as Gentili, are willing to extend this right to private persons as well, it is clear that for Story the right to universal jurisdiction is inherent in the conduct of a sovereign as such.

In response to the third question, the majority opinion concludes that the special verdict from the circuit court jury provides sufficient proof that the conduct of the *Irresistible* was indeed piratical: "[The prisoner] and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition."[82] The public's ambivalence over this conclusion, evidenced by the various petitions for pardon circulated and presented on the pirates' behalf, does not undermine the work done by Story and the other justices

[81] Ibid., 162.
[82] Ibid., 163.

to draw out the definition of piracy from the law of nations. The decision in *Smith* reestablished full universal jurisdiction over robberies committed at sea *animo furandi*.

Primordial Jurisdiction

The rhetorical difference between *Palmer*'s and *Smith*'s treatments of universal jurisdiction is largely found in the origin that each decision gives the doctrine. In *Palmer*, universal jurisdiction is contingent upon the will of a nation-state. If the Congress had authorized the United States to try any person or persons, the Supreme Court would accept it. Jurisdiction, in this way, is fundamentally indistinct from the municipal law and finds no home in natural law or the law of nations. In *Smith*, however, universal jurisdiction is part of what makes a nation-state what it is. It is essential to the fabric of the international community of sovereigns, not only because it promotes the universal freedom of the seas but also because it represents the sovereign's interest in protecting the system of sovereignty. If pirates are allowed to operate with impunity, then the entire structure of sovereign right is called into question. But why is this the case? Daniel Heller-Roazen provides a succinct explanation:

> Piracy brings about the confusion, and in the most extreme cases, the collapse of the distinction between criminal and political categories. Acting outside regions of ordinary jurisdiction and conceived as not opponents of one but as "enemies of all," pirates cannot be considered common criminals, whose place may be defined in the terms of a single civil code. But they cannot be represented as lawful enemies, for by virtue of their enmity with respect to a general collectivity they fail to constitute an association with which there might be peace as well as war.[83]

[83] Heller-Roazen, *Enemy of All*, 11.

This quotation emphasizes the importance of the distinction between just and unjust enemies to the definition of piracy and the structure of international sovereign right. Gentili, Grotius, and Vattel define piracy in contrast to the proper form enmity takes as an international political affect: a just war between states. Because pirates prey upon those with whom they are in political amity, as Story notes in *Smith*, they erase the significance that enmity and amity play in structuring the conduct of political violence. To put it another way, as Gentili wrote, "A war with pirates has never been terminated by agreement or brought to an end by a treaty of peace, but the pirates have either saved their lives by victory, or have been conquered and compelled to die."[84] The quality that makes pirates the enemy of all is not, thus, the implicit threat they pose to any ship, nor is it the difficulty of their capture on the high seas. By erasing the distinction between enmity and amity, by denying the possibility of peaceful association between warring actors, pirates in effect deny the very foundation of international sovereign society itself.

Not all early modern writers saw this issue in the same way. Despite recognizing pirates as the common enemy of all, the German jurist Samuel Pufendorf, one of the most celebrated judicial scholars of the early modern period, never advocated for universal sovereign jurisdiction over pirates. Instead, he believed that piracy and robbery were punishable by private citizens: "For against pirates and freebooters, inasmuch as they are enemies of all mankind, every man is a soldier in defense of his country," because robbery is a crime against nature.[85] Walter Rech argues that Pufendorf held a thick conception of sovereignty, which, although not overriding his naturalist position, led him to advocate for domestic solutions rather than international ones.[86] However true

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[84] Gentili, *De iure belli*, 22 (I.4).
[85] Samuel Pufendorf, *De jure naturae et gentium libri octo*, vol. 2, trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934), 1182 (bk. VIII, chap. 3, § 13).
[86] Walter Rech, *Enemies of Mankind: Vattel's Theory of Collective Security* (Leiden: Martinus Nijhoff Publishers, 2013), 70–84.

this may be, Rech's argument does not overcome Pufendorf's basic observation that because pirates are not constrained by relationships of enmity and amity, their crimes are naturally crimes against everyone.[87] Thus Pufendorf advanced a position perhaps even more extraordinary than sovereign right: all persons are endowed with universal jurisdiction to punish pirates.

Although Kontorovich is certain that the difference between privateers and pirates is largely procedural, and thus renders the "heinousness" of piracy inert as a precedent for new crimes of universal jurisdiction, the analysis of *Palmer*, *Klintock*, and *Smith* conducted here demonstrates that the distinction is more than bureaucratic formality. Recovering the general motive in *Palmer*—eliminating universal jurisdiction so as to prevent the judiciary from determining US neutrality in the Spanish American revolutions—reveals the importance of the distinction to positivist sovereign recognition. *Klintock* introduced the idea that statelessness, when coupled with a predilection for wrongdoing (*animo furandi*), was sufficient ground to comprehend piracy as a universal offense against the sovereign order. Thus the "heinousness" of piracy is not reducible to the phenomenology of the criminal act, because that act represents a rejection of the system of sovereignty protected by the law of nations. Furthermore, the amity proviso in *Smith* reveals the basic ground for that claim: by operating without a commission, pirates erase the distinction between friend and enemy, which imperils the basic fabric of human association. Piracy is heinous because it perverts the social order and violates the law of nature. It is heinous because it denies the condition of sovereign right itself.

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[87] "Now a robber is called a common enemy because he does not declare war upon any particular person as other enemies do, but threatens with violence any and every person who falls into his hands. For this reason, there is no need for a declaration of war, the formation of an army, or a call to arms, to put down such a person, but nature herself allows every man the right to take up arms against him." Pufendorf, *De jure naturae*, 420 (III.6.11).

The Supreme Court's commitment to sovereign exclusivity in the *Palmer* decision provides considerable proof of this interpretation, despite the apparent contradiction. Even if the court's deference to exclusivity was only an expedient means to avoid the political question of Spanish America's sovereign independence, the rhetoric of the opinion indicates that a thick conception of sovereignty was part of the sovereign imaginary in the early nineteenth century. The court's incredulity as it imagined hypothetical applications of the 1790 statute as universally enforceable law serves as a reminder that universal jurisdiction was something sacred and dangerous. But a thick conception of sovereign exclusivity is not incompatible with universal jurisdiction; in fact, they have the same object: to protect the equality of international sovereign right from those who would take heinous action to destroy it.

The Future of Universal Jurisdiction

The sanctity of sovereign exclusivity influenced the Supreme Court's interpretation of universal jurisdiction, but its role cannot be reduced to issues arising from overlapping, multiple, or competing jurisdictions claimed by various nation-states. In fact, as the general motive in the *Palmer* decision illustrates, the debate over universal jurisdiction was in part a debate over the status of sovereignty itself. By refusing to determine whether the rebelling South American nations were legitimately independent from the Spanish Empire, *Palmer* entered a centuries-old debate on sovereign recognition. The positivist form of recognition is constitutive in nature: a state becomes sovereign only when it is recognized as such by an existing sovereign. In contrast, the naturalist iteration is declaratory: a sovereign is already sovereign based on moral, natural, or rational principles (e.g., in Vattel's definition of sovereignty, an independent government fused with a nation), and

recognition merely declares that fact.[88] The *Palmer* opinion was not exclusively positivist, since Buenos Aires was acknowledged as a "new government" fighting a civil war with Spain, but it was not yet sovereign enough to receive American recognition. In the majority opinion, Marshall notes that recognition is a political rather than a legal issue, which suggests some affinity with the naturalist approach, as does the relatively thick description of sovereign exclusivity in *Palmer*'s hypothetical applications of the 1790 statute. However, the *Palmer* decision clearly reserves the right to nullify sovereign exclusivity through a positivist version of universal jurisdiction. This somewhat confusing position is similar to Gentili's chapter-long exposition on piracy in his treatise on war, *De iure belli libri tres*, published in 1598.

Gentili opens the chapter by explaining why pirates, robbers, rebels, and brigands cannot wage war. His first claim, which he derives from readings of classical jurists, is that such persons are not sufficiently emancipated from legal jurisdiction so as to become legal authorities in their own right. Moreover, he writes, because the law of war is derived from the law of nations, and pirates violate that law entirely, they cannot enjoy its protection. "How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty with the human race," he asks.[89] This language is similar to the Supreme Court's naturalist position in *Klintock*, and it is consistent with Gentili's later claim that piracy is a crime of universal jurisdiction because it violates the law of nature.[90] However, his argument concerning pirates is not as naturalist as it would appear. Twice he draws a distinction between pirates and their proper,

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[88] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), 124–25.
[89] Gentili, *De iure belli*, 22 (I.4).
[90] "Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated." The subsequent paragraph details Gentili's thoughts on natural law. Ibid., 124 (I.25).

authorized counterparts. First, he cautions readers not to confuse pirates and generals. How one distinguishes them is not, however, determined by "the command of a regular army or by the capture of cities," but rather "by the assumption of a public cause," which means the cause of a sovereign nation. "Indeed, those who do not have such a cause are not properly enemies, even although they may have armies and wage war with some success."[91] The second case is more complex. He tells the story of French sailors who were presumably raiding Spanish ships in support of António, prior of Crato, who claimed the Portuguese throne from Spain's King Phillip II in 1580. The Spanish caught the French sailors and held them as pirates, a lawful act since Spain did not recognize António as a legitimate sovereign. However, Gentili notes that the Frenchmen bore a commission from the King of France, who was a legitimate sovereign, thus rendering illegitimate the Spanish charge of piracy.[92] In both of these cases, the criterion by which one is determined to be a pirate is reducible to the recognition of sovereign authority or lack thereof.

Rubin identifies an important consequence from this basic premise. Without any naturally derived criteria to constitute a sovereign as such, the positivist position in Gentili essentially makes sovereign recognition a political tool. Whatever the state desires, or whatever is most expedient at the time (i.e., the general motive in *Palmer*), is very likely to be that principle by which recognition is given or withheld. Moreover, Gentili's argument allows for an extraordinary expansion of jurisdiction, as Rubin notes: "Now any sovereign could extend his municipal law to the high seas, and possibly even to foreign land, by authorizing his Admiral or General or other delegate to wipe out the 'pirates' there."[93] Although the majority opinion in *Palmer* acknowledges that the

[91] Ibid., 24–25 (I.4).
[92] Ibid., 26 (I.4).
[93] Rubin, *Law of Piracy*, 25.

Constitution authorizes precisely this power, Marshall's incredulity at the prospect of subverting foreign sovereign exclusivity reveals how extreme such a power would be.

In contradistinction to Gentili, Grotius takes a naturalist approach to sovereign recognition vis-à-vis piracy. He defines sovereignty, almost empirically, as noncontradiction: "That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will."[94] Although he remains agnostic as to the form a sovereign government might take, the state is the subject of sovereign power, not the people.[95] As it was for Gentili, piracy in Grotius is defined largely by warlike behavior (violence, robbery, etc.) that is conducted without sovereign authorization upon the high seas.[96] However, sovereignty here is not determined by the declaration of other sovereigns; rather, states can be distinguished from collections of pirates or other brigands by their aim as a community:

> A commonwealth or state does not immediately cease to be such if it commits an injustice, even as a body; and a gathering of pirates and brigands is not a state, even if they do perhaps mutually maintain a sort of equality, without which no association can exist. The reason is that pirates and brigands are banded together for wrongdoing; the members of a state, even if at times they are not free from crime, nevertheless have been united for the enjoyment of rights, and they do render justice to foreigners. If the treatment of members of other states is not in all respects according to the law of nature, which, as we have showed elsewhere, has become partly obscured among many peoples, it is at least according to agreements entered into with each state or in accordance with customs.[97]

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[94] Grotius, *De jure belli*, 102 (I.3.7.1).
[95] Ibid., 102–11 (I.3.8.1–16).
[96] Ibid., 633 (III.3.4).
[97] Ibid., 631 (III.3.2.1).

Here the distinction between Grotius and Gentili is clear. For Grotius, states are organized as such based on a unified aim: "the enjoyment of rights." Moreover, they respect members of other states either through positive agreement or the law of nature. Pirates, on the other hand, are unified by a desire for "wrongdoing," which on its own can never equal the moral quality of state association. The universality of piratical violence is proof for Grotius that pirates do not respect foreigners and thus do not respect the international sovereign society protected by the law of nations. That said, Grotius concedes that bands of pirates or other brigands may ultimately form a state, but they can only do so by "embracing another mode of life," by abandoning wrongdoing as their principle of organization and respecting the law of nations.[98] Nowhere does he mention that sovereignty is conditioned upon the constitutive recognition of another sovereign. Sovereignty is factual, as is piracy. Instead, naturalist morality—"united for the enjoyment of rights" versus "banded together for wrongdoing"—takes center stage in Grotius's iteration of sovereign recognition.

If *Palmer* is primarily positivist, then *Klintock* and *Smith* side with Grotian naturalism. Recall the distinction between takings *jure belli* and those *animo furandi*: the former are justified in the process of legal war between states, whereas the latter are always crimes against the law of nations. This distinction can be precisely mapped onto Grotius's distinction between states and pirates. The universal jurisdiction reestablished in *Klintock* and *Smith* is thus a direct consequence of a sovereign's moral obligation to meet and uphold the law of nations.[99]

These theories of sovereign recognition underlying the piracy cases are of considerable importance to the circumstances of the early twenty-first century. Most immediately, naturalist

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[98] Ibid., 632–33 (III.3.3).

[99] Grotius's major treatise on prize law repeats much of what he writes regarding pirates in *Mare lebrum* and *De jure belli*. For an example of the naturalist contention that all "evildoers" must be punished, see Hugo Grotius, *De jure praedae commentarius*, trans. Gwladys L. Williams and Walter H. Zeydel (Oxford: Clarendon Press, 1950), 90.

recognition complicates Kontorovich's critique of the piracy analogy in new universal jurisdiction cases by calling into question his claim that pirates and privateers are indistinct. Grotius's moral argument illustrates that the difference was more than a matter of securing the proper paperwork, since the motivations of states and brigands are fundamentally incompatible. Privateers take up the public cause of a sovereign community, and therefore they work in service of the promotion of common rights. Pirates, in contrast, form communities and wage war for the cause of wrongdoing (*animo furandi*), which denies the rights pursued by states, such as the right to private property. Even in those cases where piracy and privateering are closest, such as for Vattel's immoral privateers who commit robberies beyond the scope of their commission, the first principles of each association sustain the distinction between them. What remains, then, is a belief that piracy is heinous not because robbery is particularly horrible, but because piracy founds community in an antagonistic relationship to the rights protected by sovereign communities. Even if a pirate and privateer commit duplicate actions, they are fundamentally not the same.

Kontorovich argues that the crimes in new universal jurisdiction cases—like torture, genocide, or rape—are unlike piracy because they would still be heinous even if they were sanctioned by the state. If piracy is heinous because it violates the system of mutual respect that sustains international sovereignty, and if it is heinous because pirates form communities for wrongdoing rather than for the creation of right, then Kontorovich's objection cannot be sustained. To incorporate this version of heinousness into his argument produces a contradiction, since pirates cannot be state actors as a matter of definition. However, the difference between pirates and privateers is not procedural but substantive. Thus, one can imagine the pirate analogy functioning as the basis for new universal jurisdiction crimes, as long as those crimes are heinous today in the same way as piracy was in the nineteenth century. This does not suggest, however, that the meaning of

heinousness in the nineteenth century will apply to the twenty-first; rather, how one defines a heinous act as such is dependent upon the cultural context from which that act emerges. Thus, the task for those pursuing the piracy analogy must be to craft a definition of heinousness that fits their own time, their own culture, and their own law, so long as that definition is not unlike the one that characterized piracy two centuries ago.

Or perhaps the piracy analogy cannot sustain new forms of universal jurisdiction. In 1820, and again in 1823, the US Congress amended the 1819 antipiracy statute. The 1823 act extended the statute in perpetuity.[100] The 1820 act, however, expanded the scope of American power: it named the slave trade as piracy under the 1819 act, which subjected slaving to universal jurisdiction.[101] Unlike piracy, slavery was not historically understood as a crime, much less one that would warrant universal jurisdiction. There are a number of reasons for this differential interpretation, including the social, political, and legal acceptability of slavery for those writers in antiquity from whom early modern scholars drew much of their theory. Joseph Story, however, believed that slavery was a gross violation of natural law, which was cognizable under the law of nations as a violation of international law. Yet, in the 1822 circuit court case *La Jeune Eugenie*, Story held that the 1820 statute did not authorize the United States to try an apparently French slaver caught off the coast of Africa if the French were similarly willing to prosecute. He wrote, "The American courts of judicature are not hungry after jurisdiction in foreign cases, or desirous to plunge into the endless perplexities of

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[100] An Act in Addition to "An Act to Continue in force 'An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,' and, also, to Make Further Provision for Punishing the Crime of Piracy," 3 Stat. 721 (1823).

[101] An Act to Continue in force "An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy," and, also, to Make Further Provision for Punishing the Crime of Piracy, 3 Stat. 600 (1820).

foreign jurisprudence."[102] But this was not to be the last time the question of universal jurisdiction over slavery would reach the courts.

In 1825, the Supreme Court heard a case styled *The Antelope*. It concerned the fates of several Africans who were captured from Portuguese and Spanish ships by a privateer. The question was whether or not the slaves should be restored to their European masters or freed under the 1820 statute. John Marshall wrote the opinion for the court in this case. He began by arguing that slavery was not a crime under the law of nations, and that the appellation of slaving as piracy by the 1820 statute was insufficient to constitute a principle of international, rather than municipal, law:

> No principle of general law is more universally acknowledged than the perfect equality of nations. . . . If it be neither repugnant to the law of nations nor piracy, it is almost superfluous to say in this Court that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another, and the course of the American government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruiser on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace by an American cruiser and brought in for adjudication, would be restored.[103]

Although Marshall stipulated that this holding was unique to the circumstances of the capture in this case, the precedent is clear enough: slavery is not the crime of piracy, nor is it a crime at the law of nations worthy of universal jurisdiction, and thus the attempt to expand the doctrine was

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[102] *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (1822).
[103] *The Antelope*, 23 U.S. 66 (1825).

unsuccessful. Instead, the doctrine of exclusive sovereignty prevailed, and the captive slaves were returned to bondage under Spanish and Portuguese rule.

Making an argument similar to this chapter's reading of *Palmer,* a recent note in the *Harvard Law Review* claims that Story and Marshall were constrained by the political implications of their decisions. For Story in *La Jeune Eugenie* it was the complexities of French foreign relations, and for Marshall in *Antelope,* the politics of slavery in southern states. This chapter has presented Marshall and Story as two sides of the great debate over positivism and naturalism in the early nineteenth century, and the rhetoric of these decisions supports the same figuration. However, despite the differences in their interpretive approaches to international law, the note provides us with a sense that the two were much closer in their beliefs than their judicial rhetoric would suggest.[104] The evidence is compelling, and it raises again a significant issue. The decisions of courts and legislators and executives, the articulation of principles and theories, and the status of sovereignty are only not abstractions. They are part of the fabric of cultural life. They are conditioned by the sovereign imaginary in which they are written. And by ripping them from their own histories, we prevent them from telling a fuller tale.

Jurisdiction and the Postsovereign Present

The insights gained from the Supreme Court's opinions on universal jurisdiction are not limited to that specific legal doctrine. In fact, the flux between universal jurisdiction and exclusive sovereignty in the nineteenth century mirrors many of the challenges to territorial integrity faced in the twenty-first-century war on terror. American counterterrorism foreign policy appears to have

[104] "International Norms and Politics in the Marshall Court's Slave Trade Cases," *Harvard Law Review* 128 (2015): 1184.

embraced Gentili's positivist constitutive position tout court insofar as that foreign policy treats sovereignty as a necessarily contingent feature of nation-states. Already established states, especially those at the top of the sovereign hierarchy, can act with little fear of delegitimation and are thus able to impose municipal law in the territories and populations of "failed," "weak," or "terrorist" states. Indeed, such a hyper-positivist approach to sovereign recognition fuels much of what I have called nationalist postsovereignty. The extraordinary strength of first-tier sovereign military forces certainly enables these practices, but their justifications find an intellectual ancestor in Gentili's positivist definition of piracy and its distinction from real war.

What my analysis has shown, then, is that society has always been postsovereign. The partial account of pirate law in the US Supreme Court provided here is proof enough that a thick conception of exclusive sovereignty has been under pressure by the forces of global mobility for at least two hundred years. The presence of universal jurisdiction in the writings on the law of nations extends this history back further. To be sure, there is little chance that Story or Vattel could have anticipated the extent of the challenges faced by sovereign right since the 1970s. Nor is pressure put on sovereignty by universal jurisdiction identical to the dissolution of the nation-state by the forces of neoliberalism. But there are important points of contact, important historical precedents, that have been obscured by the rhetorical obsession with postsovereign novelty in the twenty-first century.

Privateering anticipates the institutional changes of postsovereignty, by granting the state's right to fight just wars to private actors. The positivist approach to nation-state recognition prefigures the contingent sovereignty of the war on terror. And universal jurisdiction reveals the capacity of states to extend their influence across the globe to cover peoples and territories that are not their own. For scholars like Wendy Brown, the temporality of "postsovereignty" is as much

about the resurgence of sovereign right as it is about the twilight of the sovereign state. But rather than framing postsovereignty as a temporal distinction, perhaps we ought to think of it as a continuous struggle within the doctrine of sovereignty itself. The rights of states, their limits, their powers, and their capacities are never fixed and certain. They are born out of practice and are captured by those who know them best. The nation too is not fixed, nor is it certain. The *Smith* decision makes this flux clear by treating universal jurisdiction as an essential feature of every sovereign nation. For many Americans in the nineteenth century, the fact that an Englishman could be tried in American courts for attacking a Spanish merchant was no less extraordinary than it was mundane. For many Americans in the twenty-first century, the same is true of the considerable resources given to the Kenyan government so that it could become the judicial hub for African pirate trials, where Somali nationals captured by American naval vessels are tried for attacking French ships under Kenyan law.[105] The analysis of universal jurisdiction in this chapter suggests that, as a limit on sovereign power, the nation was as mutable and sacred two centuries ago as scholars like Sassen, Brown, Ong, Wriston, Elden, and others suggest that it is today.

Rather than carving up history into periods based on differing strengths of the nation as the sovereign limit, perhaps we needed a new approach to the basic elements of sovereignty altogether. The nation and its division into territories and peoples are little more than an attempt to fix in space, place, and time the jurisdiction of the state. But jurisdiction is not so fixed. In many respects jurisdiction takes the form of a capacious challenge: Who, or what, has the right to rule this place, these people, or those activities? And this challenge can be as much normative as it is descriptive. Who, or what, *should* have the right to rule? Jurisdiction is equally at home in the exclusive

[105] Mateo Taussig-Rubo, "Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya," *Humanity* 2 (2011): 51–74.

sovereignty of the Westphalian nation-state or the corporate rule of Ong's neoliberal graduated sovereignties. It can comprehend enemies defined by their national affiliation or their practices. It can be a vehicle to protect life or to destroy it. The nation is but one form that jurisdiction might take, as is the undifferentiated field of universal jurisdiction. The flexibility of the concept allows the investigation of sovereignty to shift from the constraints of the break to the flexibility of open inquiry. Within the paradigm of jurisdiction, it makes little sense to say that the world is postsovereign; instead, one would say that the world is merely differently sovereign.

But there are practical implications as well. Instead of asking if the United States *does* have the sovereign right to kill Osama bin Laden in Pakistani territory, we can ask if the United States *should* have jurisdiction over his life in the first place. This raises a series of questions about the function of the state, the qualities of punishment, and the acceptable limits of human violence. It raises questions about geographic and state power, about the interests of others in pursuing justice or preventing a future catastrophe, and about the necessary scope of military deployment. It raises questions about how guilt and innocence ought to be determined, and by whom, and under what circumstances. And if not the United States, then who? Rather than slowly chipping away at nation-state sovereignty under the cover of administrative discretion, perhaps it is time that these questions are discussed in the open. More to the point, the killing of Osama bin Laden makes a series of implicit and explicit claims about the jurisdiction of the United States. But by reducing those claims to one—the sanctity of territorial integrity—we ignore the broad implications of the act itself, what it means for democracy, and what it means for a nation fighting a war on practices rather than nations, on individuals rather than states. The piracy analogy, to borrow Kontorovich's term, provides some cultural resources from which to begin addressing the implications of bin Laden's death. One could, for example, compare the positivist legal justifications allegedly produced by the

Obama administration with naturalist claims that terrorism is a crime which violates the sanctity of a peaceful and just society. One could ask how terrorism interacts with the peace provided by the law of nations, or if expansion of American jurisdiction is worth the price of violating the trust of another state. These are but a few of many options, but they illustrate the importance of history to the present as we walk a path so similar to one we have trod before.

Part Two

Imagining Domestic Sovereignty

Chapter 3

The Structure of a Sovereign Decision

In part 1, I argued that postsovereignty has been conceptually muddled due to the conflation of neoliberal and nationalist transformations in governance that have taken place during the past half-century. One could also say that postsovereignty is inherently ambiguous because its parent concept, sovereignty, is itself understood, theorized, discussed, and analyzed in myriad ways simultaneously. Stephen Krasner, for example, describes the complexities of sovereignty for those who study international politics and law: "[Some] take sovereignty as an analytic assumption, others as a description of the practice of actors, and still others as a generative grammar."[1] To remedy this conceptual "muddle," Krasner proposes a typology of the four most common uses of sovereignty in contemporary scholarship. They are:

> Domestic sovereignty, referring to the organization of public authority within a state and to the level of control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.[2]

In addition to the initial substantive differences laid out in the typology, Krasner argues that each type can be further described by its relationship to two familiar political concepts: authority (the

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[1] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 3.
[2] Ibid., 9.

recognized right to act) and control (the ability or capacity to act).[3] Westphalian and international legal sovereignty raise questions of authority, since they describe interactive relationships between nation-states. For example, the Supreme Court's debate over universal jurisdiction in early nineteenth-century piracy cases focused on authority as the justices parsed where and how the United States ought to have jurisdiction over the trial and punishment of international pirates. In contrast, interdependence sovereignty often ignores authority altogether and attends solely to matters of control. During the 2016 presidential campaign, for instance, Donald Trump framed his advocacy for a wall along the US-Mexico border as a failure of the federal government to control the nation's territorial security. Krasner's typology can thus be useful in reaching a degree of analytic clarity when faced with the complicated conditions of postsovereignty.

Because Krasner is a scholar of international politics, it is not surprising that his typology offers more nuance for outward-facing forms of contemporary sovereignty, in turn reducing the complexities of inward-facing sovereignty to the singular "domestic" type. Nevertheless, Krasner concedes that "domestic sovereignty, the organization and effectiveness of political authority, is the single most important question for political analysis."[4] Hence the focus by the earliest theorists of sovereignty on the inner workings of the commonwealth.

Because domestic sovereignty is less nuanced than the international types, it is more complex. "Domestic sovereignty," Krasner writes, "is used in ways that refer to both authority and control: what authority structures are recognized within a state, and how effective is their level of control?"[5] Liberal democratic societies often conceive of domestic authority in the model of popular sovereignty, under which sovereign authority is atomized and ultimately rests in the hands of the

[3] Ibid., 10.
[4] Ibid., 12.
[5] Ibid., 10.

people. Indeed, Charles Taylor suggests that popular sovereignty is a major link in the "great connected chain of mutations in the social imaginary that have helped constitute modern society."[6] Likewise, domestic control appears in questions of regulation: over which areas of life ought the state to rule? How effective is that rule? Although the liberal model has certainly dominated Western attitudes toward twentieth- and twenty-first century politics globally, it is by no means the only form that domestic sovereignty has taken.[7] Dictatorial, authoritarian, autocratic, oligarchic, and fascist regimes have significantly shaped the past century of human history, often through violence.[8]

In addition to politics, domestic sovereignty is a central issue in the analysis of law. And this is true not only in terms of law's operation—who can make, interpret, and enforce laws—but also in terms of identifying how law is grounded in the first instance. Determining whether law is born from popular will or divine mandate, for example, can have a great effect on the entire structure of a legal order. In his 1922 essay, *Political Theology*, Carl Schmitt argues for a definition of sovereignty that foregrounds these issues: "Sovereign is he who decides on the exception."[9] "The exception" refers to both a situation not comprehended by existing laws and the action taken to respond to that situation. The sovereign decision is thus most clearly observable in moments of peril, when the existence of the state is threatened. When faced with a crisis that exceeds the bounds of established legal norms, Schmitt argues, the sovereign is the one who decides to suspend the rule of law and to direct the action of the state to ensure its survival independent of the normative order. In such a

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[6] Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2003), 109. See also Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton and Company, 1988).
[7] Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (New York: Holt, 2008).
[8] Hannah Arendt, "Authority in the Twentieth Century," *Review of Politics* 18 (1956): 403–17; Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001).
[9] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 5.

moment, law is created from outside of law, and thus the foundation of the legal order becomes clear.

Essential to Schmitt's definition of sovereignty is the belief that legal norms—the systems of rules, procedures, categories, and so forth through which jurists determine whether social behavior is acceptable or unacceptable—are not the foundation of the juridical order, since no general norm can account for all contingent situations. There will always be an exception. Sovereignty is thus defined as the capacity to act without norms as a guide:

> All law is "situational law." The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.[10]

Neither control nor authority, as Krasner defines them, captures the essence of Schmitt's sovereign decision. In reducing sovereignty to the "monopoly to decide," Schmitt reveals what he believed to be an essential truth about legal systems: they are composed of both decisions and norms, but the decision reigns supreme since it can suspend the norm. As the final sentence of the quotation suggests, the ground of any juridical order is not a primordial rule but a human agent who wills the order into existence. "There exists no norm that is applicable to Chaos," Schmitt writes. "For a legal

[10] Ibid., 13.

order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists."[11]

Rather than raising questions of control or authority, Schmitt's sovereign determines whether or not the state exists in a situation where legal norms can govern the judicial process, which in turn positions the sovereign as the guarantor of law in the first instance. This definition of sovereignty thus appears to be incompatible with contemporary liberal governments whose constitutions establish the supremacy of norms such as justice or equality. However, scholars in the humanities increasingly argue that contemporary constitutionalist regimes operate, at least in part, with authoritarian tactics almost identical to the sovereign decision. Much of this scholarship has been prompted by Giorgio Agamben's incorporation of Schmitt's work into his own theory of biopolitical sovereignty, which can be simplified to the power to decide which types of human life ought to be protected by law and which ought to be abandoned by it.[12] In contrast to Taylor's claim about popular sovereignty, Agamben and others see modernity as a state of exception in which sovereign power routinely justifies the denigration, dehumanization, and destruction of certain forms of life in order to secure the existence and supremacy of the nation-state, the ruling class, whiteness, masculinity, heteronormativity, and other hegemonic forms.[13] Although many of these

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[11] Ibid.

[12] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998).

[13] See, for example, Achille Mbembe, "Necropolitics," trans. Libby Meintjes, *Public Culture* 15 (2003): 11–40; Ewa Plonowska Ziarek, "Bare Life on Strike: Notes on the Biopolitics of Race and Gender," *South Atlantic Quarterly* 107 (2008): 89–105; Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence, and Poverty in India* (Durham, NC: Duke University Press, 2012); Kalpana Rahita Seshadri, *HumAnimal: Race, Law, Language* (Minneapolis: University of Minnesota Press, 2012); Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007), 79–113; Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Durham, NC: Duke University Press, 2006). See also Alexander G. Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham, NC: Duke University Press, 2014).

scholars do not mention Schmitt's juristic definition explicitly, the sovereign's role in grounding the juridical order remains central to the theory.

The critique of biopolitical sovereignty, broadly speaking, smuggles Schmitt's thought into a critique of twenty-first-century state practice, which has indelibly linked decisionism to a politics of violence, oppression, and death. This linkage is compounded by the clearly authoritarian nature of sovereignty in *Political Theology*, and by Schmitt's other writings on politics—his claim in *The Concept of the Political* that politics is organized around a distinction between friend and enemy, for example.[14] Nevertheless, nowhere in *Political Theology* does he argue that the sovereign is sustained solely through violence or exclusion. Indeed, the decision on the exception is definite only in terms of its structure, remaining agnostic toward the norm. What is lost in the discussion of a specifically *biopolitical* sovereign, then, is an inquiry into actual and possible sovereign decisions whose principal aim is to protect life, especially against state violence. To frame it as a question: In what way might the sovereign decision on the state of exception be used as a means of protecting individuals and populations from the violence of existing juridical orders? The stakes of this question are quite high, not only because its answer may reveal a path away from the violence of sovereign biopolitics but also because even to ask it challenges scholarship in the critical humanities to rethink its own relationship to the state and domestic sovereignty.

Part 2 of this dissertation interrogates the role of exceptionalist decisionism in the American sovereign imaginary. In this chapter, I argue that the domestic sovereignty of the United States is, at least partially, decisionist. I begin by recasting *Political Theology* as a structural account of sovereignty, tracing exceptionalist decisionism through the works of Jean Bodin, whom Schmitt identifies as the

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[14] Carl Schmitt, *The Concept of the Political*, trans. George Schwab, expanded ed. (Chicago: University of Chicago Press, 2007). See also Carl Schmitt, *Theory of the Partisan*, trans. G. L. Ulmen (New York: Telos Press, 2007).

inspiration for his theory. Both thinkers believed that sovereignty belongs to an individual, and that any attempts to disperse it throughout a divided government are antithetical to the nature of the concept. Thus, I next examine how a structuralist account of sovereign decisionism might be atomized and expressed within constitutionalist governments such as the United States. Drawing from Bodin's specifically monarchical account of sovereignty, I conclude by arguing that the pardoning power granted to US presidents functions as a sovereign decision in Schmitt's sense that defies the impulse toward death described in Agamben's theory of biopolitical sovereignty. Pardons, I argue, reveal a different disposition of the sovereign decision, a claim that I elaborate in chapter 4 through an analysis of an 1819 public debate over executive clemency.

Bodin and the Structure of Sovereignty

Schmitt's political theory is often associated with English philosopher Thomas Hobbes's 1651 treatise on the power and form of commonwealths, *Leviathan*.[15] Despite the importance of Hobbes's thought to the development of *Political Theology*, his theory of sovereignty was not the primary inspiration for Schmitt's work on the concept.[16] Rather, Schmitt cites French philosopher Jean Bodin, who was himself an inspiration for Hobbes, as the first great thinker of nation-state sovereignty.

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[15] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (New York: Hackett, 1994). See also Jacob Als Thomsen, "Carl Schmitt: The Hobbesian of the 20th Century?," *Social Thought and Research* 20 (1997): 5–28; Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, trans. George Schwab and Erna Hilfstein (Chicago: University of Chicago Press, 2008). Jeremy Engels's work on the rhetoric of political enemies, although not directly addressing the relationship between Schmitt and Hobbes, nevertheless reveals their consubstantiality. See Jeremy Engels, "Friend or Foe?: Naming the Enemy," *Rhetoric and Public Affairs* 12 (2009): 37–64; Jeremy Engels, *Enemyship: Democracy and Counter-Revolution in the Early Republic* (East Lansing: Michigan State University Press, 2010).

[16] For example, Schmitt nominated Hobbes as the "classical representative of the decisionist" type of juristic thinking. Schmitt, *Political Theology*, 33.

Bodin's definition of sovereignty from book I, chapter 8 of *Les six livres de la république* (1576) is a familiar starting point for many who study the nature of state power. It reads: "Sovereignty is the absolute and perpetual power of a commonwealth . . . that is, the highest power of command."[17] Schmitt eschewed this definition. He believed that the true inventional moment in Bodin's text was chapter 10's enumeration of the sovereign's "marks," or the specific manifestations of sovereign power in law and state action. As Schmitt wrote:

> He [Bodin] discussed his concept in the context of many practical examples, and he always returned to the question: To what extent is the sovereign bound to laws, and to what extent is he responsible to the estates? To this last, all-important question he replied that commitments are binding because they rest on natural law; but in emergencies the tie to general natural principles ceases. In general, according to him, the prince is duty bound toward the estates or the people only to the extent of fulfilling his promise in the interest of the people; he is not so bound under conditions of urgent necessity.[18]

Of critical importance for Schmitt is the idea that the constraints placed upon sovereigns by their obligation to protect the people are mutable in cases of emergency. But it is not altogether clear from which portion of Bodin's work Schmitt derives this sentiment. He mentions a "core quote" in Bodin that, he says, is "nowhere" cited by scholars, but he also fails to provide the citation himself. Richard Joyce points to a passage in chapter 8 of *République* in which Bodin critiques the "kings of northern peoples [who] take oaths that detract from their sovereignty" as the quotation in question.[19] There, Bodin describes a situation in which a prince limits his own power by pledging to

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[17] Jean Bodin, *On Sovereignty*, ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 1.
[18] Schmitt, *Political Theology*, 8.
[19] Bodin, *On Sovereignty*, 26; Richard Joyce, *Competing Sovereignties* (New York: Routledge, 2013), 58–61.

uphold existing laws: "The prince who swears to keep the civil laws either is not sovereign or else becomes a perjurer if he violates his oath, which a sovereign prince will have to do in order to annul, change, or correct the laws according to the exigencies of situations, times, and persons." Bodin concludes that such oaths, or any other state structures in which sovereign power is vested in a body other than or in addition to the prince (e.g., the people), are "contrary to the laws and to natural reason."[20]

It is easy to see what Schmitt would find attractive about this passage. To be sovereign, a prince must exercise an exclusive power, which includes but is not limited to the restructuring of the legal order when faced with emergencies ("exigencies"). Joyce, however, is not satisfied with this interpretation. "Contrary to Schmitt's reading," he writes, "in this passage Bodin does not deal with the question of the circumstances in which it is proper for a sovereign to break a promise to maintain, in general, the laws in place. Bodin's point here is that such a promise is inconsistent with sovereignty itself. Moreover, Bodin is not referring to the 'suspension of the entire legal order' but merely to the need, as the case arises, to change the ordinary laws of the land."[21] How, then, could this passage in Bodin function as the basis for a theory of sovereignty as radical as Schmitt's?

Although Joyce's hermeneutic criticism is well taken, it is not as though Schmitt's appropriation of Bodin is without merit. When Bodin lays out the "marks" of the sovereign in chapter 10, he argues that all sovereign power stems from a primordial prerogative: "The first prerogative (*marque*) of a sovereign prince is to give law to all in general and each in particular. But this is not sufficient. We have to add 'without the consent of any other, whether greater, equal, or

[20] Bodin, *On Sovereignty*, 27.
[21] Joyce, *Competing Sovereignties*, 61.

below him.'"[22] What is important about this quotation is not its definition of the content of the sovereign's power—to give law—but the qualification of the relationship between the prince, the remainder of government, and those whom the prince governs. The sovereign's power knows no peer within a commonwealth because that power must be absolute. As Joyce himself suggests, to constrain the sovereign in any way is antithetical to the idea of sovereignty as such. Thus, the key to distinguishing the prince from other lawmakers (for example, Bodin spends considerable time discussing the difference between sovereign princes and nonsovereign magistrates, despite both appearing to make law) can be found in the structural relationship between the prince and all other elements of the commonwealth.[23] The prince, the sovereign, is above all else.

Two important consequences flow from this structural account of sovereign power. First, as we have already seen in Bodin's criticism of northern kings, the prince cannot create conditions that constrain his own power. Although the prince might obey natural or divine law, such laws are not of his own creation. Thus, the prince as sovereign must remain outside the confines of civil law. Second, as Bodin writes, "This same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is this only one prerogative of sovereignty, inasmuch as all other rights are comprehended in it."[24] The sovereign's subsidiary prerogatives, such as the powers to make war, levy taxes, or pardon prisoners, are thus contingent expressions of the primordial sovereign prerogative. That Bodin explicitly includes the

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[22] Bodin, *On Sovereignty*, 56. Stephen Holmes has argued that, despite the absolutism of such passages, Bodin believed princes to be significantly constrained in theory and practice, which would bolster Joyce's argument against Schmitt. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 100–133.
[23] Bodin, *On Sovereignty*, 57–58.
[24] Ibid., 58.

power to repeal law alongside the power to create it is significant, because it is compatible with Schmitt's belief that the sovereign is the one to decide on the exception to the juridical order.

To be sure, Schmitt's interpretation of Bodin's theory of sovereignty is controversial. However, analyzing Bodin's text allows one to understand the significance of several elements of Schmitt's own theory. For example, rather than focusing on the origin or justification for the sovereign's power, Schmitt treats sovereignty as a structural distinction within a given state apparatus. The exercise of sovereignty necessitates hierarchy. But such a structural focus does more than describe the allocation of governing power. Indeed, it defines the position of the sovereign in relation to law itself. Because the sovereign cannot be constrained by the civil law, he or she must remain independent of it. At the same time, however, by functioning as the curator of that law, the sovereign occupies an ambiguous position that is simultaneously inside and outside the juridical system. Schmitt's supplement to Bodin—or departure from him, as Joyce might have it—lies in his insistence that sovereignty is manifest not in the day-to-day making and repealing of laws but in the exceptional case of the emergency situation.[25] It is precisely the nature and function of this exception that has generated so much interest in Schmitt's definition of sovereignty.

Decisions on the Exception

George Schwab's canonical translation of the first line of *Political Theology* reads: "Sovereign is he who decides on the exception."[26] Tracy Strong notes that the German original—"*Soverän ist, wer*

[25] Schmitt argues that sovereignty is a "borderline concept," which "is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefor be associated with a borderline case and not with routine." Schmitt, *Political Theology*, 5.
[26] Ibid.

über den Ausnahmezustand entscheidet"—reveals a fundamental ambiguity in Schmitt's thought central to his theory of sovereignty. As Strong writes:

> The decisive matter comes from the fact that translation imposes on us the temptation to think that *über* is ambiguous: in English the sentence can be rendered "he who decides *what* the exceptional case is" or "he who decides *what to do* about the exceptional case." . . . Schmitt is saying that it is the essence of sovereignty *both* to decide what is an exception *and* to make the decisions appropriate to that exception, indeed that one without the other makes no sense at all.[27]

Schwab's translation, Strong notes, retains the ambiguity between *what is* and *what to do about* an exception in the formulation "decides on." The residue of Bodin's thought is clearly visible in the ambiguity, since the sovereign's primordial prerogative to create and repeal law encompasses both senses in which exception might be understood. Thus, a preliminary reading of the definition would suggest that the sovereign constitutes the exception as such by naming it and then determines the means by which law ought to respond to that named exception. In other words, sovereign power appears to create the conditions through which it can act upon the juridical order.

But what is the exception precisely? Again, Schmitt's meaning is ambiguous. In one sense, the exception refers to an emergency situation: "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state and the like."[28] This definition corresponds closely with the *what is* sense of Schmitt's definition, since it describes the exception that prompts a sovereign response. Sovereign action thus appears to be taken only in order to defend or preserve the existence of the state. In another sense,

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[27] Tracy B. Strong, foreword to Schmitt, *Political Theology*, xi–xii.
[28] Schmitt, *Political Theology*, 6.

the exception refers to an exception from the rule of law: "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy or chaos, order in a juristic sense still prevails even if it is not of the ordinary kind."[29] This definition corresponds closely to the *what to do about* sense of Schmitt's definition, since it describes the general conditions of sovereign action. The response to the exception takes the form of a suspension, not merely of this or that civil law but of the entire legal order. Taking both senses of exception together, then, we find that sovereignty for Schmitt appears in a decision on the conditions under which the sovereign must take complete control of the state's juridical structure *and* decide what to do once that control is taken.

This dual sense of the exception raises several important issues. First, the decision on the exception might appear paradoxical, since the sovereign must suspend the law and act extralegally in order to save the legal order. Giorgio Agamben, however, argues that this paradox is a tropological characteristic of all exceptions: "The exception is what cannot be included in the whole of which it is a member, and cannot be a member of the whole of which it is already excluded."[30] To put it differently, the exception to a set is excluded from that set by definition, yet it is indelibly attached to the set since it is defined as an exception to it. Moreover, the exception delimits the set from which it is excluded—the exception proves the rule—which in the case of sovereignty means that the sovereign exception determines the limits of the juridical order. These formal qualities help explain why Schmitt argued that the legal order rests on the decision rather than the legal norm, since the

[29] Ibid., 12.
[30] Agamben, *Homo Sacer*, 25; emphasis in original removed.

sovereign decision maintains the power to constitute the law as such, whereas the norm merely describes the law's specific content.[31]

This leads to another important point: the power of the sovereign to decide on the exception cannot be formalized or codified prior to the sovereign's decision. To do otherwise would obliterate the decision's exceptional status. For example, a clause in a constitution that grants the executive extraordinary power during times of crisis is not an exception to that constitution, and thus uses of that power are not sovereign action under Schmitt's definition. Unlike Bodin's theory, in which the prince occupies an enduring position within the commonwealth, according to Schmitt the sovereign cannot be named in advance. Rather, it is through the decision to suspend the law that the sovereign is constituted as such.

One might protest that this type of decisionism is characteristic of authoritarian dictatorships rather than liberal constitutionalist governments. In the United States, for example, not only does the preamble to the Constitution suggest that sovereign authority is ultimately distributed to the people, but it is further parceled out between the federal and state governments, and then again between the various branches within each. Because authority is so divided within constitutionalist regimes, Schmitt argues, they are anathema to the concept of sovereignty, and they are in most cases explicitly designed to prevent the rise of the singular sovereign.[32] And here we arrive at the central problem: Of what use, then, is a theory like Schmitt's to contemporary regimes in which sovereign power is thoroughly atomized?

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[31] Schmitt, *Political Theology*, 10.

[32] An example of Schmitt's critique: "[Article 48 of the 1919 German Constitution] corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences." Ibid., 11. See also Carl Schmitt, *Dictatorship*, trans. Michael Hoelzel and Graham Ward (Cambridge: Polity Press, 2014).

The Atomized Sovereign

Despite Schmitt's insistence to the contrary, several scholars have argued that the decision on the exception is a core component of modern constitutionalist democratic states. Perhaps the most famous attempt has been Agamben's study of the relationship between sovereign power and "bare life" (life deprived of rights) in his book *Homo Sacer*, first published in Italian in 1995. The phrase *homo sacer* (sacred life) refers to an ancient Roman legal category that names life "that cannot be sacrificed and may yet be killed" under the law.[33] Agamben argues that *homo sacer* is an inverted form of Schmitt's sovereign, since both share the same paradoxical relationship to the civil law: one of exception. On the one hand, *homo sacer* is part of the juridical order because it is an element of law; on the other hand, *homo sacer* is excluded from the protection of the law because the state allows *homo sacer* to be killed without consequence. As Agamben argues, "the sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice," because the sovereign is not subject to the civil law, "and sacred life—that is, life that may be killed but not sacrificed—is the life captured in this sphere."[34] Agamben's primary example of this arrangement in the modern world is the Nazi concentration camp, where Jews and other minorities were deprived of rights and killed based solely on the sovereign's command. However, the production and elimination of bare life is not limited to the atrocities of the Holocaust. Agamben argues that all of modernity is structured by this dialectical relationship between the sovereign who retains the right to kill and the bare life of *homo sacer* who lives in abandonment, excluded from the law. For Agamben, sovereign power in modernity is sustained through the continuous destruction of bare life.[35]

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[33] Agamben, *Homo Sacer*, 82 (italics omitted).
[34] Ibid., 83 (italics omitted).
[35] Agamben calls the concentration camp the "nomos" of the modern. Ibid., 166–80.

Agamben sutures sovereignty to death so completely not because of Schmitt's theory, but rather because Agamben's primary aim in *Homo Sacer* is to elaborate Michel Foucault's theory of biopower, or the governance of life itself. For Foucault, the essence of sovereign power is the right to kill in defense of the state.[36] For Schmitt, in contrast, it is clear that the essence of sovereign power cannot be described by any particular right or norm, because sovereignty at its core is the act of deciding upon the circumstances in which law shall remain in force. To be sure, the subsequent decision on what should be done beyond the space of the exception may result in the production of bare life, or, for that matter, any other form of life that must be destroyed to ensure the existence of the state, but it is not an essential consequence of the sovereign decision for Schmitt.

Judith Butler offers an example of Schmittian sovereignty, again inflected by the work of Foucault, that does not aim toward death as its primary object. Butler argues that the early policies of the George W. Bush administration regarding so-called enemy combatants in the war on terror—discussed in more detail in chapter 1 of the present study—is an example par excellence of Schmittian sovereignty. Under the authority of an executive order, the American government indefinitely detained foreign nationals while Bush administration officials argued that neither the international laws governing "lawful enemies" nor US domestic criminal laws applied to the detainees. To shore up this gap, the Bush administration created an entirely new administrative system of military tribunals, directed by the Department of Defense, that would determine the detainees' fates. Importantly, this system was originally not authorized by Congress, nor was it subject to judicial oversight, and thus the executive branch created a system of trial and punishment

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[36] See the discussion of Hobbesean sovereignty in Michel Foucault, *The History of Sexuality,* vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 135–36. See also Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

excluded from the normal rule of law. Butler argues that this new administrative system constituted a withdrawal from the rule of law homologous to the sovereign exception in Schmitt:

> The state *produces*, through the act of withdrawal, a law that is no law, a court that is no court, a process that is no process. The state of emergency returns the operation of power from a set of laws (juridical) to a set of rules (governmental), and the rules reinstate sovereign power; rules that are not binding by virtue of established law or modes of legitimation, but fully discretionary, even arbitrary, wielded by officials who interpret them unilaterally and decide the condition and form of their invocation.[37]

Unlike Agamben's argument in *Homo Sacer*, which seeks to reveal the fundamental conditions of modernity through the dialectic of bare life and sovereign power, Butler here analyzes specific techniques of governance that demonstrate the exercise of sovereign power in a constitutionalist regime. Administrative officials within the Department of Defense—whom Butler calls "petit-sovereigns"—determined, largely at their own discretion, whether a detainee would be protected by the established norms of juridical order (lawful combatants) or by the contingent administrative system of military tribunals (enemy combatants). These petit-sovereigns thus made decisions on an exception to the rule of law localized to the cases of individual detainees. To be sure, such a scenario is quite far from Bodin's image of the indivisible sovereign prince who wields the power to make and repeal law above all others. However, Butler's analysis does reveal how sovereign power can be atomized within a constitutionalist state such that a state of exception justifies extraordinary and extralegal action in the name of the nation-state's survival.[38]

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[37] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 61–62.
[38] See also Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

The Bush administration was unable to sustain this state of exception in the long term. The Supreme Court compelled the executive to obtain congressional approval for the military tribunals and grant enemy combatants basic judicial rights, which at least partially restored the rule of law for detainees.[39] But is ending the state of exception and restoring the rule of law enough to disqualify a practice as sovereign in Schmitt's sense? Bonnie Honig, for one, suggests that decisionism is one of the primary techniques of governance in the United States. "Within the rule-of-law setting that Schmitt *contrasts* with decisionism," Honig says, "something like the decisionism that Schmitt approvingly identifies with a dictator goes by the name of discretion and is identified (approvingly or disapprovingly) with administrators and with administrative governance." Honig is interested in the specific role decisions play in emergency situations that are not exceptions to the rule of law. In such situations, procedure is replaced by discretion, and power shifts from the courts and the legislature to executive agencies. The use of the Federal Emergency Management Agency to coordinate responses to natural disasters is one example of this shift. It is important to remember, however, that Schmitt's exception is not reducible to the emergency: to qualify as a true exception, the law itself must be suspended rather than merely transformed into a different modality of governance. Nevertheless, Honig's argument is predicated on the unexceptional nature of decisionism in the United States. The rhetorical production of emergencies, which includes naming a situation *as* an emergency, makes the shift from procedure to discretion nearly constant. Moreover, the political issues that arise from those shifts, like the tradeoff between security and freedom or efficiency and individualized care, are themselves components of "larger struggles over governance that have

[39] *Hamdan v. Rumsfeld*, 548 U.S. 559 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). See also Bas Schotel, "Defending Our Legal Practices: A Legal Critique of Giorgio Agamben's State of Exception," *Amsterdam Law Forum* 1 (2009): 113–25.

marked American liberal democracy for over a century."[40] To be sure, the unexceptional, quotidian nature of administrative discretion makes it unlikely to qualify as sovereign action as Schmitt defines it. However, Honig's analysis points us in an important direction, that of situating exceptionalist decisionism within a particular cultural context to determine whether or not sovereignty is manifest as such to those who live within that culture.

Bodin himself was clearly aligned with Honig in this regard. His extensive discussion of the sovereign's marks in book I, chapter 10 of *République* is rhetorically motivated by his belief that recognizing the sovereign as such is crucial to the exercise of sovereign power:

> Since there is nothing greater on earth, after God, than sovereign princes, and since they have been established by Him as His lieutenants for commanding other men, we need to be precise about their status (*qualité*) so that we may respect and revere their majesty in complete obedience, and do them honor in our thoughts and speech. . . . To be able to recognize such a person—that is, a sovereign—we have to know his attributes (*marques*, *nota*) which are properties not shared by subjects.[41]

Although Bodin describes sovereignty as an ontological property of the prince, there is a practical implication to identifying the sovereign: the prince, for whatever reason, appears incapable of governing if he is not seen as the head of the state. This, in turn, justifies the need to train everyone in a polity, from judges to common persons, to recognize the sovereign's marks. Of course the most important mark remains the primordial prerogative, or the power to make and repeal law. But the subsidiary prerogatives—declaring war, hearing final appeals, appointing ministers, levying taxes, pardoning, setting currency, and requiring oaths of loyalty to the sovereign—play an important role

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[40] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009), 67–68.
[41] Bodin, *On Sovereignty*, 46.

in crafting the sovereign's image. These subsidiary prerogatives are historically and culturally contingent manifestations of the primordial prerogative, and thus for Bodin they served as touchstones for distinguishing the sovereign from all other elements of government.

Despite his veneration of precisely this component of Bodin's work, Schmitt avoids the issue of the sovereign's marks almost entirely in *Political Theology* by stripping sovereignty down to the sovereign's structural relationship to law and hierarchical position within the state. As a consequence, sovereignty is reduced to the singular moment of the decision, whereas in Bodin's work sovereignty is a characteristic of continuous state action. In the same way that Bodin found the primordial prerogative to make and repeal law at work in other sovereign powers, so too do Butler and Honig find Schmitt's decision on the exception at work in the administrative discretion of twenty-first-century American governance.

At this point one might call the task of the chapter complete: I have identified administrative discretion as a manifestation of Schmitt's exceptional decisionism that can operate smoothly within the atomized system of sovereign power characteristic of liberal constitutionalist democratic governments. However, a gap remains. The rise of the administrative state is a relatively new legal phenomenon, one that Robert Rabin argues took its modern form in the United States in the 1880s, with the regulation of interstate commerce on the nation's railroads.[42] What remains to be seen is if and how exceptionalist decisionism operated prior to the development and the intensification of the US administrative state. The question thus becomes: Is decisionism a foundational component of the American sovereign imaginary rather than a contingent feature of administrative governance?

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[42] Robert L. Rabin, "Federal Regulation in Historical Perspective," *Stanford Law Review* 38 (1986): 1189–326.

Bodin provides a first step in answering this question. With the exception of the loyalty oath, all of the subsidiary prerogatives Bodin identifies in *République* are present in American government in general, and in the Constitution in particular. Of course, these powers are not vested in a single individual. The power to declare war, for example, belongs to the legislature, while final appeals are heard by the judiciary, and political appointments are made by the executive. However, the uses of any of these powers remain subject to the checks and balances of a divided government. Moreover, their inclusion within a constitutionalist regime apparently bars them from taking on the character of the exception so essential to Schmitt's theory of sovereignty. That said, in the same way that administrative discretion has smuggled decisionism into constitutionalism, there remains one prerogative discussed by Bodin that can take on the character of the exception that may smuggle in decisionism at the foundation of America's legal order: the power of clemency.

Clemency as the Sovereign Decision

Clemency is the mitigation of a criminal sentence by a nonjudicial actor, and Article II, Section 2, of the US Constitution grants this power to the president in response to federal crimes. The Constitution only mentions two types of clemency, reprieves and pardons, but the Supreme Court has subsequently expanded the power through judicial review.[43] Today, clemency can take a number of forms, the most common of which are full and conditional pardons, which absolve the criminal of guilt and prevent punishment for the convicted crime; commutations and remissions, which reduce the severity of a punishment; and respites and reprieves, which suspend or delay a

[43] For a succinct genealogical overview of the pardoning power, see P. S. Ruckman Jr., "Executive Clemency in the United States: Origins, Development and Analysis (1900–1993)," *Presidential Studies Quarterly* 27 (1997): 251–71.

punishment. Here I shall use "pardon" or "pardoning power" to refer to executive clemency in general and "full pardon" when I refer to that specific form.[44]

"As a consequence of this prerogative of sovereignty," Bodin says, "is the power of granting pardons to the condemned, ignoring verdicts and going against the rigor of the laws to save them from death, loss of goods, dishonor, or exile." The power is uniquely sovereign, he continues, "for it is not in the power of any of the magistrate, no matter how great, to do any such thing, or to alter anything in the judgments handed down."[45] Bodin's description of the pardoning power, which emerges from analyses of historical European governments ranging from ancient Greece to early modern France, is nearly identical to the power's American iteration. Margaret Love's discussion of the federal pardoning power in the United States suggests that it is unique among executive powers for two reasons. First, the power has never been delegated, and most legal scholars agree that it cannot be. Second, the pardoning power is absolute: clemency cannot be challenged or limited by either the judiciary or the legislature, and it cannot be reversed by the executive. Presidents are held responsible for their pardons only through the political process.[46] Pardons allow the president to suspend the judgments of the other two branches of government— the legislative judgment that created the law and the judicial judgment that interpreted and applied it—and to supersede those judgments entirely. Although this arrangement of power is not unique within the federal government as a whole (one could argue that judicial review operates in a similar way), it is certainly not part of

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[44] For the most complete resource regarding the history and philosophy of American pardons, see Kathleen D. Moore, *Pardons: Justice, Mercy and the Public Interest* (New York: Oxford University Press, 1997).

[45] Bodin, *On Sovereignty*, 73.

[46] Margaret Colgate Love, "Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful," *Fordham Urban Law Journal* 27 (2000): 1486. The Constitution itself does place two limits on the president's pardoning power: he or she can only pardon federal crimes, and he or she cannot offer clemency in cases of impeachment.

the "to and fro" battle between discretionary and procedural governance that Honig describes. Pardons thus ought to be seen as exceptions from the normal operation of juridical order.

The pardoning power in the United States grew out of the English common law tradition, in which clemency was the prerogative of the monarch. Hence, the traces of Bodin's monarchical sovereignty linger in the Constitution. It is clear as well that pardons contain some elements of Schmitt's decisionist exceptionalism. Indeed, when granting a prisoner clemency, the president decides that a particular case is extraordinary enough that typical procedures of the judiciary—trial, conviction, and punishment—ought to be suspended. The president makes a subsequent decision on what form the juridical order should take within that evacuated space, whether a full pardon, reprieve, commutation, and so forth. But the pardoning power diverges from Schmitt's formulation of sovereign power in two important ways: first, pardons in the United States are authorized by the Constitution, and therefore the use of the pardoning power cannot be an exception to the rule of law; second, it is not apparent how acts of clemency secure the survival of the state. The doubly exceptional nature of the sovereign decision—it arises due to an exceptional threat and takes the form of an exception to the rule of law—are the very elements upon which Schmitt distinguishes his specifically juristic definition of sovereignty from other theories that merely describe the scope of the sovereign's power. In other words, the presidential pardon cannot be the type of decision on which one founds an entire legal order.

The point is conceded. Pardons are almost certainly not what Schmitt had in mind when he outlined the sovereign decision in *Political Theology*. That said, by setting aside the pretext of fully satisfying Schmitt's schema, we can begin to explore an entirely new set of questions. How might Americans in the early nineteenth century have understood the pardon as a form of decisionism? Were pardons understood as extraordinary or normal? Were they seen as exceptions to the rule of

law? What role did pardons play in the development of an ethics of punishment, or even in judicial ethics more broadly? How did pardons affect attitudes toward the executive's use of rights historically reserved for the sovereign? How did they affect attitudes toward the president or presidential power? Such questions would likely be of little interest to Schmitt, at least as far as his philosophical argument in *Political Theology* is concerned. However, the answers to them are of vital importance. If the pardon functioned as a sovereign decision on the exception to the rule of law in the early nineteenth century, then perhaps the logic through which pardons were justified might operate in contemporary cases of administrative discretion, even if it is only a latent effect. In other words, exploring the pardon as an instance of exceptional decisionism may reveal more about administrative discretion than a conceptual Schmittian analysis otherwise could.

Pardons are a particularly important vehicle for the rhetorical analysis of decisionism in the history of Americans' sovereign imaginary because of their unique juxtapositional structure. That is, pardons position elements of an atomized sovereign regime against one another in such a way as to foster critique of the state. From one perspective, pardons are a means of correcting mistakes in the judicial process, thus protecting a vulnerable population from state violence. From another, pardons suspend the processes that define, determine, and punish criminal activity, thus endangering the security of the state and its population. In the first case pardons are pharmaceutical, suppressing an immune system that has begun to attack the larger organism it is otherwise meant to protect. In the second case, pardons are an autoimmune disease, depressing the typical procedures that are meant to secure the organism from harm. These perspectives speak to the different dispositions that sovereign power might take. Agamben's analysis of *homo sacer*, for example, gives sovereign power a specifically negative disposition, linked to enmity, violence, and death. Sovereign power in modernity, Agamben argues, is predicated on destruction, and thus the only available path forward is

to critique sovereign action. Although this position is admirable because it reveals the depths of the relationship between violence and the state, it also forecloses attempts to recuperate sovereign power precisely because that relationship is understood to be essential and not contingent. Pardons resist such a dispositional characterization of sovereignty. Clemency prima facie limits state violence. An analysis of pardons as sovereign action may thus provide an alternative account of the decision on the exception, one that is not predicated upon death, exclusion, or abandonment. As I discuss in the next chapter's analysis of a debate over the use of the pardoning power in 1819 Boston, perhaps pardons can serve as a model of sovereign power whose primary aim is mercy and protection.

Chapter 4

Suspended Between Life and Law: Disposition and the Sovereign Decision

To begin at the end: on February 18, 1819, John Williams, Francis Frederick, Nils Peterson, and John Rog were executed by hanging at the burying ground on Boston Neck, the isthmus that in the early nineteenth century connected Boston to nearby Roxbury, Massachusetts. Two months prior, the four men had been convicted in federal court of the crimes of murder and piracy for their actions aboard the *Plattsburgh*, a merchant schooner based in Baltimore, Maryland.[1] In July 1816, during a journey to Turkey, the crew of the *Plattsburgh* mutinied and threw the captain, first mate, and supercargo overboard before absconding with the ship and its cargo. Some commentators have described these events as "the most remarkable mutiny in the annals of American commerce"; however, they are not remarkable for the reason one might assume.[2] When read against the archival record of nineteenth-century piracies and mutinies, what took place aboard the *Plattsburgh* appears relatively ordinary.[3] Indeed, the significance of the case lies not in the piracy itself but in what occurred after the conviction of the four men, in the wake of a month-long reprieve granted by President James Monroe. "The act of the President," wrote the *New-England Galaxy*, "has caused

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[1] The ship's name is spelled *Plattsburgh* or *Plattsburg* depending on the source. For consistency, I will use the more popular *Plattsburgh* throughout, except in the case of direct quotations from materials that use a different spelling.

[2] John R. Spears, "Mutinies on American Ships," *Munsey's Magazine*, August 1901, 646. For the most complete contemporary scholarly treatment of these events, although inaccurate in many details, see Fred Hopkins, "The *Plattsburg* Mutiny, 1816," *The American Neptune* 35 (1995): 135–41.

[3] Consider, for example, the case of William Holmes, Thomas Warrington, and Edward Rosewain, who were tried for piracy in Boston on January 4, 1819, a mere week after the *Plattsburgh* trial. Although the cases differ in circumstance, the type and severity of the violent acts (murdering a ship's officers and throwing them overboard) are quite similar. See *The Trial of William Holmes, Thomas Warrington, and Edward Rosewain, on an Indictment for Murder on the High Seas [. . .]* (Boston: Joseph C. Spear, 1820).

considerable excitement in the public mind."[4] Hence the reason that the story of the *Plattsburgh* pirates ought to begin with their ends: it is only because of their suspension between life and law—the figurative suspension of their deaths by Monroe's reprieve and the men's literal suspension from the gallows on Boston Neck—that the news-reading public would debate the nature and effect of Monroe's sovereign decision.

In chapter 3, I argued that the presidential pardoning power is structured similarly to Carl Schmitt's theory of the sovereign decision. Analyzing the use of that power within a given cultural context might, then, reveal something about the nature of decisionism within the American sovereign imaginary. The *Plattsburgh* piracy is an excellent case to study in this regard, because the crimes committed aboard the schooner were notorious, and thus there exists a breadth and depth of public debate surrounding Monroe's reprieve that is difficult to find elsewhere. Public interest in the case was piqued throughout the maritime states. Baltimore's nationally circulating newspaper *Niles' Weekly Register* printed a preliminary account of the crew's alleged crimes more than two years before the federal court trial that led to their conviction.[5] A private printing press published a full transcript of the court proceedings the day after the verdict was issued, and considerably more printed material—including the pirates' autobiographies, an eyewitness account of the mutiny, and a

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[4] "Reprieve of the Pirates," *New-England Galaxy and Masonic Magazine*, January 22, 1819, APS. Newspaper citations followed by "AHN" are materials obtained in Readex's *America's Historical Newspapers* database. Citations followed by "APS" are materials available in ProQuest's *American Periodicals Series* database. Citations followed by "NCN" are materials available in Gale's *19th Century U.S. Newspapers* database. Newspapers cited without a database indicator were examined in print at the American Antiquarian Society, Worcester, MA.

[5] "Chronicle," *Niles' Weekly Register*, November 16, 1816, APS. It is important to note that the *Plattsburgh* originated in Baltimore, so there was likely some local interest in the story as well. Nevertheless, the *Register* was truly a national publication. See Norval Neil Luxon, *Niles' Weekly Register: News Magazine of the Nineteenth Century* (Baton Rouge: Louisiana State University Press, 1947), especially 6–9.

narrative version of the crime—followed. Many of these texts focus on the infamy and moral calamity of the pirates' crimes. One preface offers the following description of the men's motives:

> What caused the crime?—Was it committed with the view of redressing any real or even *imaginary* grievance?—No, had they even the miserable subterfuge to plead in extenuation, the heat of *passion*? No. OR, what is still worse, was the murder instigated by REVENGE?—No, not even that *shadow* of palliation is afforded them. In cold blood—perfectly collected—and after a plan was digested and organized, each having his part assigned him, was the deed committed.—From a thirst after gain, and the principle of
>
> ☞AVARICE☜
>
> at whom the good, the virtuous and the amiable, will always point the finger of scorn, three innocent men, who never harboured in thought, or evinced in word or deed, aught to the prejudice of their sanguinary assassins, were murdered!![6]

Statements like this one were relatively common in what Karen Halttunen has described as the "gothic" trends of early nineteenth-century crime literature.[7] But such rhetorical commonplaces are informed, at least in part, by the attitudes of those who wrote them and read them, and it is because the citizens of Boston believed the *Plattsburgh* piracy was a moral disaster that Monroe's act of clemency rose to such prominence in the public mind. For those who supported the reprieve, the

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[6] *The Pirates: A Brief Account of the Horrid Massacre of the Captain, Mate, and Supercargo on the Schooner Plattsburg [. . .]* (Boston: Henry Trumball, 1819). Although three editions of this text were published, only the third includes a date. However, it is likely that all three were published in 1819, since the narrative contains details of the federal court's sentencing, which took place on December 30, 1818. The manicules in the original manuscript are white hands with black wrists, with index fingers extended and palms facing away. On the left manicule the index finger is at the top, and on the right manicule it is at the bottom.

[7] Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge, MA: Harvard University Press, 2000).

pirates' degeneracy meant that the men required more time than was usual to prepare themselves for God's judgment after death. For those who critiqued the reprieve, the heinousness of the piracy warranted an expedient end to the pirates' lives to act as a deterrent. In this chapter, I analyze the discourse surrounding the *Plattsburgh* piracy, the pirates' trial, Monroe's reprieve, and the execution to explore how Americans in the early republic understood the use of the pardoning power and its place in the American sovereign imaginary. I argue that attitudes toward the prerogative power in 1819 reveal unique features of decisionist sovereignty in the American context that are not often considered by scholars in the twenty-first century. Such scholars ought to attend to the role of sovereign disposition cultivated throughout the debate over the reprieve, because it illustrates one path through which the sovereign decision becomes beneficent rather than maleficent.

This chapter proceeds in four parts. First, I offer a historical account of the *Plattsburgh* piracy, its conditions, and its effects. There exist six firsthand accounts of the events: two accounts from state's witnesses presented at trial, and one account each from the four convicted men, Williams, Frederick, Peterson, and Rog. Although the accounts differ slightly in the details, they overwhelmingly agree on the major events, and they provide important context through which to make sense of the reprieve and the debate over its reception. Second, I analyze the announcement of the reprieve in the *Independent Chronicle and Boston Patriot*, a prominent Massachusetts newspaper. Through a close reading of that text, I argue that the reprieve was received as an interruption in the normal operation of juridical order whose structure is homologous to the decision on the exception discussed by Schmitt. Next, I analyze the major contours of the debate over the reprieve to illustrate differences in the reprieve's reception between those who supported Monroe's action and those who did not. I argue that these differences are not merely evidence of political partisanship but are in fact dispositional differences toward the use of prerogative power as a sovereign decision. In the fourth

section, I analyze two articles published in Boston's *Columbian Centinel*, one in support of the reprieve and one against it, to explore the necessity of a relationship between decisionism and violence. In the case of the *Plattsburgh* pirates, I suggest that violence is understood as a feature of liberal governance against which the sovereign decision on the exception to the law provided protection.

The Plattsburgh Piracy

In late June 1816, a schooner arrived at its home port of Baltimore, following a cruise that had taken the vessel around the Atlantic, from Baltimore to Brazil to Italy to New York.[8] The ship was owned by Isaac McKim, a notable Baltimore merchant and future Representative of Maryland in the US Congress. He named the ship after Plattsburgh, New York, the site of an important US military victory in the War of 1812.[9]

After docking in Baltimore, the *Plattsburgh* was loaded with several tons of coffee and over forty thousand dollars in gold and silver.[10] McKim selected William Hackett as the ship's captain, and Hackett in turn appointed a crew of three additional officers, a cook, a steward, and eleven sailors.

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[8] "American Marine List," (Baltimore) *American and Commercial Daily Advertiser*, June 19, 1816, AHN; "Shipping Journal," *Baltimore Patriot*, June 26, 1816, AHN; "Marine Register," *Baltimore Price-Current*, June 29, 1816, AHN.

[9] In addition to his merchant and political careers, McKim was renowned in Baltimore for philanthropic support of education. According to one contemporaneous source, his 1838 funeral was attended by 15,000–20,000 mourners. "Funeral of Isaac M'Kim," *Charleston Courier*, July 10, 1838, AHN. See also J. S. Buckingham, *America, Historical, Statistic, and Descriptive* (New York: Harper and Brothers, 1841), 291–94.

[10] Based on available archival materials, it is not clear what form this money took, although it seems likely that it was a combination of specie, gold, and silver. Furthermore, it is unclear whether the value "dollars" here refers to American dollars, Spanish dollars, or continental rixdollars.

Crew of the Plattsburgh[11]

Officers
Captain: William Hackett
First Mate: Frederick I. Yeiser
Second Mate: Stephen B. Onion
Supercargo: Thomas Baynard

Cabin Crew
Steward: Edward Samberson
Cook: "A Spaniard"

Crew
Francis Frederick
John Johnson
Nils "Peter" Peterson
John Raineaux
John Rog
John Smith
John Stacey
John Stromer
Daniel Went
Nathaniel White
John Williams

The ship was bound for Smyrna, which is today known as Izmir, Turkey, where the cargo of coffee and money would be exchanged for opium that would likely be resold to merchants along the eastern coast of the United States.[12] Once the *Plattsburgh* was loaded and crewed, the schooner set sail from Fell's Point on July 1, 1816.[13]

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[11] At trial, Isaac McKim claimed that he did not have the *Plattsburgh*'s "shipping papers," and thus the ship's articles—the legal documents employing the officers and crew—were not admitted as evidence. No single complete list of the crew has been found, and the list presented here is based on mentions of crew names in multiple sources. The most complete list comes from Stephen Onion's testimony at trial. When asked for the crew's names, Onion replied: "John Williams, Nathaniel White, Francis Frederick; —Frederick was not on the articles; —Stacey, John Smith, Peter Peterson, Johnson, and some others; making in all eleven before the mast" (12). Over the course of his narrative, Onion also mentioned Daniel Went, Raineaux, and Stromer. Raineaux's and Stromer's first names are recorded in diplomatic documents concerning their failed extraditions from France and Prussia, respectively. John Johnson's first name is given by Peter Peterson in his autobiography. John Stacey's first name is mentioned in Onion's published account of the events on the *Plattsburgh*: Stephen B. Onion, *Narrative of the Mutiny on Board the Schooner Plattsburg [. . .]* (Boston: Stephen T. Goss, 1819), 5.

[12] The *Niles' Weekly Register*'s November 16, 1816, article on the piracy mentions the *Plattsburgh*'s intended involvement in the opium trade, although it was not mentioned at trial. See also Geoffrey M. Footner, *Tidewater Triumph: The Development and Worldwide Success of the Chesapeake Bay Pilot Schooner* (Mystic, CT: Mystic Seaport Museum, 1998), 132–34.

[13] The majority of the information about the piracy itself is drawn from the published transcript of the trial. This transcript was not produced by the court; rather, it was recorded by a private firm and

Problems aboard the *Plattsburgh* arose before the ship exited US waters. The crew, apparently not trusting the ship's officers, requested their seaman's protection certificates from Captain Hackett before they would weigh anchor, but Hackett was initially reluctant to turn them over. These certificates, known colloquially as protections, were early forms of state identification. Issued by the customs house in a vessel's home port, a protection contained a sailor's name, birthplace, and physical description. Protections were necessary to guard sailors from foreign military impressment, especially by the British Empire. In fact, *Plattsburgh* crewman John Williams claimed to have been a victim of a British press gang early in his sailing career.[14] Protections established sailors' identities and nationalities, providing a legal basis on which consulates could contest illegal conscriptions or negotiate with local authorities if other legal issues arose. They were truly precious documents, and

published in the days following the trial's conclusion. Where possible, claims made in that text have been corroborated by newspaper accounts, the published autobiographies of Williams, Rog, Peterson, and Frederick, and a cache of diplomatic documents. There are several methodological concerns in relying on legal documents as historical records. First, legal rhetoric tends to represent arguments and acts as unassailably true. Caleb Smith describes the rhetoric of early nineteenth-century juridical texts as "oracular" because within them, abstract universals (e.g., law, God) appear to speak through jurists. Although legal texts are designed to appear ideologically neutral, they often represent the interests and views of those who occupy positions of social and political power. Moreover, this particular transcript was produced for commercial purposes, which renders dubious its status as an accurate portrayal of the trial. Nevertheless, because this account of the trial and piracy correspond so closely with others found in the archive, it seems reasonable to conclude that the public primarily encountered this version of the story and likely regarded it as fact. See *The Trial of John Williams, Francis Frederick, John P. Rog, Nils Peterson, and Nathaniel White, on an Indictment for Murder on the High Seas [. . .]* (Boston: Russel and Gardner, 1819). See also Caleb Smith, *The Oracle and the Curse: A Poetics of Justice from the Revolution to the Civil War* (Cambridge, MA: Harvard University Press, 2013), 1–95. For discussions of these issues in twentieth-century legal discourse, see Victoria Kahn, "Rhetoric and the Law," *Diacritics* 19 (1989): 21–34; Robert A Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law and the Humanities* 2 (1990): 201–20; Gerald B. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1545–97.

[14] John Williams et al., *Lives and Confessions of John Williams, Francis Frederick, John P. Rog, and Peter Peterson [. . .]* (Boston: J. T. Buckingham, 1819), 6–7.

although Hackett's individual motivations are unknown, it was not unheard of for captains to keep protections under lock and key to prevent sailors from abandoning a voyage partway through.[15]

Hackett's initial rebuff of the request apparently soured relations between the officers and the crew. On July 4, as the *Plattsburgh* neared the maw of the Atlantic at Cape Henry, a scuffle broke out between sailor John Smith and first mate Frederick Yeiser. According to Stephen Onion, the ship's second mate, Smith did not adequately comply with Yeiser's order to sweep the deck, resulting in a physical altercation between the two men. Onion, after rescuing Yeiser, informed Captain Hackett, who "came upon deck, and said he would knock any man down with a hand-spike who should offer resistance to the mate."[16] John Williams told largely the same story, although in his version, it was Yeiser who attacked Smith after ridiculing his methods of sweeping.

Two days after the row, on July 6, Hackett turned the protections over to the crew, after which Yeiser is reported to have made the following declaration: "Men, one and all, if you do your duty, as men, you will be treated, as men. But if I hear the least grumbling or murmur, whatever, I will take the trouble myself, of making a can-o' nine tails [*sic*], seize up the first man among you to the main rigging by two thumbs, and flog him, as long as I can stand ever [*sic*] him. Go forward now; you know what you have to depend upon."[17]

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[15] See Matthew Taylor Raffety, *The Republic Afloat: Law, Honor, and Citizenship in Maritime America* (Chicago: University of Chicago Press, 2013), 158–59.

[16] A handspike is a large rod inserted into a capstan to gain leverage when raising the anchor. *The Trial of John Williams*, 12.

[17] This quotation appears in John Williams's autobiography, but neither Onion nor Samberson mention the event at trial, nor does Onion mention it in his published account of events. Williams et al., *Lives and Confessions*, 16.

Falling to the Sea

Life progressed "without any murmur, whatever" as the *Plattsburgh* traversed the Atlantic. Watches were set, the first led by Yeiser and the second by Onion. On July 21, the schooner passed near Santa Maria, one of the Azorean islands west of Portugal. At midnight, as the watches changed from first to second, disaster struck. Williams called out "Sail, ho!" to signal a problem with one of the ship's main sails. Yeiser and Onion, who were both on deck due to the watch change, rushed along opposite sides of the vessel toward the bow. Onion recalled peering over the side of the railing into the sea in search of the missing sail when he was struck on the head with such force that it knocked him to his knees. As he recalled at trial:

> I did not know at first what struck me; I supposed it was the foot of the jib which struck me on the head. I fell upon the deck and immediately *scuffled* to windward. As I lay upon my hands and knees, John Williams caught me by the breast. That minute I heard the chief mate scream murder. Williamssaid [*sic*], "here is one of the damned rascals—come help me kill him."[18]

After he was struck, Yeiser was thrown overboard. Captain Hackett, who had likely heard the commotion from his cabin, came to the deck. His arrival drew the attention of the crew away from Onion, affording the second mate an opportunity to flee below and hide in the ship's bread locker. Hackett, like Yeiser, was beaten and thrown overboard. Thomas Baynard, the supercargo, was disturbed by the tumult as well. A crewman called him to the deck, where he was ambushed, beaten, and thrown into the sea. The three officers—Hackett, Yeiser, and Baynard—were left for dead. No bodies were ever recovered.

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[18] *The Trial of John Williams*, 13.

Onion, the last of the ship's officers, survived the night with little more than a wounded arm. After the crew discovered him in the bread locker, they offered to spare his life if he agreed to join their now-piratical voyage. Edward Samberson received the same offer, and both men accepted. The Spanish cook, who receives little mention in any account of the voyage, survived as well.[19]

A new command assumed control of the *Plattsburgh*. John Stromer was named captain, John Williams became first mate, and Stephen Onion resumed his role as second mate. Stromer, who had apparently captained merchant ships earlier in his life, set course for Norway. The fourteen men remaining on the ship divided the cargo of gold and silver between them, each receiving approximately three thousand dollars. Stromer, likely with the intention of passing himself off as the former captain, obtained Hackett's protection, as Williams did with Yeiser's. The ship's logs were altered, and new letters were drafted bearing Isaac McKim's name, removing mention of the ship's cash cargo and changing the ship's course (to what is unknown). As the ship neared port, Stromer ordered the crew to break the main boom, and the *Plattsburgh* docked in Mandal, Norway, on the pretext of seeking repairs.

"All nations will be found to fall, / O'er those who're enemies to all"[20]

Stromer, writing as Hackett, announced the arrival of the *Plattsburgh* in a letter sent to Peter Isaacksen at the US consulate in Kristiansand, Norway. To do otherwise might have drawn

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[19] Samberson described a brief encounter with the cook once the supercargo had been thrown overboard: "In less than two minutes I heard the voice of Baynard in the water. I went forward and asked the cook what was the matter; he said, he did not know. He was crying"; ibid., 21. Frederick mentions that he and the cook stayed in a pilot's house in Cleveland, Norway, indicating that Spaniard survived. Williams et al., *Lives and Confessions*, 25.

[20] From *Verses Composed on the Four Unhappy Pirates, Whose Trial Came on in the Circuit Court of the United States on Monday Last, [. . .],* broadside, sold by N. Coverly, no. 16 Milk-Street—Boston, 1818, American Antiquarian Society.

suspicion. Before Stromer's letter arrived, however, Isaacksen had heard rumors of men in Mandal who were "reported to be in possession of and spent more money in silver and gold than what is usual amongst sailors."[21] He decided to investigate, and set out on the forty-mile journey to Norway's southern coast. Upon reaching Mandal, Isaacksen found that the *Plattsburgh*'s crew, including the purported captain, had abandoned the schooner after selling a small portion of the cargo of coffee. Moreover, nearly all the men had fled the city, dispersing throughout Europe. On September 7, Isaacksen wrote a letter to President James Madison detailing the alleged piracy and recovery of the *Plattsburgh*, which set in motion an extraordinary attempt to bring the alleged pirates to justice.

Williams, Onion, and Samberson—all Americans—sailed together from Mandal to Copenhagen. The three men eventually were caught thanks to Hans Saabye, the American consul in Denmark. They were detained by Danish police and confessed to the piracy.[22] John Rog, who was

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[21] All of the diplomatic documents related to the *Plattsburgh* affair were requested by the House of Representatives and compiled by the Van Buren administration on May 9, 1840. I consulted the typeset copies of these documents published in the Serial Set, which include translations to English where appropriate. The original letters, if they still exist, were not consulted. Peter Isaacksen, *Mr. Isaacksen to Mr. Madison, September 7, 1816,* letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 10–11 (1840).

[22] The story of the capture is as follows: Samberson convinced Onion and Williams to declare their presence in Copenhagen to the American consulate there. They delivered their protections to consular officials but could not produce a passport for entry into Denmark. For whatever reason, Onion chose to use Yeiser's protection rather than his own, despite not matching the physical description on the document. Saabye became suspicious and began investigating the men. He learned that Onion and Williams had chartered a small boat in Copenhagen, filled with 1300 dollars' worth of rum and sugar, and they intended to sail the vessel from Denmark to Norway. Around the same time that the men applied for a passport for that vessel, Saabye heard rumors through unofficial channels of an American ship abandoned by its crew in Norway. Saabye, convinced that Onion, Williams, and Samberson were likely crew from that ship, resolved to have the men arrested. According to Williams, when he and Onion returned to the consulate to retrieve their protections, Saabye informed them that it was customary to notify the Danish police of any foreigner's presence in the city via sealed letter from the consulate. The letter would apparently contain their protection, which they could retrieve upon registering with the police. Upon delivering those letters to the police, Onion and Williams were promptly arrested. Samberson was arrested some time later, and he

born in Denmark, traveled separately to Copenhagen, where he was caught and similarly detained after a chance encounter with Samberson in the "King's Market" (*Kongens Nytrov*).[23] The Danish government agreed to deliver the prisoners to American custody, but the men were held in Copenhagen's jail from October 1816 to September 1818, when they were finally extradited to the United States.

Nathaniel White, a citizen of Norway, stayed in Mandal, where he was briefly detained by Norwegian officials before being released, after which he left the country. Meanwhile, Saabye had dispatched a circular letter to American consulates throughout Europe asking for assistance in apprehending White and the remainder of the *Plattsburgh*'s crew. White was found in Hamburg, and the American consulate there sent him to Copenhagen. He arrived in December 1816 to join the four other captured men in prison.[24]

Francis Frederick, who was born in Minorca, sailed with John Smith from Mandal to Scotland, where they were apparently defrauded in a series of business deals. Frederick returned to Mandal alone and was subsequently arrested by Norwegian authorities. He was sent to Copenhagen and imprisoned with the rest.[25]

Nils "Peter" Peterson, born in Gothenburg, Sweden, in 1799, was the youngest member of the *Plattsburgh*'s crew. Peterson traveled from Mandal to his family home, where he was arrested by

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was the first to confess. See Hans Rudolph Saabye, *Mr. Saabye to the Secretary of State, October 21, 1816*, letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 22–24 (1840); Williams et al., *Lives and Confessions*, 20.

[23] Williams et al., *Lives and Confessions*, 29. *Kongens Nytrov* is today better known in English as "King's New Square" or "King's Square."

[24] Hans Rudolph Saabye, *Mr. Saabye to the Secretary of State, October 21, 1816,* letter, and *Mr. Saabye to the Secretary of State, February 2, 1817,* letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 22–24, 24–25 (1840).

[25] Williams et al., *Lives and Confessions*, 25–26. See also Hans Rudolph Saabye*, Mr. Saabye to the Secretary of State, February 2, 1817,* letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 24–25 (1840).

Swedish authorities on September 6, 1816. He confessed to receiving money from Stromer and Williams, but he denied any part in the murder of the *Plattsburgh*'s officers. Peterson was tried in a Swedish court, although the exact charges are unknown, and he was acquitted. The American chargé d'affaires in Sweden, Christopher Hughes Jr., appealed to the Swedish king for Peterson's extradition, which was granted. Peterson was sent to the United States aboard the *Joseph*, a brig out of Massachusetts captained by Ezra Allen.[26] Peterson arrived in Boston on October 3, 1817, where he was immediately jailed.[27]

These seven men—Williams, Frederick, Peterson, Rog, White, Onion, and Samberson—were the only members of the *Plattsburgh*'s crew recovered by the United States. Seven crewmen eluded American custody: the Spanish cook, Johnson, Smith, Went, Stacey, Raineaux, and Stromer. Little is known about the fates of the first five; however, Raineaux and Stromer were the subjects of intense diplomatic exchanges over their extradition. John Raineaux traveled from Mandal to Bordeaux with Daniel Went, where the two apparently parted ways. Raineaux was later apprehended in the Breton city of Vannes. Because Raineaux was a French subject, and because France and the United States did not have an extradition treaty in place at the time, cabinet officials from both nations negotiated over the conditions of his release into American custody. Ultimately, the United States could not meet France's requests, Raineaux was not extradited, and his fate remains unknown.[28]

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[26] For details on the diplomatic negotiations regarding Peterson's extradition, see the correspondence between Christopher Hughes Jr., the Count D'Enström (Swedish Foreign Minister), Carl Adolph Murray (American consul in Gothenburg), and John Quincy Adams (American Secretary of State), collected in H.R. Doc. No. 199, 26th Cong., 1st Sess., at 12–22 (1840).

[27] Williams et al., *Lives and Confessions*, 34–36. Newspapers reported Peterson's arrival beginning in late October: *Daily National Intelligencer* (Washington, DC), October 31, 1817, NCN; "Chronicle," *Niles' Weekly Register*, November 8, 1817, APS.

[28] The negotiations are recorded in a series of letters between American Ambassador Albert Gallatin, Secretary of State John Quincy Adams, and the Prime Minister of France, the Duke de Richelieu.

John Stromer, who was by most accounts the primary instigator of the mutiny, was caught by Prussian authorities in Danzig (present-day Gdansk, Poland). Because he was Prussian, the law prevented his extradition to the United States. John Murray Forbes, the Consul General of the United States in Copenhagen following Saabye's death in 1817, tried to negotiate with the Prussian government, to no avail. However, the Prussians did agree to a confrontation between Stromer and the six men held in US custody in Copenhagen. The confrontation took place in Helsingør, Denmark. As Forbes wrote to then–Secretary of State John Quincy Adams:

> The police-master had prepared twelve or fifteen sailors in their usual dress, who were mixed with several other spectators; and John Strümer, freed of his irons, was placed in the midst of this crowd; the other prisoners were introduced singly, and without naming any one, each prisoner, as he was introduced, was asked to look about in the crowd and to say if he knew any one; each and every prisoner, without hesitation, singled out John Strümer, and charged

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On January 18, 1817, Richelieu wrote to Gallatin indicating that Raineaux was in custody. Gallatin replied that the United States would like to take custody of Raineaux and take him to Copenhagen to await transport for trial. Richelieu, after consulting with the Keeper of the Seals (the head of the French justice ministry), informed Gallatin that there was no extradition treaty between the two nations, and thus he could remit Raineaux only if the United States would agree to act in kind if circumstances were reversed. Gallatin did not have the authority to make such a deal. The French then suggested that they would hand over Raineaux if the United States could prove his guilt. Adams, replying to Gallatin's legal aide Daniel Sheldon Jr., argued that such an arrangement was impossible because: (a) under US law, guilt can only be established at a trial, and (b) Raineaux could not be tried in absentia. Thus, Adams proposed that the French try Raineaux themselves. Punishing Raineaux was critical, he argued, because pirates were "*hostis humani generis*," the enemy of all. Acknowledging the impossible situation, the French asked the United States to provide all proof of guilt, and Gallatin ended the negotiations in hopes that the American trial might provide some evidence that might assist in Raineaux's prosecution in France. See the correspondence between Gallatin and Richelieu, and Adams, Gallatin, and Sheldon from January 31, 1817, to April 28, 1818, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 3–10 (1840).

> him with all the circumstances of the mutiny and murder. They afterwards unitedly charged him with being the principal projector and mover of the horrid conspiracy.[29]

Under Prussian law, according to diplomatic records, this identification, coupled with a preponderance of physical evidence, constituted proof of guilt; but without Stromer's confession, the law prevented execution or extradition. Stromer remained in Prussian custody, and his fate is unknown.

To Boston, the Hornet's *Nest*

Following their confrontations in Helsingør, Williams, Rog, White, Onion, Frederick, and Samberson boarded the *Hornet*, an American sloop-of-war captained by Commander George C. Read.[30] The men were accompanied on their voyage by John Murray Forbes; the ship set sail from Denmark on September 5, 1818. Due to its status as a military vessel and the notoriety of its passengers, the *Hornet* drew considerable attention in newspapers across the United States, and much speculation as well. In November, two months after the *Hornet* set sail, news of a potential sighting of the ship in the Chesapeake Bay spread throughout the maritime states. Upon debunking the rumor, newspapers began to speculate that the ship had been lost during a particularly harsh fall

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[29] John Murray Forbes, *Mr. Forbes to Mr. Adams, September 5, 1818*, letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 40–42 (1840).

[30] It was customary for criminals to be shipped across oceans on merchant vessels, as happened in this case with Nils Peterson. Saabye attempted to send Williams and Rog to the United States aboard the merchant vessel *Lady Gallatin*, but the captain refused to transport the men even under threat of sanction from Saabye. Ezra Allen, who captained the ship that carried Peterson from Sweden to Boston, originally protested as well. In both cases, the objection to carrying the men was apparently not logistical or financial—the United States would foot the bill for transporting the prisoners—but rather it stemmed from a general fear of pirates. It is almost as if the captains believed that piracy was contagious. See Hans Rudolph Saabye, *Mr. Saabye to the Secretary of State, February 2, 1817,* letter, and the various letters sent by Mr. Murray and Mr. Allen on August 29 and 30, 1817, collected in H.R. Doc. No. 199, 26th Cong., 1st Sess., at 24–45, 19–22 (1840).

season in the northern Atlantic.[31] Nevertheless, after nearly three months at sea, and after experiencing conditions that prompted "the most experienced seaman on board [to confess] that he had never met with so much bad weather in any one passage," the *Hornet* arrived in Boston on December 2, 1818.[32]

Upon disembarking, the six crew members of the *Plattsburgh* were delivered first to the US marshal in Boston and subjected to "an examination before the hon. John Davis," a federal circuit court judge for the district of Massachusetts. What occurred at this examination, or who exactly was examined, is not clear. At some point, Onion and Samberson were offered immunity in exchange for their testimony. Williams, Frederick, Rog, and White, in contrast, joined Peterson in Boston's jail as they awaited a grand jury hearing the following week.[33] The grand jury returned five indictments against the jailed men, but they were only formally arraigned on the indictment for murder of the *Plattsburgh*'s supercargo, Thomas Baynard, because his was the only murder for which there was an eyewitness. (Neither Samberson nor Onion was on deck when Yeiser or the captain was killed. Samberson, but not Onion, claimed to have witnessed Baynard's murder.) The federal court trial was set for December 28, 1818.[34]

The trial proceeded with few surprises from either side. The prosecution's argument relied on testimony from Onion and Samberson, along with Isaac McKim, George Read, and Captain De

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[31] The first available evidence of the false sighting can be found in "Shipping News," *Baltimore Patriot*, November 9, 1818. For two important articles dispelling the false sighting and fears that the *Hornet* had crashed, see "Lloyd's Lists," *Commercial Advertiser* (New York), November 16, 1818, AHN; "Hornet Sloop of War," *Columbian Centinel*, November 18, 1818, AHN.
[32] *Boston Daily Advertiser*, December 3, 1818, AHN.
[33] "Pirates," *Salem* (MA) *Gazette*, December 8, 1818, AHN.
[34] The indictment as it was read in court is recorded in *The Trial of John Williams*, 3–6. The expanded list of indictments was reported in newspapers, although no official grand jury documents have yet been found. It was typically claimed that the grand jury returned indictments for the murders of the three officers, the piracy of the *Plattsburgh*, and murder and piracy under the statute. See, for example, "Capital Trials," *Boston Daily Advertiser*, December 14, 1818, AHN.

La Roche, the man sent by McKim to recover the *Plattsburgh* in Norway. Because piracy jurisprudence does not distinguish between principal actors and accomplices, the prosecution only needed to show that Williams, Frederick, Rog, Peterson, and White were present and assisted in the crime that caused Baynard's death, rather than having to prove that each man directly participated in the murder. Based principally on Samberson's eyewitness account of Baynard's apparent death, the prosecution argued in the terms of the indictment that Williams, Frederick, Rog, Peterson, and White "not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil . . . with force and arms, upon the high seas, and out of the jurisdiction of any particular state . . . piratically and feloniously, willfully and of their malice aforethought did kill and murder, against the peace and dignity of the said United States of America, and the form of the Act of Congress of said United States."[35]

The defense could not, apparently, call any of the pirates as witnesses in their own defense, and because the trial happened so quickly, because the men were so far from their homes, and because of the itinerant nature of their maritime lives, no witnesses appeared on their behalf. Instead of providing exculpatory evidence, the defense attorneys each delivered a long series of arguments meant to attack the prosecution's case in several ways: first, they argued that because Baynard's body was never recovered, and because Samberson did not see him die, there was no reasonable proof that a murder had taken place; second, they argued that neither Samberson's nor Onion's testimonies could prove, beyond a reasonable doubt, that any of the accused had actually participated in the murder; and third, they argued that the state's witnesses were not credible, Onion because he was a coward and Samberson because he was black, and both men because they had

[35] *The Trial of John Williams*, 3; for the prosecution's case, see 6–25, 48–77.

been offered a pardon in exchange for their testimonies.[36] The defense consisted entirely of evidentiary interpretation and the technical nuance of legal doctrine, neither of which seems to have had much effect on the jury.[37]

Justice Joseph Story followed the closing statements with instructions to the twelve jurors for their deliberations. After an hour, the jury returned a guilty verdict for Williams, Frederick, Rog, and Peterson, and found White not guilty. The court adjourned until the next morning for sentencing. There, Story allowed each prisoner to provide justifications for sentencing mitigation, and each man spoke in turn. Story then addressed the prisoners, restating the heinousness of the crime, and recommending to each man sincere reflection upon his past deeds and true consideration of the Christian religion. He then pronounced the sentence: John Williams, John Rog, Francis Frederick, and Nils Peterson were to be executed by hanging between the hours of 11:00 A.M. and 2:00 P.M. on January 21, 1819.[38]

Suspensions

After sentencing, the *Plattsburgh* pirates returned to jail, where they were to await their execution. Elsewhere in Boston, several members of the city's Congregationalist community penned a letter to President James Monroe petitioning for respite on the pirates' behalf, although without

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[36] The racist comments against Samberson came from Mr. Hooper, who said, "Do you believe that part of the black man's' story, in which he says, that he was dragged, and compelled to come on deck, just in time to witness the casting of the body of Baynard into the sea; and fearful, and suspicious of him, as he says they were, and in his station, do you believe they made him the confidant of their secrets? . . . He is an uninstructed man, of the lowest class in society; ignorant probably in a degree of the nature of an oath; swearing, as he understand, for his life; a story which he had ample time to agree upon with the mate [Onion]." Ibid., 34.
[37] For the defense's case, see ibid., 25–48.
[38] Ibid., 91.

the convicted men's knowledge or consent.[39] John Quincy Adams, who, as Secretary of State, had been involved with the diplomatic negotiations on the pirate's extraditions, recorded notes of a January 10 meeting in which Monroe discussed the reprieve with his cabinet:

> There are four Pirates and murderers, condemned to death, by sentence of the U.S. Circuit Court at Boston. They were to be executed on the twenty first of this month; several clergymen have written a letter to The President urgently intreating him to respite their execution, because they are unusually hardened in crime; and in order to bring them to a sense of their condition, and prepare them for death. The district attorney, G. Blake, with the assent of the judges, Story and J. Davis, wrote to the President that there was not a single circumstance in their case, which could recommend them to mercy. He [Monroe] had directed a reprieve for sixty days, which he afterwards shortened to four weeks.[40]

As with every event in the *Plattsburgh*'s voyage, Monroe's reprieve elicited considerable public interest. This was due in part to its exceptional nature, but also because many in New England had been looking forward to the spectacle of the execution itself. "The annunciation of this reprieve," the *Providence Patriot* wrote, "will not have been timely, however, to restrain the eager curiosity of many in our vicinity who, we learn, have hastened to Boston, to witness the execution of four of their fellow-men."[41]

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[39] Daniel Preston's catalogue of Monroe's correspondence lists a letter requesting the reprieve received by Monroe dated January 5, 1819. The authors listed are Joshua Huntington, Sereno Edwards Dwight, Samuel Hubbard, Jeremiah Everts, John E. Tyler, E. Peterson, and Samuel Armstrong. See Daniel Preston, *A Comprehensive Catalogue of the Correspondence and Papers of James Monroe*, vol. 2 (Westport, CT: Greenwood Press, 2001), 746.

[40] John Quincy Adams, Diary 31, entry for January 10, 1819, p. 10, in *John Quincy Adams Diary: An Electronic Archive,* Massachusetts Historical Society, http://www.masshist.org/jqadiaries. Monroe's letter granting the reprieve is dated January 12, 1819. See Preston, *Comprehensive Catalogue,* 747.

[41] *Providence* (RI) *Patriot*, January 20, 1819, AHN.

When the day of their execution arrived, the pirates were dressed in "blue jackets and trousers; they wore hats, with pendant ribbons. At a quarter after 11, they were placed in a wagon . . . they wore outside garments to protect them from the weather, which was cold."[42] The wagon, flanked by police, marshals, clergy, and more, proceeded from the US marshal's office to the scaffold erected on Boston Neck. The deputy marshal delivered a short speech in which he entreated the crowd to silence, read the warrant for execution, and explained the seriousness and solemnity of the event. Father Philip Lariscy, a Roman Catholic priest who had ministered to the pirates during their confinement, administered the last rites, blessing each man and embracing him.[43] The pirates ascended the scaffold. White bags were placed over their heads, and nooses were tied around their necks. Each man was blessed by Father Lariscy a final time before the priest descended from the platform.

A report described the scene: "The scaffold was let down, and left them suspended[.] Williams died without the least movement[,] the others, particularly Frederick, died Hard. After hanging some time the halter which held Rog gave way and he came to the floor, but he was perfectly senseless.—the halter was replaced, and in less than three minutes he was against suspended, and struggled considerably."[44] Several minutes passed, with the lifeless bodies on display in the harsh February cold, until the deputy marshal read a final charge from the warrant omitted

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[42] *A Concise Sketch of the Execution of John Williams, Peter Peterson (Alias Nils Peterson,) Francis Frederick, and John P. Rog [. . .]* (Boston: N. Coverly, 1819), 7.

[43] Father Lariscy's name is variously spelled in newspaper and pamphlet publications about the execution, but it appears from Church records that this is the proper spelling. See John Gilmary Shea, *History of the Catholic Church in the United States from the Division of the Diocese of Baltimore, 1808, and Death of Archbishop Carroll, 1815, to the Fifth Provincial Council of Baltimore, 1843*, vol. 3 (New York: D. H. McBride and Co., 1890), 127.

[44] *Concise Sketch of the Execution*, 11–12. The inserted punctuation corresponds to line breaks in the original that help readers make sense of the text.

earlier. It offered the pirates' bodies to any surgeon for dissection; several stepped forward to claim them.

Despite the reprieve's delay, an enormous crowd assembled to watch the killing of John Williams, John Rog, Nils Peterson, and Francis Frederick by the government of the United States. One writer estimated the size of the crowd to be more than twenty thousand.[45] The execution was a public performance of the law that served to reinforce state power.[46] It was also an occasion for public moralizing. A broadside purporting to contain the "dying declaration of the pirates" also provided a "solemn address to the public," in which the author cautioned parents and children that the "seeds of violence and immorality, which lead to crime and ignominy, are generally sown at the early period of life," speaking to the necessity of virtuous education.[47] Several thousand copies of a pamphlet prepared by the Boston Society for the Moral and Religious Instruction of the Poor were distributed at the execution, calling for readers to reflect on the criminals, "the operation of the laws," and the interests of the community, children, and themselves.[48] Still other publications chose to defend public executions as an essential part of a healthy civil society.[49] The execution of the

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[45] A.B., "The Execution of the Pirates," *The Panoplist, and Missionary Herald*, March 1819, APS.
[46] Dwight Conquergood, "Lethal Theatre: Performance, Punishment, and the Death Penalty," *Theatre Journal* 54 (2002): 339–67; Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (Oxford: Oxford University Press, 1989).
[47] *Dying Declaration of the Pirates,* undated broadside, American Antiquarian Society. This broadside, which includes black mourning borders, may have been published by Nathaniel Coverly, who published several texts on the *Plattsburgh* pirates. The woodcut depicting four prisoners on the gallows that adorns the top of this broadside also appears in Coverly's *Concise Sketch of the Execution*.
[48] *An Address to the Spectator of the Awful Execution in Boston, February 18, 1819* (Boston: U. Crocker, Printer, No. 50, Cornhill, 1819), American Antiquarian Society. Of the pamphlet, one writer claimed, "Three thousand copies were dispersed, and many more called for. It was solemn, tender, judicious, and impressive." It is worth mentioning that this claim appeared in a publication edited by Jeremiah Everts, one of the men who signed the petition for reprieve. Several of the signatories either founded or were active in the society for which the pamphlet was published. A.B., "Execution of the Pirates."
[49] "The Execution: Reflections," *New-England Galaxy and Masonic Magazine*, February 26, 1819, APS.

Plattsburgh pirates was thus a liminal event in which state-sanctioned biological death and the maintenance of a particular, qualified form of social life—the harmonious, penitent, and lawful one imagined in the broadsides and pamphlets—were fused.

Afterlives

The *Plattsburgh* affair did not die along with Williams, Rog, Peterson, and Frederick; indeed, its afterlives are varied. Nathaniel White, who escaped conviction for piracy and murder, was later convicted as an accessory-after-the-fact to the *Plattsburgh* piracy for receiving a share of the cargo of money. He was sentenced to two years in prison and a one-dollar fine, or about a day's wage for one of Boston's laborers in 1819.[50] As for the schooner, Isaac McKim sold it after recovering the ship from Europe. Under new ownership, the *Plattsburgh* was captured off the coast of Africa while on a slaving mission. In 1820, the new captain, Joseph Findley Smith, was tried in federal court in Boston, with many of the same judges and lawyers as in the original piracy case. He was found guilty of violating the 1818 Slave Trade Act, specifically for outfitting the *Plattsburgh* for the slave trade and participating in that trade himself.[51] Two decades later, John Quincy Adams requested copies of the diplomatic correspondence between the United States and European governments concerning the *Plattsburgh* pirates' extradition as part of his preparation to defend the Africans who had rebelled against the slavers aboard the *Amistad* at the US Supreme Court.[52]

With this history, it may seem unfair—or even incorrect—to call the *Plattsburgh* mutiny unremarkable. Indeed, in Henry St. Clair's *The United States Criminal Calendar; or, An Awful Warning to*

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[50] *Daily National Intelligencer*, June 14, 1819, NCN; Carroll D. Wright, *Comparative Wages, Prices, and Cost of Living* (Boston: Wright and Potter Printing Co., 1889), 46–151.
[51] "Slave Trade," *Niles' Weekly Register*, December 2, 1820, APS.
[52] John Quincy Adams, offering two resolutions, on March 23, 1840, 26th Cong., 1st. sess., *Congressional Globe,* vol. 8, p. 281.

the Youth of America (1835), the stories of the Plattsburgh pirates adorn the same pages as those of notorious Golden Age pirates like William Kidd, Samuel Bellamy, and William Fly.[53] But it is impossible to ignore the similarities between the events on the *Plattsburgh* and so many other pirate attacks throughout the nineteenth century. Even though the *Plattsburgh*'s fate was, in many ways, ordinary at this point in Atlantic history, the criminal case sparked considerably more interest in the public mind than did the vast majority of piracies. Perhaps this is due to Isaac McKim's prominence in public life, or to the significant and extensive diplomatic effort undertaken to render the prisoners to American custody, or to the pirates' choice of Catholicism over Protestant Christianity in puritanical Boston, or to simple happenstance. Whatever the reason, and there were likely many, the *Plattsburgh* pirates, their lives, and their deaths captured the attentions of thousands, not just at the spectacle of the execution but throughout the course of events that led to it. And it is precisely the scope and depth of this public interest that calls the attention of scholars today, in part because there exists a rich textual record, but more importantly because that record illustrates the significance of piracy in early nineteenth-century American public culture.

If nothing else, the *Plattsburgh* affair reveals the deep and multifarious entanglements between piracy and sovereignty in early American life. For example, the diplomatic correspondence between the United States and European governments concerning the pirates' extraditions illustrates how strongly Westphalian conceptions of sovereignty—that is, the exclusive right to decide on the law and its application within a given nation-state—determined the practical implementation of pirate law. Denmark and Sweden did not see their own connections to the *Plattsburgh* affair as significant enough to warrant refusing American extradition, whereas Prussia and France believed that they

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[53] Henry St. Clair, *The United States Criminal Calendar; or, An Awful Warning to the Youth of America; Being an Account of the Most Horrid Murders, Piracies, Highway Robberies, &c. &c.* (Boston: Charles Gaylord, 1835), 92–114.

should be responsible for trying and punishing their own citizens. Those same documents help us understand how the United States maintained its jurisdiction outside of its domestic territory through consulates and embassies. As much as the case draws our attention to the question of the sovereign decision, then, it also serves as a practical example of the complex relationship between space and the intensities of jurisdictional power discussed in part 1. The diplomatic issues surrounding the *Plattsburgh* piracy were not the focus of much public attention as the case unfolded in the press. Thus, to tell the story of these pirates in detail—to bring together the public spectacle of their crime, trial, and execution and the quiet diplomacy that allowed the judiciary to function—is to reveal that the sovereign imaginary of the case flows through the public square as easily as it does through the offices of diplomats or courtrooms or print shops.

Likewise, the debate over Monroe's reprieve occupied Boston's public mind. The account of the *Plattsburgh* case provides important context for the analysis of that debate, because it reveals why there was so much concern over piracy in the first place, and why the specific circumstances of these pirates would lead to a petition for reprieve. In the next section, I analyze one announcement of the reprieve popular in New England newspapers, which describes the reprieve in terms similar to those in which Carl Schmitt describes the sovereign decision. Through this analysis, I show that there are important differences between his theoretical model of sovereignty and the popular understanding of the prerogative power in 1819 Boston, differences specific to the American constitutionalist system.

Two Warrants, Two Laws: The Normal Operation of Juridical Order

News of Monroe's reprieve broke in Boston's papers on January 18, only one day after the pirates learned of it themselves. The *Independent Chronicle and Boston Patriot*, one of the city's most

prominent newspapers, published an announcement two days later, which was reprinted extensively in New England and throughout the United States over the next several weeks. It read, in its entirety:

> On Saturday last, the Marshal of this district, performed the solemn office of reading to the unfortunate prisoners, *Williams*, *Rog*, *Peterson*, and *Frederick*, his warrant for their execution. The demeanor of the prisoners on this solemn occasion, was becoming men in their situation.
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> On Sunday, about noon, the Marshal visited them again, and read the President's warrant of reprieve to the 18th of February. The prisoners at first did not appear to understand the nature of the warrant; but on its being explained they remarked in substance, that they were entirely at the disposal of the government, and *submitted* with much resignation; that neither they nor their counsel had prayed for the suspension of the sentence; that they hoped they were, and should be prepared for the important event; that they had anxiously looked forward to the period, when they should expiate by their forfeited lives, their offences against society; when their sufferings in this life should cease, and their hopes of pardon from GOD, founded on contrition and repentance, through the mediation of their BLESSED REDEEMER, would be realized.[54]

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[54] *Independent Chronicle and Boston Patriot*, January 20, 1819, AHN. The quality of the scanned version of the *Chronicle*'s announcement in the *America's Historical Newspapers* database is of poor quality, and several words appear either fully or partially italicized. Moreover, this typographical emphasis is inconsistently reproduced in many newspapers, with some fully or partially omitting the italics and small capitals. However, several texts maintain the italics on the four pirates' names and the word "submitted," along with the small capitals in GOD and BLESSED REDEEMER. Cf. *Columbian Centinel* (Boston), January 20, 1819, AHN; *American Advocate and Kennebec Advertiser* (Hallowell, ME), January 23, 1819, AHN; *Connecticut Courant* (Hartford), January 26, 1819, AHN; and *Baltimore Patriot*, January 26, 1819, AHN.

In addition to being one of the most widely circulated texts about the *Plattsburgh* pirates, this short article provides significant insight into the ways in which the reprieve was received and understood by those who wrote in Boston's newspapers. In short, the *Chronicle*'s announcement renders the reprieve as an interruption in the normal operation of juridical order. By this phrase "juridical order," I mean the sum of practices, expectations, beliefs, knowledge, forces, and institutions that compose law as a mechanical and normative practice within social life. I have chosen this phrase, rather than the more familiar "rule of law," for two reasons: first, to suggest that what the reprieve interrupts is not simply an abstract principle but also a culturally grounded and material phenomenon; and second, to foreground the procedural dimensions, internal mechanisms, and distributions of force within the law that lend themselves to interruption. Thus, the aim of my analysis is first to determine what the normal operation of juridical order is in the text, and then to determine how the text depicts the reprieve as an interruption of that order.

The reception of the reprieve as an interruption was nearly universal in the debate over Monroe's action. But the *Chronicle* developed the reception in a unique way. The *Boston Commercial Gazette*'s announcement simply declared the existence of the reprieve: "The Pirates who had been condemned to be hanged on the 21st inst. have been, we understand, reprieved to the 18th February."[55] The *Chronicle*, in contrast, chose to style the announcement as a narrative, specifically a narrative of the reprieve's announcement to the pirates. Narratives, according to Walter Fisher, rely on a reader's prior experience to make sense of a story as such, and as a consequence, the propositional content of a narrative text is subsumed by the ideological elements by a which a reader produces narrative coherence.[56] A sense of the normal operation of juridical order is one such

[55] *Boston Commercial Gazette*, January 18, 1819, AHN.
[56] Walter R. Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument," *Communication Monographs* 51 (1984): 1–22.

ideological element, which is the principal reason to analyze the *Chronicle*'s announcement in particular despite the ubiquity of the interruptive reception.

Another formal element of the text guides my analysis here: namely, its dyadic structure. Although Williams, Frederick, Peterson, and Rog are individually mentioned by name at the start of the text, the four men are more often referred to as "the prisoners." "Prisoners" in this case works as a mass noun rather than a plural one because the men never act separately from one another. Aside from listing their names, the *Chronicle* treats the men as singular: their actions, conduct, speech, cognition, sentiment, desire, and fate are all rendered identical. By compressing the actors within the scene, the announcement becomes structured in a series of dyads—two sentences in two paragraphs, two actors in each paragraph, two warrants contrasted between paragraphs, two days represented in the text, and so on. The rhetorical effect of the structure is to invite comparison. My analysis follows this dyadic structure, beginning with the first sentence of the first paragraph.

First Paragraph: The Normal

The first paragraph of the *Chronicle*'s announcement depicts a scene of reading. It begins: "On Saturday last, the Marshal of this district, performed the solemn office of reading to the unfortunate prisoners . . . his warrant for their execution." The reader is placed in the midst of a story already in progress. Four prisoners have been convicted of a crime, and they await their death at the hands of the state. The initial narrative temporality is one of continuity, in which a crime, trial, sentence, and jailing have led to the textual present, a present which will lead to an explicit future, an execution. There is, however, a second sense of time in the sentence; repetition.[57] The word "office,"

[57] For a general overview of repetition as a mode of time, see Gilles Deleuze, *Difference and Repetition*, trans. Paul Patton (New York: Columbia University Press, 1994).

used to describe the marshal's actions, suggests that reading warrants to prisoners was a routine part of his occupation. When combined, continuity and repetition create a process, and a process in turn provides a sense of the normal, of a predictable sequence of action and effect. Because the *Chronicle* offers no explanatory annotation as the text narrates the process, it was likely one with which the readers would be familiar. Historical analyses of early American legal culture bear out this assumption.[58]

There is a second repetition in the marshal's oratorical act: "reading . . . his warrant." The warrant was prepared by a judge for the marshal, and it ordered the execution of the prisoners. By speaking the judge's words, the marshal performatively blends the judicial and executive domains of governance. This combination is seamless within the text, but it is made visible if one analyzes the situation as a speech act. The text of the warrant is performative in J. L. Austin's sense because it empowers and compels the marshal to execute the prisoners. However, reading the warrant aloud to the prisoners is constative, because it informs the men of the text's perlocutionary force: the warrant is a commandment that compels the marshal to act.[59] The analytic distinction between the

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[58] It was customary for the US marshal to read the warrant before executing a convicted criminal in federal cases. Most often this would happen as part of the execution ritual, but it is reasonable to conclude that it could happen in private as well. For a historical overview of execution rituals in the United States, and legal culture more broadly in the early nineteenth century, see Conquergood, "Lethal Theatre"; Masur, *Rites of Execution*; Daniel A. Cohen, *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1676–1860* (Oxford: Oxford University Press, 1993); Steven Robert Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge: Cambridge University Press, 2010).

[59] A similar difference can be seen using one of Austin's examples of performative speech. An officiant proclaiming two people to be married is performative, since the speech literally marries them. However, if the married couple were to describe the ceremony later, their repetition of the officiant's proclamation would be constative since it merely informs and does not *do* anything in the second instance. J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmson and Marina Sbisà, 2nd ed. (Cambridge, MA: Harvard University Press, 1975).

performative text and the constative reading is collapsed in the *Chronicle*'s narrative, which in turn sutures together the judiciary and the executive.[60]

The second sentence builds upon this interpretation. "The demeanor of the prisoners on this solemn occasion," the *Chronicle* writes, "was becoming men in their situation." This assessment requires a conceptual separation between an ideal or expected demeanor and an actual one, the latter of which is judged by its similarity to the former—judged as "becoming" in this case. The expectation in turn requires foreknowledge of the situation, or at least the cultural resources to imagine it, which suggests the normalcy of the scene. In other circumstances, the word "situation" might be ambiguous because it could refer either to the prisoners' general situation of criminal conviction or to their specific situation of listening to the marshal. In this case, however, the general and the specific are the same. The prisoners are listening to the reading of a document whose commandment produces their fate. Because the prisoners' demeanor fits the broader expectations entailed by the scene, it becomes a part of the law's normal operation differently than the marshal's reading. Instead of the functional "office," this sentence sets a scene of subjection and acceptance. Like the marshal, the law acts through the prisoners, but it also acts over and against them. Thus, as Michel Foucault might say, the becoming demeanor of the prisoners is evidence that they had internalized the law's judgment against them, its commandment of their death, and thus the effective force of the law as such.[61]

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[60] The structure of the marshal's oratory is thus not unlike a linguistic shifter, or the distinction between the enunciator and the enunciated in Lacanian psychoanalysis. See Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, ed. Jacques-Alain Miller, trans. Alan Sheridan (New York: Norton, 1978), 138–42.

[61] Foucault identifies the guilty's assumption of guilt as the desired outcome of disciplinary juridical systems, which he contrasts to other outcomes (death, usually) under sovereign juridical systems. We might say, provisionally, that the expected demeanor of the prisoners represents an overlap in sovereign and disciplinary regimes, a point that will become crucial later in the chapter. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books,

The repetition of "solemn" in both sentences ties them together affectively and descriptively, uniting the situation. When read as a whole, the paragraph indicates that the normal operation of juridical order involves three major elements: an institutional process that works seamlessly through different domains of governance; the acceptance of that process and its outcomes by its subjects; and the existence of a public capable of passing judgment on everything. The last of these three elements is evidenced not only by the *Chronicle*'s explicit judgment of the prisoner's demeanor but also by the fact that the announcement was printed and reprinted throughout the nation.[62]

Second Paragraph: The Interruption

Like the first, the second paragraph opens to a scene of reading: "On Sunday, about noon, the Marshal visited them [the prisoners] again, and read the President's warrant of reprieve to the 18th of February." Although the opening sentences of the two paragraphs are similar in form and substance, there is an important difference between them. In the first, the marshal reads *his* warrant for *their* (the prisoners') execution. In the second paragraph, the marshal reads *the President's* warrant of reprieve. Although the difference is subtle, it achieves something quite significant.

1995). It is important to note, however, that behaving in a manner "becoming their situation" was hardly the only response available to criminals convicted in the United States during this period. Caleb Smith, for instance, discusses the "cursed" rhetorics of criminals who condemned the law rather than praised it. Smith, *Oracle and the Curse*, 96–150.

[62] The public judgment of the prisoners, when combined with the taken-for-granted knowledge necessary to understand the scene itself, constitutes a sort of second persona for the text. The implied reader is someone for whom the normal operation of juridical order is known and normalized. See Edwin Black, "The Second Persona," *Quarterly Journal of Speech* 56 (1970): 109–19. For a discussion on the role of newspaper culture in the formation of a public sphere in the United States, see Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, MA: Harvard University Press, 1990). See also Benedict Anderson, *Imagined Communities*, rev. ed. (New York: Verso, 2006).

In the first paragraph, the possessive pronouns give the marshal and the prisoners some degree of ownership over the warrant for execution and its consequences. Recall that the judge, whose authority is the basis for the warrant's performative function, is absent in the text. His role is sutured to the marshal's official, executive duty in the reading of the warrant. Likewise, the prisoners' subjection to the law, evidenced by their becoming behavior, makes them, too, a part of the juridical order. The ownership of the warrant by all five men makes them part of that order's normal operation.

The second paragraph's first sentence does not repeat this effect. To be sure, the marshal's reading of the second warrant is both performative and constative—it literally reprieves the pirates and announces the reprieve simultaneously. However, because the president is given ownership of the text, the performative and constative qualities do not collapse into one another. They remain separate. This separation is true for the prisoners as well. It is not *their* reprieve as it was *their* execution. The text isolates the president; he is set apart from the subjects who were part of the law's normal operation, which figures the reprieves as an intervention into an otherwise ongoing process and the president as an interloper in an otherwise normal scene.

Isolating the president, which is a rhetorical effect in the first sentence, becomes part of the narrative itself in the second. Not only are the prisoners distanced from the reprieve personally, but they explicitly deny any part in its origin ("that neither they nor their counsel had prayed for the suspension of the sentence"). Before this denial, however, the *Chronicle* foregrounds the prisoners' confusion: "The prisoners at first did not appear to understand the nature of the warrant." This confusion stands in stark contrast to the clarity and smoothness of the first paragraph, where no explanation of events is required. Foregrounding this confusion, which may have been shared by readers unfamiliar with the prerogative power, makes the reprieve appear abnormal. It is figured as

an intervention that the prisoners did not understand into a process that they did, and it is an intervention for which they did not ask.

Despite being distanced from the reprieve, the prisoners acknowledge its force ("[the prisoners] remarked in substance, that they were entirely at the disposal of the government"). But this acknowledgment is distinct from acceptance, which would be the first step toward incorporating the reprieve into the normal operation of juridical order. Instead, the prisoners disavow the reprieve's effect ("and *submitted* with much resignation"). "Submitted" is followed by an extended critique of the reprieve by the pirates. In essence, they argue that the reprieve does them violence by delaying their salvation. The men see their execution as the only path to redemption, hence their "anxious" desire for death itself. Here the *Chronicle* makes explicit the normative core of the juridical order. Not only must the execution happen because it typically does; it *ought* to happen because it would guarantee an end to "sufferings in this life," provide redemption for the men's "offenses against society," and offer them a chance at a "pardon from God." The execution, which is itself part of the narrative continuity of normal law, becomes a critical act whose effects are manifest at individual, social, and cosmic levels. It is here that the nature of the reprieve as an interruption is realized in full. Formally, the reprieve suspends the judge's sentence, which was expressed in the warrant for execution, for nearly one month. The critique of the reprieve is thus a critique of time's suspension, which is neither repetition nor continuity, but dilation. The previously contracting gap between the prisoners' present and their end is now, for the first time, widened. The prisoners exist within this dilated interval, whose passage is filled with anxiety, suffering, and denial.

Taken as a whole, the second paragraph suggests that the reprieve is at best not a part of the normal operation of juridical order, and is at worst a total disruption of it. Not only are the law's formerly seamless processes temporally disrupted, but that disruption threatens the effects of the

law itself. If what the *Chronicle* reported is a true account, then the prisoners' critique confirms their internalization of the law's effective force, which in the second paragraph takes the form of desiring death.[63]

The Sovereign Order

The *Chronicle*'s announcement closes by relaying that Williams, Rog, Peterson, and Frederick looked forward to their execution in part because they hoped for a "pardon from God." Although claims such as this were standard in execution speeches and sermons of the early nineteenth century, it is difficult to read this invocation of divine clemency as a mere commonplace. The core subject of the announcement is the use of the prerogative power, and thus the reference to the divine invites a direct comparison between the president's use of it and God's. Attending to this comparison becomes a recurring theme in the debate over the reprieve in Boston's newspapers, as authors openly discussed whether American law was grounded in divine law or in the drive to maintain social order. In cases of clemency, the powers of the state and the divine are formally identical, with their primary difference being scope. The comparison brings to mind the early modern formulation in which the political right of kings flowed directly from heaven, and the *Chronicle*'s juxtaposition of Monroe's and God's use of the pardoning power in essence raised the question of sovereignty for Boston's news-reading public.

In *Political Theology*, Schmitt writes that the concepts composing modern theories of the state are the secularized residues of older theological concepts. In the case of the sovereign decision, for

[63] One might suspect that the *Chronicle* chose to render the story this way as an implicit critique of the reprieve, which may very well be true. However, there is other corroborating evidence to suggest that the prisoners experienced deep ambivalence about the reprieve and regarded it as "an unhappy condition." See Williams et al., *Lives and Confessions*, 21.

example, he writes: "The [sovereign] exception in jurisprudence is analogous to the miracle in theology."[64] The narrative structure of the *Chronicle*'s announcement emphasizes these miraculous qualities. In the first paragraph, the law is undergoing its normal process, and the prisoners are being made ready for their execution as the sentencing judge had decreed. In the second paragraph, the reprieve appears as if *ex nihilo*, confusing the prisoners and disrupting the rituals of justice for which they had been prepared just the day before. President Monroe takes on an almost spectral quality in the announcement, his voice echoing through the text of the reprieve, and through the voice of the marshal who reads it as if possessed by the spirit of the chief magistrate. Distinguishing the president's juridical agency from the normal order produces a fundamental division between domains of state authority. Because the reprieve eclipses judicial authority, at least to some degree, it transforms the distribution of state authority into a hierarchy. At the top, the president wields what Jean Bodin calls "yet another sovereign prerogative, namely, the right of judging in the last instance."[65] Readers are left with an image of a singular sovereign whose miraculous intervention into the legal process has created an exception to the normal operation of juridical order.

By the *Chronicle*'s account, however, the reprieve seems anything but miraculous. The prisoners' critique of the reprieve would suggest that Monroe's intervention was unwelcome. In that sense, the announcement functions as the first critical entry in the debate, and the concern it displays for the prisoners' condition is an important precursor for some of the arguments that would follow. In the next section, I argue that the interruptive qualities of the reprieve transcend political divisions between those who supported and those who condemned it. I argue that the differences between

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[64] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 36.
[65] Jean Bodin, *On Sovereignty*, ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 67.

the two sides of the debate are evidence of a uniquely American attitude toward the sovereign decision precisely because they constitute a debate over the role of sovereignty in liberal democratic society.

The Dispositional Difference in Boston's Public Mind

The debate in Boston's newspapers over Monroe's reprieve began soon after the printed announcement, which suggests that the issue had been percolating in the public mind for some time already. In the month that followed, more than twenty articles appeared in newspapers and periodicals printed in and around Boston that offered either a critique of or support for the reprieve (for a list, see Appendix A). Some of these articles are monologues, in which an author offers an opinion on the president's use of the prerogative power. Others respond directly to previously published pieces, and in one case two authors engage in a back-and-forth exchange over several weeks. As was customary in the period, most correspondence to the editor was signed with a pseudonym or initials; thus, although one might speculate about identities, it is impossible to identify from the current archival assemblage whether the articles were published by specific persons or specific types of persons. I found more articles critical of the reprieve than supportive of it, although the supportive articles tend to be longer. Some texts strike a more ambivalent tone than others, especially when assessing the motives of the president and the reprieve's petitions, but each text makes a clear judgment for or against the reprieve itself. As New Hampshire's *Concord Observer* noted, "The publick voice was generally opposed [to the reprieve]."[66]

There is considerable argumentative diversity throughout the debate. The authors had varying ideas about and investments in many aspects of social life, from religion and law to

[66] "Reprieve of the Pirates," *Concord* (NH) *Observer*, February 1, 1819, AHN.

education and commerce. Despite this diversity, the debate coheres around two critical issues: (1) how the decisions to petition for and use the prerogative power were and ought to be made; and (2) various judgments of the reprieve as a formal legal act. This is a delicate distinction, which hinges on the analytic difference between the decision-making process and the effects of that decision. It was not uncommon for authors to treat these two as separate issues, condemning the reprieve while praising Monroe's temperament or wisdom. Other authors only explicitly discuss one of the two issues, addressing the other enthymematically. Regardless, the focus on the decision and its effects as distinct objects illustrates a deep concern with how public decisions are and ought to be reached, especially as they relate to the law, which is par excellence a concern over sovereignty.

In this section, I analyze the broad debate over Monroe's reprieve in Boston's newspapers. I begin by analyzing the various judgments that authors made about the reprieve and its effects, which I argue reveal two important themes in the debate: the distinctions between public and private and between the secular and the religious. Next, I analyze the prevailing arguments concerning how decisions for the use of the prerogative power ought to be made, especially in the context of the public/private and secular/religious binaries. Finally, I argue that the different attitudes toward the reprieve expressed in the debate should not be understood as mere political differences. Rather, when they are analyzed in the context of the reprieve's reception as an interruption, they reveal fundamental dispositional differences regarding the sovereign decision in nineteenth-century Boston.

Justifying Time

Critiques of the reprieve are united by a common position: the pirates ought to have died on January 21, 1819, the date for execution set by the trial court. However, they justify this position in

different ways. The *New-England Galaxy*, for example, echoes the *Chronicle*'s announcement, arguing: "Instead of being a mercy to the prisoners, as it was undoubtedly intended, it [the reprieve] is in fact a protraction of misery. From long imprisonment they have become sick of life," so sick that they desire execution.[67] Because the *Galaxy* mentions the explicit cause of misery, it is difficult to read this passage as a rhetorical commonplace of nineteenth-century crime writing (as one might do with the *Chronicle*'s claim that the execution was the time when the pirates' "sufferings in this life should cease"). This claim is particularly interesting because it is the only case in which opposition to the reprieve is expressed in terms unambiguously sympathetic to Williams, Rog, Peterson, and Frederick; in all others, the men are rendered monstrous or are obliterated entirely in favor of an abstract figural pirate. For example, writing under the pseudonym Justice, an author in the *Boston Commercial Gazette* argues that considerations of mercy cannot justify the reprieve: "I would ask again, if when the victims of these monsters pled for mercy, was it granted to *them*? No—they cast a deaf ear on their cries and petitions for mercy—they hurried them out of the world without a moment to make their peace with God . . . [the petitioners] ought to have remembered, that *mercy* to these criminals, is *cruelty* to society, and ought not go before Justice."[68] Although these two articles depict the pirates in opposite terms—one humanized and the other monstrous—the texts arrive at the same injunction: the pirates must die, and they must die now.

The critiques by Justice and the *Galaxy* are specific to the circumstances of the *Plattsburgh* pirates, but others expressed concern over the wider effects of the reprieve. For example, a letter to the editor of the *Chronicle* suggests that the pardoning power is "dangerous to the *majesty of the laws*," noting that its use "in this case may prevent in future the *grace* of the Executive, when a short

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[67] "Reprieve of the Pirates," *New-England Galaxy and Masonic Magazine*, January 22, 1819, APS.
[68] Justice, "Communication," *Boston Commercial Gazette*, January 21, 1819, AHN.

reprieve may be a *mercy*."[69] In a letter published in the *New-England Palladium*, an author worries that the reprieve presaged a full pardon:

> Can it be, that a few individuals, are so tender hearted, that they would rather than witness a public execution, effect the enlargement of the bloody and remorseless savages who had merited ignominious death, and thereby turn them loose to prey upon Society, *"and damn themselves the deeper?"* For if not ultimately to obtain their pardon, what is the motive for prolonging their existence?[70]

What is at stake here is not the promise or curse of sympathy to the pirates but rather a threat to the social safety provided by law, a law that had been circumvented materially and ideologically by the reprieve. The *Dedham Gazette* made a similar argument specific to the circumstances of maritime labor. The author feared that "hundreds of seamen" would leave Boston believing that the *Plattsburgh* pirates would receive a pardon, which would increase the likelihood of another mutiny: "And thus the salutary effect of prompt execution of justice has been lost, and a prospect of impunity held out to many, whose fear only will restrain them from deeds, which they have at this time such great temptations and facilities to perpetrate."[71]

Supporters of the reprieve dismissed many of these concerns as ridiculous. For example, on the threat of a pardon, an author writing under the pseudonym Mercy wrote the following in the *Palladium*: "*Not a thought was harboured, for a moment, favorable to a final pardon of the Criminals.*—No—

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[69] *Independent Chronicle and Boston Patriot*, January 27, 1819, AHN.
[70] Justice, "Communication," *New-England Palladium*, January 19, 1819, AHN. Note that there is no definite evidence that this Justice is the same author as the Justice who published in the *Gazette* on the twenty-first. That said, it is likely that the two are the same. The *Gazette* printed an article on February 1 in which Justice responds to Mercy's rejoinder to the *Palladium* article cited here. See Justice, "Communication," *Boston Commercial Gazette*, February 1, 1819, AHN.
[71] *Dedham* (MA) *Gazette*, February 5, 1819, AHN.

such a hope would have been as absurd, as it would have been fruitless."[72] In general, supporters of the reprieve offered the same justifications for it as had the authors of the original petition to President Monroe. The pirates, they argued, were particularly "hardened in crime" and needed additional time to repent, convert, and otherwise prepare themselves religiously for death. An article in reprieve petitioner Jeremiah Evert's *Panoplist, and Missionary Herald* went so far as to suggest that clemency was necessary to give time for Protestant ministers to visit the pirates, because the four men had failed to "derive any proper knowledge of the Gospel" from Father Lariscy's Catholic ministrations.[73] Although anti-Catholic sentiment was explicit in the texts circulated at the execution, aside from the *Panoplist* article, it was more commonly an enthymeme in the newspaper debate. What mattered most to supporters is preparation for death, and thus their dominant justification for the reprieve is both religious and sympathetic. As one author, writing under the pseudonym Hope, suggests in the *Gazette*: "But shall we not pity them [the prisoners] and do all within our power, with a view to produce upon their hearts true contrition before God? However deep and aggravated may have been their guilt, they are yet within reach of divine mercy."[74]

Two major themes arise from this comparison of justifications for the reprieve. First, clemency is a point of contact between two different apprehensions of everyday life: the personal and the public. This division does not fall neatly along political lines, since critics and supporters articulate their positions in both registers. Second, the debate is also a point of contact between

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[72] Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN.
[73] A.B., "The Execution of the Pirates," *The Panoplist, and Missionary Herald*, March 1819, APS. It could be interesting to read the supporters' articles as attempts to link a nascent evangelical Christian identity to sovereignty by way of anti-Catholicism. For a discussion of the role of anti-Catholic sentiment in constituting Protestant ideology in the antebellum United States, see Jenny Franchot, *Roads to Rome: The Antebellum Protestant Encounter with Catholicism* (Berkeley: University of California Press, 1994).
[74] Hope, *Boston Commercial Gazette*, January 28, 1819, AHN.

secular and religious sociologies. Although secular and religious rhetorics abound on both sides, it is clear that supporters of the reprieve gravitate toward religious terms and that critics favor secular ones. These themes provide a frame for analyzing the more substantive portion of the debate, which focuses on how decisions to use the prerogative power ought to be made.

Deciding Death

The *Essex Register*'s January 20 article on the reprieve states: "We excuse the President from any blame. He is wise enough not to be deceived twice. We excuse the men who have done the thing," that is, petition for the reprieve. The article continues: "If it be artful or otherwise, too great indulgence has been shewn to that overweening pride which the men have indulged, who ought to know its dangers. When men describe the whole race in the humblest degradation, and refuse to the laws the safety of the State, we may not depend much on their judgment, and we may suffer their folly."[75] Preceding this passage, the *Register* quotes at length from an article in the *Boston Daily Advertiser*, which claims that the petitioners for the reprieve had not met the pirates and thus could not "be acquainted with their conduct, character, and state of mind."[76] We ought to read the *Register*'s critique, then, as fundamentally epistemological: it is a critique of those who act upon essentialist presuppositions about human nature rather than contextually derived evidence specific to a situation.

The *New-England Galaxy*, which quotes the *Register* with approval, explicitly identifies this epistemology as religious:

[75] *Essex Register*, January 20, 1819. The *Register* was published in Salem, Massachusetts.
[76] As quoted in ibid. For the original, see *Boston Daily Advertiser*, January 18, 1819, AHN.

> There is no doubt that *he* [the president] acted from the best and purest of motives; and we would willingly believe that *they* [the petitioners] did also. But men are liable, and often willing, to be the dupes of self-deception; and indulge the impulse of feeling and the spirit of proselytism, where cooler reason would pause and ponder upon the consequences.[77]

The distinction between motive and judgment points toward an implicit difference between the two realms of social decision-making: the personal (motive) and the public (judgment). The former can be affective, passionate, and universal; the latter ought to be reasoned, deliberate, and contextual. What is at stake in both critiques is thus a normative claim about governance. Reasoned judgment, rather than non-reasoned motive, is the proper tool for evaluating possible and actual public action.[78] Indeed, even the structure of both arguments—first absolution, then critique—mirrors this political commitment. Just as public decisions ought not to be personal, so too is critique framed as abstract judgment rather than personal condemnation. The consequences of this form of decision-making, it would seem, are precisely those outlined above: motive over judgment imperils the security of society and the state.

Lurking below these critiques, then, is a common enthymeme: the failure of the normal operation of juridical order. For Justice, the reprieve is a slippery slope to a pardon; the *Dedham Gazette* claims that the petitioners "mistook or overlooked the true end and design of punishment," and the *Advertiser* laments that the request for clemency did not come from "the Court, the Jury,

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[77] "Reprieve of the Pirates," January 22, 1819.

[78] This critique is not confined to religious reason either. See Justice, "Communication," February 1, 1819. In a later article, the *Galaxy* continues to push the religious version of the critique, and it is important to note that this is the only article that explicitly critiques the president's choice. The author claims that Monroe "followed, to say the least, a very inconsiderate course which, in moments of more leisure, he may perhaps see cause to regret." The article proceeds to flesh out in more detail the critique made in the same paper a week prior. See "The Reprieve," *New-England Galaxy and Masonic Magazine*, January 29, 1819, APS.

Counsel for the government or the prisoners on trial, the Marshal of the District, the Prison Keeper," or any of the law's other metonymic figures who would "be acquainted with the conduct, character and state of mind of the prisoners." Even the interval of the reprieve undermines juridical order because potential pirates left port without seeing the law's force expressed through execution. As in the *Chronicle*'s announcement, these texts exhibit a general fear that the transposition of private motive over public judgment will damage, challenge, or undermine juridical order. The reprieve is, after all, "dangerous to the *majesty of the laws*."[79]

Supporters of the reprieve refused the dissociation between private motive and public judgment. Mercy, for example, argues that the combination of justice and mercy can only be realized through humility and thus implores readers to "cherish in our breasts the humble spirit of consideration of our own sins."[80] Hope, whose letter is published in the *Boston Commercial Gazette*, offers a similar request: "Now, let every man examine himself, and the more he discovers of the natural propensities in his own heart [to criminal behavior] . . . the more earnest he will be led to pray for himself and others, especially for those just launched into eternity." Indeed, Hope's argument rests on the similarities between pirates and the rest of humanity. In this view, the only thing stopping anyone and everyone from becoming a pirate is "the exercise of that grace [in the reprieve] which is adequate to the formation of a new heart in them as in us." For Hope, the decision to reprieve the pirates is required to provide them additional time to prepare for the moment when they would meet the "King of terrors" *and* to prepare the reflexive self for that event.[81]

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[79] Justice, "Communication,"; *Dedham Gazette*, February 5, 1819; *Boston Daily Advertiser*, January 18, 1819; *Independent Chronicle and Boston Patriot*, January 27, 1819.
[80] Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN.
[81] Hope, *Boston Commercial Gazette*, January 28, 1819, AHN.

In arguing that the pirates needed more time for reflection, Hope, Mercy, and the other supporters of the reprieve are making a tacit epistemological claim: they *know* what the pirates need. Mercy justifies this position through a long allegory about a man walking blindly toward a cliff who insists that he will be fine while refusing the help of someone who knows that the cliff is there.[82] The allegory implies that Mercy, and by extension the reader, operate at a knowledge surplus, and the subjects of the narratives (the walking man, the pirates) have a knowledge deficit. As A.B. writes of the pirates in the *Panoplist, and Missionary Herald*, "They were not competent judges of what they needed, or of what would be for their benefit. As to all questions of this kind, they were children."[83] What is at stake here is the nature of evidence for truth. Only those who have obtained true knowledge can make judgments about their own and others' futures.

For A.B., Mercy, and Hope, evidence of human nature, and by extension of truth, is obtained through reflexive contemplation. The epistemology is thus autopoietic: one must scour the self to access true knowledge of the self. But it is also allopoietic, because self-examination can create the means for building and appraising social relationships. To put the claim simply: any one person is who we all are, which is discovered through what I am. Private opinion is thus transformed into public judgment, or rather, the two are recognized as identical. It is those who take this epistemological position that the *Register* accuses of "overweening pride," and that the *Galaxy* accuses of being the "dupes of self-deception." But the supporters are undeterred. Mercy, in

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[82] Mercy writes: "Were we to discover a man in a path which we saw would lead him directly over a precipice . . . would we not strive by persuasion, and if necessary by force, to alter his course and save him from instant death? And should we excuse ourselves from the performance of this duty, on account of the repeated assurances of the man, that he was in no hazard of his life, and of his wishes to be left with himself? Now we will apply the case—The Prisoners, it is alleged, are prepared to die—they have no desire for the protraction of their days.—What then? Does it follow that they are *indeed* ready to appear at the tribunal of their final Judge?—That they are true penitents?" Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN.

[83] A.B., "Execution of the Pirates."

response, acknowledges that some might wish to do away with feelings of sympathy for the pirates, but "we hope, nevertheless, to retain them [those feelings] while the 'lamp of life holds out to burn.'"[84] This final phrase is a line from a hymn by eighteenth-century English Protestant minister Isaac Watts. The first stanza reads:

> Life is the time to serve the Lord,
>
> The time t'ensure the greatest reward,
>
> And while the lamp holds out to burn,
>
> The vilest sinner may return.[85]

Readers are invited to sing alongside Mercy, not only in praise of the Lord but also in praise of the sovereign who has allowed the "lamp of life" to burn for thirty more days, providing light to guide the prisoners on their path to repentance and salvation.[86]

Although this epistemological collapse of the public and the private serves the specific political goal of the reprieve, it is hardly the only consequence. Indeed, supporters imagine the reprieve as a fundamentally transformational opportunity for Bostonian society. Hope contends that seeing evidence of true and proper repentance from the pirates at their execution will enhance the ritual's effects, "and what transport will fill the breasts of God's children, who may be spectators of the melancholy *happy* scene!"[87] If this enhanced execution solidifies state power, however, it is not the secular power imagined by the reprieve's critics. Mercy makes this clear in the *Palladium* with a nod to the paradigmatic slippage between the president's pardoning power and God's:

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[84] Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN.
[85] James M. Winchell, *An Arrangement of the Psalms, Hymns, and Spiritual Songs of the Rev. Isaac Watts [. . .]* (Boston: James Loring, 1818), 608–9.
[86] Thank you to Angela G. Ray for noting the citation of the hymn and suggesting the language of song to describe the quotation.
[87] Hope, *Boston Commercial Gazette*, January 28, 1819, AHN.

> With a promptitude becoming the dignity of his [the president's] elevated office—and as a Magistrate "ruling in the fear of God," he reached forward the scepter of mercy, saying, "live a little longer and repent." That this act be found, to his unspeakable joy, to have been a means for preparing four of our fellow creatures for the exchange of worlds, will God, of his infinite mercy, grant. "Joy shall be in heaven over one sinner that repenteth." May new shouts of joy resound throughout the heavenly choir, over four repenting sinners! yea, over thousands![88]

Here we see a clear allusion to monarchical sovereignty: the image of the president leaning over a lower, perhaps prostrated, subject, holding a scepter, and bestowing mercy. Indeed, this figuration confirms the early observation of the intimate connection between the idea of sovereignty and the prerogative power in general. But it also expands the association from the sovereign to society. Mercy and others believed that the citizens of Boston should rejoice over the reprieve rather than resent it, and Mercy noted that "WE would exceedingly rejoice" that the president granted the reprieve so promptly. The injunction to joy, or happiness in Hope's case, mirrors the joy with which the reprieve will be met in heaven. Not only is Monroe the terrestrial simulacrum of God (or he should at least strive to rule "in the fear of God"), but society has also been transformed into the terrestrial simulacrum of the "heavenly choir."[89]

The Dispositional Difference

In my analysis of the *Chronicle*'s announcement, I argue that Monroe's action is received as an interruption in the normal operation of juridical order. The analysis of the ensuing debate over the

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[88] Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN. Here Mercy quotes Luke 15:7, KJV.
[89] Ibid.

reprieve confirms this reading, but it also reveals several varying dispositions of that reception. For critics, the reprieve interrupted a normal process with potentially devastating consequences. Although the decisions made by the petitioners and by Monroe are apparently not condemnable, they nevertheless represent a form of social and political judgment that undermines values such as reason, impartiality, and transparency. For supporters, in contrast, the reprieve interrupted a judicial process to ensure the religious security of the prisoners, the community, and the state. The petitioners and the president made decisions emblematic of a divine ideal, which, if mimicked widely, could have transformational social and religious consequences. We are thus left with two competing visions of social life, one secular and the other religious.

It may seem strange that such a relatively minor event in a nation's history would raise such monumental questions about the nature of social life. But scholars have long noted capital punishment's crucial role in the articulation of social, cultural, and political values in the United States.[90] Some, such as Stephen Hartnett, have even explored how debates over executions navigated the rift between religious and enlightenment thought in the early nineteenth century.[91] Hartnett's work in particular treats capital punishment as a political question and a political opportunity, which is how I have analyzed the debate thus far. Focusing solely on the political dimensions of the debate over the reprieve, however, risks ignoring the fact that the reprieve was received universally as an interruption of the legal order. Instead of politics, the different positions expressed in Boston's newspapers constitute dispositional differences with regard to the decision to suspend the normal

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[90] Masur, *Rites of Execution;* Cohen, *Pillars of Salt, Monuments of Grace.*

[91] Stephen John Hartnett, *Executing Democracy,* vol. 1, *Capital Punishment and the Making of America, 1683–1807* (East Lansing: Michigan State University Press, 2010); Stephen John Hartnett, *Executing Democracy,* vol. 2, *Capital Punishment and the Making of America, 1835–1843* (East Lansing: Michigan State University Press, 2012).

operation of juridical order, and as such they reveal the unique character of exceptionalist decisionism within the early nineteenth-century American sovereign imaginary.

Consider, for example, how the notion of emergency functions in the debate. Schmitt, in his theory of sovereignty, argues that the sovereign decision arises in responses to an exception or emergency, and then takes the form of an exception to the rule of law.[92] Supporters of the reprieve in the *Plattsburgh* case lay out their arguments in similarly urgent terms. For them, the execution of inadequately prepared souls puts society at risk ideologically by softening Christian norms, and materially through the possibility of God's wrath.[93] Although the reprieve might create an exception to the normal operation of juridical order, it does so out of necessity, to shore up the religious failures of both society and the state. The paradigmatic slippage between Monroe and God, made especially clear in Mercy's writing, sutures their sovereign powers together: Monroe suspends his law to secure the proper judgment for the prisoners by God's law. Because the reprieve's supporters believe that public judgments ought to emerge from private self-reflection, Monroe's decision cannot be atomized or displaced to a different part of the government. For the supporters of the reprieve, the sovereign decision is thus an intensely personal one, made in the face of danger to society and the state, to secure the continuity of a proper religious order. Just as in Schmitt's juridical formulation, then, the sovereign decision to suspend the (civil) law is made in order to secure the (religious) law.

Critics of the reprieve, in contrast, argue that it *creates* crisis by suspending the efficacy of the laws, either by delaying the execution or presaging a full pardon. Although this might appear to suggest that critics do not believe Monroe's decision to be a sovereign one, the opposite is the case.

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[92] Schmitt, *Political Theology*, 6–7.

[93] See A.B., "On the Execution of Criminals," *The Panoplist, and Missionary Herald* 15, no. 1 (January 1819): 19; Mercy, "The Reprieve," *New-England Palladium*, January 29, 1819, AHN.

It is precisely because the decision is sovereign that the critics reject it, not only as a matter of policy, but also as a model of decision-making. Recall that the contributors to the *Register* and the *Galaxy*, who accuse the reprieve's supporters of making an epistemological mistake by confusing public and private judgment, ultimately criticize the reprieve as unreasoned, impulsive, and guided by emotion. More importantly, critics valorize the institutions of liberal government that are charged with administering the laws under normal circumstances; hence the *Advertiser*'s lamentation that "the Court, the Jury, Counsel for the government or the prisoners on trial, the Marshal of the District, the Prison Keeper," did not petition for the reprieve.[94] Thus, rather than not recognizing the reprieve as a sovereign decision, critics of the reprieve recognize it as such and then reject exceptionalist decisionism altogether in favor of the normal, which is to say liberal, order of government. Schmitt argues for the incompatibility of liberal constitutionalism and decisionist sovereignty, since authority is atomized in constitutionalist regimes and can never coalesce into the singular authority necessary to decide on the exception.[95] Even though critics of the reprieve might have been politically opposed to it, and although they might have criticized the sovereign decision as a form of state action, their critiques of the reprieve do not constitute a denial of sovereignty from a juristic, structural standpoint. The critics understand quite clearly that the reprieve represents a decision on the exception, and thus they reject sovereignty rather than deny its existence in their own government. Supporters, on the other hand, see sovereignty as the only means of salvation from a juridical order that has lost touch with the spiritual needs of society.

The analyses of the *Chronicle*'s announcement and the debate over the reprieve suggests that a conception of sovereign action similar to Schmitt's model of decisionism existed in early

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[94] *Boston Daily Advertiser*, January 18, 1819, AHN.
[95] Schmitt, *Political Theology*, 11.

nineteenth-century American public culture. There are, however, several notable differences. First, and most importantly, the authors in Boston did not treat the reprieve as an action unauthorized by existing law. The reprieve does not interrupt the structure of law, but rather it interrupts the operation of law under normal conditions. This explains why both critics and supporters articulated their positions in terms immanent to their situations—sailors leaving port without experiencing the deterrent of an execution, prisoners needing more time to commune with God, suffering from a long imprisonment, and so on—instead of in terms of juristic ontology, or the foundation of law in the first instance. Schmitt calls the concern with the immanent the "sociological" valence of law, which refers to the empirical existence of law in each social and state configuration, and juxtaposes it with the juristic valence, which concerns the law's structure. What the analysis of the debate over the reprieve has demonstrated, however, is that predicating sovereign action on the existence of an emergency invites rhetorical appeals to the sociological to make sense of that emergency as such. To put it differently, the dispositional difference between supporters and critics of the reprieve is in fact a difference in the definition of emergency. For critics, there is no emergency in the *Plattsburgh* case, and thus the appeal to the sovereign's prerogative power is out of place; whereas the supporters see the pirates' conditions as an emergency requiring sovereign response. This is the difference between an exception to the rule of law and interruption in the normal operation of juridical order. Rather than the sovereign decision creating law where there was none before, Monroe's reprieve of the pirates caused Bostonians to define how the law ought to function in its normal case.

The second difference between the model of sovereign decisionism implicit in the debate over the reprieve and Schmitt's theoretical formulation is the object of sovereign action. For Schmitt, even if the decision on the exception might harm the state, the sovereign decides in order to ensure the state's continued existence. This view is consistent with the supporters' position vis-à-

vis spiritual security, since they see Monroe's reprieve as creating a path to salvation. Criticism of the reprieve, in contrast, often hinges on the reprieve circumventing the most important function of the laws, specifically punishing and deterring crime. Taken to its logical extreme, this position poses an interesting challenge to Schmitt's theory: can the sovereign decide to harm the state such that it might lead to the state's end? To be sure, Schmitt is clear that sovereign decisions are made to protect the state. Bodin as well claims that it would be impossible for the sovereign to destroy the state, since he believes sovereign power to be indissoluble, immutable, and nontransferable. Nevertheless, within a state system in which power is distributed between branches of a government, it stands to reason that a sovereign could suspend the operation of one branch entirely. What might that look like? This is a question taken up by two authors in the *Columbian Centinel*, a critic of the reprieve writing as Justitia and a supporter writing as M. Their editorials outline competing theories of sovereignty, its relationship to the normal operation of juridical order, and the state's use of violence. In the final section, I analyze these two editorials to answer the remaining question posed in chapter 3: is there a necessary linkage between the sovereign decision and state violence in the American sovereign imaginary?

The Dispositional Interval

On January 20, 1819, the *Columbian Centinel* published a letter authored pseudonymously by Justitia, the figural representation of justice as a blindfolded woman, often seen holding scales and a sword. The letter is the longest published critique of Monroe's reprieve of the *Plattsburgh* pirates, and it incorporates many of the arguments made in the larger debate. Justitia laments the indistinction between public judgment and private sentiment embodied in the reprieve, the absence of a proper deterrent from the pirates' expedient execution, and the threat to the laws posed by the prerogative

power. In so doing, Justitia articulates a theory of state power secured in the first instance by violence. Not only does the reprieve pose an imminent threat to the security of Boston's society, but it dissolves the very core of liberal government. On January 30, the *Centinel* published a letter authored by M., which is a direct response to Justitia's from the week prior. As support for the reprieve, M.'s letter is distinct from those authored by Mercy, Hope, and A.B., because it offers a secular rather than a religious defense of the prerogative power. Much of the letter is dedicated to refuting the more outrageous assertions made by Justitia, but M. does articulate a substantive position on sovereignty, and one which is unique in the debate over the reprieve: it is a theory of state power, grounded in enlightenment ideas of rigorous reason, that is secured not by violence but by the benevolence of the sovereign.

In this final section, I analyze how Justitia and M. describe the relationship between violence and sovereignty. I then place each author in conversation with contemporary theorists of sovereignty to see how nineteenth-century insights into the nature of state power might alter our own understanding of sovereignty and our approaches to it. Justitia's letter offers a conception of sovereign violence similar to the one described by Foucault in his work on power. Unlike Foucault's version, however, which is monarchical to its core, Justitia incorporates violence into the very fabric of the liberal state at the expense of the sovereign decision. M., in contrast, resists the necessary link between violence and state action, and offers instead something like Schmitt's sovereignty guided by the logic of care. Together, the analyses of Justitia and M. illustrate that the nineteenth-century American sovereign imaginary may offer novel paths forward for contemporary scholars in the humanities who seek to address the violence of the modern state.

Suspending Life: Justitia

The bedrock of Justitia's vision of sovereignty is a classic slippery slope argument: the reprieve undermines the sanctity of law, which will lead to the end of law, and thus the dissolution of juridical order. Justitia writes:

> Let it be allowed that it [the reprieve] is humanity to the prisoners themselves, can it be believed for a moment that it is humanity to society? What would be the effect of permitting murderers and pirates to commit their bloody deeds with impunity and after sacrificing to their deadly malice the lives of harmless men, to walk the earth, untouched by the hand of justice: particularly at this time, when scarcely a newspaper issues from the press, without containing some horrid tale which makes us shudder while we read it? If the seaman be allowed to murder his commander, to run away with the vessel, and dissipate the property of his employer, and then return uninjured to his country, loaded with plunder so unjustly obtained, and stained with innocent blood, the lives, the property, the dearest rights of the citizens are exposed to ruin, and miserable indeed would be the situation of the nation.[96]

There are several assumptions that undergird this argument. First, humanity is naturally inclined toward behavior otherwise restrained by the legal norm (sailors are "*allowed* to murder" as though such behavior were natural). Although the norm may determine what behavior is prohibited, enforcement is for Justitia the crucial function of juridical order. The object that law protects is life, but not only life in its biological sense; rather, law protects a qualified form of social life, one prescribed by norms. However, the failure to enforce the law does not dissolve this normative life

[96] Justitia, "The Reprieve," *Columbian Centinel*, January 20, 1819. Of the longer editorials, Justitia's appears to be the only one that was reprinted. See *Dedham Gazette*, January 22, 1819, AHN.

altogether. Through murder and depredation, the pirate retains life and property, although they are degraded in a lawless world. The pirate is "uninjured" and "loaded with plunder," but is "stained with innocent blood." For Justitia, the reprieve (and the possibility of a full pardon) replaces the existing order with a piratical one, where every individual is open to violence and theft, and where qualified social life can no longer be lived.

In line with other critiques of the reprieve, Justitia sees the sovereign decision as the mechanism by which enforcement is destroyed:

> Far be it from us to wish, that the prisoners should not have sufficient opportunity to prepare for their departure, and for completing their repentance.—God give them the strength so to do. But who will deny, not merely the impropriety, but imprudence of interfering with the judicial tribunals of a nation? There would soon be an end to all society and government, if private opinion did not acquiesce in their public judgments and decisions. By the law of the land, by the law of right reason, they must administer justice; they are sworn to do it faithfully and impartially, and we are to presume they do, until they are detected in doing the contrary.[97]

This is a more complete version of the normative division between public judgment and private opinion offered by the *Register* and the *Galaxy*. Justitia valorizes enlightenment ideals such as reason and publicity, which are in this case explicitly linked to the trial as a judicial process. Beyond describing good governance, Justitia outlines the proper relationship that individuals ought to have toward institutional processes. Private opinion must yield to public judgment *and* presume that judgment is correct. This is a world in which process trumps discretion, a world in which there is no sovereign decision. The presumption of validity, perhaps even truth, given to the trial expands the

[97] Justitia, "Reprieve."

juridical beyond the immediate realm of the judicial to become a model procedure for social life. In the same way that the reprieve's supporters argue in favor of a Christian social transformation, Justitia defers to the trial as a means of solidifying juridical ideology.

The world Justitia imagines is governed by a form of sovereign power similar to the one outlined by Foucault. For him, sovereign power is the state's right to "*take* life or let live," which is the hallmark of monarchical government.[98] Illegal activity is treated as an injury to the sovereign: "By breaking the law, the offender has touched the very person of the prince; and it is the prince—or at least those to whom he has delegated his force—who seize upon the body of the condemned man and display it marked, beaten, broken. The ceremony of punishment, then, is an exercise of 'terror.'"[99] The right to kill is thus a "right of rejoinder," a right activated by the sovereign's vulnerability. Whereas Schmitt privileges the juristic element of sovereign action—the decision—Foucault privileges the sociological element, the experience of crime and punishment.

Foucault's characterization of sovereign power is derived partly from eighteenth- and nineteenth-century French sources, and thus there is some historical contiguity between his theoretical model and Justitia's vision of a liberal state. There is also, however, an important difference. For Foucault, sovereignty resides in the will of the prince. For Justitia, this kind of sovereign power is distributed throughout a process. Rather than injuring the person of the monarch, the injury caused by the breaking of law is felt across the entire social body. It is in the name of preserving social life that Justitia believes the biological lives of the prisoners must end:

> Nothing less than the dread of being early sent to the awful presence of his Maker, can deter the assassin from perpetrating his foul design. Our tribunals have therefore annexed the

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[98] Michel Foucault, *The History of Sexuality,* vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 136.
[99] Foucault, *Discipline and Punish*, 49.

> punishment of death to this offence; and while in some countries the rack, in others the guillotine, are the instruments of execution, our law adds infamy to pain, and ordains that the criminal be suspended between heaven and earth, as though unworthy of either.[100]

Through blood, Justitia's law becomes retributive and cruel. Death at the gallows is not a path to atonement but rather a spectacle of public violence. The description of hanging invokes a powerful image of the condemned body, a body that exists independently of, "as though unworthy of," the protection of law, human or divine. Although there is an additional justification for the execution on biblical grounds (the nearly ubiquitous quotation from Genesis 9:6, "Whoso sheddeth man's blood, by man shall his blood be shed"), it is second in order and significance. The primary reason to execute the *Plattsburgh* pirates in Justitia's critique is to preserve society and government.

Foucault writes that "the law cannot help but be armed, and its arm, *par excellence*, is death."[101] What is striking about this statement, like Justitia's defense of the execution, is how completely law is sutured to violence. Justitia believes that it is because of the "law of right reason" that the process of law must pursue death, because death is justice. Rather than a vestige of monarchical sovereignty subsisting in the new forms of liberated government, Justitia sees retributive violence as a hallmark of enlightened society. "Our tribunals have therefore annexed the punishment of death to this offence [piracy]," Justitia writes, which emphasizes that the turn to violence is not only deliberate but also reasoned. By the logic of Justitia's argument, death in these cases is a state obligation, and liberal society is built on the foundation of a gallows platform.

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[100] Justitia, "Reprieve."

[101] Foucault, *History of Sexuality* 1: 144. This quotation has been modified. The Hurley translation appears as follows: "Law cannot help but but be armed, and its arm, *par excellence*, is death." The extra "but" is extraneous and has been removed. Compare to the original French: "La loi ne peut pas ne pas être armée, et son arme, par excellence, c'est la mort." Michel Foucault, *Histoire de la sexualité I: La Volonté de savoir* (Paris: Gallimard, 1976), 189.

As I argue in chapter 3, sovereignty has been indelibly linked to violence in contemporary humanities scholarship. Agamben's reading of Schmitt, for example, incorporates this violence into the ontology of law through the sovereign decision on the exception. Even if the critique of violence is not applied to the entire state—that is, even if a critic would recognize that some state actions are not aimed in the first instance toward violence—the fact that violence is the entire subject of discussion is nevertheless totalizing. The law is approached first in terms of blood, degradation, exclusion, and pain, and then only after in terms of normative effect. To be sure, these critiques have brought light to the extraordinary danger posed by sovereign states. At the same time, they have made it more and more difficult to think of the state as a possible means to end political violence.

Justitia's critique, when read against Foucault's theory of sovereign power, ought to make us rethink the totalizing stance. By critiquing discretion, Justitia grants violence an air of inevitability, since it is a necessary outcome of a properly functioning juridical process. This outcome gains ideological power because, as Justitia suggests, the outcomes of trials are a form of public judgment that must be presumed correct. Violating laws does injury to the social body, and law is triggered as a kind of auto-immune response, destroying that which would otherwise harm the organism. In Foucault's case, however, the violence of sovereign power is discretionary. It comes in the dyadic form: "*take* life or let live." There is a choice, to act or not, to take life or let live. In his lectures on beasts and sovereigns, Jacques Derrida explores the idea of sovereign discretion in terms of responsibility as obligation and responsibility as accountability. He writes:

> And it is indeed the most profound definition of absolute sovereignty. . . . The sovereign does not respond, he is the one who does not have to, who always has the right not to, respond, in particular not to be responsible for his acts. He is above the law and has the right

> to suspend the law, he does not have to respond before a representative chamber or before judges, he grants pardon or not after the law is passed.[102]

Where Derrida acknowledges that the excessive power of sovereignty includes the right not to act, the right not to be accountable to others, Justitia sees the process of law as a necessary one. In other words, the normal operation of juridical order must continue, and any interruption of it constitutes a mortal failure in the liberal course of governance. Derrida's position is much closer to Georges Bataille's belief that sovereignty is pure excess, including the capacity to exceed responsibility. Bodin and Schmitt each incorporate minimal levels of obligation into their theories to give shape to sovereign action: for Bodin it is natural and divine law, and for Schmitt it is the impulse to preserve the state in the face of catastrophe. But Derrida understands that such limitations are, indeed, inconsistent with the absolute power of sovereignty itself. And Justitia, by eliminating discretion altogether by turning government fully over to the process of law, therefore obliterates sovereignty.

This analysis, including its anachronistic dialogue between Justitia, Foucault, and Derrida, reveals something important about sovereign power. Although it is common to see Foucault's version of sovereignty as violent through and through, what makes that power *sovereign* is precisely the discretionary capacity of the decision to take life or let live. Either of those choices is as sovereign as the other, because it is the power to decide which is itself sovereign. In Justitia's case, the private judgment which undergirds discretionary power is replaced by a public judgment that is constrained by a process. And one outcome of that process is death. Justitia's critique is thus a critique of those moments when the violent processes of liberal government are thwarted by the sovereign's decision to reprieve. Importantly, however, Justitia is not concerned by the power of the

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[102] Jacques Derrida, *The Beast and the Sovereign*, vol. 1, ed. Michel Lise, Marie-Louise Mallet, and Genette Michaud, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2009), 57.

sovereign per se; rather, the concern arises only because the private judgments of the sovereign cannot be subject to scrutiny. One would imagine that, could Justitia trust the sovereign to act according to the laws in every case, discretion would be acceptable (primarily, of course, because it would never be used!). Thus, in a certain light, Justitia's critique boils down to the question of trust, and if the appeal to process is born out of a mistrust of private judgment, one question remains: what happens if we trust the sovereign?

The Prerogative Exception

For Mercy, Hope, and A.B., expanding the paradigmatic slippage between the terrestrial and the heavenly is the reprieve's true promise. For them, the petitioner's appeal to Monroe is a model of social behavior in much the same way that the trial is a model for Justitia. These supporters of the reprieve believe that divine authority permeates the state epistemologically and performatively, founding law in the divine. Thus, the petitioners' actions and the sovereign's benevolent reprieve are linked by a common thread of Christian concern for the other. For Justitia, the authority of reason permeates society and the state epistemologically and performatively through the trial. Thus the petitioners' actions are linked to state action through a shared disrespect for the laws.

But what if the petitioners and the state were disaggregated? Is it possible to evaluate Monroe's decision in isolation? An author ("M.") in the *Columbian Centinel*, writing in response to Justitia, pursues precisely this track:

> These arguments [for the reprieve] or others may have appeared to individuals to have commanding weight, and to justify the application for a short suspension of the sentence. Such an application founded on *mere argument* could have no weight with the Executive, unless it deserved it. If the reasons for a suspension appeared to preponderate, the Executive

> undoubtedly did right to grant it. To state arguments in ones [*sic*] own case, or in the case of another, especially if it be in the cases of life and death, seems to be a right in the possession of every man. To hear these arguments and give them weight which they appear to deserve, seems to be the right of the Executive. This is all that has been done in the case in hand.[103]

M. suggests a clear separation between the public mind and the executive. Individuals have the right, but presumably not the obligation, to present arguments in support of themselves or others, and thus private judgment is transformed into public judgment. Social relations within this paradigm of sovereign action are manifest as an obligation at least to consider, if not explicitly to care for, the self and others. But it is not left to the public mind to *decide*, only to *argue*. Decision, which is here a combination of judgment and consequential action, is reserved for the executive.

There is a clear affinity between M.'s position and Schmitt's articulation of decisionist sovereignty. Not only does the executive maintain exclusive decisionist authority over, and perhaps even against, public judgment, but the reprieve also ensures the hierarchical supremacy in judicial decisions because it suspends the judgment of the other branches of government. This is what Derrida means when he says that the sovereign "is above the law and has the right to suspend the law, he does not have to respond before a representative chamber or before judges, he grants pardon or not after the law is passed."[104] For M., then, the reprieve is a product of the singular authority of the office of the executive, whose function in this case is only to decide whether the law should stay in force or not.

However, reprieves are distinct from other forms of clemency—full and conditional pardons, commutations, mitigations, and so on—because they augment the temporality of juridical

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[103] M., "The Reprieve," *Columbian Centinel*, January 30, 1819, AHN.
[104] Derrida, *The Beast and the Sovereign*, 1: 57.

decrees rather than their material consequences. Thus, as supporters of the reprieve noted, the pirates would still die only a month later: "A *reprieve* is not a *pardon*," M. writes in response to Justitia's slippery slope argument, "nor in the given case does any one expect it to be followed by one." Given this acknowledgment, the question must arise as to how M.'s position could possibly serve as a basis for a nonviolent conception of sovereign power? M. explicitly critiques the style of "sanguinary government" favored by Justitia. "Government, while it is seen regularly to punish transgression, ought also to appear actuated not by passion and a thirst for blood; but by benevolence towards the community at large, and compassion even towards those who have merited capital punishment." A society that thirsts for public violence, M. suggests, will never be secure. Even in England, which M. claims has the world's highest per capita execution rate, "It is no unfrequent fact that men commit capital crimes at the very foot of the gallows on which a convict is suspended."[105] Thus, although the state might retain the right to kill, that right ought not to be transformed into an obligation of its legal process. The sovereign must first be concerned with protecting society.

For M., the discretion of the executive serves as a bulwark against the increasing violence of the normal operation of juridical order. The sovereign's primary obligation is not to prevent injury to the state but to show benevolence toward the community. Discretion magnifies this potential by relying on the sovereign's judgment, which M. believes was displayed in the *Plattsburgh* case: "The Executive declare in the reprieve that considerations of *clemency* alone prompted the measure. We ought to believe it. The great body of this community do believe it; and they rejoice in the fact that the Chief Magistrate of their country is governed by such considerations in cases where the public

[105] M., "The Reprieve," *Columbian Centinel*, January 30, 1819, AHN.

safety will allow them to operate."[106] In sanguinary governments, when law is a process obliged to do violence, there is little recourse available to the public to stop that violence from taking place. By trusting in the sovereign's benevolence, M. accentuates the division between the sovereign and the state, between the decision and the process, and casts the prerogative power as an important means to attenuate the state's bloodshed.

On Sovereign Benevolence

This chapter has shown that decisionist sovereignty was a component of the American sovereign imaginary even before the transition to administrative government discussed by Bonnie Honig and others. There are, to be sure, critical distinctions between the understanding of sovereignty in 1819 Boston and its theoretical articulation in the works of Schmitt or Agamben. Monroe's reprieve of the *Plattsburgh* pirates did not create law where there was none before, nor did it create an exception to the constitutionalist regime that governed the United States at the time. Instead, those who wrote in Boston's newspapers saw the reprieve as an interruption in the normal operation of law, an interruption that imperiled the proper function of legal processes, with various effects. Those who critiqued the reprieve thought that it would do damage to a society governed by law. Those who supported the reprieve thought that it would promote the spiritual virtues of the people. Supporters hoped that the reprieve would transform the normal operation of juridical order, creating time to prepare prisoners for divine judgment. Critics, in contrast, hoped that the reprieve would not be repeated, and that the time between judgment and punishment would remain short.

For the authors in Boston's newspapers, the prerogative power creates a zone of indistinction, to borrow Agamben's phrase, between the public and the private, which is central to

[106] Ibid.

the generative capacity of decisionist sovereignty. What matters is not that the sovereign decision is an individual decision but that the decision is not determined by public process. This explains why critics of the reprieve did not condemn the president, nor the prerogative power, but the usurpation of a juridical order to which they felt some degree of affiliation. The indistinction between public and private would alienate those who did not share the immediate concerns motivating the sovereign decision—allowing time for repentance, in the *Plattsburgh* case—which underlies all critiques of the reprieve. Hence, even within a constitutionalist regime that guarantees the prerogative power for the executive, the use of that power retains the character of an exception.

The reliance on process, which is emphasized from the *Chronicle*'s announcement through Justitia's critique of the reprieve, reveals another unique feature of decisionist sovereignty in the American context. Monroe's use of the prerogative power illustrates that an emergency requiring sovereign response can arise from within the government. This is especially true in cases where powers are separated, and one branch can insulate society from the potentially disastrous effects of the others. In the contemporary world, for example, the Supreme Court moderated the George W. Bush administration's use of indefinite detention for enemy combatants captured as part of the war on terror.[107] But the pardoning power is unique in this regard. The Constitution protects the executive's prerogative from any type of juridical response, and thus there are no conditions under which the process halted by the sovereign can begin again on its own. Rather, the process only proceeds in that case at the pleasure of the president.

Critics of the reprieve crafted a case specific to piracy to defend the normal operation of juridical order, best encapsulated in the *Essex Register*'s belief that itinerant sailors should witness the

[107] Bas Schotel, "Defending Our Legal Practices: A Legal Critique of Giorgio Agamben's State of Exception," *Amsterdam Law Forum* 1 (2009): 113–25.

spectacle of the execution to prevent them from becoming pirates themselves. This chapter has offered a close analysis of one case, but even a cursory evaluation of Monroe's use of the prerogative power reveals that he was no stranger to pardoning pirates.[108] There are several reasons why this might be the case, from sympathy felt toward sailors unwittingly drafted into privateering crews to commiseration with the often-oppressive conditions of maritime sailing in the nineteenth century. More likely, however, is the fact that pirate law was functionally binary because the only punishment for piracy was death. Thus, for the public process of law to work as it normally would, juries were faced with a choice between innocence or execution, with no light between them. Monroe's extensive use of the prerogative power to offer clemency to pirates was thus one means by which he could prevent the state from visiting considerable violence on its own and foreign subjects.

Like the legislators who drafted pirate statutes, Justitia believed that the only acceptable response to piracy was execution. M.'s defense of the reprieve serves as an important reminder that benevolence is an alternative to such sanguinary impulses, and it is a reminder that is still of use today. To be sure, scholars have demonstrated the state of exception's extraordinary capacity for violence. Agamben has argued that sovereignty in the era of biopolitics is sustained through the sovereign's decision on which types of life are worth living, and which are not.[109] Butler's analysis of indefinite detention in the war on terror reveals how the decisions of administrators in the executive branch can retract the protection of the rule of law for those whom the state seeks to abandon.[110] Achille Mbembe has shown how the logic of death, sutured to the excesses of sovereign power, has produced a politics of disposability, occupation, and war, which has wreaked havoc across the globe

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[108] See, for example, Preston, *Comprehensive Catalogue,* 788–92.
[109] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998).
[110] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004).

for centuries, from the slave plantations of European colonies to the "war machines" of contemporary African conflicts.[111] For these scholars and others, the sovereign decision to produce death is imported into a process through habituation or, in the case of the war on terror, legislative approval. Thus, it makes little sense to appeal to the sovereign for protection against those processes, since the sovereign is the source.

Although polemical, William Rasch argues that such critiques of sovereignty make a crucial error:

> Rather than asserting the value of the political as an essential structure of social life, the post-Marxist left seems intent on hammering the final nails into the coffin. In the most celebrated works in recent years, Giorgio Agamben's *Homo Sacer* (1998) and Michael Hardt and Antonio Negri's *Empire* (2000), the political (denoted by the notion of sovereignty) is irretrievably identified with nihilism and marked for extinction. . . . Violence, which is not thought of as part of the state of nature but is introduced into the human condition by flawed or morally perverse social institutions, is to be averted. . . . To seek to remedy the perversity of the world as it is from within the flawed social and political structures as they are only increases the perversity of the world. One must, therefore, totally disengage from the world as it is before one can become truly engaged.[112]

Rasch's point, when condensed to its simplest terms, is that critiques that see violence as sovereignty's core element have rendered it impossible to conceptualize a version of sovereign power that is not itself violent. The only response made available by these critiques is to turn away from the state, and the political, entirely in favor of recovering some original harmony that has been

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[111] Achille Mbembe, "Necropolitics," trans. Libby Meintjes, *Public Culture* 15 (2003): 11–40.
[112] William Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck Law Press, 2004), 3.

lost through the previsions of sovereignty. I have argued a very similar position in part 2 of this dissertation, although I hope in less divisive terms than Rasch's. M.'s response to Justitia's critique is a reminder that, however completely one associates sovereignty and death, there remains a dispositional interval within the sovereign decision that carries the capacity for benevolence as well as violence. What we can learn from M., then, is not to ignore the violence of legal process by focusing on the violence of the sovereign decision. Instead, we must remain open to the possibility of trusting the sovereign to decide, when she or he can, to intervene in that process and work to protect life rather than destroy it.

I write this claim while living in a world fraught with violence, exclusion, pain, and death. I cannot place my trust in Donald Trump, the current president of the United States. Indeed, Trump's first major use of the prerogative power was to pardon Arizona Sheriff Joe Arpaio, who was convicted of criminal contempt for defying a federal judge's order to "stop detaining people based solely on their immigration status." Arpaio had been the subject of a multi-decade lawsuit alleging unequal and illegal treatment of Latinas and Latinos whom he suspected of undocumented immigration.[113] It is difficult to find benevolence in pardoning a man who stands accused of transforming the jails under his control into concentration camps.[114] Even in the shadow of a sovereign decision that might enable exactly the type of political violence discussed by Agamben and others, it seems now more important than ever to find a sovereign whom I can trust just as M. trusted Monroe. The pardoning of Arpaio is evidence enough that the relationship between the

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[113] Julie Hirschfeld Davis and Maggie Haberman, "Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigrants," *New York Times*, August 25, 2017, https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.
[114] Valeria Fernández, "Arizona's 'Concentration Camp': Why Was Tent City Kept Open for 24 Years?" *Guardian*, August 21, 2017, https://www.theguardian.com/cities/2017/aug/21/arizona-phoenix-concentration-camp-tent-city-jail-joe-arpaio-immigration.

normal operation of juridical order and the exceptional decision of the sovereign is not always cast in the same terms as it was for Justitia and M., where process was equated with violence and sovereignty with benevolence. Such relationships are complex and context-dependent. But in the same way that a commitment to preserving sovereignty at all costs might lead the state to justify cruelty and bloodshed, so too can a disengagement from sovereignty lead to a sanguinary state in which all pirates, regardless of circumstance, must die.

Conclusion

The Uses of a Sovereign Imaginary

As Lauren Benton reminds us, sovereignty is elusive.[1] Not only do the practices of states rarely, if ever, match the theories and models produced by scholars, but state actions disorganize our attempts to apprehend them. Those who study sovereignty have lamented this situation for decades. As Vernon O'Rourke wrote in 1935, "The word sovereignty holds various conflicting connotations and by no means arouses identical patterns in the minds of different students. A failure to define this significant concept before applying it to concrete political phenomena will produce results of a very confusing nature."[2] Although limiting definitions of sovereignty might bring clarity to the scope of a study's claims and findings, those limits have exacerbated a second problem in the study of state authority: they produce rigid partitions, and thus sovereignty is rarely discussed as a plural form.

Consider Stephen Krasner's typology of sovereignty, discussed in chapter 3 above. He divides sovereignty into four types: domestic sovereignty, interdependence sovereignty, international law sovereignty, and Westphalian sovereignty.[3] Krasner, like O'Rourke, desires precision, but what may be intended as a set of analytic distinctions is easily transformed into a set of presumptively real ones. In practice, contemporary scholars often eschew a holistic approach to the study of sovereignty that was common in earlier periods. In *Le droit des gens*, for example, Emer de Vattel lays out a theory of sovereignty and the state that addresses each part of the typology, from domestic

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[1] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2009).
[2] Vernon A. O'Rourke, *The Juristic Status of Egypt and the Sudan* (Baltimore: Johns Hopkins University Press, 1935), 10.
[3] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 3.

matters in book I to all manner of international relations, including diplomacy and trade in book II, and war and peace in books III and IV.[4] To be sure, by pursuing precision, Krasner and other careful scholars have revealed extraordinary nuances in state power that are otherwise eclipsed by the capacious approach of a text like *Le droit des gens*. At the same time, precision can produce conceptual silos, which in the case of sovereignty has driven scholars away from an important element of its study: namely, that sovereignty is not merely conceptual or procedural; it is also a lived phenomenon experienced at all levels of a state, a society, and a culture. It is difficult to imagine what life would look like if the experience of sovereignty was confined to a single analytic dimension.

My approach to the study of sovereignty begins from neither a set of definitions nor a set of practices parsed into like types. I define sovereignty as an attitude toward the limits of state power, articulated over the course of everyday life, at every level of a culture, of a society, of a nation, and of a state. Sovereignty is vast and disorganized by definition, and attempts to limit it for analytic clarity ought to be matched by attempts to apprehend it in its diversity. Toward the latter end, I rely on the concept of a "sovereign imaginary," which is an account of how people within a given context think through state power to then enable it. In this dissertation, I analyze the sovereign imaginary produced through encounters with piracy in the United States from 1815 to 1830. I chose this focus not only because piracy and sovereignty are bound together in important ways, but also because the problems piracy poses to state power are homologous to many of the challenges faced in the twenty-first century. Like Walter Benjamin, I want to "grasp the constellation which [my] own era has formed with a definite earlier one," rather than "telling the sequence of events like the beads

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[4] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008).

of a rosary."[5] Thus, this dissertation broadly challenges two assumptions of much contemporary work on sovereignty: first, that its disorganization requires organization by scholars in every instance; and second, that the experiences of sovereignty in the twenty-first century are historically unique.

In this conclusion, I offer a final case study to support those two assertions: the case of Ezra Allen. Allen was the captain of the *Joseph*, a merchant brig sailing out of Boston that cruised the Atlantic in the early 1800s. According to John Sleeper, who sailed on the *Joseph* in 1817 and recorded the journey in his memoirs, Allen was "a very worthy, well-meaning man, of moderate capacity, and an indifferent sailor."[6] Because Allen was a maritime merchant captain, he was particularly predisposed to pirate encounters. I would like to highlight two such encounters, one with the *Plattsburgh* pirates discussed in part 2, and the other with the pirate crew of the *Louisa*, whose members were involved in a case involving universal jurisdiction that reached the US Supreme Court. With the first encounter, I discuss the diverse forms of sovereignty experienced by a single captain on a single voyage at sea, as means of illustrating the holistic nature of the sovereign imaginary. With the second encounter, I analyze *United States v. Pirates* (1820), a set of cases decided by the Supreme Court that decided the limits of American criminal jurisdiction on the high seas. I argue that this decision, and the circumstances of the piracies that prompted it, reveal important links between the sovereign imaginary of Ezra Allen's time and the sovereign imaginary of the present. In the context of universal jurisdiction, I discuss the historical analysis of pirate law in the recent case *Kiobel v. Royal Dutch Petroleum* (2013), where the Supreme Court limited American

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[5] Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York: Schocken Books, 2007), 263.
[6] John S. Sleeper, *Jack in the Forecastle; or, Incidents in the Early Life of Hawser Martingale* (Boston: Crosby, Nichols, Lee and Company, 1860), 408.

jurisdiction over conduct occurring in foreign territory. In the context of the prerogative power, I analyze an 1821 report of the Senate Judiciary Committee, which considered allowing the president to commute pirate sentences from death to imprisonment, and the similarities of that rhetoric to contemporary scholarship on pirate law and sovereign violence. Between these two encounters, Ezra Allen's story connects the two parts of this dissertation, showing that the sovereign imaginary is indeed whole.

First Encounter: Captain Allen as the Pirate's Warden

Ezra Allen did not want to transport Nils Peterson—an accused *Plattsburgh* pirate—from Gothenburg, Sweden, to Boston, Massachusetts, in August 1817. As he wrote to the American consul who requested passage for the prisoner on the *Joseph*, "As this prisoner is ordered for the United States, and my brig Joseph is the vessel allotted for him by you, I shall make refusal to take him on board, or to give my obligations in writing to watch and prevent his escape, unless I am to receive twenty pounds sterling to fund him in provisions, freight, and responsibility." Allen added in a postscript, "I consider this man is a criminal prisoner, to be kept in chains; but a distressed American sailor I would not refuse giving a passage for free."[7] The acting consul in Gothenburg met Allen's demands, providing him twenty pounds sterling, and secured a statement from the captain acknowledging receipt of the prisoner and payment and "bind[ing him] to guard, maintain, watch, and preserve" the prisoner until he arrived safely in the United States.[8]

Allen's accession to transport Peterson recognizes several of Krasner's sovereign types simultaneously. For example, he writes that the prisoner is "now delivered over by the Swedish

[7] Ezra Allen, undated letter to C. A. Murray, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 21 (1840).
[8] Statement of Ezra Allen, August 30, 1817, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 20 (1840).

Government, to be sent to the United States, there to stand trial," which invokes the concept of international law sovereignty, since mutual respect between nations is a predicate of regular diplomatic relations, and also the concept of Westphalian sovereignty, since Peterson's extradition is evidence of the United States' sovereign right to implement law within its territory. He further commits himself to act as the sovereign's proxy, since he must "guard, maintain, watch, and preserve" Peterson for the duration of the voyage. Allen even exercised sovereign discretion by allowing Peterson out of his irons to help the crew work the ship, but only after the Swede had convinced the captain and crew of his innocence in the *Plattsburgh* case. Allen thus assumed the role of a micropolitical sovereign, wielding complete authority over those whom he commanded and making discretionary decisions about the implementation of American law on his own vessel.[9]

In his memoirs, Sleeper includes in his narrative an account of the violent murders of the *Plattsburgh*'s officers, but his literary treatment of Peterson is largely sympathetic. After persuading the crew of the *Joseph* that he was innocent, Peterson was apparently joyful at the prospect of his federal court trial, since he believed he would be exonerated. According to Sleeper, however, Peterson's disposition changed as the brig approached Boston:

> We had no sooner anchored off Long Wharf than Captain Allen went ashore, and in about an hour the United States marshal, accompanied by a posse with handcuffs and shackles, came on board and demanded the prisoner. Peterson was brought on deck and delivered into his hands. But his countenance had undergone an appalling change within a few hours. He seemed suddenly to have realized the horrors of his situation. His features were pale, and his eyes seemed glazed with fear as he looked upon the officers of justice, and trembling in every limb, was assisted into the boat. A sense of his guilt, and the terrible consequences,

[9] Ibid.

> now seemed to weigh upon his spirits. The penalty exacted by the laws for the crimes of piracy and murder stared him in the face.[10]

Here we see the confluence of domestic sovereignty, international law sovereignty, and Westphalian sovereignty manifested in the crumpled frame and tortured expressions of a nineteen-year-old man. The sovereign's metonyms—the consul who negotiated the extradition, the marshal and his posse who seized the accused, the captain who commanded the ship, the prisoner about to face trial, and the sailor who wrote it all as popular literature—can be analytically distinguished from one another, their subjectivities parsed, and their positions within the capillary network of sovereign power isolated. But to Sleeper, Peterson, and likely to Allen as well, the experience of sovereignty in this case, especially at the moment Peterson surrendered fully to the state, appeared undivided, unnuanced, uninterrupted, and powerful.

Interdependence sovereignty, Krasner's fourth type, which describes the power of the state to control movements across its national borders, was also a feature of the *Joseph*'s voyage. Sleeper's chapter that introduces Peterson to readers begins with a lengthy disquisition on maritime quarantine laws, of all things. On its voyage from Savannah to Gothenburg, the *Joseph*'s first mate died of an illness, exhibiting symptoms of yellow fever. Informed of the death, Swedish authorities elected to quarantine the ship upon its arrival. Sleeper was not pleased by this development, since, as he noted at some length, "it is generally admitted, by enlightened physicians, that the *yellow fever is not contagious*."[11] The distress of his two-week confinement prompted the following: "But the quarantine laws all over the world, with some rare exceptions, being the offspring of ignorance and terror, are not only the climax of absurdity, but act as an incubus on commerce, causing ruinous delays in

[10] Sleeper, *Jack in the Forecastle*, 442.
[11] Ibid., 417.

mercantile operations, much distress, and unnecessary expense."[12] Not only are quarantine laws an example of interdependence sovereignty par excellence, but the terms of Sleeper's 1860 critique resonate with those of twentieth-century capitalists such as Walter Wriston, the former Citibank chairman who spoke of sovereignty's twilight in the face of globalization.[13] Thus Ezra Allen, a single man, on a single ship, on the course of a single voyage, was confronted with all four of Krasner's types of sovereignty, and in his own letters as in Sleeper's memoirs, nary a distinction is drawn between them.

With this first encounter, I do not mean to argue that divisions between different aspects of state power, or precise definitions of sovereignty in sociological analysis, are unnecessary or always counterproductive. As I have argued, they often provide extraordinary insight. However, parsing sovereignty into bits and pieces is not reflective of the experience of it, nor often how it was made sense of in earlier periods—and outside of scholarly or policy contexts, I imagine the same holds true today. Yet there is a paradoxical danger in limiting a definition, as it can lead to imprecision through overstatement. Scholars in rhetoric, for example, have essentially reduced the definition of sovereignty to the integrity of national borders, which led the authors of one recent study to conclude that China "surrender[ed] any sense of national sovereignty" when it agreed to open the Pearl and Yangtze River deltas to British merchants as part of the 1842 treaty negotiations ending the Opium Wars. Presumably, the Qing Dynasty could still implement laws within its nation's borders, maintain diplomatic relations with Britain and other nations, and operate a national government of its own choosing—actions falling under "any sense of national sovereignty," if "any

[12] Ibid., 415.
[13] Walter Wriston, "The Twilight of Sovereignty," *RSA Journal* 140 (1992): 567–86.

sense" has meaning at all.[14] We must remember that sovereignty encompasses a diverse set of attitudes toward state power that are not reducible to any single metonym, whether borders, diplomats, judges, or soldiers. Sovereignty flows through every state action, and although critics might isolate specific currents within that flow, those isolations ought be made with conspicuous reference to the whole.

Second Encounter: Captain Allen as the Pirate's Victim

As the pirate's warden in charge of the *Joseph*, Allen was a subject of the sovereign pressures of American law and a source of sovereign power on his own vessel. These currents of sovereignty were activated in the service of bringing a pirate to justice. One year later, Allen's relationship to piracy was inverted; no longer the agent of the sovereign, Allen became the victim of its primordial enemy. A handwritten report in the papers of Samuel Hodges Jr., the US Consul General for the Cape Verde Islands, dated December 5, 1818, contains a statement from Allen in which he details a pirate attack against the *Joseph* some days prior, near the island of Maio. The crew of an unnamed pirate vessel, which flew a British flag, boarded the *Joseph* and robbed the ship of its cargo and robbed Allen and the crew of their personal effects. During the robbery, one of the pirates shot and killed Elijah Clark, one of Allen's men.[15]

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[14] Stephen J. Hartnett and Bryan R. Reckard, "Sovereign Tropes: A Rhetorical Critique of Contested Claims in the South China Sea," *Rhetoric and Public Affairs* 20 (2017) 303. See also Anne Demo, "Sovereignty Discourse and Contemporary Immigration Politics," *Quarterly Journal of Speech* 91 (2005): 291–311.

[15] Statement by Ezra Allen, Captain of the brig *Joseph*, concerning a pirate attack near the Isle of May, Cape Verde Islands, December 11, 1818, Box 3, Folder 7, Samuel Hodges Papers, 1807–1827, Manuscript Collections, American Antiquarian Society (AAS), Worcester, MA; Diary of Samuel Hodges, 1818, Octavo Vol., Folder 4, Samuel Hodges Papers, AAS.

The pirate ship was later identified as the *Louisa*, a former Buenos Airean privateer originally captained by Joseph Almeida, the man who captained the privateer *Congreso,* discussed in chapter 2, whose crew were involved in the Supreme Court case *United States v. Palmer* (1820). Almeida had turned over command of the *Louisa* to one of his lieutenants, George Clark, in early September 1818, so that Almeida could take command of a recently seized Spanish prize ship. After Almeida parted ways with the *Louisa*, Clark continued to secure Spanish prizes under the privateering commission, until he decided that more money could be made from piracy. From October to December, the *Louisa* sailed as a pirate ship throughout the eastern Atlantic, before setting out for the United States at year's end. The ship landed in South Carolina in January 1819. The crew abandoned it, set it on fire, and separated before fleeing to Charleston and Savannah.[16]

Under Clark's leadership, the *Louisa* committed more than a dozen piracies in the span of three months, plundering ships from multiple nations, including Great Britain, Russia, the Netherlands, Spain, and the United States. The *Louisa*'s conduct was so notorious that in December 1818, the British Admiralty dispatched HMS *Lee*, captained by Stewart Blacker, to hunt the pirates down.[17] In the Canaries and Cape Verde, Blacker was told that the *Louisa* meant to dispose of its plunder on a Caribbean island, and so to the Caribbean the *Lee* sailed. Finding nothing at any port, Blacker learned that the *Louisa* was destroyed and some of its crew were in jail in Charleston.[18] Upon arriving on the Carolina coast around May 1, Blacker dispatched several letters to American officials, requesting that the pirate crew be remitted to his custody for trial in Britain, "where the subjects of

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[16] *Particulars of the Piracies; Committed by the Commanders and Crews of the Buenos Ayrean Ship Louisa, and Those of the Sloops Mary, of Mobile, and Lawrence, of Charleston [. . .],* 3rd ed. (Charleston, SC: A. E. Miller, 1820).

[17] An extract of Blacker's orders, specifically his instructions for pursuing the *Louisa* and its crew into foreign ports, dated December 24, 1818, is included in the diplomatic correspondence about the case. See H.R. Doc. No. 199, 26th Cong., 1st Sess., at 46 (1840).

[18] Peter Earle, *The Pirate Wars* (New York: St. Martin's Press, 2003), 236–37.

many nations are now waiting my arrival to appear against them for acts of unparalleled cruelties and robbery on the high sea."[19] In reply, Secretary of State John Quincy Adams asserted that the United States had jurisdiction and planned to try the pirates. This answer satisfied the British, who offered to send all available evidence across the Atlantic to aid the prosecution. With British evidence in hand, the federal court trials commenced in January 1819.[20]

Most of the *Louisa*'s crew escaped capture. Charges were brought against several men, including Captain George Clark, and six crew members: James Griffin, Benjamin Brailsford, Henry Roberts (alias Wolf), Thomas Robinson (alias Robert Jones), David Bower, and Henry Matthews. Robinson was accused of killing Elijah Clark, and although he was confined to jail on charges of piracy, I have found no account of his trial. Clark and Roberts were tried together in Charleston and convicted of piracy on January 28, 1820, and they were hanged on May 12. Griffin and Brailsford were also tried together in Charleston and convicted on January 17, and they were similarly sentenced to die on May 12. Monroe reprieved them on the eve of their execution, however, and ultimately pardoned them on July 1, based on a petition for clemency from the trial jury. Bower and Matthews were tried together in Savannah in March of the same year, and although both men were convicted of piracy, they too "were recommended to the mercy of the President by the jury."[21]

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[19] Steward Blacker, letter to His Excellency the Governor of Charleston, May 1, 1819, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 47 (1840); and Steward Blacker, letter to President James Monroe, May 2, 1819, H.R. Doc. No. 199 at 47–48 (1840). Copies of the letters were forwarded to John Quincy Adams by the British chargé d'affaires; see G. Crawfurd Antrobus, *Mr. Antrobus to Mr. Adams*, *May 10, 1819,* letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 45 (1840).

[20] John Quincy Adams, *Mr. Adams to Mr. Antrobus, May 11, 1819*, letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 49 (1840). See also G. Crawfurd Antrobus, *Mr. Antrobus to Mr. Adams, May 13, 1819,* letter, and *Mr. Antrobus to Mr. Adams, October 1, 1819*, letter, H.R. Doc. No. 199, 26th Cong., 1st Sess., at 50 (1840).

[21] "Pirates Sentenced," *Savannah Republican*, March 27, 1820, reprinted in *City Gazette* (Charleston, SC), March 30, 1819, AHN.

Before Monroe offered clemency, however, both Griffin and Brailsford, and Bower and Matthews, appealed their convictions to the Supreme Court in a set of cases consolidated under the name *United States v. Pirates* (1820).[22]

Between them, the attorneys for the *Louisa* pirates raised four important questions. Griffin and Brailsford's attorneys argued: (1) that privateers were protected from punishment for piracy by their foreign privateering commission; (2) that the word "state" in the phrase "out of the jurisdiction of any particular state" from the 1790 federal antipiracy statute under which they were charged meant "nation-state" and not "state of the union"; and (3) that the piracies for which they were indicted occurred within a "marine league" of Cape Verde's shore, which was Portuguese jurisdiction and not the "high seas." Bower and Matthews's attorneys made similar jurisdictional arguments, and they also (4) questioned whether a jury could determine the national character of a ship without evidence of its registry.[23] To dispose of these two cases, then, the court was tasked with determining the jurisdictional limits of American criminal law on the high seas.

Associate Justice William Johnson, who authored the opinion in *United States v. Pirates*, disposed of the fourth and second questions with ease. He argued that the national character of a

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[22] *United States v. Pirates*, 18 U.S. 184 (1820). A third case is included under the *Pirates* moniker, *United States v. Furlong*, which concerned whether a foreign citizen murdering another foreign citizen on a foreign vessel was cognizable under the 1790 antipiracy statute. The court held, based on the ruling in *United States v. Palmer*, 16 U.S. 610 (1818), that murder would be outside American jurisdiction, since the court had determined in that case that the United States needed some direct connection to a maritime murder—either the victim, perpetrator, or place at which the crime was committed must belong to the United States—to establish jurisdiction if the crime would otherwise fall under the jurisdiction of another state.

[23] Both sets of attorneys also argued that the antipiracy sections of the 1790 statute, under which all four men were charged, had been virtually repealed by an 1819 act of Congress, which restored universal jurisdiction to American courts in the wake of *United States v. Palmer* (1820) but which left the definition of piracy to the law of nations. The court in *United States v. Pirates* held that both the 1790 and 1819 acts remained in force, per its recent decision in *United States v. Smith* (1820). See *United States v. Pirates*, 192–93.

ship was a fact to be found by the jury based on whatever evidence it chose. For Bower and Matthews, who were indicted for the robbery of the *Asia*, the jury relied on the fact that the ship flew the American flag, that it had "New-York" painted on its stern, and that the captain reported telling the boarding party that the ship was American during the pirate attack. Formal evidence of the ship's registry, then, was unnecessary.[24] As for the meaning of "state" in "out of the jurisdiction of any particular state" in the 1790 antipiracy law, the court held that it referred to a state of the union, not a nation-state.[25] Thus were the questions settled.

As for the first question, Johnson referred to the court's decision in *United States v. Klintock* (1820), discussed in depth in chapter 2. In *Klintock*, the court held that pirate ships retained no national character because they existed in open war with every nation, and thus all states had an equally compelling connection to any piracy; this doctrine is known as universal jurisdiction.[26] Johnson argued that the *Louisa*'s commission offered no immunity to the pirates whatsoever from the moment they began taking ships from nations not at war with Buenos Aires. Universal jurisdiction was also an important factor in the court's answer to the third question, concerning the definitions of territory and the high seas and the limits of American jurisdiction. The piracies at issue in the cases of the *Louisa*'s crew were against ships anchored in open roadsteads (relatively calm bodies of water, sheltered by land, in which a ship could anchor safely) within a marine league (three nautical miles) of the coasts of Cape Verde's Maio and Boa Vista Islands. Johnson argued that the 1790 statute placed no international limits on American jurisdiction—a consequence of the interpretation of "state" in response to the second question. Whether an area of water constituted the "high seas," which would determine statutory jurisdiction, was a fact for the jury to find, not a

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[24] *United States v. Pirates*, 190.
[25] Ibid., 199–200.
[26] *United States v. Klintock*, 18 U.S. 144 (1820).

settled doctrine of law. Thus, since the juries in both cases believed the victim ships to be anchored on the high seas, the convictions against the *Louisa* pirates were sustained.

Johnson closed his discussion of American sovereign jurisdiction with this claim: "Nor can it be objected that it [the roadstead] was within the jurisdictional limits of a foreign State; for, those limits, though neutral to war, are not neutral to crimes."[27] On first gloss, this sentence suggests that the United States can exercise criminal jurisdiction over whatever area a jury might determine to be the "high seas." The claims of other states to sovereignty over their littoral waters, while perhaps important to consider in matters of war and peace, are irrelevant in determining jurisdiction for criminal prosecution. As one legal scholar has written of this sentence, "In finding U.S. jurisdiction over a seizure which occurred on a ship anchored within the territorial waters of a foreign nation, the Court dispensed with the boundary question."[28] This interpretation is consistent with the court's other opinions on the statutory limits imposed on universal jurisdiction by sovereign exclusivity, most notably in *United States v. Palmer* (1818), since those limits were defined based on the the territory in which the crime occurred, that is, the national character of the vessel upon which the crime was committed. That the United States tried the *Louisa* pirates for crimes committed within the "jurisdictional limits" of Cape Verde did no damage to the laws of Portugal, since all of the high seas was the domain of American law.

Sovereign Constellations over Pirate Waters

This nexus of issues—American jurisdiction, foreign sovereign exclusivity, and piracy—arose nearly two hundred years after *United States v. Pirates* was decided, when the Supreme Court

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[27] *United States v. Pirates*, 200–201.
[28] William J. Aceves, *Anatomy of Torture: A Documentary History of Filartiga v. Pene Irala* (Leiden: Martinus Nijhoff Publishers, 2007), 432.

heard arguments in *Kiobel v. Royal Dutch Petroleum Co.* (2013).[29] In this case, a group of Nigerian nationals, members of the Ogoni minority residing in the United States as refugees, filed suit against several Dutch, British, and Nigerian corporations. The plaintiffs alleged that the corporations had aided the Nigerian government in destroying Ogoni villages and "beating, raping, killing, and destroying or looting property [of Ogonis]" in the early 1990s.[30] This violence violated the law of nations, the plaintiffs argued, and thus they filed suit under the Alien Tort Statute, a part of the Judiciary Act of 1789 that reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[31] In other words, the non-citizen plaintiffs sought to hold foreign corporations liable for their conduct on foreign soil, under American jurisdiction, as a violation of the law of nations.

In the majority opinion, authored by Chief Justice John Roberts, the court in *Kiobel* held that there exists a "presumption against extraterritoriality" in American statutes, meaning that jurists should avoid applying a statute to conduct occurring outside of US territory *unless* the statute explicitly authorizes extraterritorial action. The court held that the Alien Tort Statute did no such thing, and thus the federal courts had no jurisdiction over the conduct of foreign corporations in Nigeria.

The presumption against extraterritoriality exists, the court argues, partly to prevent the judiciary from involving itself in foreign affairs, which are the domain of the executive branch of government. To prove that extraterritoriality was not intended by the authors of the Alien Tort Statute in 1789, the court discusses the three classical crimes under the law of nations that were "familiar to the Congress that enacted the ATS [Alien Tort Statute]": violating safe conducts

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[29] *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013).
[30] Ibid., 113.
[31] An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, 77 (1789).

(documents allowing belligerent nationals to pass through enemy territory unmolested), infringing the rights of ambassadors, and piracy. Of the three, the piracy example is the most significant because, the court acknowledges, "piracy typically occurs on the high seas, beyond the jurisdiction of the United States or any country." The petitioners argued that the statute was originally intended to help with the recovery of assets in piracy cases, and thus the authors must have intended jurisdiction over conduct outside of US territory. This is an especially compelling interpretation, the court admits, because justices have "generally treated the high seas as the same as foreign soil for the purposes of the presumption against extraterritorial application."[32] Roberts responded to this argument as follows:

> Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game whenever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, *supra*, at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.[33]

The court here makes several assertions, both empirical and hermeneutic, as to the material and legal history of piracy in the United States. It does so to suggest that piracy is a poor case to use when testing for the presumption against extraterritorial jurisdiction because the very thing that presumption is meant to prevent—conflicts in foreign affairs—is unlikely to occur in pirate trials.

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[32] Ibid., 121.
[33] Ibid.

Hence the concluding claim that piracy is unique. Rhetorically, the court's argument approximates foreign policy realism, as its reasoning is articulated in terms of prediction and the probability of state behavior, rather than the natural or positivist essence of the statute. Hermeneutically, the opinion uses this realist reasoning to determine the intentions of the statute's authors in 1789. This reasoning is sustained by an empirical assertion about the diplomatic history of pirate law. All of this is unsupportable, for two reasons.

First, as Associate Justice Stephen Breyer argues in his concurring opinion (joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan), Roberts's interpretation of jurisdiction over piracy is historically inaccurate as a matter of law. Citing Johnson's argument in *United States v. Pirates* that a foreign vessel is "the same thing" as the territorial jurisdiction of another state, Breyer argues that piracy always took place within the sovereign territory of some nation: "The robbery and murder that make up piracy do not normally take place in the water; they take place on a ship."[34] Thus, by trying and punishing pirates for attacks on foreign vessels—a practice explicitly authorized in *Klintock*—the United States was, to borrow Roberts's language, "[imposing its] sovereign will . . . onto conduct occurring within the territorial jurisdiction of another sovereign."[35]

The argument can be taken further based on the analysis of *United States v. Palmer* (1818) in chapter 2, where I demonstrate that the political stakes of the *Palmer* case were extraordinarily high. In *Palmer*, the court was asked to determine whether a Spanish American privateering crew, who had taken a Spanish prize, was guilty of piracy. The majority opinion in that case, I argue, was rhetorically motivated by the need to prevent trial judges and juries from having to intercede into American foreign policy, specifically concerning American neutrality in the revolutionary wars taking

[34] *United States v. Pirates,* 120; *Kiobel v. Royal Dutch Petroleum Co.*, 130 (concurring opinion).
[35] *Kiobel v. Royal Dutch Petroleum Co.*, 121.

place between Spain and its colonies. If the men at trial in *Palmer* were pirates, then the court would be tacitly denying the sovereignty of the Spanish American colonies, since their privateering commissions were not recognized in the United States. If the men were legally privateers, however, the court would be recognizing the colonies' sovereignty, thus aligning the United States against the Spanish Empire. Aware of these stakes, the *Palmer* court chose to avoid the issue entirely by arguing that the 1790 antipiracy statute did not give the United States jurisdiction over piracies that did not involve American sailors or vessels. As I illustrate in chapter 2, there was considerable political backlash to the *Palmer* decision, which resulted in angry diary entries from John Quincy Adams and the passage of a new antipiracy statute in 1819 that explicitly authorized jurisdiction over foreign ships under the law of nations. Moreover, two years after *Palmer*, in the *Klintock* decision, the court upheld American universal jurisdiction over piracy, even if the victim was foreign. The court subsequently reaffirmed this interpretation in *United States v. Pirates*. Contradicting the conclusions drawn by Roberts in *Kiobel*, the history of pirate law suggests that the government was willing to impose American sovereign will, albeit through universal jurisdiction, over piracies committed within the territories of foreign sovereigns, even under threat of extraordinary political consequences.

If the first critique of *Kiobel* is derived from the rhetorical history of American pirate law, the second comes from the rhetoric of those texts composing the law of nations. Recall that the majority in *Kiobel* frame the argument in terms of prediction and probability. Because piracy "typically" takes place outside of territorial jurisdiction, punishing pirates poses a "less direct" threat to the stability of international relations. Compare that language to the paragraph, cited by the court, from Blackstone's *Commentaries on the Laws of England*, the urtext on common law in American jurisprudence. The paragraph reads:

> Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to sir Edward Coke, *hostis humani generis*. 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.[36]

Blackstone's rhetoric is neither predictive nor probabilistic; rather, it is a statement on the very essence of the pirate, an essence that establishes a set of political and legal relationships that define the international conduct of sovereign nations. Universal jurisdiction over piracy is never an imposition of one nation's sovereign will on another, since the right to try and punish pirates is possessed by all nation-states as a matter of definition. If Blackstone is correct, then the sovereign's will to punish a pirate is shared by all. Book IV of Blackstone's *Commentaries*, in which he discusses crimes against the law of nations and universal jurisdiction over piracy, was published in 1769, only twenty years before the Alien Tort Statute was passed. As I demonstrate in chapter 2, the rhetorical construction of universal jurisdiction, from early modern treatises through nineteenth-century American pirate jurisprudence, shares Blackstone's quasi-ontological style. Rather than mirroring Blackstone, Roberts in *Kiobel* retrojects contemporary foreign policy realism into the past and uses it to determine what the authors of the 1789 statute "intended" American jurisdiction to be. Unlike the majority, Breyer in his concurrence is explicit about the material connections between past and

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[36] William Blackstone, *Commentaries on the Laws of England*, book 4 (Oxford: Clarendon Press, 1769), 71.

present: "I very much agree that pirates are fair game 'wherever found.' Indeed, that is the point. That is why we asked, in *Sosa* [*v. Alvarez-Machain* (2004)], who are today's pirates?"[37]

Despite the disagreements among the justices, the decision in *Kiobel* was unanimous against the plaintiffs. The majority opinion, which holds considerable weight as precedent, argues that there exists no expectation of extraterritorial jurisdiction in the Alien Tort Statute whatsoever, a claim that hinges on a dubious rhetorical history of piracy. Thus the plaintiffs' claims were denied. Breyer's concurring opinion, which includes a much more nuanced and properly contextualized interpretation of pirate law, offers a more expansive reading of the statute. In terms reminiscent of those the court used when establishing US jurisdiction in *Palmer* and *Klintock*, Breyer concludes that the Alien Tort Statute grants jurisdiction over cases where the tort occurs on American soil, the defendant is an American national, or the conduct in question significantly affects American national interests, including the interest of not becoming safe harbor for those who commit abhorrent acts.

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[37] *Kiobel v. Royal Dutch Petroleum Co.*, 131 (concurring opinion). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The facts in *Sosa* are extraordinary. Mexican national Humberto Alvarez-Machain was accused of torturing Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar in 1985. In 1990, an American federal grand jury indicted Alvarez for that crime. The DEA, which was refused help by the Mexican government, hired several Mexican nationals, including José Francisco Sosa, to abduct Alvarez and render him to the United States for prosecution. At the district court trial, Alvarez argued his seizure was "outrageous governmental conduct" and the case should be dismissed. The Supreme Court disagreed; see *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), which holds that the circumstances of his rendition to the United States do not affect federal court jurisdiction. Back in Mexico, Alvarez sued the US government, Sosa, DEA agent Antonio Garate-Bustamante, five unnamed Mexican citizens, and four additional DEA agents. The Mexican nationals, who had no jurisdictional connection to the United States other than their contract with the DEA, were sued under the Alien Tort Statute. In an opinion written by Associate Justice David Souter, the court argued, among other things, that the abduction was dissimilar to the three crimes at the law of nations identified by Blackstone—piracy, violation of safe conducts, and infringing the rights of ambassadors—and that courts ought to be wary of expanding that list, although they have the power to do so.

The plaintiffs' claims in *Kiobel* do not meet those standards, however, and thus Breyer writes, "I agree with the Court's conclusion but not with its reasoning."[38]

The *Kiobel* case provides a concrete example of how twenty-first-century understandings of early American sovereign imaginaries can have real effects. In part 1 of this dissertation, my analysis emphasizes the connection between piracy in the nineteenth century and terrorism in the twenty-first, but *Kiobel* also illustrates that residues of pirate law have a wider reach, even to issues of international human rights. The cases of the US Supreme Court offer particularly potent evidence that the ways in which Americans imagined sovereignty in the early republic have shaped contemporary attitudes toward the limits of nation-state power. In the conclusion of part 1, however, I suggest that we ought not limit the historical comparison to issues of jurisprudence alone. As the opinion in *Kiobel* argues explicitly, questions of sovereign jurisdiction have implications far beyond the chambers of a courthouse. They affect the foreign policy of a nation, whether in the context of maritime piracy, global terrorism, drug trafficking, torture, or corporate liability for aiding state violence. These issues and others speak to the importance of treating sovereignty and postsovereignty not as temporally distinct periods but rather as a continuous struggle within the sovereign imaginary over the scope, form, and function of state power. To take this claim seriously will require scholars to adopt rigorously transhistorical analytic methods, ones that follow sociologist Avery Gordon in seeing the present as haunted by the past. "Reckoning with ghosts," she writes, "is not like deciding to read a book: you cannot simply choose the ghosts with which you are willing to engage. To be haunted is to make choices within those spiraling determinations that make the present waver. To be haunted is to be tied to historical and social effects."[39] Thus we ought not only

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[38] *Kiobel v. Royal Dutch Petroleum Co.*, 127 (concurring opinion).
[39] Avery Gordon, *Ghostly Matters: Haunting and the Sociological Imagination,* new ed. (Minneapolis: University of Minnesota Press, 2008), 190.

look for pirates and sovereigns in the present. We ought to find their ghosts as well. Perhaps we will find that they haunt us in unexpected places.

Sovereign Constellations over Pirate Lands

In part 1, the American sovereign imaginary takes shape around a specific set of questions concerning the geographic limits of American jurisdiction over pirates. There is an immediate and necessary connection between piracy and jurisdiction, as Blackstone says, because piracy is a crime against all nations. In part 2, I argue that piracy shaped the sovereign imaginary in another, different way, by calling into question the disposition of sovereign decisions. The punishment for piracy under the 1790 and 1819 antipiracy statutes was death in every case, and thus concerns about the use of state violence, the role of the prerogative power, and the function of juridical order were simply common in piracy cases. However, as the debate, discussed in chapter 4, over James Monroe's reprieve of the *Plattsburgh* pirates illustrates, requiring death for pirates was not a politically settled matter. The law was at odds not only with public sentiment but also with the beliefs of the nation's chief magistrate. Executing and pardoning pirates shaped how Americans understood the limits of law, not in terms of territory or geography, but in terms of the form state action takes.

As a strict and universal rule, death as the punishment for pirates created difficult conditions for jurors in the early nineteenth century. Consider the case of the four crew members of the *Louisa* in *United States v. Pirates*. They were all convicted for piracy at trial, a conviction that was subsequently reaffirmed by the Supreme Court. In Griffin and Brailsford's case, witnesses testified that both men requested to join the crew of a Russian vessel bound for Suriname, which the *Louisa* had attacked. Using force, the *Louisa*'s officers denied the request, arguing that it might lead to the pirates' discovery, although they conceded that Griffin and Brailsford could join a ship bound for

Southeast Asia if one was captured.[40] The district court jury that convicted them recommended the men to the president for clemency, perhaps based on their apparent desire to quit the *Louisa*'s cruise once it had shifted from privateering to piracy. Bower and Matthews's jury did the same. For these pirates, the prerogative power was a tool to work against a juridical process that was too monolithic properly to account for the contingencies of nineteenth-century maritime sailing. It was their only chance to survive the violence of the state.

In 1821, following several cases in which Monroe exercised his prerogative power to pardon pirates convicted in prominent trials, a resolution was passed in the Senate requesting the Judiciary Committee to investigate giving the president power to commute pirate sentences to imprisonment. Article II, Section 2 of the Constitution only grants the president the power to reprieve or pardon criminals, a power which through judicial review the Supreme Court has expanded to include other forms of clemency, but which in 1821 was limited to the pardon or reprieve.[41] The proposed legislation under investigation, then, would have granted the president more flexibility in responding to petitions for clemency in the many pirate trials of the period.

As Caleb Smith has illustrated, attitudes toward carceral punishment in the 1820s were plural, contested, and under constant revision, matching the cultural ambivalence toward capital punishment discussed in part 2.[42] But the attitudes of the Judiciary Committee showed no signs of wavering. Their report was delivered to the full Senate on February 9, 1821, by committee chairman William Smith of South Carolina, the state in which Griffin and Brailsford were tried and pardoned for piracy. "In the catalogue of human offences," Smith said, "if there is any one supremely

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[40] *Particulars of the Piracies*, 36.
[41] P. S. Ruckman Jr., "Executive Clemency in the United States: Origins, Development and Analysis (1900–1993)," *Presidential Studies Quarterly* 27 (1997): 251–71.
[42] Caleb Smith, *The Prison and the American Imagination* (New Haven, CT: Yale University Press, 2009).

distinguished for its enormity over others, it is piracy. It can only be committed by those whose hearts have become base by habitual depravity." Not only is the chance of rehabilitating such criminals low, but, he argues, by confining them with those convicted of lesser crimes the state would risk producing more pirates by contagion. Imprisonment, then, was out of the question.[43]

The report does not shy away from criticizing the sovereign's prerogative power. Smith begins by noting that American "policy and political institutions are administered so mildly, that we seem to have forgotten the protection due to the public," then criticizing those who call capital punishment "cruel and degrading to our national character." He argues that the pardoning power "has more than sufficient range for its exercise," without the legislature allowing for commutation.[44] Smith continues:

> Whatever may be the public feeling against a pirate previous to his trial and conviction, as soon as that takes place that feeling subsides and becomes enlisted on the part of the criminal. There is not a favorable trait in his case but what is brought up and mingled with as many circumstances of pity and compassion as his counsel can condense in a petition, which every body subscribes without any knowledge of the facts; and this is presented to the Executive, upon which alone he is to judge the case. All the atrocious circumstances are kept out of view. There is no one hardy enough to tell that this criminal and his associates had boarded a defenseless ship, and, after plundering all that was valuable, had, with the most unrelenting cruelty, butchered the whole crew and passengers; or crowded them into a small boat, in the midst of the sea, without provisions or clothing, and set them adrift, where their destruction was inevitable; or, the better to secure their purpose, had shut all, both male and

[43] William Smith, *Punishment for Piracy,* S. Rpt. 16, no. 501, February 9, 1821.
[44] Ibid.

> female, under deck, and sunk the ship, to elude detection, or to indulge an insatiable thirst for cruelty.[45]

Although Smith's rhetoric reflects his political commitment to execution as the punishment for piracy, his argument serves as an important reminder amid otherwise technical discussions of pirate law. Every Supreme Court case, every pirate trial, every captivity narrative, every collection of pirate stories, every newspaper article describing pirate pardons or executions, and every advertisement for a pamphlet purporting to tell the *true* story of a pirate ship was read against a background of actual violence, murder, robbery, assault, pain, loss, suffering, fear, and death. *Hostis humani generis* was not, as Matthew Tindal wrote in 1694, "a Rhetorical Invective to shew the Odiousness of that Crime."[46] To call pirates the enemies of all was to name the horrors they wrought and to remind those whose lives were lived on land of the dangers faced by sailors on the high seas. Smith's belief that piracy was the worst crime in the "catalogue of human offences" is worth taking seriously, not only because it reflects the circumstances of several of the pirate cases discussed in this dissertation but also because it is a clear rhetorical motivation for his critique of the prerogative power.

Smith's position is not unlike many expressed by authors in Boston's newspapers during the *Plattsburgh* affair. For him, the prerogative power is a private decision made in ignorance, and the legislature ought not bow to that form of governance. Congress declared the punishment of piracy to be death "at a time when no undue influence could interpose," Smith writes, adding later, "The object of capital punishment is to prevent the offender from committing further offences, or to deter others from doing so by example. If it be commuted for temporary confinement, it can effect

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[45] Ibid.

[46] Matthew Tindal, *An Essay Concerning the Law of Nations, and the Rights of Sovereigns,* 2nd ed. (London: Richard Baldwin, 1694), 25–26.

neither to any valuable purpose."[47] The legislature and the judiciary make decisions through an impartial assessment of a full record of a crime's facts, Smith claims; the executive, in contrast, decides from a degraded position, based only on a document written to frame a criminal in the best terms. By acting upon the constitutionally guaranteed prerogative power, the executive circumvents the true object of punishment, preventing crime, and acts instead out of "pity and compassion" for the enemy of all.

By refusing to empower the president to commute pirate sentences, Smith makes the pirate's fate a choice between two extremes: death or freedom. Perhaps he hoped that restricting the president to a polar choice would caution against the use of the prerogative power. Or perhaps he sought to articulate a vision of state power in which the choice to pardon must take the form of an exception to the rule of law. Or perhaps he simply did not want to empower the presidency further. Whatever the cause, Smith predicates the security of society on the death of the pirate, on the death of the one who is "at war with his species, and has renounced the protection of all civilized Governments, and abandoned himself again to the savage state of nature." This language, reminiscent of Hobbes's description of pregovernmental society in *Leviathan*, weaves together the conduct of pirates and sovereigns. One is defined by the rejection of the other or, indeed, by the death of the other.[48]

Smith's vision of the pirate's body, bloodied and broken at the feet of the state, bears more than a family resemblance to Agamben's description of the ancient Roman legal figure *homo sacer*, the "sacred man" who lives in exception to the protection of the law, a figure whose production

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[47] Smith, *Punishment for Piracy*.
[48] Ibid. See also Thomas Hobbes, *Leviathan*, ed. Edwin Curley (New York: Hackett, 1994).

through the exceptional decision, Agamben claims, grounds the sovereign order as such.[49] Scholars following Agamben often see the state as ontologically compromised by the articulation of sovereign power and violence. For example, one might argue, if the destruction of pirates is understood as the foundation of sovereignty, then the concept of universal jurisdiction—so inextricably linked to the punishment of pirates—becomes thoroughly tainted. Thus Sonja Schillings writes in her recent book *Enemies of All Humankind*, "One vehicle used to enforce such a sovereign's claims to universal violent outreach may be the notion of universal jurisdiction against the enemy of all humankind." She attributes this development in Agamben's theory to two other recent books on piracy: Daniel Heller-Roazen's *The Enemy of All* and Amedeo Policante's *The Pirate Myth*.[50] In these texts, every crime punished under universal jurisdiction, whether piracy, torture, or genocide, is recoded as part of an emerging "Imperial constitution," to borrow Policante's language, and any attempt to work within that system is recoded as another expansion of an imperial sovereign order.[51]

Unlike part 1 of this dissertation, which supplements contemporary theories with a history of the postsovereign in the American imagination, part 2 returns to the nineteenth century to prompt scholars in the present to reconsider their own dispositions toward sovereignty. Although there is much to admire about the political commitments against violence, colonialism, and abjection articulated in the works of Schillings, Heller-Roazen, Policante, and many more, the totalizing nature of their critique risks undermining attempts to thwart violence from within the state. Indeed, they

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[49] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998).
[50] Sonja Schillings, *Enemies of All Humankind: Fictions of Legitimate Violence* (Hanover, NH: Dartmouth College Press, 2016), 271, see also 9–11; Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009); Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (London: Routledge, 2015).
[51] Policante, *Pirate Myth*, 191. See also Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000).

foreclose completely the prospect of state action as a method of addressing state violence. Part 2 of this dissertation does not offer specific solutions to the real problems of modern sovereign power identified by these authors; rather, by analyzing the structure of decisionist sovereignty within the American sovereign imaginary, and by highlighting one case in which the sovereign actively worked to stop state violence, I hope to have revealed one way in which sovereign power can be used to *preserve* life that is vulnerable to state power, rather than to destroy it.

An Imaginary Coda for Ezra Allen

A sovereign imaginary—an assemblage of experiences, attitudes, and ideas, all about the limits of state power—is an ambiguous concept by design. Not quite ideology, nor hegemony, nor culture, nor episteme, the term "imaginary" highlights reflexivity, or, to borrow Charles Taylor's language to describe the social imaginary, "it is what enables, through making sense of, the practices of a society."[52] A sovereign imaginary, a subsidiary of the social imaginary, is thus what enables, through making sense of, the practices of the sovereign. I have argued that responding to piracy—whether legally, socially, politically, or personally—was one of the most important ways in which Americans in the early nineteenth century made sense of the practices of sovereignty. Through piracy, sovereignty operated as a navigational concept at the frontiers of American law—both the literal frontier of the jurisdictional limit and the figural frontier of an emerging set of legal norms that would undergird American state power for centuries—which helped a young nation chart its own course as a sovereign power, domestically and internationally. I have shown that this sovereign imaginary was not isolated to the period in which it formed, and that its residues influence scholarship, politics, and law as history marches forward in the twenty-first century. We still have

[52] Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2003), 2.

much to learn from past iterations of the American sovereign imaginary, and piracy is one of many lenses we might use. As always, there remains more to discover, more to imagine.

Ezra Allen serves as a reminder, however, that within these imaginaries are the real lives, the real experiences, of real people. My argument in this dissertation is not that Allen, or any particular person from the nineteenth century, would have made sense of piracy exactly as I have here. Rather, by assembling and analyzing this archive of pirate rhetorics, I have illuminated some of the pathways through which Allen and his contemporaries made sense of the sovereign networks in which they operated. Allen's story reveals, more than anything, that the experience of sovereignty in the early nineteenth century was capacious. Sovereignty was written about, even if not under that name, in diaries, on broadsides, in newspapers, and in books, and it was a topic of considerable interest to jurists, ministers, sailors, and philosophers. I have tried to produce an account of the sovereign imaginary that would be as at home in a courtroom as in *The Pirates Own Book*, but more so, I have sought to describe a sovereign imaginary that resonates with the everyday life of Ezra Allen.[53]

[53] Charles Ellms, *The Pirates Own Book; or, Authentic Narratives of the Lives, Exploits, and Executions of the Most Celebrated Sea Robbers [. . .]* (Boston: Thomas Groom, 1837).

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Appendix A: The Debate over the Reprieve of the *Plattsburgh* Pirates

Below is a list of articles printed in and around Boston, Massachusetts, between January 18 and March 1819. Each of these texts discusses President James Monroe's reprieve of the *Plattsburgh* pirates. The articles are categorized by their general disposition toward the reprieve, divided between critical and supportive positions. Articles that critique the reprieve as such, while offering comments in support of the president, reprieve petitioners, or prisoners, are coded as "critical." In each section, articles are listed in chronological order of publication, followed by alphabetical order by publication title.

Articles primarily critical of the reprieve:

Boston Daily Advertiser, January 18, 1819, AHN.
Justice, *New-England Palladium*, January 19, 1819, AHN.
Justitia, "The Reprieve," *Columbian Centinel*, January 20, 1819, AHN.
Essex Register (Salem, MA), January 20, 1819, AHN.
Justice, *Boston Commercial Gazette*, January 21, 1819, AHN.
Dedham Gazette, January 21, 1819, AHN.
Independent Chronicle and Boston Patriot, January 21, 1819, AHN.
New-England Galaxy and Masonic Magazine, January 22, 1819, APS.
New-England Galaxy and Masonic Magazine, January 29, 1819, APS.
Justice, *Boston Commercial Gazette*, February 1, 1819, AHN.
Note: Responds to Mercy's article published in the Palladium *on January 22.*
Dedham Gazette, February 5, 1819, AHN.
Christian Charity, *Boston Kaleidoscope and Literary Rambler*, February 6, 1819, AHN.
Justice, *New England Palladium*, February 9, 1819, AHN.
Note: Responds to Mercy's article published in the Palladium *on January 29.*

Articles primarily supportive of the reprieve:

A.B., "On the Execution of Criminals," *Panoplist, and Missionary Herald*, January 1819, APS.
Mercy, *New-England Palladium*, January 22, 1819.
Note: Responds to Justice's article published in the Palladium *on January 19.*
Hope, *Boston Commercial Gazette*, January 28, 1819, AHN.
Mercy, *New-England Palladium*, January 29, 1819.
M., *Columbian Centinel*, January 30, 1819, AHN.
Note: Responds to Justitia's article published in the Centinel *on January 20.*
Mercy, *New-England Palladium*, February 16, 1819.
Note: Responds to Justice's articles published in the Palladium *on February 1 and 8.*
A.B., "The Execution of the Pirates," *Panoplist, and Missionary Herald*, March 1819, APS.