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Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism

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In his geographical treatise of 1537, the Portuguese chronicler D. João de Castra explained that it would be possible to correlate all newly discovered lands with astronomical markers to produce an accurate map of the world. The result would be, he wrote, a "true and perfect geography."[1] The movement toward this vision, from the cartographic revolution of thirteenth-century Portolan charts to the use of surveying to map colonial territories in the nineteenth century, is a compelling narrative of the rationalization of space, and of the reinforcement of this trend by the pursuit of European imperial interests.[2]

This narrative needs to be placed alongside the history of "imperfect geographies" and their production in empire. Territorial control was not a central aim of most empires in history. While an iconic association with empire is the pink shading of British imperial possessions in nineteenth- and early twentieth-century maps, this image obscures considerable variation across imperial holdings. Empires did not cover territory evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings. Even in its most paradigmatic cases, empire's spaces were interrupted, politically differentiated, and encased in irregular and sometimes undefined borders. Though empires did lay claim to vast stretches of territory, the nature of these claims was tempered by control that was exercised mainly over narrow bands, or corridors, of territory and over enclaves of various sizes and situations.

[1] Quoted in Armando Cortesão and Avelino Teixeira da Mota, "General Introduction," in *Portugaliae Monumenta Cartographica* (Lisbon: n.p., 1960), Vol. I, xvii–xlii, quote p. xvii.

[2] This narrative is presented piecemeal in works spanning the history of cartography, historical geography, and colonial studies. In early colonial history, one result has been a consistent emphasis on the erasure of the spatial understandings of non-Europeans; see, for example, J. B. Harley, "New England Cartography and the Native Americans," in *The New Nature of Maps: Essays in the History of Cartography,* Paul Laxton, ed. (Baltimore: Johns Hopkins University Press, 2003), 169–96. In the construction of high colonialism, mapping is seen to function as a reinforcement of social control; for example, see Matthew H. Edney, *Mapping an Empire: The Geographical Construction of British India, 1765–1843* (Chicago: University of Chicago Press, 1999). The general argument about an association between the transition to Cartesian representations of space and European empire is in Robert David Sack, *Human Territoriality: Its Theory and History* (Cambridge and New York: Cambridge University Press, 1986), ch. 2.

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The history of these other ways of understanding and producing space in empire is important in part because they played a role in the composition of world regions. These historically new designations have been studied very little by world historians, who have developed methodologies for bridging the "local" and the "global" without giving much attention to categories that defy either label. When regions have been examined, the result has been mainly to reinforce the notion that such categories were creations of Europeans, part of a generalized project to concentrate geographic knowledge and to shape a global image with Europe at its center.[3] Yet territory, as we have learned from historians of borderlands regions, was constructed not just for empire but also in empire, and at its margins.

Law comprises a particularly important part of the social construction of territory and region. This function of the law is often obscured by an enduring emphasis on the study of legal systems that appear more or less coterminous with political jurisdictions. But legal practices crossed boundaries and helped to constitute legal cultures of unruly dimensions. In empire, law traveled with legal officials and also with merchants, sailors, soldiers, sojourners, and settlers. Legal practices often closely intertwined with those of the peoples with whom imperial agents came into contact, creating continuities in patterns of legal pluralism across substantively different legal orders.[4] Yet we should not confuse global legal continuities with the homogenization of territory. Legal routines and institutions also marked discrete spaces of empire—the corridors and enclaves of imperial control. While this use of law in shaping imperial space was itself a global phenomenon, it also set in motion political tensions and processes that helped to create regional diversification.

This paper examines the link between globalizing legal practices of one kind—the circulating legal strategies of mariners in the late seventeenth and early eighteenth centuries—and sharpening distinctions between the Atlantic and Indian oceans as separate regulatory spheres. Pirates are the central characters in a story about the mutual influence of Atlantic legal politics and Mughal-European relations. This account works against several common but flawed narratives: one about the uncomplicated role of oceans as forces of global integration in the early modern world; a second about piracy as a phenomenon of political opposition or lawlessness; and a third about the genesis of a society of international law in early modern Europe. In my sea yarn, the oceans have a quality of lumpiness about them, pirates strain not to break the law, and

[3] See e.g., Martin Lewis and Karen Wigen, *The Myth of Continents: A Critique of Metageography* (Berkeley: University of California Press, 1997). An interesting case study of regional formation that emphasizes the geographic imagination of a region's inhabitants rather than the discourse of outsiders is Katherine Morrissey, *Mental Territories: Mapping the Inland Empire* (Ithaca, N.Y.: Cornell University Press, 1997).

[4] This is one of the arguments in Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge and New York: Cambridge University Press, 2002).

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international norms take shape not at Westphalia but at the edges of the Indian Ocean.

OCEANS OF LAW

The pattern of imperial expansion in which empires laid claim to vast stretches of territory but exercised control over only narrow bands, or corridors, and over enclaves of various sizes, was represented most clearly in early modern European maritime empires. Extensive claims to ocean territory coexisted with effective control over sea-lanes connecting dispersed settlements or trading posts. For example, Portuguese claims in Asia recognized by the Treaty of Tordesillas included control of the eastern seas, but the geography of the Portuguese trading-post empire in sixteenth-century Asia was shaped by the ability to monitor sea lanes and ports. Both Spanish and Portuguese rulers understood the Treaty of Tordesillas as an agreement dividing the globe into spheres of influence rather than realms of sovereignty.[5]

European powers had long recognized the Indian Ocean as in some respects a different sort of ocean space, one of crowded sea-lanes dominated by coastal polities and ethnic traders. This idea matched the Ptolemaic image of the Indian Ocean as a separate sea encircled by land.[6] But mariners after da Gama, especially from the second half of the sixteenth century, increasingly experienced travel around the Cape of Good Hope as routine and carried expectations about maritime affairs across ocean basins.[7] Europeans did not invent a new maritime politics for the Indian Ocean but sought to continue older practices from the Mediterranean and, later, from the West Indies. The Portuguese sale of permits, modeled on Venetian strategies, was adapted by other Europeans entering Indian Ocean trade; by the second half of the seventeenth century, the pass system overlapped with practices from the Atlantic such as the issuance of letters of marque for privateering. Indian Ocean and Atlantic maritime conventions

[5] On this point, see Philip Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 75–86. Jerry Brotton traces the difficulties of enforcing the Treaty of Tordesillas given the state of geographic knowledge in "Terrestrial Globalism: Mapping the Globe in Early Modern Europe," in Denis Cosgrove, ed., *Mappings* (New York: Reaktion Books, 1999), 90–108. For an approach that takes Portuguese sovereignty claims at face value, see Patricia Seed, "This Island's Mine," in Peter Hulme and William H. Sherman, eds., *The Tempest and Its Travels* (Philadelphia: University of Pennsylvania Press, 2000). An overview of imperial rivalries influencing early maritime politics is provided by Elizabeth Mancke, "Empire and State," in David Armitage and Michael Braddick, eds., *The British Atlantic World, 1500–1800* (New York: Palgrave MacMillan, 2002), 175–95; and E. Mancke, "Negotiating an Empire: Britain and Its Overseas Peripheries c. 1550–1750," in Christine Daniels and Michael V. Kennedy, eds., *Negotiated Empires: Centers and Peripheries in the Americas, 1500–1820* (London: Routledge, 2002), 235–65.

[6] On the legacy of Ptolemy for cartographic representations of ocean space by Europeans, see Martin W. Lewis, "Dividing the Ocean Sea," *Geographical Review* 89, 2, "Oceans Connect" (Apr. 1999), 188–214.

[7] Portuguese shipwreck rates at or near the Cape were appreciably reduced in the second half of the sixteenth century, though the area around Mozambique continued to be considered a dangerous coast. The Dutch, in the seventeenth century, largely avoided these dangers by sailing east to Batavia.

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were similar in their flexibility and in the tensions they embodied between, on the one hand, competing imperial claims to the control of ocean space and, on the other, cooperation across imperial lines and pervasive freebooting.

The boundaries between separate ocean worlds at the beginning of the eighteenth century were thus surprisingly blurred. World maps still did not consistently label the "Atlantic Ocean" or the "Indian Ocean," and each region was often represented as comprising multiple seas.[8] Regional trading patterns helped to confound boundary lines between the oceans. To the west of the Atlantic, there were spaces of close connection between the Atlantic and the "South Sea." In particular, mariners' overland crossings of the Central American isthmus brought a long stretch of the Pacific coast into a regional ambit still centered in the Atlantic-Caribbean.[9] To the east, if we were to draw a map of the Atlantic-Indian Ocean connection following the model of Braudel's space-time maps of the sixteenth-century Mediterranean, the seventeenth-century Atlantic would extend beyond the Cape of Good Hope to the island of Madagascar, the object of Atlantic-style colonizing efforts and slaving expeditions.[10]

The question of whether and to what degree international law reigned in the early modern Indian Ocean is puzzling to scholars and was also a matter of some confusion among early modern mariners. Philip Steinberg argues that prior to the incursions of the Portuguese in the Indian Ocean, no power in the region held a view of maritime jurisdiction that paralleled that of the European Mediterranean and, later, the European-controlled Atlantic.[11] That is, ships at sea were not viewed as extensions of land-based power, and the sea itself was a non-militarized space. The Mughal Empire had no choice but to follow this tradition after a series of dramatic demonstrations of European maritime superiority.[12] Yet Mughal practices did encompass routines for controlling maritime trade. And the views of European legal theorists, simplified by a later historical preoccupation with the legal basis for the expansion of the limits of territorial waters, were consistent with Indian Ocean maritime politics.[13]

[8] Martin W. Lewis, "Dividing the Ocean Sea."

[9] Peter T. Bradley, *The Lure of Peru: Maritime Intrusion into the South Sea, 1598–1701* (New York: St. Martin's Press, 1989).

[10] See the work of Alison Games on English colonization schemes for Madagascar.

[11] Steinberg, *The Social Construction of the Ocean,* 41–52.

[12] Thus Prakash notes that when the king of the Maldive islands appealed to Aurangzeb to prevent English and Dutch shipping from reaching the islands, he was told that the emperor could do nothing because he was "master only of land and not of the sea." Om Prakash, "European Corporate Enterprises and the Politics of Trade in India, 1600–1800," in Rudrangshu Mukherjee and Lakshmi Subramanian, eds., *Politics and Trade in the Indian Ocean World: Essays in Honour of Ashin Das Gupta* (Delhi: Oxford University Press, 1998), 165–82, quote p. 174.

[13] For a strong argument that the international law of the Indian Ocean not only predated that of Europe but was the model for certain aspects of seventeenth-century international law, see R. P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff, 1983); and for a more measured approach that provides some support for this view, see C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)* (Oxford: Clarendon Press, 1967).

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Many accounts of early European law of the sea focus attention on the debate between Grotian arguments for freedom of navigation and definitions of territorial sovereignty of the seas as forwarded by Selden. This narrative tends to overlook both the preoccupations that gave rise to these alternatives and their substantial areas of agreement about the foundations of maritime legal order. One source of continuity was the recognition, across European polities and among jurists, of a broadly similar configuration of ship's law in relation to the law of European sovereigns. The legal authority of ship captains was one variety of a wider array of subordinate and semi-autonomous legal authorities.[14] Early Iberian overseas missions awarded ship captains and the military commanders of overseas fortresses judicial authority over their crews and factories, with the duties and powers of, essentially, petty magistrates. English and French ship captains also had wide-ranging authority to conduct inquiries and inflict punishments on their crews. Capital cases, in all these systems, were routinely transferred to metropolitan, non-military courts. This semi-autonomy in judicial matters formed the basis for the harsh shipboard disciplinary order shared across the European maritime experience.[15] The arrangement also presupposed the right of state legal officials to oversee and intervene in regulating maritime affairs. Ships thus played a dual role as sources of order in the oceans: they were islands of law with their own regulations and judicial personnel, and they were representatives of "municipal" legal authorities—vectors of crown law thrusting into ocean space.

The history of piracy has often focused on the challenge posed by mariners to these elements of maritime order. Mutinies attacked the legitimacy of captains, and piracy turned ships into vectors not of law but of lawlessness.[16] Piracy was not merely a challenge to order, however. In the arena of international law, defining piracy became related to the question of legitimate sponsorship—indirectly important to understandings of sovereignty. Maritime practice meanwhile focused attention on the nature of legal ties between mariners and their sponsors.

Defining the legal status of particular pirates, whether Barbary corsairs or

[14] For a broader discussion of the influence of this model, see Chapter 2 of Benton, *Law and Colonial Cultures;* and Lauren Benton, "The Legal Regime of the South Atlantic World: Jurisdictional Complexity as Institutional Order," *Journal of World History* 11, 1 (2000):27–56.

[15] On shipboard discipline, see especially Marcus Rediker, *Between the Devil and the Deep-Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700–1750* (Cambridge and New York: Cambridge University Press, 1987). See also Pablo E. Pérez-Mallaína, *Spain's Men of the Sea: Daily Life on the Indies Fleets in the Sixteenth Century* (Baltimore and London: The Johns Hopkins University Press, 1998).

[16] See for example Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon, 2000). A treatment of piracy that notes its close relation with claims to the monopoly of trade routes is Anne Pérotin-Dumon, "The Pirate and the Emperor: Power and Law on the Seas, 1450–1850," in James D. Tracy, ed., *The Political Economy of Merchant Empires* (Cambridge and New York: Cambridge University Press, 1991), 196–227.

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European mutineers, and judging particular acts at sea depended on distinctions between legality and illegality residing in two legal traditions.[17] A first tradition can be traced forward from the writings of Alberico Gentili, an Italian jurist at Oxford writing in the 1580s. Gentili defined piracy as any taking not authorized by a sovereign. Takings at sea were merely analogous to robbery on land. The approach turned on the definition of lawful sovereigns and insisted that merely declaring enemy states piratical would not legally make them so. Thus the Barbary states could not be defined as piratical, even if engaged in raiding. This view legitimated the expansion of letters of marque and reprisal, and, as Alfred Rubin has noted, it opened piracy to international law by requiring legal forums to judge the legitimacy of authorizations by other sovereigns.[18] A further implication was that any sovereign could extend the jurisdiction of its municipal law to foreign lands by asserting the existence of "pirates" there—or the absence of a controlling polity.

A second tradition is traced to the writings of Hugo Grotius and the publication of *De Jure Belli ac Pacis* (On the Law of War and Peace) in 1625. Grotius rejected Gentili's notion that actions could be denoted as piratical by withholding recognition of polities as having legitimate authority. There was no such thing as a lawful capture outside a state of war. The implication in regard to the Barbary states—on Grotius' mind as much as on those of his fellow Europeans—was that a state of war existed between European nations and the Barbary states and therefore the takings were legal. But the effect of this argument on Grotius' view of the sovereignty of the seas is perhaps not what is expected by readers accustomed to associating him simply with the notion that the sea was free for all to navigate.[19] If seizures not conducted in a state of war were unlawful and piratical, then military presence itself could create the conditions for the extension of a country's law into ocean space: "[S]overeignty over a part of the seas is acquitted in the same way as sovereignty elsewhere,

[17] The discussion of the two approaches follows Alfred P. Rubin, *The Law of Piracy* (Newport, Rhode Island: The Naval War College Press, 1988).

[18] See Rubin, *The Law of Piracy,* 23.

[19] Grotius' treatise in defense of free navigation of the seas, *Mare Liberum* (The Free Sea) was written in response to a request by the Dutch East India Company (VOC) to justify its seizure of a Portuguese ship near Malacca in 1603. Grotius argued forcefully that the unlawful claims of the Portuguese created a condition of just war that legitimated the taking by a forerunner of the VOC. The argument rested in part on Grotius' view that the sea could not be occupied and therefore could be held only in common. But Grotius' view of the sea as a "state of nature" in which both sovereign agents and private actors were guided by natural law coexisted with the more familiar argument that the VOC forerunner was indeed an agent of the Dutch state. (In point of fact, Grotius claimed that the ship captain was acting at the behest of the King of Johore, whose sovereignty Grotius upheld and whose right to action in this case derived from his alliance with the Dutch.) On the classical foundations for Grotius' views on natural law and its implications, see Benjamin Straumann, "'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae,* Institute for International Law and Justice, New York University Law School, unpub. MS, 2005. On the context of Grotius' early writings, see "Introduction," in David Armitage, ed., *The Free Sea* (Indianapolis: Liberty Fund, Inc., 2004), xi–xx.

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that is, . . . through the instrumentality of persons and of territory. It is gained through the instrumentality of persons if, for example, a fleet, which is an army afloat, is stationed at some point of the sea; by means of territory, insofar as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself."[20] Grotius did not contemplate a sea space that was under the control of an international authority but rather one in which various sovereign nations operated "in tension with one another" without interfering in each other's rights to travel and trade freely.[21] His views anticipated an Atlantic order based on what James Muldoon has called "European condominium," or "Christendom without the pope."[22]

The approaches had in common the notion that the extension of jurisdiction into the "international" space of the seas was a function of the extension of municipal law through the presence of legal actors with ties to particular sovereigns. This construction was supportive of the legal underpinnings of ships' law and captains' authority, while adding an opening to international law through the requirement of ascertaining sponsors' legitimacy or intentions. The understanding of legal authority as extending into ocean space through ships as vectors of law developed parallel to a maritime world in which authority was indeed limited in practice to the control over sea lanes rather than extensive ocean zones. While such boundaries as the line of the Treaty of Tordesillas and, later, the Lines of Amity dividing European from extra-European arenas provided a loose framework for a global legal geography, these markers were less important—in both theory and practice—than the intricate, intersecting, and fluid corridors of control that were established through shipping patterns and defended by force.[23] Mariners, in other words, carried law beyond the line, even or especially when they acted as privateers or pirates.

PIRATES AS LAWYERS

The term "piracy" in the seventeenth century could be applied to an array of actions including mutiny, shipboard felonies, and unlicensed raiding of various kinds. The line between privateering and piracy was thin, and the distinction

[20] Quoted in Rubin, *The Law of Piracy,* 30. Rubin suggests that Grotius was reversing his earlier position developed in *Mare Liberum* that a sovereign could not effectively occupy part of the sea. Yet in the earlier work, Grotius already noted that Roman law recognized not ownership of the sea but the right of "protection and jurisdiction . . . which also other free nations have in the sea." (Grotius, *The Free Sea,* in David Armitage, ed., 31).

[21] James Muldoon, "Who Owns the Sea," paper presented at the conference "Sea Changes: Historicizing the Oceans," Universitat Greifswald, July 2000.

[22] James Muldoon, "Christendom, the Americas, and World Order," paper presented at the conference "The History of the Atlantic System 1580–1830," 18.

[23] Steele describes the shifting definitions and flexible interpretation of treaty enforcement beyond the line. See Ian Steele, *The English Atlantic, 1675–1740: An Exploration of Communication and Community* (New York: Oxford University Press, 1986). For an argument about the lasting symbolic importance of the lines, see Eliga H.Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, Circa 1772," *William and Mary Quarterly* 60, 3 (2003), 471–510.

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was blurred by cycles of inter-imperial war and peace: In times of war, the demand for privateers surged, and in periods of peace, decommissioned, experienced sea raiders found themselves without sponsors yet sometimes continued to engage in raiding, especially in places where lucrative shipping was poorly protected.[24] The legality of their actions depended upon open and conflicting interpretations of whether the timing, location, and targets of raids fell within the terms of often dubious commissions. Not surprisingly, both captains and common sailors cultivated a certain expertise in representing their commissions as legitimate and the assets they seized as legal prizes.

Mariners had one eye always on return and the possibility, however remote, of being brought to trial. As a consequence, they engaged in frequent legal posturing, the practice of rehearsing stories that might serve to establish actions as legal in prize proceedings or in criminal trials if the mariners ever landed in court to be tried as pirates. Certainly there was some shared knowledge of defense arguments that might be effective, and even when very far from home, mariners gave considerable thought to strategies for preserving the pretense of legality. Such efforts extended, albeit unevenly, across the ocean world. Sailors' familiarity with the various ways to establish the legality of their actions suggests a certain disconnect between representations in Europe of lawlessness "beyond the line" and the understandings of sailors (and colonial officials) themselves.

A clear view of mariners' role in the construction of legal practice on the seas is provided by the trial of William Kidd, whose career connected Atlantic freebooting, elite politics in England, colonial tolerance for piracy, and an increasingly valuable Indian Ocean trade. Kidd became a mariner in the Caribbean, settled in and sailed from New York, obtained sponsorship from the highest reaches of London society, traveled through the South Atlantic and into the Indian Ocean, returned to New England via the Caribbean, and was tried and hanged in London in 1701. Kidd's voyage began in an atmosphere of tolerance for privateering irregularities in the midst of King William's War and ended in peacetime when political winds had shifted. Sharp political discord over management of the East India trade and anxiety over maintaining the trade combined to fuel new efforts to suppress piracy. Worse for Kidd, his Whig sponsors had suffered political losses to the ascendant Tories.[25]

Kidd, like his peers, fashioned out of his experience in the Atlantic an imperfect framework for understanding Indian Ocean maritime politics. Even as

[24] For an overview of long and short waves of early modern piracy and an analysis of the impact of cycles of warfare, see David Starkey, "Pirates and Markets," in C. R. Pennell, ed., *Bandits at Sea: A Pirates Reader* (New York: New York University Press, 2001), 107–24.

[25] The political context of William Kidd's voyage and trial is analyzed thoroughly in Robert C. Ritchie, *Captain Kidd and the War against the Pirates* (Cambridge and London: Harvard University Press, 1986). I rely throughout this section both on Ritchie's excellent account and on the documents from the Kidd case contained in Franklin Jameson, ed., *Privateering and Piracy in the Colonial Period, Illustrative Documents* (New York, Augustus M. Kelley, 1970).

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he misjudged the larger forces of imperial politics that would lead to his being turned into an example, he operated on the more or less accurate assumption that the Atlantic system of letters of marque and the Indian Ocean pass system both rewarded the exploitation of legal ambiguity. Like most other seventeenth-century pirates, Kidd never perceived his actions as entirely outside the regulatory order and fashioned a narrative of his voyage that he hoped would allow him to keep his booty and protect him at trial.

Kidd sailed from London with a commission permitting him to capture pirates and French merchant ships. On the trip down the Atlantic coast, Kidd threatened to seize a Portuguese ship and refused the request of a British navy ship to provide it with healthy crewmembers. These actions would not have won friends for Kidd, but they were hardly piratical. Once in the Indian Ocean, though, Kidd's status changed quickly. After friendly exchanges with pirates at Madagascar, Kidd sailed to the mouth of the Red Sea in search of ships returning from Mocha to Surat. Often laden with valuable goods and wealthy pilgrims returning from Mecca, such ships were attractive—and, given Kidd's commission, illegal—targets. Kidd captured two merchant ships in the Indian Ocean, one of which, the *Quedah Merchant,* was leased by a high official of the Mughal court. Kidd sailed the larger ship back to the Caribbean, where he scuttled and hid it before returning to New England.

After a careful approach and attempts to negotiate his safety, Kidd was arrested on the orders of Governor Bellomont of New York, ironically one of Kidd's London sponsors, and was transferred to London to stand trial for piracy and murder (both capital crimes) in consecutive trials. Although he did not have a particularly sophisticated legal strategy and did not use all the legal arguments available to him, Kidd defended himself vigorously at both trials. The evidence against him for murder was strong: ship captains' authority on board was vast, but it did not encompass murder. The piracy charges were weaker, but in a political climate that had turned against both piracy and the irregular practices of privateers as forces disruptive to trade, conviction was inevitable. Kidd's trial and execution signaled, even more clearly than the anti-piracy legislation with which it nearly coincided, a shift in official policies toward piracy at the beginning of the eighteenth century. It is this significance that has largely fueled the interest of historians in the case.

Kidd's legal acumen—or lack of it—also deserves attention because it points to the pervasiveness of certain ideas among mariners about the law. When arrested, Kidd defended his capture of the two merchant ships in the Indian Ocean by citing his possession of French passes seized from the ships. That the ships were carrying such passes was itself an indication of the legal ambiguity of global shipping. Like other trading ships, the prizes carried multiple flags and passes, and the captains had been tricked by Kidd into presenting the French documents that he hoped would provide legal cover for his actions. Conveniently for English authorities, the French passes were misplaced after Kidd's

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arrival in London, and he was never able to present them at trial. He was reluctant to abandon this strategy, though, and persistently pleaded with authorities to recover the lost passes.

His only remaining strategy was to plead coercion. He tried arguing that a mutinous crew had forced him into taking the prizes in the Indian Ocean. Claiming that he had dissuaded his men from taking another unlawful prize, Kidd informed the court, "with all the arguments and menaces he could use [he] could scarce restraine them from their unlawful Designe, but at last prevailed."[26] He also reported that he had discovered soon after its capture that his largest prize in the Indian Ocean was in fact not French, though it traveled with a French pass, but that it "belonged to the Moors." He then "would have delivered her up again, but his men violently fell upon him, and thrust him into his Cabbin, saying the said Ship was a fair Prize, and then carryed her into Madigascar and rifled her of what they pleased."[27]

Kidd was not wrong to think that such arguments might carry some weight in pirate trials; he was only wrong to suppose they might prove useful at his own trial. Given the political vulnerability of his former sponsors, the strong interest in London of protecting Indian Ocean trade, the embarrassing ability of the notorious pirate Henry Avery to escape capture, and the fact that the trial was being watched by Mughal observers, conviction was a foregone conclusion (and a moot point, given that Kidd had already been convicted of murder and could not be hanged twice). Kidd at no point gave up trying to defend himself. He did fail to present other arguments available to him, in particular that his return with the booty to the Caribbean was necessary because of the absence in the Indian Ocean of a functioning prize court. Instead, his choice of defense strategies relied upon familiar interpretations of legal ambiguities at sea—the permissible range of a captain's authority, the definition and threat of mutiny, and the liberties taken in interpreting both letters of marque and the sponsorship of other ships.

In calling on these arguments, Kidd was relying closely on widely circulating understandings of the maritime legal order. No matter how remote, the possibility of prosecution, together with the need to establish ownership over seized goods, caused privateers-turned-pirates to anticipate defense arguments they might use at trial and to make efforts to preserve the pretense of legality, even while openly conducting unsanctioned raids and seizures. Pirates went out of their way to obtain flawed commissions and to represent fraudulent commissions as valid. In the Atlantic, letters of marque and reprisal could be broadly interpreted to permit attacks on a wide range of targets; national identities

[26] "Narrative of William Kidd. July 7, 1699" (PRO, CO 5:860, no. 64 XXV), printed in *Privateering and Piracy,* 205–13, quote p. 208.

[27] "Memorial of Duncan Campbell" (PRO CO 5:860, no. 64 IV), printed in *Privateering and Piracy,* 202–5, quote p. 203. Kidd was already telling this story when he held discussions with Governor Bellomont's envoy off the coast of Rhode Island to try to arrange a safe return.

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could be changed or disguised to render illegal seizures quasi-legal; and the disciplinary order of ships themselves could be cited to blame acts of piracy on captains' orders or on the intimidation of mutinous crews. Added to these conditions was the simple fact of geographical distance, which could be cited by privateers, pirates, and their backers to justify attacks on shipping because of the slow pace of news travel and the ambiguities of diplomacy and war-making "beyond the line."[28] The privateering commission had neither uniform standing nor consistent terms; in many cases, it was little more than sham. Yet examples abound of privateers and pirates going out of their way to obtain or create commissions that they might present in defense of raiding.

At his trial for piracy in the English Channel (a capture that followed a longer stretch of piracy in the Atlantic), George Cusack presented a commission in someone else's name; the court rejected his explanation that his own valid commission had been accidentally exchanged for the invalid one he carried and pointed out that even a commission in his own name would not have entitled him to capture an English ship.[29] William Dampier reports on the enthusiasm for forged or flawed commissions in describing a voyage to raid Spanish ports on the Pacific in the 1680s. The ships in Dampier's party, captained by Edward Davis and Charles Swan, met up with a large group of French and English freebooters off the coast of Panama. In exchange for provisions, the French offered the English captains blank commissions issued at Petit Goâve. Davis accepted one to replace his expired commission, but Swan chose to keep his commission from the Duke of York. Though it explicitly ordered him not to attack Spaniards, he reasoned that a skirmish at Valdivia, where some of his crew had been killed, could be used to argue that subsequent raids on Spanish ports were justified and that "he had a lawful Commission of his own to right himself."[30] One English captain even rested his defense against charges of piracy on a commission

[28] The definition of which line was meant when Europeans invoked the phrase "no peace beyond the line" underwent change from the more precise delineations of fifteenth- and early sixteenth-century treaties, to the simple designation of the Tropic of Cancer, and to the more informal reference to the equator as the dividing line. As Ian Steele has shown, these differences paralleled emerging definitions of different zones of peace. Treaties routinely came to recognize phases in treaty enforcement in several zones of increasing distance in the wider world. However, as Steele also notes, these zones were not precisely bounded and, for all intents and purposes, North America was included in the southern Atlantic zone. This geography of diplomacy provided yet another dimension to the legal structuring of piracy since the interpretation of these boundaries had important and concrete implications for the characterization of seizures as legal or illegal. See Steele, *The English Atlantic, 1675–1740.* On the generalized perception of Europe as law-bound and civilized, and the extra-European world as lawless and barbarous, see Gould, "Zones of Law, Zones of Violence."

[29] *The Grand Pyrate, or, The Life and Death of Capt. George Cusack, the Great Sea-Robber: With an Accompt of all His Notorious Robberies Both at Sea and Land: Together With His Tryal, Condemnation, and Execution / Taken by an Impartial Hand* (London: Printed for Jonathan Edwin, 1676) [microform].

[30] This is from Dampier, quoted in Peter T. Bradley, *The Lure of Peru: Maritime Intrusion into the South Sea, 1598–1701* (New York: St. Martin's Press, 1989), 136.

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supposedly issued by a Central American Indian leader.[31] And when Edward Mansfield seized Santa Catalina from the English in 1666, at the end of an unprofitable six-month voyage around the Caribbean, he could be relatively sure that he would not be punished on his return to Jamaica even though he had carried only a letter of marque approving attacks on the Dutch. Mansfield had earlier justified raids in Cuba by producing a commission permitting raids against the Portuguese that had been issued by the French governor at Tortuga. Taking hostages in an attack on a Cuban port in violation of the peace with Spain and with the use of a French commission to attack the Portuguese stretched interpretations of legality. Yet when the Spanish townsmen requested the paperwork, Mansfield cared enough to produce it. Both parties seemed to be preparing their reports on the incident, with Mansfield betting that a flimsy legal cover would be enough to protect him on his return to Jamaica, given the island's insecurity and local interests in sustaining privateering.[32]

The terms of valid commissions were also open to creative interpretation. Henry Morgan, for example, carefully analyzed the scope of his commission of 1667. The commission did not authorize attacks on Spanish targets, but it did allow Morgan to stop Spanish ships to determine if the Spaniards were plotting against Jamaica. Morgan was certainly aware that if he concocted a story about a discovered plot against the English, it would provide a rationale for aggression. And the commission's failure to condone land attacks made them all the more attractive. The crew would be able to divide the booty from such raids among themselves without worrying about shares for the ship owners or the crown. Morgan clearly understood this opportunity and formed a contract with his crew distinguishing between the "free plunder" taken on land and goods captured from ships that would have to be taken to a prize court for distribution according to a predetermined formula.[33]

In addition to seeking cover for their actions in dubious commissions, mariners also prepared arguments that they had been forced into raiding against their will. Though it failed for Kidd, this strategy was not always unsuccessful.[34] Three members of Kidd's crew were acquitted on the strength of their de-

[31] Ignacio Gallup-Diaz, *Door of the Seas and Key to the Universe: Indian Politics and Imperial Rivalry in the Darien, 1640–1750* (New York: Columbia University Press, 2004).

[32] Several days before Mansfield took Santa Catalina, the Jamaican Governor Modyford had actually declared war on the Spaniards—though Mansfield did not know this until later—and the declaration made his expedition against the Spaniards legitimate.

[33] Peter Earle, *The Sack of Panama: Sir Henry Morgan's Adventures on the Spanish Main* (New York: Viking, 1981), 60–61.

[34] This defense continued to be common—and sometimes effective—at pirate trials into the eighteenth century. The project of sorting out unrepentant offenders from forced participants came to be a routine function of court proceedings and invited testimony from pirates about how they came to serve, whether they participated willingly, and even whether they fought with gusto or appeared unhappy with their lot. In the trial of 168 men from Bartholomew Roberts' crew at Cape Coast Castle in 1722, seventy-seven were acquitted on grounds that they were unwilling or indifferent pirates, while thirty-nine were punished and fifty-two were hanged. See Peter Earle, *The Pirate Wars* (London: Methuen, 2003), 207.

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fense that they were servants and had no choice but to follow their masters into piracy. One crew member, a Jewish jeweler named Benjamin Franks, provided a deposition in India describing the voyage in detail but protesting that his information came "of the Seamen" as he lay below decks, too ill to participate in sailing the ship or in any of the raids.[35] Another member of the crew, Edward Buckmaster, who joined another pirate ship after leaving Kidd's, reported that "he had been often in the hold" during the voyage and "saw nothing but water Casks."[36] Privateers-turned-pirates positioned themselves for a safe return in other ways, too. In a letter sent across the Central American isthmus home, Swan implored his wife to assure his employers that he had been forced to abandon trade in favor of plundering: "So desire them to do all they can with the King for me, for as soon as I can I shall deliver myself to the King's justice, and I had rather die than live skulking like a vagabond for fear of death."[37] Protests of ignorance and innocence occasionally had an element of truth. On several ships that turned from trade to freebooting in the South Seas, the crew were not told even of their destination until they were in the south Atlantic. Leaving the Caribbean with a pirate ship under the command of John Cook in 1683, the pilot William Cowley recorded in his journal he had been told the ship was heading only to Tortuga and that he did not learn it was a freebooter until they were at sea.[38] Kidd was not the only one for whom the strategy proved unsuccessful. When six men of Henry Avery's crew were tried for taking part in the mutiny that gave Avery command of the English ship *The Charles the Second* in the waters off La Coruña, and for the acts of piracy committed under Avery afterwards, several of the men pleaded that they had been ignorant of the mutiny until it was too late, and then they were forced to go along. William May even claimed he had intended to report the mutiny to authorities. Asked why he had missed opportunities to do so, even at Bristol after his return to England, May replied—no doubt hoping to ingratiate himself with the court—that he had "intended to declare to none but the Lords of the Admiralty."[39]

Pleas of coercion might best be understood as a common and cheap form of insurance. With the success of Exquemelin's and Dampier's published journals and the popularity of pamphlets reporting on the trials of Kidd and of Avery's

[35] "Deposition of Benjamin Franks. October 20, 1697" (PRO CO 323:2, no. 124) printed in *Privateering and Piracy,* 190–95, quote p. 194.

[36] "Examination of Edward Buckmaster. June 6, 1699" (Oxford Bodleian Library, Rawlinson MSS, A. 272, fol. 48; also PRO, CO 5:1042, no. 40 XL), printed in *Privateering and Piracy,* 197–200, quote p. 199.

[37] Quoted in Anton Gill, *The Devil's Mariner: A Life of William Dampier, Pirate and Explorer, 1651*–1715 (London: Michael Joseph, 1997), 165.

[38] *The Devil's Mariner,* 144

[39] Unfortunately for May and the other defendants, the King's witnesses included crewmembers who testified that all had been free to leave the captured ship; all six defendants were hanged. *The Tryals of Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis and John Sparkes for Several Piracies and Robberies by Them Committeed in the Company of Every The Grand Pirate, Near the Coasts of the East-Indies, and Several Other Places on the Seas: Giving an Account of Their Villainous Robberies and Barbarities: At the Admiralty Sessions, Begun at the Old Baily on the 29th of October, 1696, and Ended on the 6th of November* (London, 1696), 23.

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men, they were also an emerging literary device: Good men went to sea and fell into bad company. The story was one that seemed curiously to reinforce the legitimacy of shipboard discipline, as well as the larger legal framework of competing jurisdictions. Though sailors' work was notoriously grueling and dangerous, and the punishments inflicted on crewmembers often arbitrary and cruel, voyage narratives typically faulted particular captains without criticizing their prerogatives in a general way. And mariners positioned themselves to be able to present a range of stories before the bar. In many pirate trials, including that of Kidd, defense strategies joined in vilifying mutineers and upholding captains' authority, and they reinforced rather than challenged norms of legitimate sponsorship.

THE INDIAN OCEAN AS A LEGAL REGION

Mariners were not behaving irrationally in adopting such strategies. They rightly understood that they were sailing in environments in which their ties to particular sovereigns were both vitally important and a matter of interpretation. This was true in both the Atlantic and the Indian Oceans, despite the differences in the power and presence of non-European traders and in the complexity of intra-regional trading networks.

The Indian Ocean pass system had developed out of an innovation of the Portuguese, in turn based on eastern Mediterranean models, requiring every Asian merchant within Portuguese purview to purchase a pass or license called a *cartaz.* The passes were obtained at the beginning of journeys and required stopovers in Portuguese-controlled ports where customs duties were paid.[40] The Dutch, English, and French adopted the pass system in modified form in the seventeenth century. Though Lane argued famously that this system stood for little more than the collection of protection money, it rested not just on the superior strength of European ships and armaments but on a delicate balance between Europeans' maritime superiority and "their almost total vulnerability on land for a long time."[41] The pass system was profitable only if diplomatic relations with Asian land-based powers permitted trade. To secure this cooperation, rival European merchants often found themselves in informal alliance across national lines. The Portuguese cooperated with Dutch traders on the Coromandel coast in the early seventeenth century and later in the century with the English. Dampier noted in 1684 that English ships were traveling with English passes but Portuguese pilots; a decade later they were even flying Portuguese colors.[42] There were many other examples of a pragmatic intermingling of interests. English trade in particular interpenetrated with Asian trade

[40] On early Portuguese-Indian interactions, see Michael N. Pearson, *Port Cities and Intruders; The Swahili Coast, India, and Portugal in the Early Modern Era* (Baltimore: Johns Hopkins University Press, 2003).

[41] Om Prakash, "European Corporate Enterprises," 174.

[42] Kenneth McPherson, "Trade and Traders in the Bay of Bengal: Fifteenth to Nineteenth Centuries," in *Politics and Trade in the Indian* Ocean, 183–209, quote p. 196.

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so that the ownership of goods on board a given ship was often mixed. Any experienced trader in the east knew that the pass system provided only a loose set of rules for much more complex and layered arrangements. Ships sailed with multiple passes and multiple flags, and they chose to display the colors and present the passes selectively and according to the ports, ships, or courts with which they were engaged.

If this ambiguity was familiar to Atlantic mariners, an important and growing difference with Atlantic conditions lay in the political impact of Mughal authority. Kidd's undoing was not, after all, the coordination of British legal authority but the importance of the protests of the Mughal emperor. Though Indian Ocean traders before 1500 did not militarily enforce their right to trade at sea, they were accustomed to using diplomacy and viewed their control of selective ports as key to the protection of trade interests. Certainly Mughal officials quickly grasped the possibilities of turning European maritime claims in the region to their advantage. Doing so required, after all, only an extension of existing Mughal land-based jurisdictional arrangements and of controls on other, subordinate trading groups. The Mughal emperor rehearsed this policy a few decades before clashes with the English when Maratha insurgents attempted to construct independent maritime trading networks in the Indian Ocean. In the 1660s and again after a brief hiatus in the 1670s, the Maratha leader Shivaji, who had developed a network of inland, fortified posts, began to seize coastal towns, including two raids on the key port of Surat. His forces established coastal island fortresses, engaged in Indian Ocean trade, and disrupted Mughal ocean trading. The Mughal response was to put pressure on other powers, including European traders, to intercept the Maratha fleet whenever possible. Until the 1690s, Mughal authorities were more preoccupied with containing the Maratha threat than with negotiating with European traders in the region.

The approach continued and culminated in the Mughal response to the taking of the *Ganj-I Sawai,* the largest ship of the Surat merchant fleet, captured by Henry Avery on its return trip from Mocha in 1695 and laden with trade goods and with wealthy, well-connected passengers returning from the pilgrimage to Mecca. Trade out of the European factories was stopped, while the Mughal court demanded that the English and Dutch send armed ships in convoys to protect shipping from Mocha. English traders were imprisoned—fifty-three at Surat and eighteen at Swalley—and more than a dozen died. Two years later, an English ship bound for Madras was also seized in response to pirate attacks by "three Saile of Arabs" and "after having Cruized up and down the Gulf five or six day[s]" was plundered and all its crew imprisoned on shore after first having been forced to assist in fighting off an attack by a Portuguese ship.[43]

The East India Company (EIC) officials involved in these acts of reprisal characterized them as piracy. But their complaints about the lack of procedur-

[43] India Office Records (IOR), E/3/53, 6404.

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al formality surrounding these seizures also underscored their understanding that the reprisals were part of a more elaborate legal politics. The senior EIC official at Surat wrote to the Company about the "barbarous usage we have met with from these unreasonable oppressive Moors on no real and only Base affirmacions of the rabble without so much as the Least Shadow or pretence of proof."[44] The captain of the Madras-bound ship sounded a similar complaint when he noted the "absence of any official proceeding" as the crew and passengers were taken into custody.[45] At the same time that British actors complained about the illegality of the seizures, they signaled their expectation that such acts should follow formal procedures as part of a larger diplomatic and legal relationship. But the traders faced a serious imbalance of power on land and were subject to easy Mughal retaliation for raids at sea. When Kidd seized the *Quedah Merchant,* acts of reprisal against traders at Surat were immediate, and the East India Company, struggling in the midst of a downturn in trade, urged Kidd's capture and punishment to prove that there was no official support for this sort of raiding.[46]

The taking of English ships was an example of Mughal action in coastal waters to complement the pressures it exerted on land. To insist that Europeans collaborate to pacify the pirate-ridden Indian Ocean was, in effect, to hold these powers to their jurisdictional claims over ocean space. And while Mughal officials protected their rights by paradoxically reaffirming English ocean sovereignty, English company officials reinforced Mughal legal authority on land and on the coasts as a way of protecting English enclaves and European-Mughal arrangements for trade. English traders extended this strategy to agreements with coastal principalities. One example is an episode reported by an EIC official in April of 1696. Writing from the Malabar Coast to the head of the Company at Fort St. George, the official was responding to a complaint he knew was being lodged by a pair of traders who had been denied permission to trade along the coast, in the small principality of Signaty. Interlopers in the trade were a familiar problem for the Company, and this dispute was in many ways typical, though in making his case the EIC official provided an unusually elaborate rationale. After pointing out that the English in the area had "conquered the whole Malabar Coast by the Right of the Sword, from the Portuguese," the official went on to make clear that he was not claiming English possession of the region, only asserting the right to control trade. He was careful to point out that the Company had claimed only very limited jurisdiction in the area controlled by the Prince of Signaty. That jurisdiction, he insisted, extended only "500 Rods from the Walls within and 60 outwards" and did not in any way compromise the sovereignty of the Prince of Signaty, who continued to be "the lawfull possessor of the said Kingdom" and to enjoy undisturbed sovereignty over the area,

[44] IOR, E/3/52, 6205. [45] IOR, E/3/53, 6404.

[46] On the changing fortunes of the East India Company during this period, see Ritchie, *Captain Kidd,* 128–131.

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"Especially on the Sea Shore of Signaty."[47] Indian sovereignty on land made English trade by sea both possible and legitimate.

European maritime power implicitly recognized Mughal regional dominance. The arrangement neatly merged Atlantic and Indian Ocean patterns: An Atlantic-style convoy system was to be staffed by Europeans operating as clients of Mughal authority while in the service of European trading companies. The Indian Ocean was not a Mughal lake, but it was not a European one, either. English traders crafted their claims to the control of sea-lanes in response to Mughal demands. At the same time, Mughal pressures reverberated as far as the Atlantic, where Kidd's arrest and, more generally, attempts to construct an imperial legal system capable of containing piracy directly responded to maritime politics half-a-world away.

EUROPEAN LAW AND THE HIGH SEAS

As mariners circulated legal practices and presented new challenges to the legal order of the seas, the administration of European maritime law underwent a transformation. Out of shared origins in Roman merchant law, maritime law had developed as a separate jurisdiction in the various Atlantic European legal orders. The complexity of the different institutional trajectories makes their overview impossible here, though two widespread and significant tendencies are clear: the proliferation of prize courts and the narrowing of maritime jurisdiction. These trends can be illustrated using the example of English admiralty law. Despite the idiosyncrasies associated with the peculiar jurisdictional split between common and civil law courts in England, the trajectory of English imperial law shared these broad patterns of change with other European imperial legal orders.

By the late seventeenth century, the "high seas" were emerging as a separate legal space—a region all its own. This shift was not the product of the growing importance of maritime law but rather a result of its absorption into other jurisdictions—the common law in England and its colonies, and non-specialized mercantile law in the Spanish, Dutch, and French empires.[48] In England,

[47] IOR, E/3/52, 6198.

[48] In Spain, for example, a separate jurisdiction for maritime law had its origins in the fusion of Mediterranean and Atlantic traditions of self-regulating maritime merchant communities and in the proliferation, after the end of the fifteenth century, of *consulados* that brought commercial disputes under the ambit of maritime judges and created a different procedural regime emphasizing arbitration. While the impulse to regulate new long-distance trade at first gave rise to a greater prominence for Spanish maritime law, this trend was followed by its gradual merging with other jurisdictions, mainly an undifferentiated merchant law. As in England, imperial expansion unsettled the system of regulating privateering and adjudicating prize cases in local specialized forums with appeals to the Consejo de Guerra. In 1674, the crown made it possible for the first time for prizes to be taken to the nearest *audiencia,* or high court, and for pirates to be tried by local justice. The earlier system was flawed, from the crown's perspective, in that it provided local communities with the incentive and means of using prize cases as a cover for contraband trade. "Prizes" could be brought to port, condemned, and distributed as a way of avoiding duties. One measure of the importance of maritime law in the early Spanish empire is that maritime laws made up by far the

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by a gradual process culminating in the second half of the seventeenth century, common law courts effectively stripped from admiralty law its authority over non-tidal waters and maritime disputes arising on land.[49] In defense of the admiralty jurisdiction, prominent civilians argued that the forum and its law were peculiarly suited for handling matters involving commercial activities of shipping, in ports, and on navigable rivers, having incorporated the customary law of the sea, which in turn constituted simply the sea-based portion of the ancient Lex Mercatoria.[50] The civilians insisted that the admiralty jurisdiction included all affairs of the regions "within the flowing and ebbing of the Sea" or upon adjoining banks, and all personnel involved in maritime affairs.[51] Even before this period, pirates were not being tried in admiralty courts. Because civil law evidentiary requirements were considered too stringent to produce many convictions, a 1536 statute designated special commissions to try pirates under the common law. The High Court of Admiralty retained jurisdiction, and admiralty judges issued charges to the commissions and their juries. Admiralty courts continued to try cases brought by seamen against vessels, and jurisdiction over prize cases was also preserved. These prerogatives were consistent with a substantially reduced jurisdiction over commercial maritime disputes and affairs not arising on the high seas—a victory for advocates of the common law.[52]

The tensions played out in complex ways in the colonial sphere. The various admiralty courts of the Atlantic colonies developed with highly localized concerns at their core—fishing in Newfoundland, sea wrecks in Bermuda, piracy in Jamaica.[53] Authority radiated out unevenly from these points. The courts

largest category of laws listed in the *Recopilación de las leyes de los Reynos de las Indias* (1680). See Patrick Werner, "El Régimen legal de actividad marítima del imperio Hispanico: El libro nueve de la Recopilación," *The Nicaraguan Academic Journal* 3, 2 (2000), 39–62. On the consulados, see Marta Milagros del Vas Mingo, *Los Consulados en el tráfico indiano* (Fundación Histórica Tavera, 2000); on corsairs, Enrique Otero Lana, *Los Corsarios Españoles durante la decadencia de los Austrias: El corso español del Atlántico peninsular en el siglo XVII (1621–1697)* (Madrid: Editorial Naval, 1992).

[49] This process is traced in M. J. Pritchard and D.E.C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (London: Selden Society, 1993).

[50] This argument was put forward most forcefully by Richard Zouch, a prominent civilian and judge of the High Court of Admiralty from 1641 to 1649. He wrote the eight-volume *Jurisdiction of the Courts,* which included as its Chapter 22 *The Jurisdiction of the Admiralty of England Asserted, against Sr. Edward Coke's Articuli Admiralitatis* (London: Printed for Francis Tyton and Thomas Dring, 1663).

[51] Joanne Mathiesen, "Some Problems of Admiralty Jurisdiction in the 17th Century," *The American Journal of Legal* History 2 (1958):215–36, quote pp. 223–24.

[52] The most outspoken and effective opponent of preserving or extending civil law jurisdiction was Sir Edward Coke, who defended a narrow definition of admiralty jurisdiction, particularly on the grounds that the court did not use juries. See Mathiesen, "Some Problems of Admiralty Jurisdiction"; and Brian P. Levack, *The Civil Lawyers in England, 1603–1641: A Political Study* (Oxford: Clarendon, 1973).

[53] On the origins of various admiralty jurisdictions in the Atlantic, see Helen J. Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London: Lonmans, Green and Co., 1931).

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were in their operation driven by local interests, resulting, for example, in the unwillingness in Jamaica and New York to prosecute pirates who were active clients of local merchants. Mariners contributed to and benefited from local legal differences by engaging actively in forum shopping. With multiple prize courts operating, it became possible to secure a letter of marque in one port and take prizes to another forum, where captures and shares might be awarded more favorably or certain legal requirements overlooked.[54]

While colonial admiralty courts extended English legal authority through the empire, jurisdictional tangles made them a clumsy instrument of imperial legal authority. If civil lawyers were under attack in England in the seventeenth century, they were non-existent as a professional body in the colonies, where, also, the jurisdictional complexities of English law were shunned. Seventeenth-century colonial officials tried pirates mainly in common law forums, where juries were often openly sympathetic to defendants. Local officials, many of whom were deriving direct profit from privateering and piracy, often had little interest in sending defendants to England, where they would be tried by a court of oyer and terminer, the only legal procedure recognized by statute. In 1673, an English reform required that all pirates be tried in admiralty courts, a move partly intended to allow their trial in colonial forums so that these could be made more effective in combating piracy. Attempts to shift the prosecution of pirates to colonial forums were repeatedly reversed until the 1700 "Act for the More Effectual Suppression of Piracy" created a special procedure for staffing a seven-person court in any location.[55]

It might be assumed that this new flexibility promoted legal continuities across maritime zones. Instead, there is evidence of sharpening legal distinctions between the Atlantic and the Indian Ocean. The assertion of maritime jurisdiction in the Indian Ocean was complicated by the fact that the crown did not claim jurisdiction in English factories; the limited legal administration that existed was in the hands of the East India Company. In 1683, the Company was awarded the right to suppress interloping and establish courts where necessary. These courts operated, in effect, as admiralty courts, though they were not officially termed as such. They were staffed by "one Person learned in the Civil Laws, and two Merchants" and were established at Surat (later moved to Bombay), Fort St. George, and the Bay of Bengal.[56] The three courts developed dif-

[54] For example, Newcastle Lieutenant-Governor Usher complained in 1696 that he had issued a letter of marque to a privateer named Captain Mould, who took his prizes into Boston rather than returning to Newcastle and his sponsors. Crump, *Colonial Admiralty Jurisdiction,* 127.

[55] The 1673 Order of Council required the creation of special commissions in the colonies. It took another eight years for Jamaica to establish a conforming statute enabling royal officials to oversee the trial of pirates. But this hardly ended the legal difficulties. Two years later, in 1683, a ruling by the Lords of Trade and Plantations effectively nullified the Jamaican statute by insisting that colonial admiralty courts had no jurisdiction to try capital cases but only property disputes. On this "muddled legal situation" see Ritchie, *Captain Kidd,* 143.

[56] Quoted in Crump, *Colonial Admiralty Jurisdiction,* 167.

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ferently in response to distinct political strategies of company officials and the kinds of cases being generated locally. Only the court at Fort St. George, where officials were inexplicably encouraged to merge common and civil law jurisdictions, did the courts operate with some efficiency. In general, they proved relatively powerless in the face of the growing threat of piracy in the Arabian Sea at the end of the century. Operating under the aegis of the Company, the courts had no direct connection to the navy to enforce sanctions, little attraction for privateers as a place to bring prizes, and no appellate relation to the High Court of Admiralty in England. In fact, there was some confusion about whether the courts in India were official prize courts. This ambiguity was not cleared up until 1739, when the EIC legal advisor, in response to a query from the company principals for clarification on precisely this issue, ruled that the Indian courts were not prize courts and formally requested that they be given authority to issue letters of marque and to adjudicate prize cases.[57] This long period of uncertainty about the jurisdiction of the courts over prize cases no doubt contributed to emerging mariners' perceptions that the Indian Ocean was a different regulatory space.[58] Regional patterns of enforcement would soon make these distinctions even sharper.

AN ATLANTIC CAMPAIGN

A new wave of piracy following the 1713 Peace of Utrecht prompted English colonial admiralty courts to prosecute piracy vigorously, leading to the widespread public executions of pirates in the 1720s that signaled a new era of British naval hegemony. The public hangings of pirates in Atlantic ports and the chase and capture of celebrated pirates in this decade have sometimes been characterized by historians as comprising an episode of terror and counter-terror, with, on one side, state terror in the form of mass hangings of pirates, and, on the other, the terror of increasingly desperate and openly criminal pirates.[59] But the coordination of official attacks on piracy and the abandonment by some mariners of the usual defensive legal strategies should be placed within the longer framework of Atlantic history, and the larger framework of global mar-

[57] IOR, L/L/6/1, case 14.The Legal Advisor's Department wrote: ". . . [U]pon Inquiry we find that there is no Court of Admiralty in any part of the East Indies belonging to the East India Company, which we are humbly of opinion is necessary [and] should be erected before any Letters of Marque and Reprisal can be granted."

[58] William May, one of Avery's men who was tried for piracy, apparently benefited, if only temporarily, from the relative weakness of Indian Ocean forums. May was left at Joanne in the Indian Ocean; he was sick and on shore trying to recover when Avery's ship sailed off to avoid three incoming English ships. Fearing "to be left to the mercy of these Negroes," May agreed to be taken to a court in Bombay where he would be tried for piracy. But Bombay was a long way off. Either May changed his mind or the leader of the small convoy could not be bothered to chase and deliver a solitary pirate; the ships sailed on without him. It was here that May met up with an African who had lived at Bethnal-Green "and spoke English very well," a minor but interesting encounter in the annals of early modern globalization (*The Tryals of Joseph Dawson,* 23).

[59] This is the premise of the account of the campaign against the pirates in Marcus Rediker, *Villains of All Nations* (Boston: Beacon Press, 2004), ch. 1.

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itime affairs. During the brief period when the line between legality and illegality was most sharply drawn, legal ambiguities persisted in new forms; enforcement was regionally uneven; and many mariners continued to angle for legal reprieves.[60]

When hundreds of pirates accepted the King's pardon in 1718 and then took up raiding again, they were following familiar patterns of accommodation and selective law breaking. A glimpse of the persistence of such strategies is provided by the actions of the pirate Edward Teach, also known as Blackbeard. Represented as a singularly menacing pirate by Captain Charles Johnson and romanticized by some historians as the epitome of the hardened criminal pirates of the 1720s, Teach had hardly given up on the prospect of legitimacy.[61] He and his crew had accepted the King's pardon from the North Carolina governor in 1718 and settled briefly in Bath Town, in North Carolina. Teach obtained title to his ship from the Vice-Admiralty Court in Bath Town and also secured clearance papers for a trip to St. Thomas to trade. When, instead of trading, Teach captured two French ships on the open sea, he appeared in the Vice-Admiralty Court at Bath Town to have one of the ships declared a legal prize, claiming with the support of four crew members' affidavits that the ship had been found adrift. Teach split the salvage rights with local officials.[62] Just two months later, in an Ocracoke Inlet attack organized by Virginia's Governor Spotswood, Teach was killed and his surviving crew arrested. Though there is no doubt that Teach had raided illegally, his actions leading up to the attack suggest a plan to settle in Bath Town and to protect his position by creating a paper trail. Like Kidd, Teach was typical in his enthusiasm for legal posturing; like Kidd, he found that the strategy did not work in certain political climates.

The early eighteenth-century campaign against piracy was global in its ambitions but regionally varied in its effects. Of the twenty-six pirate captains hanged in the 1720s, all but one were tried in Atlantic ports.[63] This distribution reflected not legal policy—English commissions could be formed anywhere to try pirates—but rather legal practice, while it also responded to a new wave of raiding in the Atlantic, pressures by merchants engaged in the West African slave trade, and naval tactics. Royal Navy patrols increased along American and Caribbean coasts, and pirate hunting was attempted in West African waters, but the rarer expeditions to the Indian Ocean were less effective. The campaign did

[60] As Rediker acknowledges, it was mainly during the brief period from 1722 to 1726 that pirates gave up on legitimacy and "became more desperate and more violent and killed more of their captives." (*Villains of All Nations,* 37). Yet, even as the campaign against them turned brutal, some legal posturing continued. Men with the pirate Thomas Anstis waited on the coast of Cuba hoping to receive a pardon from King George II (ibid., 155).

[61] Captain Charles Johnson, *A General History of the Robberies and Murders of the Most Notorious Pirates* (New York: Routledge, 2000 [1726]), 55–77.

[62] See Robert E. Lee, *Blackbeard the Pirate: A Reappraisal of His Life and Times* (Winston-Salem, N.C.: John F. Blair, 2002 [1974]).

[63] The figure includes pirate captains hanged by the English, Dutch, French, Portuguese, and Spanish. Peter Earle, *The Pirate Wars,* 206.

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curtail European raiding in the Indian Ocean but mainly by suppressing Atlantic sponsors and outlets.

The English campaign against piracy in the 1720s should not be taken as representative of policies toward piracy in the long eighteenth century, and the behavior of mariners labeled as pirates in this period should not be understood as a sign of their innate oppositional culture and permanent attachment to custom over state law.[64] Both trends followed decades of a more open-ended maritime politics at the turn of the eighteenth century in which imperial legal policies developed in an ad hoc, fragmented way and mariners both challenged the legal order and promoted it by insisting on the legality of a range of actions. The official crackdown on piracy changed but did not resolve the anomalous legal status of pirates. No longer regarded as mere sea robbers, they nevertheless were subject to municipal law and strategically asserted their political loyalties. They were also not yet clearly defined under international law. As a place of international regulation, the sea was imagined more often as the negotiated product of multiple jurisdictional thrusts than as the birthplace of international norms.

Not surprisingly, the campaign eliminated the piracy of the day but also gave rise to a regulatory framework for privateering under which waves of barely contained maritime violence continued into the nineteenth century. Janice Thomson, writing about global efforts to control mercenaries, pirates, and other non-state violent actors, argues that the long nineteenth century is the period of more definitive reordering.[65] This later shift consisted in part in the opening of an arena for true internationalism in the form of inter-state agreements to suppress piracy and police the seas. Internationalism in earlier periods was of a fundamentally different kind and was consistent with understandings of non-territorial sovereignty forged in the seventeenth-century seas.

GLOBAL LEGALITIES

A global maritime culture and legal regime produced a diversification of ocean regulatory regimes by the middle decades of the eighteenth century. This distinction was not sharp, and it did not prohibit the continued circulation of maritime practices and personnel from one ocean region to the other.[66] Oddly, the

[64] This is of course the central assertion of Linebaugh and Rediker in *The Many-Headed Hydra.* Their chapter on piracy notes that both extreme cases of "hydrarchy," or the creation of a parallel social order under pirate rule, and the virulent suppression of piracy by the English crown were peculiar to the 1720s, but elsewhere the authors suggest that pirates' loyalty to custom was relatively constant, and linked in unspecified ways to proto-revolutionary sentiments around the Atlantic.

[65] Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994).

[66] A developing understanding of ocean basins as geographical entities did not entirely displace an alternative vision of ocean arcs connecting through sea passages until well into the nineteenth century, while later designations (the Atlantic, Indian, and Pacific Oceans) would also long coexist with a more varied nomenclature. Martin W. Lewis, "Dividing the Ocean Sea."

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differentiation developed out of the effects of mutual influence. In the Indian Ocean, political maneuvering shaped a more nearly "Atlantic" regime of maritime control characterized by jurisdictional claims over particular sea-lanes. Non-European land-based polities advocated importing a system of maritime protection, the convoy, which had debuted in the Mediterranean and been tested in the Atlantic. The resulting regulatory order relied more on inter-imperial negotiation than on a connected network of legal forums and naval enforcers. The influence worked in the other direction, too, as Indian Ocean political pressures reverberated in the Atlantic world. Despite some attempts to impose a truly imperial maritime law, European empires extended forums and enforcement vigorously only in the Atlantic, and the culminating campaign against piracy in the early decades of the eighteenth century was also largely an Atlantic affair. A new kind of regionalism was being forged out of increasingly globalized maritime practices. Mariners in general, and pirates in particular, helped to shape this geographically variegated legal sea-space, in part through their own strategies of hedging to sustain potential claims to legality and playing one power off against the other.

While emerging European understandings of international law and mariners' practices reinforced a pattern of regulatory regionalism of the seas in the early decades of the long eighteenth century, European empires were struggling to construct coherent maritime imperial policies—an elusive goal. The definition of the "high seas" as a special legal category formed out of institutional tensions within separate imperial legal orders, and these institutional orders also replicated, with variations, systems for the proliferation or empowerment of colonial forums to handle maritime cases. Meanwhile, jurisdictional jockeying among competing polities composed a broader maritime legal politics. All these institutional processes had regional variations. The same forces whose similarities across empires helped to compose a global legal regime were generating new kinds of ocean regionalism.

The account shows that we do not have to choose between writing the history of the impact of European imperial law on the wider world and constructing a narrative that emphasizes the autonomy and resilience of non-European legal orders. The approach also suggests a critique of the Eurocentrism still implicit in the history of international law. While its practitioners agree that polities outside Europe had law and were engaged in international relations before the rise of European global power, the emergence of an international legal community of nation-states is located firmly in seventeenth-century Europe and seen as extending beyond Europe through various forms of cultural diffusion and political imposition.[67] This view has survived decades of criticism of every other as-

[67] This is true for even the most sophisticated treatments of the history of the field. See Martti Koskoniemmi, *The Gentle Civilizer of Nations* (Cambridge and New York: Cambridge University Press, 1997). Anghie argues for the influence of colonial history on international law but concedes that this influence was limited and controlled largely by European debates, not by the messy legal

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pect of Eurocentrism in world history.[68] The resilience can be explained in part by an emphasis within the history of international law on the study of interstate agreements and of intellectual trends represented in core texts of international legal theory. One lesson to be drawn from the history of piracy is that a more diverse set of political and social actors structured global legal interactions. Another is that it is somewhat artificial to separate European from non-European legal cultures, or theory from practice. Circulating legal practices, like the sponsorship of privateers and the legal posturing of pirates, both relied upon and developed global legal discourses with regional variants. Even when not responding directly to colonial politics, European legal institutions and ideas about global order were also being influenced by remote politics and the strategies of unlikely legal actors.

The reluctance to define international legal ordering more expansively has important implications for spatial representations of European empire. Locating the society of international law within Europe, scholars of its history have tended to emphasize the ways in which law functioned to wall off Europe from the rest of the world. Certainly they are right in identifying a strong discursive thread representing Europe as civilized, and the rest of the world as barbarous. It is also true that at certain historical moments this rhetoric sharpened and highlighted legal dualism: Europe possessed law, the rest of the world was lawless.[69] But scholars have occasionally allowed accounts of Europeans' discourse about legal zones to stand in for historical description. From a world historical perspective, there is a great deal of evidence that European law was neither exceptional nor isolated. The discourse of legal dualism—of lawful and lawless zones—coexisted historically both with a pervasive legal pluralism that recognized non-European law and with a spatially diffuse legal culture that en-

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politics of empire. Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," *Social and Legal Studies* 5 (1996), 321–36; and Antony Anghie, " Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" *Harvard International Law Journal* 40 (1999), 1–80.

[68] On Eurocentrism in world history, see the essays in Benedikt Stuchtey and Eckhardt Fuchs, *Writing World History 1800–2000* (Oxford: Oxford University Press, 2003); especially Arif Dirlik, "Confounding Metaphors, Inventions of the World: What is World History For?" on pp. 91–134.

[69] Much has been made of the "lines of amity" of the first half of the seventeenth century that marked the division between a zone of negotiated peace and a zone of war. Gould emphasizes the importance of demarcating two Atlantic legal zones, a division he views as sharpening in the second half of the eighteenth century. Eliga H.Gould, "Zones of Law, Zones of Violence." Carl Schmitt argued that this separation was an essential element of the emerging European-centered international order; the bracketing of war in the extra-European zone, he contended, formed a precondition for order inside Europe. Carl Schmitt, *Nomos of the Earth in the International Law of Jus Publicum Europaeum* (New York: Telos Press, 2003). Many scholars, including some who usually line up with the critics of Eurocentrism, have been influenced by Schmitt, particularly his insight that sovereignty is always formed against exceptions; the spatial dimensions of Schmitt's formulations have been given less attention. This is perhaps as it should be, but without its clear critique, the formulation of a European world of law and a non-European world of lawlessness has remained implicit in many studies.

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gaged actors from all sides—even ruffians and rogues—and gave rise to novel institutional arrangements.[70]

Comprising a powerful set of forces in the early modern world, "archaic globalization" was not producing undifferentiated spaces.[71] Globalizing legal practices could set in motion different regional political trajectories, resulting in an uneven spatial distribution of regulatory practices, and the creation of multiple, regional "legal spaces." If colonial and metropolitan sovereignty depended upon articulated positions about when the rule of law did not apply, or when and where it applied differently, both also relied upon routines and exceptions for extending law, even or especially into supposedly "lawless" realms.[72] Outside Europe, there was abundant law "beyond the line" of both European and non-European origins, while the extension of European legal practices followed spatial patterns of conquest and settlement, traveling along corridors of imperial control, encircling imperial enclaves, and composing these elements into new regional agglomerations. Inter-imperial rivalries encompassed a global politics in which the legal strategies of other polities mattered and in which patterns of legal interaction were shaped by both the policies of states and the strategies of a wide variety of legal agents, including pirates. If oceans were in some sense quintessentially "global," it was not because they were assumed to be empty, vast, and lawless but because globally circulating processes were transforming them into a different kind of bounded legal space.

[70] On legal pluralism and global legal regimes, see Benton, *Law and Colonial Cultures.*

[71] The term is C. A. Bayly's, from *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (Malden, Mass., and Oxford: Blackwell, 2004).

[72] Nasser Hussain makes this point about colonial sovereignty in exploring legal definitions of martial law as a component of both colonial and metropolitan sovereignty, relying in part on Schmitt (see note 69, above). Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

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