# Pirates, Highwaymen, and the Origins of the Criminal in Seventeenth-Century English Thought

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## INTRODUCTION

This Note outlines a genealogy of the early modern English criminal. I posit an intellectual historical account of the relationship between international law concepts and the figure of the criminal in both canonical liberal social contract thought and the development of criminal enforcement in England. Tracing the figure of the brigand or *latro*[1] from international legal texts of the sixteenth century into seventeenth-century English political and literary tracts, I reach the following conclusion: "The criminal," as the figure would come to be understood in nineteenth-century thought, actually pre-dates a body of criminal law as such. Rather than a generalization following from the categorization of a series of offenses as "criminal," "*the* criminal," in its paradigmatic form of the highwayman, reflects the internalization of international law concepts in the nascent English state. Moreover, political theoretical accounts of criminal punishment in the seventeenth century relied on an "essentialized" understanding of the criminal personified in the international legal figure of the pirate. Besides being of historical interest,

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1. The four major international legal theorists cited in this Note—Vitoria, Suarez, Gentili and Grotius—wrote in Latin and used the term *latro* (pl. *latrones*). This is generally translated, both contemporarily and contemporaneously, as "pirate" or "brigand," and I use both terms interchangeably in translation. The other primary sources are originally in English and therefore the use of "pirate" or "brigand" in quotations or explications reflects their original usage.

these conclusions also challenge certain elements of Anglo-American legal ideology regarding criminal punishment; *contra* its current self-conception, Anglo-American criminal law has at its roots not the liberal conception of crime-as-law-breaking, but rather a notion of criminality as a status deserving of punishment.

Contemporary Anglo-American debate on criminal punishment has been dominated by the clash between retributivism and consequentialism. What contemporary philosophical accounts have largely assumed, however, is that the problem of punishment is the consequence of individual rule-breaking; punishment is defined as a response to *actions* rather than people. When and how violence is justified depends on the story we tell about why individuals break the law, but liberal political thought is broadly committed to the principle that punitive violence, to be justified, must be a response to wrong acts.

Historians have pointed to ways in which this liberal ideological conception of punishment contrasts with social or legal discourse and practice. Nicola Lacey, for example, has argued that as British criminal procedure moved away from the self-informing jury, criminal responsibility was understood in the framework of "character"; "criminal behavior was seen as proceeding from uncivilized, savage human nature" intrinsic to the wrongdoer.[2] Punishment, specifically in the form of the modern prison, was viewed as a means of instilling "the proper habits of self-governance" by treating them "*as if* they were fully responsible."[3] Foucauldian historians have pointed to the ways in which the practices of the modern welfare state and modern social theories have produced a conception of the criminal that is both quasi-biological and grounded in the criminal's *nature* rather than his or her actions.[4] Rather than being punished, these historians argue, the criminal has—at least since the nineteenth century—been disciplined.[5] Although primarily descriptive, these accounts have normative, critical force from the contradiction between liberal, process-oriented ideology, and the reality of social practices built around a quasi-biological understanding of a criminal "type."

This Note suggests that "the criminal" is both much older and much more important to the development of liberal legal and political thought than either the Foucauldians or contemporary legal philosophers would have it. Rather than a nineteenth century innovation, or a concept

2. Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy, and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 3, 364 (2001).

3. *Id.*

4. *See, e.g.*, MARIE-CHRISTINE LEPS, APPREHENDING THE CRIMINAL: THE PRODUCTION OF DEVIANCE IN NINETEENTH-CENTURY DISCOURSE (1992).

5. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

derivative of the notion of criminal law, the idea of a wrongdoer who merited state violence actually pre-dates the development of the English criminal law as a coherent body of prohibitions. The origins of both the concept and many of the legal norms concerning "the criminal" in Anglo-American legal history lie not in the day-to-day practice of punishing wrongdoers in the domestic context, but instead with international legal theory of the late sixteenth and early seventeenth centuries. The nascent English state's early forms of intervention in the criminal law—the move from purely private, localized prosecutions to a systematic attempt to classify and control criminal threats—were built around the figure of the highwayman, who in turn was identified with the pirate and was a figure of enormous significance in international law of the late sixteenth and early seventeenth century. This intellectual historical claim suggests that the essentialized criminal Foucauldians identify as emerging in the nineteenth century is not a betrayal of Anglo-American legal ideology and practice, but actually grounds the historical development of its criminal law.

This Note proceeds in three parts. First, I describe "the pirate" as a figure in international legal thought of the late sixteenth and early seventeenth century, specifically in the works of Hugo Grotius and Alberico Gentili. Second, I argue that the rhetorical and theoretical figure of the criminal in seventeenth-century English political thought drew heavily from the pirates or brigands of early seventeenth-century international legal thought. This transmogrification from the brigand as "enemy of all" on the high seas to the "ordinary" criminal came about by way of the highwayman, the land-thief analog to the sea-thief pirate. Finally, I turn to the normative accounts of punishment in international legal theory. In his two major works on international law, Grotius posits a natural right of punishment. In the absence of legal authority, such as in conflicts between states, anyone may punish transgressions of natural law. This natural right to punish, I argue, leads to an "essentialization" of wrongdoers, that is, an account of punishment whereby individuals are made deserving through a loss of status. In Grotius's and Gentili's thought, pirates not only have lost status, they represent or symbolize the loss of status itself. Wrongdoers are "like pirates" and therefore deserving of punishment. If "the criminal" in the figure of the highwayman actually preceded the development of criminal law, this criminal is defined by his exclusion not just from the political commonwealth, but from human sociability.

Methodologically, there is some variation between these three sections, made necessary by the nature of my claims in each. When writing about the significance and substance of international legal theory, I rely primarily on close reading of major texts. The next and last sections therefore operate primarily in the register of intellectual history; each of

the writers discussed are well within the canon of international legal thought and occasionally still invoked today. My claims are limited to the conceptual and normative implications of what these thinkers said, and the connections or disagreements between their writings. In the central section, however, my central claim is that not just political thinkers, but relatively ordinary writers *and* legal authorities understood pirates and highwaymen in a particular way. This might be better described as a cultural history that draws connections between literary usages and looks to concrete enforcement practices instead of normative treatises. Because the purpose of this Note is to suggest *both* Anglo-American legal practice and ideology have at their root this notion of the criminal, both types of sources are necessary. Criminals preceded criminal law both within the cultural imagination and legal enforcement mechanisms of seventeenth-century England *and* within the normative account of punishment in which the pirate had theoretical significance. By showing the connections between these normative, theoretical accounts and common usage, I hope to convince the reader that the notion of "the criminal" in seventeenth-century English political thought is deeply informed by how pirates were understood by Gentili and Grotius.

## II. THE PIRATE IN EARLY MODERN INTERNATIONAL LAW

The legal historical figure of the pirate has received renewed attention in the past decade. In particular, legal scholars have argued that there are important parallels in how international legal norms apply to contemporary terrorists and early modern pirates.[6] In this section, I describe how two particularly significant and influential international legal theorists of the late sixteenth and early seventeenth century understood pirates and piracy. Pirates played an important role in the writings of both Alberico Gentili and Hugo Grotius. These two were at least arguably the most influential and well-read international legal theorists among seventeenth-century Englishmen of letters. Grotius, in particular, grounded his work in a theory of natural law and rights that was deeply influential upon the work of such important seventeenth-century political theorists as Selden, Pufendorf, Hobbes, and Locke, among others.[7] Pirates had been called "the enemies of all" at least since Cicero used the phrase in 44 BC.[8] More than simply a rhetorical gesture, Gentili built his entire theory of international law on the distinction between pirates and legitimate enemies. The pirate or brigand was, for these two theorists, a conceptual

6. *See, e.g.*, Douglas R. Burgess, *The Dread Pirate Bin Laden*, LEGAL AFFAIRS (July/August 2005), http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp.

7. *See generally* RICHARD TUCK, PHILOSOPHY AND GOVERNMENT, 1572-1651 (1996).

8. CICERO, ON DUTIES 108 (E. Margaret Atkins & Miriam T. Griffin eds., Miriam T. Griffin trans., Cambridge University Press 1991) (44 B.C.E.).

foil to the notion of the just or public enemy, rather than a sociological phenomenon. By distinguishing between piracy and legitimate opponents, Gentili in particular was able to posit a form of war that was neither punishment nor self-defense, but a conflict of interest between two adversaries of equal legal status. Pirates, on this description, were non-members of the international community; more than mere incidental opponents, they were "enemies of all."

The late sixteenth century witnessed a major move within international legal thought away from Scholastic just war theories that equated war with either punishment or self-defense.[9] The leading Scholastic figures were Francisco Vitoria and Francisco Suarez, both Spaniards, Jesuits, and deeply influenced by the work of Thomas Aquinas, but writing three quarters of a century apart. In contrast, "humanist" political and legal thinkers who began writing after Vitoria but before Suarez were mostly Protestant and drew primarily from Roman rather than medieval theological sources, while drawing upon the Scholastics' writings and maintaining much of their natural law language.[10] Among the most influential of these thinkers was Alberico Gentili, a Protestant Italian exile and Regius Professor of law at Oxford University, who inaugurated a number of major innovations that would be adopted and adapted by eighteenth-century canonical international legal authors including Vattel, Wolff, and Kant. According to Vitoria and Suarez, in each conflict there was a just party asserting its rights against a wrongdoer.[11] Gentili broke with these earlier just war theorists who saw all international violence within the frame of punishment.[12] Instead, Gentili—as would his modern successors—asserted a theory of international violence whereby declared war between sovereigns was carved out of a much broader category of justified violence and awarded a degree of moral neutrality.[13] Rather than

9. *See* CARL SCHMITT, NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 122 (G.L. Ulman trans., Telos Press 2003) (1950).

10. *See generally* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999); Diego Panizza, *Political Theory and Jurisprudence in Gentili's De Iure Belli: The great debate between 'theological' and 'humanist' perspectives from Vitoria to Grotius*, presented at NYU School of Law (Oct. 17, 2005), *available at* www.iilj.org/newsandevents/documents/Panizza.pdf. While Tuck identifies Grotius as primarily humanist in orientation, Panizza argues that Grotius's thought is largely continuous with that of Vitoria and Suarez. Because this debate centers primarily on the question of pre-emptive war, and because both agree that Grotius's account of a natural right to punish—discussed at length *infra*—is a major break from previous Scholastic theorists, I leave the question of relative influence on Grotius's work aside for the purposes of this Note.

11. FRANCISCO DE VITORIA, *On the Laws of War, in* POLITICAL WRITINGS 295, 303 (Anthony Pagden & Jeremy Lawrance eds., Cambridge University Press 1991) (1539); FRANCISCO SUAREZ, *On War, in* SELECTIONS FROM THREE WORKS 800, 816-17 (Gladys L. Williams, Ammi Brown, Henry Davis & John Waldron eds., William S. Hein & Co. 1995) (1612-21).

12. *See* SCHMITT, *supra* note 9, at 142-3 ("The justice of war no longer is based on conformity with the content of theological, moral, or juridical norms, but rather on the institutional and structural quality of political forms.").

13. *Id.*

punishment, Gentili compared war to a civil suit between parties, and the laws of war as defining the terrain of conflict among a community of *hostes* (enemies), or legitimate opponents.[14]

Pirates make the occasional appearance in scholastic accounts of international law, but are not of special theoretical import. Vitoria in one of his very few references describes pirates as ultimately the responsibility of the commonwealth whose interests they represent or with whose nationality they are associated. Thus, if French pirates steal from the Spanish and the French government fails to pay reparations, the Spanish can plunder innocent French farmers in response.[15] This rule recognizes the complicated reality of piracy in the sixteenth and seventeenth centuries as described by contemporary historians: The line between pirate—robbing on his own behalf—and privateer—robbing on behalf of the monarch—was a thin one, and frequently crossed.[16] The distinction between illegal pirates and sponsored privateers often turned on the presence, authenticity, and authority of a letter of marque carried by a sea captain who sought riches from other men's ships. It was occasionally in the interest of legitimate powers to foster this ambiguity, so as to escape responsibility for untoward acts by their semi-agents. Distinguished from these semi-official privateers were pirate bands, who sailed primarily off the coast of North Africa, but also the Mediterranean and Atlantic. During the early sixteenth century these bands operated as semi-organized military forces that occasionally formed treaties with European powers.

In stark contrast to both the relative infrequency of their mention, and the acknowledgement of piracy as a military strategy on the part of states, pirates act as the primary and persistent foil of legitimate state actors in Gentili's account of international law. This move is all the more striking for its rejection of what was a messy and ambiguous reality. Gentili's use of the category of "pirate" was thus both novel and aspirational. At the very outset of his major work of international law *De Iure Belli Libri Tres (Three Books on the Law of War),* originally published 1598, Gentili insists that "war" ought to refer to only those conflicts between two equals. By limiting war, in the strict sense of the term, to a contest between parties who are equal or similar inasmuch as they are sovereign public authorities, Gentili carves out but a small subset of the forms of violence outside of or between political units familiar to early modern

14. ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 32 (John C. Rolfe trans., The Clarendon Press 1933) (1612) ("Those who contend in the litigation of the Forum justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case and the verdict, are not judged guilty of injustice. . . . Why should the decision be different in this kind of dispute and in a contest of arms?"). The English translation of the title is "Three Books on the Laws of War." The original publication date was 1598; I use an English translation of the 1612 edition.

15. VITORIA, *supra* note 11, at 318.

16. *See generally* JANICE E. THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE (1994).

Europeans for legal recognition. "[T]he enemy [*hostis*] [includes those] who have officially declared war upon us, or upon whom we have officially declared war . . . . [A]ll others are brigands or pirates [*latrones*]."[17] The international legal order is thus divided into two categories: Enemies (*hostes*) and pirates (*latrones*). The former can legitimately fight wars, the latter cannot.

Gentili's major innovation on his immediate predecessors in the field of international law is driven by this basic distinction. What the law of nations (*ius gentium*) permits as to whether war is permissible, and what may be done in that war depends entirely upon whether one's opponent is a *hostis* or *latro*; it is the relative equivalence of status among enemies, moreover, that justifies the constraints placed on warring parties by the *ius gentium*. To qualify as a just war, Gentili states, a "strife must be public; for war is not a broil, a fight, the hostility of individuals. And the arms on both sides should be public, for *bellum*, 'war', derives its name from the fact that there is a contest for victory between two equal parties," that is, from the Latin *duellum*.[18] Gentili terms these relative equal opponents *hostes*, the Roman term for strangers who had equal rights (and from which we can derive the English "hostility").[19] Gentili cites Pomponius and Ulpian on the legal implications of declared wars against public entities and those of undeclared wars against brigands; one may claim honor and recover captured individuals from the former but not the latter.[20] Gentili insists the legal vocabulary should respect this basic Roman distinction; the English term "enemies" ought to be limited—although Gentili himself is not always exact in his usage—to parties of equal status. What is ethically significant about a particular *hostis* is its relative equality of standing in the interstate sphere rather than whether one's state happens to be at war with the *hostis*.[21]

"Pirates and robbers" or "pirates and brigands" was used by Gentili to designate those who were not *hostes*. International actors could fail to

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17. GENTILI, *supra* note 14, at 15. Gentili uses the term "*hostis*" (plural: *hostes*) in the original Latin and I will use this term rather than its English translation, "enemy," to highlight its usage as a term of art within Gentili's writings.

18. *Id.* at 12.

19. *Id.*

20. Gentili paraphrases the same sources to make a distinction between "the enemy . . . who have officially declared war upon us, or upon whom we have officially declared war" and "all others [who] are brigands or pirates." *Id.* at 15. Grotius also relied on this Roman etymology for his own opposition between just enemy and pirate: "But what manner of War this is, is best understood by the Definition which the *Roman* Lawyers give of an Enemy, *Pomponius* says, *They are Enemies, who publickly denounce War against us, or we against them; the rest are but Pirates, or Robbers*. So says *Ulpian, They are Enemies against whom the People of* Rome *have publickly declared War, or they against the* Romans; *the rest are called pilfering Thieves, or Robbers*." 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1247 (John Morrice, et. al. trans., Richard Tuck ed., Liberty Fund 2005) (1625). There is no way to know whether Grotius knew these quotations from Gentili's work (which he had read), the original sources, or both.

21. GENTILI, *supra* note 14, at 12-13.

meet the standards necessary for recognition as an "enemy" in a number of ways; legitimate states acting illegitimately fall into this category, as do rebels, pirates, robbers, and lesser magistrates acting without authorization from their prince. "Pirates and robbers" may renounce others' jurisdiction in a number of ways—by rebellion or by sailing into the high seas and regularly violating the laws of one's native country. In any case, to recognize a pirate or robber—or rebel—would be to grant him status for cooperation on the basis of his refusal to abide by the legitimate rule of his original prince. Thus, a pirate lost any possibility of standing in the international order by way of his violation of civil obligations. Since those "who have [not] officially declared war on us" includes persons who are not pirates in any sociological or historical sense of the term, the term "pirate" is a normative description; disqualifying actors thus described from legitimate military action.

Gentili shared his reliance on Roman sources, and in particular on the works of Cicero and Tacitus, with a number of contemporaneous humanist authors. The term *hostes* itself is derived from Roman legal sources and refers to an expansive and ambiguous category in Roman law and rhetoric. For these classical authors, any people who existed outside of or challenged legally constituted authority could be termed brigands or *latrones*, whether they be in a group dedicated to piracy or robbery as a way of life, traitors, a rebellious population, or overly ambitious statesmen.[22] Early modern political writers besides Gentili adopted this broad Roman conception of the *latro*. Jean Bodin shared a similar view to Gentili of this *hostis*/pirate distinction: "But by the name of enemies we understand them unto whom we, or they unto us, have publicly denounced war . . . . [A]s for the rest they are to be deemed of, as of thieves or pirates, with whom we ought to have no society or community."[23] Like Gentili, Bodin begins his explication of the nature of the commonwealth by making reference to the distinction between treatment in war of pirates and commonwealths: "[R]obbers and pirates are still excluded from all the benefit of the law of Armes. . . . [T]he laws of nations [has] always divided . . . just and lawful enemies, from the disordered, which seek for nothing but the utter ruin and subversion of commonweales, and all civil society."[24] Others adopted the Roman emphasis on the relative honor associated with victories in public wars as opposed to the defeat of pirates; for example, English military theorist Sir William Segar wrote in 1602: "Now are we to speake of meane or halfe triumphs . . . as if the warre was

22. THOMAS GRÜNEWALD, BANDITS IN THE ROMAN EMPIRE: MYTH AND REALITY 161-62 (John Drinkwater trans., Routledge 2004) (1999).

23. JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE 75 (Kenneth Douglas McRae ed., Harvard University Press 1962) (1606). Note that the modern edition is from an anonymous 1606 English translation; the original *Les Six Livres de la République* was published in 1586.

24. *Id.* at 1.

not iustly pronounced, or the enemie of base reputation, as a Pirate, a bondman, or a cower."[25]

Hugo Grotius—writing several decades later and in direct response to Gentili and the Scholastic authors from whom Gentili diverged—also distinguishes between a "public" enemy, the rough equivalent of Gentili's *hostis*, and other, private antagonists. Like Gentili, Grotius recognizes that opponents in a war between public entities, specifically the soldiers of another state, are entitled to certain limitations deriving from this status. "[J]ust enemies" are "those who do what they do at the command of a superior power. . . . [W]ithin a state tyrants and rebels are not classified as just enemies, and outside the bounds of any state brigands and pirates are excluded."[26] Whereas for Gentili the only just war is a public one, for Grotius, the dichotomy of public and private wars intersects with the question of whether a particular war is just or unjust: one may engage in a just private war or carry out an unjust war on public authority. However, even when public entities act unjustly, they are entitled to certain consideration on the part of their opponents, a point Grotius makes explicit in *De Iure Belli ac Pacis*. Though a particular state may commit an injustice, its integrity as a political body is still to be respected by its opponents: "A sick Body is yet a Body. And a State, however, distempered, is still a State, as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights."[27] This distinction in public/private status mattered both formally and for the conduct of war; property extracted by pirates through the use of force was not rightfully obtained and could be retaken at will, unlike property taken in similar ways by public powers.[28]

However, Grotius—unlike Gentili—included among brigands those who, despite acting on behalf of public authorities, engaged in thefts or illegitimate violence. This expansion of the category can be attributed, at least in part, to Grotius's goals in writing his first major treatise on international law, *De Iure Praedae*. The work was commissioned to justify the capture of the *Santa Catarina*—a Spanish trading vessel—by Dutch privateers.[29] To fulfill this mandate, Grotius asserted a private right of

25. SIR WILLIAM SEGAR, HONOR MILITARY, AND CIVIL CONTAINED IN FOURE BOOKS 141 (London, Barker 1602).

26. HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 126 (Gwladys L. Williams, trans., Martine Julia van Ittersum ed., Liberty Fund 2006) (1868). Titled *De Iure Praedae* in the original, this treaty was not published until a manuscript copy was found among Grotius's papers in 1864. The manuscript itself was begun in 1604 and finished by 1606.

27. GROTIUS, *supra* note 20, at 1250.

28. *Id.* at 893 ("And in this Sense may be admitted the Distinction made by *Cicero*, between an Enemy in Form, with whom, says he, we have many Rights in common, that is, by the Consent of Nations, and Pirates, and Robbers. For if these extort any Thing from us by Fear we may re[ac]quire it, unless we bind ourselves by an Oath not to re[ac]quire it; but of an Enemy we cannot.").

29. *De Iure Praedae* (*Commentary on the Law of Prize and Booty*) was originally commissioned by the directors of the Dutch East India Company (VOC) to justify the attack on and confiscation of

punishment; the Dutch seafarers who captured the Spanish trading vessel the *Santa Maria* were private actors carrying out a war against a public entity—but doing so legitimately. Although Grotius is not nearly so explicit about a private right to punishment in *De Iure Belli Ac Pacis*, his position on piracy is nevertheless informed by his recognition of a just, private war against a public enemy.

Despite these differences in who was properly considered a brigand, Gentili and Grotius shared similar views on how pirates could be treated under international law. For these two thinkers, and the seventeenth-century legal theorists they influenced, the type and extent of violence that is permitted in any war depends wholly on the status of one's opponent as enemy or pirate. While public enemies are not to be poisoned, betrayed, refused burial, or denied embassy (to name a few elements of the law of war endorsed by both Gentili and Grotius), pirates are subject to violence unlimited by law. Gentili is clear on this point in a chapter devoted to whether brigands have the right of embassy (they do not) in his *De Legationibus*: "Neither brigands nor pirates are entitled to the privileges of international law, since they themselves have utterly spurned all intercourse with their fellowmen and, so far as in them lies, endeavor to drag back the world to the savagery of primitive times."[30] Grotius as well denies the necessity of adhering to either the substantive or formal laws of war when doing battle against "tyrants, robbers, pirates, and all persons who do not form part of a foreign state."[31] To justify this, Grotius makes use of reciprocal reasoning; since one cannot expect these persons to behave lawfully, no reciprocal obligation is placed upon states that go to war with them.[32] Where one's opponent does not have the form of a state, and thus cannot treaty for lasting peace, there is no expectation of reconciliation, and therefore one need not respect the rules of treatment that presuppose and make such a lasting peace possible.[33]

Thus, pirates were for Gentili the "enemies of all."[34] Pirates could be attacked and destroyed by any nation or even any individual without a declared war. This was because their status threatened not just a particular

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goods from a Spanish vessel, the *Santa Catarina*, in the East Indies. In the end Grotius wrote a treatise-length, highly abstract account of the basic laws of international conflict, but the immediate political motive for the text informs its substance as well as its timing.

30. ALBERICO GENTILI, DE LEGATIONIBUS LIBRI TRES 79 (Gordon J. Laing trans., Oxford University Press 1924) (1594). This opinion was not universally held in Gentili's time; he cites his contemporary and colleague in the trade courts of England, Jean Hotman, as holding the opposite: "Therefore I am surprised at the statement of Hotman that international law holds for fugitive slaves and brigands; that even the right of embassy holds, as indicated by the exclamation of Caesar. Just as if Caesar would have claimed any basis of law for that act, or as if it would have been seemly for him to make such a claim!" *Id.*

31. GROTIUS, *supra* note 26, at 143.

32. *Id.*

33. *Id.* at 417.

34. *E.g.*, GENTILI, *supra* note 30, at 79; GENTILI, *supra* note 14, at 23.

commonwealth's well-being, but the international legal order itself.

> For pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law. They ought to be crushed by us . . . and by you in common, and by all men. This is a warfare shared by all nations.[35]

Pirates, by rejecting the law of nations in its entirety as a governing order, put themselves outside the protection of that law. For Gentili, the *ius gentium* (law of nations, governing interstate relations) and *ius naturale* (natural law, mandated by God) were indistinguishable. Gentili did not recognize an international legal order that was not also the law binding all men *as men*. Any derogation from the laws of interstate recognition would also place violators, such as pirates, outside the community of humanity as well.[36]

## III. FROM PIRATE TO HIGHWAYMAN TO CRIMINAL IN SEVENTEENTH-CENTURY ENGLAND

It is this description of pirates as "enemies of all" that has led contemporary legal theorists to associate the pirate with the terrorist. Pirates, like terrorists, threaten both the rights of property ownership and the military integrity of states. Moreover, they cross boundaries freely and operate outside the norms of international law governing internal structure (they are not states) and external behavior (they commit violence outside the context of a declared war). Considered only in the context of international law, these similarities are both striking and convincing. However, as I argue in this section, a stronger historical claim can be made for the links between pirates and criminals in early modern England. Pirates were closely linked to highwaymen. Highwaymen were, in turn, both used as a synecdoche for the broader category of criminal in political writings and were the original objects of centralized state-based efforts at criminal prosecution and enforcement. While pirates might be the early modern analogs of the contemporary terrorist, they were in the seventeenth century the object of theorizing about and implementation of criminal punishment.

The most extended and scholarly argument for viewing the terrorist as the modern-day analog of the seventeenth-century pirate is Daniel Heller-Roazen's *The Enemy of All*, which traces a "genealogy" of the pirate from

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35. GENTILI, *supra* note 14, at 423.

36. *See* Jeremy Waldron, *Ius gentium: A Defence of Gentili's Equation of the Law of Nations and the Law of Nature*, in THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE 283 (Benedict Kingsbury & Benjamin Straumann eds., 2010).

Roman writings to the present airplane hijacker.[37] According to Heller-Roazen, what makes the pirate the forerunner of the terrorist is that he engages in a form of "antagonism that cannot be defined as that of one individual with respect to another or of one political association with respect to another"; in other words, he is neither clearly a criminal nor a military opponent.[38] This antagonism is therefore read as "universal" and the pirate (or terrorist) himself becomes "the enemy of all."[39] The pirate "brings about the confusion and, in the most extreme cases, the collapse of the distinction between criminal and political categories."[40] He attributes this confusion to the inability to identify piracy as an action of individuals against other individuals or as the "act of one political association with respect to another"; pirates can neither be considered subject to a particular civil code nor be represented as "lawful enemies" and therefore are subject to force associated with both legal norms.[41] The "indistinction" of criminal and military categories that results, and the corresponding permissibility of *both* kinds of legitimate violence (punishment and war) against pirates leads to violence that is governed neither by the limits of legal punishment nor of war.

As a thesis about the pirate as an early modern figure, this claim rests on an anachronism. In order for the "collapse" of the criminal and the political to be meaningful, there must be a prior opposition between these two categories. However, the category of the "criminal," either as a distinct body of law or set of procedures and forms of state-authorized violence did not exist in any meaningful sense in the early seventeenth century. Although perceived as exceptional or transgressive, pirates and their treatment cannot be understood in contrast to an "ordinary" criminal law or punishment. Instead, close attention to how pirates were described, and how piracy was deployed as a rhetorical trope among English writers of the seventeenth century reveals the opposite. Pirates were not considered unique among English writers of the seventeenth century; rather, they were a type of thief. Moreover, they had a clear domestic analog: the highwayman. Not only were the pirates and highwaymen treated as equivalent by seventeenth-century thinkers and writers both inside and outside of England, but they also shared crucial characteristics: they challenged both *imperium* (political authority) and *dominium* (property rights or ownership), and they did so by blocking passages between nodes of civil communities, disrupting both economic and political movement, and thereby disrupting nascent state spaces. Rather

37. DANIEL HELLER-ROAZEN, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS (2009).
38. *Id.* at 11.
39. *Id.*
40. *Id.*
41. *Id.*

than "collapsing" the category of the political and the criminal, pirates and highwaymen provided the prototypical object of a form of state-based violence that was only beginning to be conceptualized as criminal punishment.

### *A. The ambiguous figure of the pirate in seventeenth-century England: Deceiver, traitor, thief, leader, and privateer*

Gentili, writing in England about international law in the late sixteenth century, viewed the distinction between enemies and pirates as fundamental to the laws of war. Writers of seventeenth-century England who mentioned or focused upon pirates instead held a more complex understanding of the pirate as both politically and economically troublesome. The clear distinction Gentili drew between pirate and prince had very little basis in reality for much of the seventeenth century. Princes readily made use of mercenaries and other irregular (that is, not carrying a flag identifying one as part of the national navy) ship-captains to carry out raids in the national interest. As both Benton and Thompson (and others) have described, what distinguished "pirate" from "privateer" was often little more than a letter from a political authority on land authorizing the captain to attack and take the goods of one or more other nations' ships.[42] The legitimacy of these letters of *marque* could themselves turn on domestic political battles of which sailors had delayed or imperfect knowledge.[43] This ambiguity and contingency was seemingly well-understood by most Englishmen; a pirate could be praised as a war hero one year and hung as a criminal the next, depending on the financial and political interests of the monarch and the willingness of the pirate to abide by his current wishes.[44]

A parallel ambiguity described the distinction between pirates and merchants. Texts from the period are full of references to merchants

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42. LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900, at 113-14 (2009); THOMSON, *supra* note 16, at 21-23.

43. At least one author devoted an entire pamphlet to demonstrating both the illegitimacy of those commissions issued by James II prior to his abdication and the negative consequences proceeding from political unaccountability with respect to these licenses. *See* MATTHEW TINDAL, AN ESSAY CONCERNING THE LAWS OF NATIONS, AND THE RIGHTS OF SOVERAIGNS WITH AN ACCOUNT OF WHAT WAS SAID AT THE COUNCIL-BOARD BY THE CIVILIANS UPON THE QUESTION, WHETHER THEIR MAJESTIES SUBJECTS TAKEN AT SEA ACTING BY THE LATE KING'S COMMISSION, MIGHT NOT BE LOOKED ON AS PIRATES? (London, Richard Baldwin 1694).

44. Not only a pirate's skills, but his dual status as a useful soldier and wanted criminal are highlighted by the following "satyricall epigram": "A Pirat is an excellent Bow-man. Who from his childe-hood being much *bent* to *rouing*, is in time become a cunning *Shooter*, and thereby hath wonne many a *Prize*. If you purpose to *outgoe him*, you must betake you to your *flight*: but if once he *Boord you*, your game is lost. Adam *Bell* and his Archers gaue him first example to bee an *Out-law*; And because in times past he hath beene a beneficiall Souldier to the English, hee is sent vnto the *Marshalsey*; for whose sake, there is a *Stake or two* set vp at *Wapping*, for him, or any of his Companions to make vse of." I. H. GENT, THE HOUSE OF CORRECTION: OR, CERTAYNE SATYRICALL EPIGRAMS (London, Richard Redmer 1619).

"turning pirate" once lawful tradesmen deciding they could make a better profit by pillaging or stealing from fellow sailors. This kind of theft-based piracy was obviously illegal, but one that—like the distinction between piracy and privateering—had a clear legal analog. The renegade lifestyle associated with merchants who "turned pirate" must have held some interest for the average seventeenth-century reader, as histories or biographies of famous pirates, both ancient (Roman or Greek) and modern (primarily English) was a genre during the period.[45] In defining piracy, a number of seventeenth-century English writers made no reference to their status within international law. Instead, they would refer only to the threat pirates posed to private interests, that is, property and trade.[46]

Whether literary or real, pirates operated on two sides of the law with respect to both their economic and military roles. This double ambiguity (military/economic and lawful/unlawful) with respect to historical piracy no doubt informed the occasional metaphorical usage of "pirate" as a kind of deceiver, a usage that persisted through the seventeenth century. Pirates were a common figure in moral aphorisms. For example, hypocrites were like pirates and rovers in that they used false banners to lull other sea voyagers into complacency before attacking them, according to an Italian moral treatise translated and published in 1605.[47] Pirates also served as a foil or comparative figure for political betrayal, specifically false leadership. For example, the possible "popish successor" (i.e. James II) was described as a pirate in 1681 as follows: "Nay, he shall vary his Disguises as often as an *Algerine* his Colours, and change his Flag to conceal the Pyrate."[48] Unlike the clarity of opposition between enemies and brigands, the rhetorical and moral significance of pirates in

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45. *See, e.g.*, ANONYMOUS, WARD AND DANSEKER TVVO NOTORIOUS PYRATES, WARD AN ENGLISHMAN, AND DANSEKER A DUTCHMAN. (London, E. Allde for N. Butter 1609); IMPARTIAL HAND [ANONYMOUS], A TRUE RELATION OF THE LIFE AND DEATH OF SIR ANDREW BARTON, A PYRATE AND ROVER ON THE SEAS (London, Alex Milbourn, W. Onley & T. Thackeray 1695); ANONYMOUS, 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 (1676).

46. *See, e.g.*, THOMAS PHILIPOT, AN HISTORICAL DISCOURSE OF THE FIRST INVENTION OF NAVIGATION AND THE ADDITIONAL IMPROVEMENTS OF IT WITH THE PROBABLE CAUSES OF THE VARIATION OF THE COMPASSE, AND THE VARIATION OF THE VARIATION 19 (London, W. Godbid 1661) (". . . [T]hat although in these Moderne Ages, the Name of Pirate is still applied to one who supports himself by Pillage and Depredation at Sea, yet in Times of an elder inscription, the word *Pirata* or Pirate, was sometimes attributed to those persons to whose care the Mole or Peer of any Haven (call'd in Latine *Pyra*) was entrusted, and by whose Inspection it was provided, that those places should receive no prejudice, which were the occasion of so much advantage to the publique interest.").

47. FRA. GIACOMO AFFINATI D'ACUTO ROMANO, THE DUMBE DIVINE SPEAKER (A.M. trans., London, William Leake 1605).

48. ELKANAH SETTLE, THE CHARACTER OF A POPISH SUCCESSOUR, AND WHAT ENGLAND MAY EXPECT FROM SUCH A ONE (London, T. Davies 1681). Settle continues: "As for instance; Another fit, for whole Years together, he shall come neither to one Church nor th'other, and participate of neither Communion, till ignobly he plays the unprincely, nay the unmanly Hypocrite, so long, that he shelters himself under the Face of an *Atheist*, to shrowd a *Papist*."

seventeenth-century English writing lay in their ability to switch between roles—or at least to be perceived as doing so. James II's deception in the above quote is not limited to the change of banner, that is, his willingness to hide his true religion. He is not just like a pirate, he is revealed to *be* a pirate.

Especially during the Civil War period at midcentury, piracy was used as a metaphor for political leadership itself, frequently by way of an anecdote from texts by Cicero and Augustine about Alexander and an unnamed pirate. Having been captured by Alexander the Great, a pirate informs the emperor that what distinguishes them is only the magnitude of their respective thefts; had the pirate a fleet instead of a single ship, he too would be called emperor. This remark, in the apocryphal tale, earns the pirate his freedom.[49] Among English political pamphleteers, this story could be used to undermine the authority of particular leaders or to challenge monarchical rule altogether. An illegitimate king was, like Alexander, nothing more than a particularly successful pirate and thus subject to violent overthrow. The last colloquy at Charles's trial was a retelling of this tale by the Lord President of the Court; the deposed king, now sentenced to death, responded by saying it was his prosecutors who were engaged in a robbery.[50] The story could also be used to acknowledge the difficulty associated in distinguishing just from unjust wars, and the sometimes impossibility of punishing the latter when they are large and successful.[51]

Pirates were not just economic troublemakers or robbers in disguise, but were construed as a threat to English political rule as well. At least some seventeenth-century English authors also described pirates as "the enemy of all." This descriptor, "*pirata est hostis humani generis*," was not just of rhetorical, but theoretical importance for English legal scholars. In his treatise on the criminal common law of England, Brydall notes that before the great statute of 25 Edward III, piracy was considered *petit treason*:

> Before the Statute of 25 E. 3. C. 3 *De proditionibus*, if a Subject had committed Piracy upon another, this was holden to be Petit treason, for which he was to be drawn and hanged: because *Pirata est hostis humani generis*, and it was *contrae Ligeantiae suae*

49. AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 147-48 (R.W. Dyson trans. & ed., Cambridge University Press 1998) (c. 413-426); CICERO, *On the Commonwealth*, *in* ON THE COMMONWEALTH AND ON THE LAWS 67 (Maes E.G. Zetzel ed., Cambridge University Press 1999) (54-51 B.C.E.).

50. DAVID IAGOMARSINO & CHARLES T. WOOD, THE TRIAL OF CHARLES I: A DOCUMENTARY HISTORY 10 (1989).

51. *See* WILLIAM FREKE, SELECT ESSAYS TENDING TO THE UNIVERSAL REFORMATION OF LEARNING CONCLUDED WITH THE ART OF WAR 243-44 (London, Thomas Minors 1693) ("So surely, one might as justly be guilty of a Robbery as a Conquest, unless one had the justest cause of War to move one to it. . . . Robbers and Murderers of thousands in Corruption and Flattery, we admire without regret, while the more innocent Rogues from necessity we destroy in this World, and damn in the next; but surely, God will be more just to them.").

*de[b]itum.*[52]

Brydall cites Cicero as the source of this proposition, but its logic depends on the English legal conception of treason. Treason entails the use of force against one who has authority over you. Hence a wife murdering her husband was petit treason under English law of the time, but a husband murdering his wife was simply homicide.[53] According to Brydall, piracy is a form of treason because it is against the obligation (*contrae Ligeantiae suae debitum*) the pirate has to *any* subject. The pirate's status as "the enemy of all" is construed to put *all* subjects in a position of relative authority to the pirate and thus to make piracy treason. As I shall argue in greater detail in the final section of this Note, this understanding relies on a conflation of an act of piracy (which is treason) and the status of the pirate, since one has to already have been "a pirate" in order to have underwent the necessary loss in status to make an act of theft also treason.

As Brydall mentions, the major statute defining treason in 1351 eliminated piracy from the list of petit treasons.[54] However, even if not technically traitors under the law, pirates were frequently referred to as such. Thomas Overbury—whose political rise, fall, poisoning, and posthumous vindication is well-documented in the state trial records of the 1610s—presents a characterization of pirates as traitors that also captures a number of contemporaneous piratical associations:

> A Pyrate, truly defined, is a bold Traitour, for he fortifies a castle against the King. Give him Sea-roome in never so small a vessel; and like a witch in a sieve, you would think he were going to make merry with the Divell. Of all callings he is the most desperate, for he will not leave off his thieving though he be in a narrow prison. . . . He is one plague the Divell hath added, to make the Sea more terrible then a storm. . . . He is very gentle to those under him, yet his rule is the horriblest tyranny in the world: for hee gives licence to all rape, murder, and cruelty in his own example . . . a perpetually plague to noble traffique, the Hurican of the Sea, & the Earth-quake of the Exchange.[55]

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52. JOHN BRYDALL, A COMPENDIOUS COLLECTION OF THE LAWS OF ENGLAND, TOUCHING MATTERS CRIMINAL 70 (London, John Bellinger 1675).

53. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 20 (London, M. Flesher for W. Lee & D. Pakeman 1644).

54. That is not to say the crime of piracy was considered an ordinary felony during Gentili's time; judges conferring around 1603 determined that it was not included under the heading of "felonies" for purposes of a general pardon. "About the end of the Reign of Queen Elizabeth . . . [i]t was resolved by all the Judges of *England*, upon conference and advisement" that the Queen's attempt to pardon English Pirates who had robbed merchants of Venice "in amity with the Queen" was null, since piracy "was no felony, whereof the Common Law took Conusance, and the Stat. of 28 H. 8 did not alter the offence, but ordained a Tryal, and inflicted punishment; therefore it ought to be pardoned especially, or by words." BRYDALL, *supra* note 52, at 71-72.

55. THOMAS OVERBURY, SIR THOMAS OUERBURIE HIS WIFE WITH NEW ELEGIES VPON HIS (NOW KNOWNE) VNTIMELY DEATH (London, Edward Griffin 1616).

A pirate is here a threat to the *king's* rule by virtue of the pirate's resistance to punishment ("he fortifies a castle against the king"). His threat to ordinary persons is one of tyranny—again, the contrast with justice among thieves presented as a foil to legitimate rule, and following the identification (discussed at length above) between tyranny and crimes against personal property and integrity (rape). This contrast between the *de minimis* of justice associated with groups of thieves and the failure of the pirate to respect the corresponding property or political integrity of others echoes Grotius's criteria for state recognition, discussed above. As in a number of other works, the pirate is either directly associated with the devil or as a creation thereof. Finally, the pirate is a "perpetually [sic] plague" to trade and legitimate sea-traffic.[56]

Overbury's description, therefore, captures something of the complexity of piracy as a historical practice, legal concept, and metaphorical referent in seventeenth-century England. The pirate was, on occasion, the "enemy of all," but this was neither his most salient nor most popular designation. More frequent within the same time period are references to or emphasis upon the pirate as thief and his ability to pass back and forth between thieving and legitimate activity, which in turn gave rise to the pirate's metaphorical significance as a hypocrite or deceiver. As we have seen, the pirate was not described primarily in opposition to a legitimate military actor by seventeenth-century writers, but instead, as dangerous precisely because he could be mistaken for a merchant or soldier.

Thus, one must be careful not to read Gentili's striking assessment of "pirates and brigands" as the foil to legitimate states as characteristic of popular early modern understanding. While the pirate's role as foil to legitimate ruler and as "enemy of all" were both well established within the conceptual vocabulary of seventeenth-century English writers, these two characterizations came by way of influence or quotation. The phrase "*hostis humanis generis*," on which Heller-Roazen places so much weight, is found in early modern writings almost exclusively by way of a quotation from Cicero. Rather than a claim about the structural role of pirates in an international legal regime, *hostis humanis generis* was often used simply as a literary trope, situating an author's writing on pirates in a longer, prestigious tradition. The pirate in seventeenth-century English thought certainly carried, among his many possible associations and meanings, the connotations and status in international law that Cicero, by way of Gentili, assigned to him. Considered relative to English subjects and the English state, however, the category of pirate did not just describe an opposition to legitimate actors, but had significant content: Pirates were

56. Overbury also identifies piracy with natural disasters that affect sea travel; a much more literal concern with piracy as one of many well-established threats to sea trade and with the rules governing risk associated with such threats can be found within a number of primers for merchants. *Id.*

traitors, privateers, and thieves. This thicker notion of piracy, while still linked to the *moral* standing of pirates in the international legal order, was in turn closely tied to the English highwayman, a connection the next section describes in detail.

### *B. From pirate to highwayman to criminal in seventeenth-century England*

A survey of English writings from the seventeenth century reveals that pirates and highwaymen were thought of as analogs on land and sea, and that this pairing was both a matter of legal doctrine and rhetorical usage. This identification could be at the level of definition, as evidenced by Elisha Cole's 1677 *English dictionary*, which defines *land-pirates* as highwaymen.[57] Alternately, the two could be paired, described as occupying the same or analogous professions,[58] or twinned within a single metaphor that relied on their shared characteristics.[59] Both were frequently termed rovers, distinguished by their respective field of operation as "land-rover" or "sea-rover". Both were considered infamous.[60] Like pirates, famous highwaymen were the subjects of poems and popular biographies, and seemingly occupied a similar place in the popular mindset as worthy of fear, moral condemnation, and perverse admiration for their ability to thwart attempts by agents of the Crown to capture them.[61] Pirates and highwaymen were both seen as perversions of respectable professions; just as merchants could "turn pirate," so could farmers "abdicate their plough" in favor of "robbing on the High-way."[62]

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57. ELISHA COLES, AN ENGLISH DICTIONARY EXPLAINING THE DIFFICULT TERMS THAT ARE USED IN DIVINITY, HUSBANDRY, PHYSICK, PHYLOSOPHY, LAW, NAVIGATION, MATHEMATICKS, AND OTHER ARTS AND SCIENCES (London, Peter Parker 1677). In the same work, pirates are defined as follows: "*Pirate, l.* a Sea-Robber, (formerly any Sea-Soldier, or the Overseer of a pira or Haven-peer.").

58. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 54 (Edwin Curley, ed., Hackett 1994) (1651) ("[T]ill there were constituted great Commonwealths, it was thought no dishonor to be a Pyrate, or a High-way Theefe; but rather a lawfull Trade—not onely amongst the Greeks, but also amongst all other Nations [sic].").

59. *See, e.g.*, HENRY CROSSE, VERTUES COMMON-WEALTH: OR THE HIGH-WAY TO HONOUR (London, John Newberry 1603) (No matter how wealthy and sensually satisfying a man's life may be, "yet if he be not noble in Vertues, but ignoble in vices, and have not those good parts that carry a union of good mens praises, he is but *pirat & latro*, a theefe and a robber.").

60. *See, e.g.*, WILLIAM PERKINS, A GOLDEN CHAINE: OR THE DESCRIPTION OF THEOLOGIE CONTAINING THE ORDER OF THE CAUSES OF SALVATION AND DAMNATION, ACCORDING TO GODS WORD 91 (London, Edward Alde 1600) ("For robberies, these sorts of men especially are famous: Theeves by the Queenes high waies, Pyrates upon the seas, Souldiers not content with their pay, and whosoever they be, that by maine force take that which is none of their owne.").

61. This is not to say these accounts were without differences. Highwaymen (auto)biographies tended to include accounts of sexual misadventures that were likely unavailable—or taboo—to those who spent long stretches at sea. Tales of pirates often ended with the antihero lost at sea, whereas highwaymen were more likely to tell their tale from jail awaiting execution—or to have their execution described by observers.

62. FRANCIS FOOLWOOD, AGREEMENT BETWIXT THE PRESENT AND THE FORMER GOVERNMENT, OR, A DISCOURSE OF THIS MONARCHY, WHETHER ELECTIVE OR HEREDITARY? 34-35 (London, Awnsham Churchill 1689). Foolwood is here comparing a pirate and a highwayman to James II,

There is at least one case of an English author substituting "highwayman" for "pirate" in summarizing Cicero's and Grotius's position on whether oaths obliged in the case of pirates, discussed above: "For tho' a Man swear to pay money to an *Highway-man,* the *Highway-man* has no Right to this money. *Cicero* held the Oath absolutely void; but *Grotius* and Bishop *Sanderson,* who oppose him in this, are express, that the *Highway-man* acquires no Right."[63] This example is significant because it suggests that pirates and highwaymen were not only considered similar with respect to domestic legal concerns of theft or in the social imagination, but equivalent with respect to the norms of *international law* articulated by Gentili and Grotius. An author could make the same theoretical or normative point about the nature of promises by substituting "highwayman" for "pirate." Whether by way of translation—Grotius, after all, wrote in Latin—or for all the similarities cited above, pirates and highwaymen occupied the same space with respect to the natural law by the late 1680s as did pirates in Grotius's thinking of the 1620s.

Why, then, were pirates and highwaymen so closely identified? These two figures—in both their rhetorical and historical forms—shared two important characteristics: First, they both interrupted or made especially difficult movement through or across space, and in particular, disrupted transportation between nodes of governance in a broader space over which these nodes were attempting to project power. Second, their violations of both economic and political orders were not incidental to one another, but intimately related. This second shared quality is in part derivative on the first; trade was a primary mode of governance in the fledgling early states of the seventeenth century. More than this, however, pirates and highwaymen utilized theft as a means of operating outside the social and economic authorities to which they were supposed to be subject; by stealing, they were able to live outside of political authority.

By definition, both pirates and highwaymen interrupted the travel of and stole from individuals who were attempting to carry goods from one place to another.[64] This was, according to Grotius, the primary reason why pirates were so despised: "For there is no stronger reason underlying our abhorrence even of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse."[65] It is not difficult,

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invoking his abdication of the throne as a reason to support William's and Mary's rule.

63. WILLIAM ATWOOD, THE ANTIQUITY AND JUSTICE OF AN OATH OF ABJURATION IN ANSWER TO A TREATISE, ENTITULED, THE CASE OF AN OATH OF ABJURATION CONSIDERED (London, Richard Baldwin 1694).

64. *See* RICHARD HEAD, THE ENGLISH ROGUE DESCRIBED, IN THE LIFE OF MERITON LATROON, A WITTY EXTRAVAGANT BEING A COMPLEAT DISCOVERY OF THE MOST EMINENT CHEATS OF BOTH SEXES (London, Francis Kirkman 1666) (an elaborate autobiographical account of a reformed highwayman, including the former thief's advice to travelers for avoiding others like him on the highways).

65. GROTIUS, *supra* note 26, at 305.

moreover, to see why pirates' disruption of trade routes made them the enemy of all, understood both singularly and collectively. Pirates could attack indiscriminately, without regard for the particular nationality of the traveler—although, as we have seen, the use of letters of *marque* and commissions often led to politically motivated or otherwise selective attacks. Thus they threatened all sea-going vessels at all times, without regard to the nationality or the political affinities of those nations of the captains they attacked. By disrupting trade between nations, moreover, pirates made more difficult and dangerous communication and trade within the community of nations. They were therefore the enemy of all, not just because they threatened, at some point, each individual nation, but because their activity undermined human sociability itself as carried out via oversea trade and communications.

Scholars of piracy and sovereignty in the early modern period generally, and of Grotius and Gentili in particular, have emphasized the significance of the sea as a realm of lawlessness or site "beyond the law". Carl Schmitt has argued that it was the juxtaposition of this ungoverned and ungovernable realm and corresponding license of violence "beyond the line" in this realm that facilitated the development of the Westphalian system of territorially-based, mutually respecting sovereigns within Europe.[66] The division of land into clearly defined boundaries was made possible both by a conceptual opposition to, and practical military engagement within, "the high seas," where no nexus existed between physical space and political authority and thus imperial contest was possible. Benton argues that the inability of states to exercise *dominium* on the high seas actually made necessary the sea's inscription within an international legal regime not tied to a particular territorial boundary.[67] The sea demands transnational legal rules because no state can carry out the basic ordering (*nomos*) necessary for establishing jurisdiction. Simultaneously, it resists legality altogether, as a constantly changeable space over which it was technologically difficult, if not impossible, to project power with any kind of regularity.[68] Despite their conflicting views on the role of the sea in the development of modern international law, Benton and Schmitt share the common assessment that what is distinctive about pirates is both that they move within these lawless boundaries—that these realms of ambiguous legality are their "home"—and that the threat they pose to travelers is in some sense constitutive of the lawlessness endemic to sea travel.

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66. SCHMITT, *supra* note 9, at 95.

67. *See* BENTON, *supra* note 42, at, 121-25.

68. *Id.* at 105 ("By its very nature, the ocean has seemed to demand the mutual recognition of legal norms derived from natural law or other law standing outside the control of polities. At the same time, the historical weakness of such legal regimes has given the oceans an enduring association with lawlessness—a legal void to accompany its emptiness as a medium of travel and communications.").

Much has been made, therefore, of pirates' field of operation on the high seas. As seafarers, they had the ability to operate at a great distance from the centers of legal authority or power projection, and to move in a realm where boundaries were uncertain or non-existent and identity easily obscured. Schmitt and Heller-Roazen both have emphasized these characteristics as what is special and important about pirates as historical figures. However, Schmitt's argument in *Nomos of the Earth* that colonial contests on the high seas enabled the development of a kind of mutual territorial respect on land by the eighteenth century rests on the underlying historical claim that no firm territorial legal ordering existed on land at the start of the seventeenth century.[69] While by no means possessing the same symbolic significance as the high seas, much land of the period ostensibly within political boundaries was, to a lesser degree, ungoverned by any centralized power.

These politically ambiguous or border lands were the territory of highwaymen and bandits, whose felonious careers depended upon their ability to escape to and move around relatively inaccessible geographic territory. Highwaymen were understood to both operate beyond the confines of civilized society and along cross-national borders. An act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons"[70] passed by the English Parliament in 1656 describes highway robbery as growing out of the general social condition of border inhabitants. These people "having been long accustomed to Idleness and Theft," during periods of political instability, "by reason of the scituation [sic] of their Habitations and Dwellings near to the great Bogs and Mountains," were able to move stolen goods with ease across national boundaries.[71] Like pirates on the open seas, border inhabitants were able to use a combination of geographic, physical inaccessibility and the uncertainty or absence of territorial authority, to carry out crimes against property with relative impunity. Among the enactments included in this 1656 Act is permission by local officials on either side of the border to extradite felons back to the location of their crimes. Highwaymen were thus understood to find their home in lands beyond political control, and, like pirates, to threaten individuals on both sides of the boundary and choose national identities selectively.

Highwaymen blurred national boundaries and were perceived to operate "beyond the line"[72] like pirates; conversely pirates, like highwaymen, threatened tenuous links or lines of sovereignty between trading loci of

69. SCHMITT, *supra* note 9, at 148.

70. An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland, and for Discovery of Highway Men and Other Felons, 1656, 7 & 8 Car. 2 (Eng.).

71. *Id.*

72. SCHMITT, *supra* note 9, at 95-97.

relative safety. Historians like Lauren Benton have challenged Schmitt's characterization of the high seas in the period as "remain[ing] free of the spatial order of firm land organized by states" and thus enabling "the great equilibrium of land and sea originated [that] was able to last for more than two centuries."[73] According to Benton, by the eighteenth century "interimperial maritime conflicts" represented "contests over the tracks of sea lanes and the nature of legal control within them," and the ocean increasingly envisioned "as an uneven legal space divided into long, thin zones of imperfect control connecting port towns, garrisons, and islands."[74] Benton further characterizes attempts to rein in piracy during the eighteenth century as "depend[ing] on the shared understanding of ships at sea as law-bearing vessels tied to sovereign sponsors, tracing through their movements corridors of potential jurisdiction."[75] By the end of the seventeenth century, the high sea was less and less "beyond the line" and instead very much subject to attempts to trace lines of jurisdiction across large distances.

On this account, pirates did not operate outside of the realm of sovereign territories so much as disrupt tenuous attempts to extend sovereignty across space, much as highwaymen did. Pirates were threatening not because they operated in a fully lawless territory, but because imperial powers in the seventeenth and eighteenth centuries strove to impose law tied to spatial boundaries on the sea. Pirates disrupted shipping lanes, pathways that were increasingly seen not as extending between, but as falling within, the sovereign territory of nations. I do not mean to suggest that the way in which the burgeoning English empire attempted to project power across oceans or a string of colonial possessions along coasts and rivers was *the same* as the ways in which the nascent English state sought to incorporate local elites and distant villages into a coherent territorial body. However, the rhetorical pairing of the pirate and the highwayman was grounded in broader geopolitical perceptions and practices. The threat posed by pirates internationally had a clear analog in how highwaymen were understood within England.

Pirates and highwaymen both presented a dual threat to political ordering or jurisdiction, and to *dominium*, the right of property. While it is the perceived inability or unwillingness of pirates to participate in a lasting interstate order that makes war against them so necessarily ruthless in the eyes of the Romans and early moderns alike, pirates were not unique in this respect. Similar concerns were expressed about tyrants, rebels, and atheists, whose refusal to adhere to natural law called into question their ability to participate in the rules governing legitimate state bodies. Instead,

73. *Id.* at 181.
74. BENTON, *supra* note 42, at 108.
75. *Id.* at 159.

what is distinctive about pirates among the various misfits of early modern international law is the threat they posed to private property. Most seventeenth-century English texts that mention pirates are more concerned with the threat they pose to material wealth and the physical security of merchants rather than metaphorical opposition between pirates and the human community (pirates as "*hostis humanis generis*"). Brydall, who was one of a few writers prior to Blackstone to attempt a summation of criminal matters in English common law, identifies pirates precisely in this way: "Theft generally taken doth comprehend *Larceny, Robbery, Burglary, and Pyracy*: of these in order."[76] Within this domestic family of thieves, a pirate was "a robber upon the Sea."[77] Others classified pirates as a particular type of thief or even considered the terms at least partial synonyms. Henri Estienne explains his translation of the story of Alexander and the pirate as follows: "Here note that the word *pirate* which I have translated *theefe*, signifieth one that robbeth by sea, whom we call a *rover*, or *sea-robber*: which general word I was the more bold to use, because it suteth better with the other generall, viz. *robberties*."[78] Pirates' use of the high seas did not necessarily make their actions categorically different from other "ordinary" criminals.

Still, there seems to be an important distinction: Pirates threatened not just the particular interests of individual nations, but the international community; highwaymen, on the other hand, did not violate the *ius gentium*, or international law. Whatever the analogies between these two types, one could not characterize a highwayman as "the enemy of all," because his crimes were only against the laws of a particular legal order. For political and legal theorists of the seventeenth century, however, the rights which highwaymen violated were not only or primarily those of the common law, but of the natural law. Indeed, while both pirates and highwaymen threatened the territoriality of sovereignty or legal ordering, it was not this political threat but rather what we would now identify as their "private" violations that were understood to constitute transgressions of the law of nature. Specifically, theft—the defining crime for both pirates and highwaymen—was a violation of the natural law protecting property. Gentili explicitly analogized the causes of war to individual claims regarding one's *dominium* or *ius*; property is not a civil matter but also protected by the *ius gentium*, and war the analog of a civil suit.[79] For

76. BRYDALL, *supra* note 52, at 55. Note, however, that Brydall also describes pirates as *hostis humanis generis* in the context of *treason* law, as we saw *supra*.

77. *Id.*

78. HENRI ESTIENNE, A WORLD OF WONDERS: OR AN INTRODUCTION TO A TREATISE TOUCHING THE CONFORMITIE OF ANCIENT AND MODERNE WONDERS OR A PREPARATIVE TREATISE TO THE APOLOGIE FOR HERODOTUS 97 (R.C. trans., London, John Norton 1607).

79. *See* GENTILI, *supra* note 14, at 59, 32 (identifying defense of one's property as a just cause for war and comparing war to a civil suit, respectively).

both Grotius and Locke, property precedes the state and is governed by natural law.[80] Theft, while harming a private person, transgresses not a particular political authority but rather a universal mandate.

Thus, robbery was conceived not simply as an offense against a person, but as a violation of natural law. Correspondingly, highwaymen in seventeenth-century political tracts, like pirates in international legal tracts, threatened both particular political authorities and a broader, more fundamental order. Locke makes this point explicitly; the robber puts himself not just on the wrong side of civil laws, but outside the human community. In the *Second Treatise of Government*, Locke asserts that he may kill the thief who accosts him on the highway as he would a "noxious creature."[81] By threatening Locke's *dominium* in his property, the highwayman also threatens Locke's person and thus puts himself in a state of war with his victim. While in this state of war, the laws of nature permit the victim to kill in self-defense.[82] The highwayman's, like the pirate's, "individual" crimes against property were in fact constitutive of his fundamental opposition to the natural law, and thus the community of mankind. Highwaymen, like pirates, violated both natural and positive law, and threatened property and political rule—a characteristic that is clear once we recognize that the correlation between these two distinctions was different in the seventeenth century than we might now think.

### *C. The highwayman as prototypical criminal*

In the absence of a coherent body of law or uniform procedures governing "criminal" acts and their punishment, highwaymen often stood in as a representative figure for a category of wrongdoers—criminals—that could not be defined with reference to the law itself. Locke frequently uses the highwayman or thief as synecdoche for the category of wrongdoers, who violated laws and were subject to punishment—that is, criminals.[83] Other writers of the latter half of the seventeenth century and even the interregnum Parliament used highwaymen, pirates, or one of their cognates in similar fashion. For example, *A Universal Etymological English Dictionary* (1675) defined "latrociny" as meaning "larceny, theft, robber," and "the privilege of adjudging and executing thieves."[84] The

80. *See* 2 GROTIUS, *supra* note 20, at 420-21; JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285-86 (Peter Laslett ed., Cambridge University Press 1980) (1690).

81. LOCKE, *supra* note 80, at 273, 390.

82. *See id.* at 390 ("[F]or though I may kill a thief that sets on me in the highway, yet I may not (which seems less) take his money, and let him go."); *id.* At 279-80 ("This makes it lawful for a man to *kill a* thief, who has not in the least hurt him, nor declared any design upon his life."). "Thus a *thief*, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat." *Id.*

83. *Id.*

84. NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, Printed for

reader will recall that "latrociny" is that which is done by a *latro*—or pirate, in Grotius's or Gentili's original Latin; here it is linked to a punishment of theft, a broader class of actions. An act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons" passed by the English Parliament in 1656 places highwaymen as the named figure among a general category of felons.[85]

The legal category of "criminal" did not exist in the seventeenth century. By this I do not mean the term was not in use; seventeenth-century English authors certainly used the term "criminal" as both adjective and noun, generally in relation to punishment.[86] However, no strictly delimited body of "criminal law" existed in England at the time Gentili, Hobbes, or Locke wrote. Common law in the early sixteenth century lacked a substantive criminal law doctrine. There were certainly acts characterized as "crimes," and treatises that attempted to organize and explicate the nature of these crimes. However, in practice, the vast majority of these "crimes" could be tried by either indictment or appeal—what we would now recognize as a tort case.[87] As David Lieberman puts it, "The terms crime and criminal law, while enjoying wide linguistic currency, were not part of the technical vocabulary of the law."[88] It was not until Blackstone's *Commentaries*, composed and published in the mid-eighteenth century, that English scholars or lawyers recognized a category of law as "criminal."[89] Thus, we cannot speak of "a criminal" prior to this point as a person who violated a certain body of state-based legal prohibitions.

Similarly, while individuals certainly underwent criminal punishment, this was largely a matter for local authorities, with prosecutions carried out by the victims themselves. Although felons were convicted under "the King's law," the punishing authority who invoked that law was almost

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R. Ware et. al., 21st ed. 1675).

85. Additional examples exist of this use of "highwaymen *and* . . . ." to describe the category of what we would now call criminals in sources of less political or historical significance. *See, e.g.*, DANIEL DEFOE, AN ESSAY UPON PROJECTS 91 (London, R.R. for Tho. Cockerill 1697) (describing work maintaining roads as "[a] proper Work for Highwaymen, and such Malefactors, as might on those Services be exempt'd from the Gallows"); RICHARD BURTON, HISTORICAL REMARQUES, AND OBSERVATIONS OF THE ANCIENT AND PRESENT STATE OF LONDON AND WESTMINISTER 17 (London, Nath. Crouch 1681) (remarking of Newgate, "[t]his Gate hath for many years been a Prison for Felons, Murderers, Highwaymen and other Trespassers.").

86. *See, e.g.*, LOCKE, *supra* note 80, at 274.

87. *See* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996).

88. David Lieberman, *Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence*, *in* LAW CRIME AND ENGLISH SOCIETY, 1660-1830, at 139, 140 (Norma Landau ed., 2002).

89. The technical vocabulary of the law "instead recognized other general categories of felony and trespass, as well as the intricate procedural routines by which specific injuries were prosecuted at specific courts." *Id.*

always a local official whose authority was grounded in social standing or land-ownership, and not from the fledgling central government.[90] Petty offenses had just begun to be "the business of the state" rather than the local community, increasingly addressed by local justices rather than in manorial courts set up by local landowners.[91] Finally, most prosecutions were private; victims, rather than any state-based prosecutorial apparatus, were primarily responsible for pursuing punishment of wrongdoers through the mid-eighteenth century at least.[92]

There is, however, significant evidence that the English state-based regime of criminal law *enforcement* was initially driven in significant part by the problem of highway robbery and had as its earliest object highwaymen. English criminal enforcement would not reach its modern form, i.e. include systematic professional policing and public prosecutions, until well into the nineteenth century. Before then, the primary intervention by Parliament in law enforcement outside of London entailed instructions and incentives for local officials and landowners. An act "for the better suppressing of theft upon the borders of England and Scotland, and for [the] discovery of highway men and other felons" passed by the English Parliament in 1656 is typical in treating "highwaymen" as the paradigmatic felon. In June 1677, March 1680, May 1681, and January 1683, Charles II issued and re-issued a proclamation urging officials to make greater efforts to use "their utmost diligence" in apprehending robbers or highwaymen, and provided that anyone who apprehended a highwayman or robber and brought him into custody was to receive a £10 reward from the sheriff of the county where the highwayman was brought.[93] William and Mary issued a similar proclamation in September 1692, quadrupling the reward for private persons who either apprehended

90. J.A. SHARPE, CRIME IN EARLY MODERN ENGLAND 1550-1750, at 29 (2d ed. 1999). Trials for felonies were primarily conducted at the assizes, while "the absence of trials for felony" in the records of the King's Bench is "striking." *Id.* at 31.

91. *Id.* at 133.

92. *See* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 4, 317 (1973) (arguing that while private prosecution was "dominant" through the eighteenth century, public prosecution had its origins in new roles assigned to the Justices of the Peace by 1555 Marian statutes); JOHN M. BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660-1750: URBAN CRIME AND THE LIMITS OF TERROR 395-96, 422 (2001) [hereinafter BEATTIE, POLICING] (describing the evolution of "thief-taking" bounties to the use of organized police and prosecutions in eighteenth-century London); *see also* Douglas Hay and Frances Snyder, *Using the Criminal Law, 1750-1850: Policing, Prosecution, and the State*, *in* POLICING AND PROSECUTION IN BRITAIN, 1750-1850, at 3, 25-27 (Douglas Hay & Frances Snyder eds., 1989) (arguing *contra* Langbein that Justices of the Peace were not under any systematic obligation to investigate crimes and only a small percentage of criminal prosecutions saw involvement of government officials through the end of the eighteenth century). Even Bruce Smith, who challenges the "private prosecution" thesis as applied to the eighteenth century acknowledges it as the dominant model during the seventeenth. Bruce P. Smith, *The Myth of Private Prosecution in England, 1750-1850*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 151, 152 (Markus Drubber & Lindsay Farmer eds., 2007).

93. By the King. *A proclamation for the apprehending of robbers or high-way-men, and for a reward to the apprehenders.* May 14, 1681.

or caused a highwayman to be apprehended to £40.[94] These proclamations and public rewards were at the time, and for much of the next century, the primary or only means by which the central government inserted itself into practices of capture and prosecution other than the appointment of judges.[95]

The highwayman, then, provides a direct link between the figure of the pirate and "the enemy of all" in international law of the seventeenth century and the first—and for more than a century the only—forms of state-based criminal prosecution. It is beyond the scope of this study to trace the development of criminal procedure into the nineteenth century and its transformation into something approaching its modern form. While the causes of these later developments may be diverse, their roots and pre-history, so to speak, lie in the family of concepts and rhetorical tropes that characterized what has been understood as the primarily international figure of the pirate.

## IV. THE IMPLICATIONS OF EARLY MODERN CRIMINALITY FOR AN INTELLECTUAL HISTORY OF PUNISHMENT

In the previous section of this Note I argued that "the criminal"—that is, the highwayman—historically preceded the legal, procedural, and policing mechanisms of the criminal law. In the remaining section, I identify the theory of punishment that the notion of "the criminal" derived from Grotius and Gentili entails—punishment that is justified with reference to the inherent dangerousness of a wrongdoer and corresponding loss of moral consideration rather than any specific legal violation. Gentili, Grotius, and later English writers all compared pirates, tyrants, highwaymen, and atheists to beasts. This was not mere rhetorical flourish, but grounded in a fundamental shift in how both punishment and wrongdoers were perceived: Punishment, according to Grotius and his intellectual progeny (including John Locke), is a natural right to be deployed against inherently dangerous transgressors. This shift originated in international legal thought and was internalized by political theorists who read Grotius's work and accompanied pirates and highwaymen *into* the domestic context.

Grotius's account of punishment, like Gentili's conception of war, was a radical departure from their Scholastic predecessors. According to Grotius, the right of punishment is not a power inherent in a commonwealth;

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94. England and Wales, Sovereign. *By the King and Queen, a proclamation for the discovery and apprehending of highway men and robbers, and for a reward to the discoverers.*

95. *See* Anthony Fletcher & John Stevenson, *Introduction* to ORDER AND DISORDER IN EARLY MODERN ENGLAND 16-17 (Anthony Fletcher & John Stevenson eds., 1985); BEATTIE, POLICING, *supra* note 92, at 376; JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 71 (1986). The first professional police force in England was established in London in 1829. Smith, *supra* note 92, at 152.

instead every individual has the right to punish those who violate natural law to protect our "common Humanity."[96] The right to punish is therefore both natural, i.e. does not rely on the existence of a political community, and universal. This universalization of the power of punishment shifts the justificatory frame for violence (including war) from one concerned with the authority of the *punisher* to one exclusively concerned with the character or past actions of the *punishee*. War is now justified against certain actors, rather than for or by certain political authorities.[97] The effect of this radical change is precisely to make wrongdoing a kind a status for the purposes of justifying legal violence—a "criminal."

### *A. Punishment and Self-Defense*

Grotius's clearest statement that the right to punish wrongdoing is natural, and that all individuals have this right in the absence of political authority, is found in the posthumously published *De Jure Praedae* (*Commentary on the Law of Prize and Booty*): "Accordingly, that precept of law which demands the punishment of evildoers is older than civil society and civil law, since it is derived from the law of nature, or law of nations."[98] In *De Jure Belli Ac Pacis* (*The Rights of War and Peace*)—which was widely read by political thinkers and writers of seventeenth-century England—this right is stated less clearly, but nevertheless implied.[99]

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96. 1 GROTIUS, *supra* note 20, at 385.

97. In making this claim I move away from the interpretation offered in Alexis Blane & Benedict Kingsbury, *Punishment and the Jus Post Bellum*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS (Benedict Kingsbury & Benjamin Straumann eds., 2010). Blane's and Kingsbury's argument proceeds as follows: The limits on punishment are not determined by the rights of the individual wrongdoer; rather "the nature of the peace determines the extent of post-war punishment which can be instituted." *Id.* at 260. Thus, according to Blane and Kingsbury, the *jus post bellum* is determined not by the particular act in question or moral blameability of the punishee, but the objective conditions that are necessary to ensure a lasting peace. The victor does not just act on universal jurisdiction with respect to the *particular* wrong of the punished party, but acts for the collective benefit of all states in future without regard to either the victorious party's rights or the defeated party's wrongs. *Id.* at 261. Blane and Kingsbury correctly note that according to *De Iure Belli* punitive war may function as general deterrence. Grotius lists making an example of the punishee as one reason to punish that might outweigh the *prima facie* prohibition on harm to another person along with specific deterrence or incapacitation. 2 GROTIUS, *supra* note 20, at 972. However, whereas Blane and Kingsbury read this justification of victory-based punitive jurisdiction for the purpose of general deterrence as "divorcing the right to punish from the individual wrongdoer," *id.* at 260, I would like to suggest instead that this naturalization of the right to punish actually heightens the significance of the wrongdoer's moral status (or lack thereof) in the justification of punitive violence, including war. It is not from the individual wrongdoer, but rather from the *relationship* between wrongdoer and punisher that this right of punishment is divorced.

98. GROTIUS, *supra* note 26, at 133.

99. In the later *De Jure Belli ac Pacis*, Grotius alludes to the existence of this universal right to punishment, at least with respect to one's equals and inferiors: "For, to have a Right to punish any one that has rendered himself guilty, it is sufficient that one is not subject to him; which shall be treated of elsewhere." 1 GROTIUS, *supra* note 20, at 325. Admittedly, Grotius is neither as explicit about this *right* of punishment nor as consistent in *De Jure Belli* as in the quoted passage in *De Jure Praedae*. At times, he suggests that this right is not held individually, but inherent in public authority: "Besides, in

Grotius asserts in one text, and implies in another, a natural—pre-political, individualized—right to punish. I argue that this naturalization of the right to punish gives rise to an "essentialization" of the wrongdoer. What I mean by "essentialization" is an emphasis on the quality of wrongdoers *as a category* that merits the application of punitive violence, and that, correspondingly, opens them up to violence by any party. Wrongdoers are defined by their "essence" rather than their relationships either to legal norms or political authority; they, and not their acts, are of moral significance. Punishment of criminals is justified with reference to them rather than the legitimacy of the punitive apparatus or authority. This naturalization of the right of punishment shifts the emphasis in what makes punishment just away from the status of the punisher or their relation to the offender toward the status or quality of the wrongdoer. While inside a commonwealth the positive law channels this natural right of punishment, limiting it to certain authorities, outside the commonwealth either spatially or temporally, anyone and everyone has an inherent right to punish any particular wrongdoer. Because *any* person has the right to punish, what matters for whether punitive violence is permissible is the moral status of the wrongdoer. Thus, the question in deciding the legitimacy of war ceases to be, "Does this person have the right to punish?" but "Does this person deserve to be punished?"

There could be a universal right of punishment *per se* that nevertheless required some relation between wrongdoer and punisher to justify the use of violence in question. Both Grotius, and later Locke, however, insist that the natural right of punishment may be exercised without reference to the relationship between victim, wrongdoer, or punisher. For example, if Abigail steals Bob's wallet, Bob may have the natural right to punish Abigail, but Cathy, who was not a victim of the crime, might not. Locke, who adopts a position very close to Grotius's in *De Jure Praedae*, justifies Cathy's right to punish Abigail for her crime against Bob by asserting that any individual crime constitutes a threat to *all* men in order to justify third-party intervention.[100] But what enables, within the logical contours of

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a private War we have only a Regard to our own Defence, but the supreme Powers have not only a Right of Self-Defence, but of revenging and punishing Injuries." *Id.* at 416-17. Elsewhere he suggests the right to punish is hierarchical with respect to ethical rather than legal or political standing. Although he insists "supreme Powers" in particular have this right, elsewhere he suggests that punishment is a natural right, vested in accordance with a hierarchy of individuals based upon their moral standing: "But the Subject of this Right, that is, the Person to whom the right of Punishing belongs, is not determined by the Law of Nature. [Natural reason suggests what] is the fittest to be done by a Superior, but yet does not shew that to be absolutely necessary, unless by Superior we mean him who is innocent, and detrude the Guilty below the Rank of Men, and place them among the Beasts that are subject to Men. . . ." *Id.* at 955.

100. *See, e.g.*, LOCKE, *supra* note 80, at 272 ("In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity . . . and so he becomes dangerous to mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him. Which being a trespass against the whole species . . . every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things

Grotius's or Locke's thought, this move to seeing wrongdoers as subject to universal punishment?

First is a link between punishment and self-defense, two justifications for violence that had been rigorously distinguished in Scholastic thought. For both Grotius, as for Gentili, punishment is seen as a *means* to self-preservation. The limits of punishment, correspondingly, come to be defined not simply in retributive terms, but also with respect to the safety of the commonwealth waging the just war in question. Vengeance, says Grotius, is a justification for war approved by natural law; Grotius quotes Cicero to define vengeance: It is "'that act by which, defensively or punitively, we repel violence and abuse from ourselves and from those close to us whom we should hold dear,' and also as 'that act whereby we inflict punishment for wrongdoing.'"[101] Gentili similarly acknowledges the distinction between prevention and retribution, even as he includes them under the same heading of just, expedient causes of war: "Now punishment (*ultio*) usually fulfills two ends, solace for injury and security for the future. Therefore it includes revenge (*vindicta*). . . . [R]evenge (*vindicta* or *vindicatio*) prevents wrongs in the future."[102]

The effect of the adoption of this Roman conceptual vocabulary was to blur what had been a rigorous distinction between self-defense and punishment in Scholastic just war accounts. Suarez's account is typical of the Scholastic view: Self-defense is limited to force deployed against an immediate and ongoing attack. For example, if an army, having successfully engaged in a defensive war, pursues the attacker to regain lost property, the war has become offensive (though it may still be justified). War carried out to redress past injuries, while often justified, is aggressive and requires political authority.[103] Unlike punishment, self-defense is a natural right grounded in the value of one's individual life rather than the existence of a political community and therefore not reserved (as is the right of war) to public authorities.[104] For Gentili, in contrast, self-defense was no longer understood as strictly limited temporally. Rather, it came to include any forward-looking action deemed necessary to prevent wrongdoing. As Blane and Kingsbury have remarked with reference to Gentili's theory of just war, "If injury is defined broadly enough, deterrence as a means of forward-looking self-defense can be invoked even before the occurrence of any act that directly affects the state."[105]

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noxious to them, and so may bring such evil on any one, who hath transgressed that law. . . .").

101. Grotius also uses this Roman definition of revenge in *De Iure Belli ac Pacis*: "We repel Force and Injuries either defensively or offensively both from ourselves and those who ought to be dear to us." 2 GROTIUS, *supra* note 20, at 967.

102. GENTILI, *supra* note 14, at 353.

103. SUAREZ, *supra* note 11, at 804.

104. *Id.* at 802-03. Self-defense may even be an obligation to God. *Id.* at 807.

105. Blane & Kingsbury, *supra* note 97, at 251.

Deterrence was recognized as a legitimate cause of war among the Scholastics. Grotius, who made a point of utilizing his Spanish opponents' theorists to make his case for Dutch belligerence, cites Vitoria in particular and the theologians in general in support of his claim that measures taken without immediate provocation against Spanish ships were necessary to self-defense: "As the Spanish theologian Vitoria has rightly observed . . . 'the enemy would be emboldened to make a second attack . . . if they were not deterred from injurious acts by the fear of punishment.'"[106] However, while Vitoria's account emphasizes the ongoing conflict with a particular opponent, and the role that punishment plays in *specific* deterrence (to use contemporary vocabulary), for Grotius the problem is framed in terms of self-protection: "Thus it is impossible to protect oneself from persons of the kind described [in this case, treacherous Portuguese] without resorting to vengeful measures."[107] This shift is subtle but significant: No more is the enemy "emboldened," but rather, self-protection requires vengeance against "persons of the kind described." It is the character of one's opponent, and not the ongoing relationship, that makes further vengeance necessary.

This presents an apparent tension: Punishment by and among commonwealths, as envisioned by Grotius and Gentili, was justified with reference to self-defense, but also with reference to the nature of its target. Yet the right of self-defense, according to both thinkers, does not depend on whether one's opponent is acting morally or immorally, or even the ethical standing of the person, animal, or thing that threatens one's life. The law of self-defense and defense of one's property "do not take into account the intent of one's adversary"[108] and thus one has the right to harm or even kill individuals who are not morally or causally culpable, or even those who act with good intentions, but who threaten one's life.[109] Grotius compares these innocent threats to "*Beasts*"; their moral status is irrelevant to one's right of self-preservation. Gentili concurs with Grotius both on the applicability of the right of self-defense despite the innocence of the threat in question and the analogy between this individual right and that of nations:

> And yet one may defend oneself against the violence of madmen or somnambulists, even at the cost of the lives of the latter; just as we kill wild animals which rush upon us, following the universally

106. GROTIUS, *supra* note 26, at 469.

107. *Id.*

108. *Id.* at 161.

109. *See* 2 GROTIUS, *supra* note 20, at 398 ("[T]his Right of Self-Defence arises directly and immediately from the Care of our own preservation, which Nature recommends to every one, and not from the Injustice or Crime of the Agressor; for if the Person be no Ways to blame, as for Instance, a Soldier who carries Arms with a good Intention; or a Man that should mistake me for another; or one distracted, or delirious . . . I don't therefore lose that Right that I have of Self-Defense.").

> recognized law of self-defence. This holds good, however much you may argue that madmen, somnambulists, and beasts are incapable of acts of injustice.[110]

Thus it would seem that the right of self-defense is sharply distinguished from punishment precisely with respect to the moral standing of its object.

Grotius himself expresses some doubt about this characterization: Does not Christian morality, a mandate that applies to us not merely as self-preserving beasts but as moral actors subject to divine law, demand that we love our neighbors as ourselves? Grotius has a rebuttal to this challenge: Though we are required to love our neighbors *as* ourselves, we need not love them more than ourselves. When a situation arises when it is "us or them," we can defend ourselves at their expense.[111] This objection—with a different rebuttal—comes up again in *De Iure Belli*. There Grotius concedes that "charity" demands that we sacrifice ourselves rather than kill our neighbors in certain circumstances. He would thus seem to allow a split between natural right (to self-defense) and Christian obligation (to charity). However, acts of self-preservation are still defensible on Aquinas's principle of double-effect: "we take this Course, as the only Means left to preserve ourselves, and not as the principal End proposed, just as in the Judgment of Criminals condemned to Death."[112]

This last comparison—between the necessity of killing in self-defense and the act of criminal punishment—reveals my central claim concerning Grotius's understanding of punishment. Although Grotius at times speaks in retributive terms regarding the right of punishment, he also suggests here that punishment is a form of collective self-defense. Unlike in the case of immediate threat, where the intentions (or even personhood) of that threat do not matter, what makes an individual a threat and punishment necessary is his moral character. As part of Grotius's argument that "the Right of making War is not absolutely taken away by the Law of the Gospel" in *De Iure Belli Ac Pacis*, he describes the fourth "proof" as follows:

> If it were not permitted to punish certain Criminals with Death, nor to defend the Subject by Arms against Highwaymen and Pyrates, there would of Necessity follow a terrible Inundation of Crimes, and a Deluge of Evils, since even now that Tribunals are erected, it is very difficult to restrain the Boldness of profligate Persons.[113]

Punishment, in other words, is necessitated and therefore justified (as a form of self-defense) by the existence of certain individuals who by their very profession or nature constitute an ongoing threat.

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110. GENTILI, *supra* note 14, at 260.
111. 1 GROTIUS, *supra* note 20, at 244.
112. *Id.* at 398.
113. *Id.* at 201-02.

Who are these individuals for whom punishment is required? None other than pirates and highwaymen, this time paired with "certain Criminals." Whereas we had previously seen pirates in Grotius's texts as transgressors of an international order and threats to states, here it is *subjects* who must be protected from pirates and highwaymen. The right to punish is justified by its effect of general deterrence, but one that is itself fleshed out with reference to particular "profligate Persons" rather than specific acts. The tension between the moral neutrality of self-defense and the suggestion that punishment relies upon an objective denigration of the wrongdoer rather than a subjective relationship between punisher and punishee is resolved by way of this essentialization. Self-defense can be justified without reference to the moral quality or intentions of the threat, but the pirate or highwayman *is* a threat because of his moral quality and intentions. The wrongdoer is not punished for his act, but rather because he has revealed himself to constitute in his very nature the sort of threat that a beast or rolling boulder might. There is no tension between retributivist and consequentialist justifications of punishment because the same quality that makes an individual *deserving* of punishment also makes him a forward-looking menace.[114]

Commentators on Grotius have not sufficiently emphasized this crucial contrast between post-Kantian theories of punishment and those held by Grotius. One exception is Benjamin Straumann, who has identified both retributivist and consequentialist tendencies in Grotius's theory of punishment, but is concerned primarily with how these competing purposes draw from Grotius's account of natural rights.[115] Although the fundamental opposition between consequentialist and retributive accounts of punishment is taken for granted among contemporary theorists of punishment, these two were commensurate and even mutually reinforcing among the early moderns. This convergence is most clear when Grotius uses animal metaphors to describe the appropriate relation of the innocent and the guilty. The following passage from *De Iure Praedae* is worth quoting at length. Beginning by asserting that Genesis 9:6 ("Whoso sheddeth man's blood, by man shall his blood be shed") is subordinate to Genesis 9:2-3, wherein God "delivers the beasts into man's service," Grotius continues:

> For when the theologians inquire into the origin of punishments, they avail themselves of an argument based on comparison, as follows: all less worthy creatures are destined for the use of the

114. This essentialization of the category of criminal can perhaps explain, at least in part, why these early modern thinkers did not share the contemporary obsession with the conflicting implications of consequentialist and Kantian justificatory accounts of state punishment.

115. Benjamin Straumann, *The Right to Punish as a Just Cause of War in Hugo Grotius's Natural Law*, *in* STUDIES IN THE HISTORY OF ETHICS, 15 (2006), http://www.historyofethics.org/022006/StraumannRightToPunish.pdf.

> more worthy; thus, despite the fact that the beasts were indeed created by God, it is nevertheless right that man should slay them, either in order to convert them to use as his own property, or in order to destroy them as harmful . . . ; similarly, so the theologians contend, men of deplorable wickedness, for the very reason that they are of such a character—stripped, as it were, of all likeness to God or humanity—are thrust down into a lower order and assigned to the service of the virtuous, changing in a sense from persons into things . . . .[116]

Animals are created by God, and therefore have value. However, they have less value than humans. Hence, humans are permitted to use animals for their own good by, for instance, eating them, or destroying those animals (such as wolves) that threaten human safety. Criminals are in this respect like beasts. Their crimes reveal them to be less human—"stripped . . . of all likeness to God or humanity"—and therefore, like animals, they may be used as slaves or things or destroyed to protect others. The permission to punish grows out not just of the loss of moral consideration, but of the teleological, divine mandate to make use of all *things*, where "thing" signifies a loss of moral consideration as a person.

This opposition between persons and things seemingly anticipates the central Kantian moral thesis, but is invoked to reach the opposite conclusion; treating wrongdoers as things is not only permitted, but mandated. Two claims are necessary to reach this conclusion: First, that wrongdoers present an ongoing threat; and second, a teleological understanding of the relationship between things and persons, an understanding in Grotius's case that derives from Aristotle[117] by way of Vitoria and other Scholastics. Once wrongdoers have revealed themselves to be in the category of beasts, it becomes permissible to use them for general deterrence purposes as well as slavery.

Although the teleological reasoning reflected in the above passage was consistent with the Scholastic just war accounts to which Grotius was responding, the above passage is all the more striking when considered in relation to those earlier texts. As Annabel Brett has pointed out, Scholastic writers (Grotius's "theologians") often invoked comparisons between wrongdoers and beasts to justify the former's destruction. However, among Scholastics, the comparison remained metaphorical; sinners kept their essentially human nature despite the loss of juridical status. To quote Brett, quoting Domingo de Soto, a contemporary of Vitoria and a fellow Salamancan:

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116. GROTIUS, *supra* note 26, at 135.

117. In particular, Aristotle's notion of "natural slavery" whereby a person incapable of self-governance not only can, but ought to be treated as an instrument for the sake of his master's ends. *See* ARISTOTLE, *The Politics*, *in* THE POLITICS AND THE CONSTITUTION OF ATHENS 70 (Stephen Everson ed., Benjamin Jowett trans., Cambridge University Press 1996) (c. 350 B.C.E.).

> even if human beings who have degenerated from their nature are compared to animals, they differ, however, in that beasts are by their nature such; and therefore any one can kill wild ones without any injustice, and tame ones without injustice to them, although possibly to their owner; but a sinner (*peccator*), since he is not by nature cattle (*pecus*), must not be killed excepted by public judgment.[118]

Grotius, like de Soto, makes reference to the common good as a necessary precondition for the killing of wrongdoers. However, he is not so careful to repeat the theologians' reassurance of man's essential nature even within the criminal; wrongdoers have lost not just juridical status, but natural status as well.

This quality of wrongdoer-ness extends beyond any immediate retributive harm to a general loss of moral consideration. Grotius even goes so far as to state that, "If Regard be here only had to *expletive* Justice, [one] has a Right of revening so small a Crime [as a box on the ear], even by the Death of him that attempts it."[119] Christian charity prohibits carrying out this act, but the intrinsic nature of punishment itself does not. This shocking conclusion—that one may put a man to death for a punch—suggests it is the loss of moral consideration of the wrongdoer rather than a retribution for a particular act that makes punishment permissible. Similarly, Grotius remarks that the goods of an innocent man are more deserving of protection than the life of the robber who attempts to steal them.[120] It is relative value of the robber's life that makes homicide in defense of one's property permissible.

Thus, according to Grotius, punishment is a natural, universal right and form of collective self-defense justified by reference to the generalized threat a wrongdoer poses. When we exercise the natural right of punishment, then, we do so on behalf of the common good. Grotius analogizes wrongdoers to animals whose nature it is to threaten humans and excuse or justify their elimination as a form of pest control.[121] In the final subsection, I return again to pirates and highwaymen, this time armed with a broader understanding of how Grotius, in particular, understood punishment.

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118. ANNABEL S. BRETT, CHANGES OF STATE: NATURE AND THE LIMITS OF THE CITY IN EARLY MODERN LAW 35-36 (2011).

119. 2 GROTIUS, *supra* note 20, at 406.

120. *Id.* at 408. ("For the Inequality betwixt the Goods of one Man and the Life of another is made up, by the Difference betwixt the favorable Cause of the innocent Person, and the odious Cause of the Robber.").

121. *Id.* at 973-74 ("Of this natural Right [of punishment for the sake of the common good] *Democritus* thus speaks; for I will quote his own Words, because they are remarkable. . . . *What we have said of Foxes, and noxious Reptiles, will hold good also of Men, of whom we ought to be no less aware. . . . Every one who kills a Robber, or a Thief, is innocent. . . .* Upon which passages *Seneca* seems to have had his Eye, when he saith, *When I command a Malefactor to be put to Death, I do it with the same Air and Mind, that I kill a Serpent or venomous Beast.*").

*B. "Like a brigand"—wrongdoing and loss of status*

Pirates and brigands were deemed "enemies of all"; contemporary scholars such as Heller-Roazen have interpreted this phrase to suggest a kind of exceptional status or violence. As we have seen, pirates in seventeenth-century England were indeed considered particularly troublesome figures, capable of crossing boundaries and of uncertain or deceptive loyalty. However, the above reading of Grotius's theory of punishment suggests that pirates in international law were not so much exceptional figures but merely the prototypical criminals. Pirates were not special for being compared to beasts or subject to violence by anyone; that was simply what punishment entailed outside of the commonwealth. Rhetorical references to pirates, at least in this period, i.e. the late sixteenth and seventeenth centuries, should therefore be read as exemplifying a particular account of criminality or punishment.

In what follows, I buttress this claim by looking to other "enemies of all"—atheists. Punishment, after Gentili and Grotius, entailed exclusion from the international legal community. So did unbelief. The similarities in the treatment of pirates and atheists point us toward a fundamental shift in how the relationship between punishment and membership was understood by Gentili and Grotius both. I conclude with a reading of Locke, demonstrating that this understanding of punishment as a universal right against a beast-like wrongdoer is not just characteristic of international legal thought, but at the heart of classical social contract theory.

Pirates and highwaymen, as we have seen, are appropriate targets of punitive violence. What about *hostes*? The central claim of Gentili's theory of international law is that the world is divided into *hostes* and *latrones*; the former can wage lawful war, the latter never can. However, *hostes* can engage in "brigandage" by violating the rules governing one's conduct in war with a fellow. This misbehavior includes carrying out violence without having a legitimate reason to do so: "[I]f it is evident that one party is contending without any adequate reason, that party is surely practicing brigandage and not waging war."[122] Gentili implicitly compares the misbehavior of states and the typical behavior of pirates—a poorly behaved state acts *like* a brigand, and may presumably be treated as one. Gentili never suggests, however, that such brigandage may result in a wholesale loss of status.

For Grotius, the category of brigand was far more permeable. Punitive violence is not limited to those who by their profession or nature pose a threat to humankind like pirates. Those who otherwise have the status of *hostes* can make themselves enemies of all mankind by virtue of their

122. GENTILI, *supra* note 14, at 32.

crimes. Not only is war "lawful against those who offend against Nature," including states, but because violations of the law of nature threatens all of humankind, *anyone* may make war against the violator.[123] Even more dramatically, Grotius describes otherwise legitimate states that have violated natural law as pirates or brigands, rather than simply comparing their behavior. Both Grotius's assertion that even a successful belligerent in an unjust war is "a thief, an armed robber, an assassin,"[124] and his gloss on the anecdote about Alexander and the pirate,[125] make a similar point. Carrying out war necessarily entails killing and taking items at gunpoint. These acts may be excused when one carries out a just war with authority, but absent authorization, one simply commits crimes on a larger scale.

The claim that otherwise legitimate powers may be morally assessed and treated as pirates or brigands is at the core of Grotius's motivation for writing *De Jure Praedae. De Jure Praedae* was commissioned by the Directors of the VOC (Dutch East India Company) to justify the 1603 seizure of a Spanish merchant ship by a Dutch captain.[126] As *De Jure Praedae* makes clear, this seizure of a peaceful ship was motivated by both the metropolitan rebellion of the Dutch against Spanish imperial rule and the ongoing battle for commercial dominance with respect to trade with the peoples of the East Indies. The seizure of another nation's ship without immediate provocation was justified, however, by positing the possibility of a just war of private entities against public ones—which required that the public entities act like pirates and therefore be subject to universal punishment.

In describing the Spanish atrocities justifying the later seizure of the merchant ship, Grotius maintains a contrast between the standards of behavior owed soldiers and those owed criminals. At the same time, he characterizes the behavior of the Portuguese (who were at the time under the Spanish crown) as that of a pirate—and therefore deserving of violence governed by the drastically lower set of standards usually applied to wars against pirates. Grotius describes the massacre of Dutch sailors by

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123. Blane & Kingsbury, *supra* note 97, at 252 (quoting 3 GROTIUS, *supra* note 20, at 1024).

124. GROTIUS, *supra* note 26, at 76 ("Finally, it is an indisputable fact that he who knowingly resists a just war, commits a grave offence. Even if such a belligerent is to some extent successful, he is a thief, an armed robber, an assassin . . . .").

125. *Id.* at 105 ("Accordingly, King Alexander was rightly included by the pirate among the latter's partners in crime, if that ruler had no just cause for war against Asia; and in this same sense Lucan called Alexander the 'plunderer' of the world, while Seneca described him as a 'robber.'").

126. *De Jure Praedae* (cited here as HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY) has an unusual publication history. Intended by the Directors of the Dutch East India Company (VOC) to be a polemical brief on the train of Spanish naval abuses, the manuscript included a number of chapters setting forth a series of abstract principles, before turning to a historical account of Dutch-Spanish naval relations and a valorization of the VOC. Although completed in 1606, the text would remain in manuscript until 1864 when it was found among Grotius's personal papers and published. A modified version of Chapter 12, however, was published as *Mare Liberum* in 1609 and found a wide readership in Europe and merited a number of English responses, including Selden's *Mare Clausum* (1635).

Portuguese as follows: "Thus it came to pass that six men of Holland . . . were subjected to the cruelest and most hideous punishment, suited to robbers and pirates."[127] Because of these executions:

> We shall plainly perceive that the Portuguese, though they assume the guise of merchants, are not very different from pirates. For if the name of "pirate" is appropriately bestowed upon men who blockade the seas and impeded the progress of international commerce, shall we not include under the same head those persons who forcibly bar all European nations . . . from the ocean and from access to India . . . ?[128]

Grotius concludes that anyone may punish the Portuguese, including private Dutch merchants. The Portuguese, although acting on behalf of a legitimate sovereign and presumptive member of the community of *hostes*, had become the enemy of all.

Thus, according to Grotius and to a lesser extent Gentili, while pirates are spoken of as categorically subject to a different sort of violence, legitimate powers can be made subject to this violence via wrongdoing. This does not mean the categories have collapsed. On the contrary, they are reaffirmed each time Grotius or Gentili explains this change in status by making reference to being "like a pirate or robber." Rather, it reveals that this broader category of problematic figures encompasses those who violate the rules associated with the international order, either systematically (in the case of the pirate or brigand), or incidentally. This analogy is only possible, however, if status as a pirate, brigand, or *latro* is not the equivalent of being *outside* all law, but rather, only if they are conceived of as violators of a law which they ought to obey. There is therefore a tension here between the recognition that single acts of wrongdoing may allow one to be treated *like* a figure based on his supposed incapacity to participate in the international community and the fact that this obligation to obey itself derives from the wrongdoers' membership in the international community.

This tension around membership can be seen more clearly by examining the Scholastic and Gentili's and Grotius's contrasting treatment of atheists, and in particular whether war was justified against heathens on the basis of their non-belief. The striking differences in their respective approaches exemplify a decided and significant shift in how membership in a global community was understood vis-à-vis the interstate right of punishment.

For Vitoria and Suarez, membership within the same legal community was a precondition of punishment. Although liable to punishment for violations of the natural law, "barbarians" such as the Turks or American Indians were not Christian and therefore not subject to Papal jurisdiction.

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127. GROTIUS, *supra* note 26, at 281.

128. *Id.* at 449.

A Christian king may not wage war against a non-Christian people on the basis of the latter's religion because the latter is not subject to the former; "a Christian prince has no more power over an infidel prince than over another Christian."[129] Because the Pope is the head of the Church and thus of supreme jurisdiction in matters of Christianity, Christian kings may only wage war on behalf of the religion on his delegated authority. However, the Pope lacks religious authority over non-believers precisely because they are not members of the Christian community: "[U]nbelievers are not subjects of the pope; the pope therefore can confer no authority over them upon a prince."[130] Even when a Christian prince *does* have cause to go to war against unbelievers—and this reason may include their abuse of their own people through, e.g. anthropophagy—the limits on that military violence are the same as apply to wars between Christians.[131] For the late Scholastics the ability to punish was the function of a relationship of authority that is founded in the common membership of punisher and punishee.

In contrast, for Gentili and Grotius, punishment was justified inasmuch as individuals or states placed themselves *outside* the human community. Gentili and Grotius follow their Scholastic predecessors to an extent by disqualifying conversion or heretical religious beliefs as a just cause of war.[132] Grotius's reasoning with respect to atheists reflects his insistence on a natural right to punish and the fundamental reorientation in international law this entailed. He is quite explicit in rejecting "the opinion of *Victoria, Vasquez, Azorius, Molina*" that requires direct injury for a party to begin a war. These authors "assert, that the Power of Punishing is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature."[133] Thus, individual princes may take it upon themselves to punish those who violate the laws of nature, through a kind of humanitarian intervention. This punishment is permissible not only in those cases where those violations hurt other humans as in Vitoria's case of anthropophagy, but where the harm is "indirect and consequential, as Self-Murder; for instance, Bestiality and some others."[134] Violators may be punished by anyone simply as a consequence of the intrinsic wrong of

129. FRANCISCO DE VITORIA, *On Dietary Laws, or Self-Restraint, in* POLITICAL WRITINGS 218-19 (Anthony Pagden & Jeremy Lawrance eds., Cambridge University Press 1991) (1537).

130. *Id.* at 223.

131. *Id.* at 226 ("By whatever title war is begun on the barbarians, it is not lawful to take it further against them than we should take a war against Christians. This is clear, because the justice of the war has nothing to do with their being unbelievers.").

132. According to Grotius, since Christianity must be accepted voluntarily, evangelical wars are useless. *See* 2 GROTIUS, *supra* note 20, at 1044-45. According to Gentili, since "religion is a relationship with God . . . man cannot complain of being wronged because others differ from him in religion." *See* GENTILI, *supra* note 14, at 41.

133. 2 GROTIUS, *supra* note 20, at 1024-25.

134. *Id.* at 1028.

their actions.

For Gentili, the right of war against atheists is the right of expelling from the physical world community those who have already been morally excluded. While mistaken religious belief is a violation of Christian law, the absence of belief altogether is a violation of natural law.[135] Those "who, living rather like beasts than like men, are wholly without religious belief [are] the common foes of all mankind, as pirates are."[136] For Gentili, atheists are the equivalent of pirates in threatening the community of humanity as a whole, and can be subject to violence by any political authority. One may wage war against atheists as one would against brutes—that is, *because* atheists are excluded from the community of humans they are therefore subject to violence.[137] This moral exclusion is expressed in terms of bestiality. Atheists "liv[e] like beasts, rather than men."[138]

Atheists thus invoke two competing desiderata—to physically exclude and/or to restore to membership (or at least usefulness) those who are deemed to be morally outside the bounds of a particular community. Whereas in the first instance Gentili suggests that the purpose of this war is the reintegration of atheists into the human community by "forc[ing them] to adopt the usages of humanity,"[139] in the second atheists are treated as the equivalent of brutes, sub-human and morally excluded from membership in that same community. Atheists have placed themselves outside the moral community of mankind and are therefore subject to the kind of violence that might be used against other sub-humans like beasts or pirates—but nevertheless somehow ought to be reincorporated. They retain, in other words, the potential of full status.

Rather than a means of ensuring justice within a community, punishment in the interstate sphere came to be a means of enforcing coherence between the moral and physical bounds of a particular community. With the creation of the category of *hostes* the violation of natural law norms represents a deviation from an implied community of reasonable actors. For Gentili, deviation from these norms of conduct constitutes a breach of a kind of global social compact: "How can men who have withdrawn from all intercourse with society and who . . . have broken the compact of the human race, retain any privileges of law, which itself is nothing else than a compact of society?"[140] For both Gentili and to an even greater extent, Grotius, those who do not wage war are guilty of "brigandage [*latrocinia*],"a category of action that implies a certain status,

135. GENTILI, *supra* note 14, at 125.
136. *Id.*
137. *Id.*
138. *Id.*
139. GENTILI, *supra* note 14, at 41.
140. *Id.* at 79.

or lack thereof. To violate natural law is to place oneself outside the category of the relevantly human, and to be punished was to be treated as if one were a pirate or brigand, that is, one who by definition is *not* a *hostes* or member of the international community.

This use of "brigandage" thus provides a final link between the pirate and the criminal. Criminality is a loss in status associated with, and at least nominally predicated upon, the violation of law. As an essentialized figure, compared to a beast, the seventeenth-century pirate may closely resemble the nineteenth-century criminal who can be recognized by the shape of his head;[141] what makes punishment necessary for both is their inherent nature. However, Grotius and Gentili also have an account of loss of status, exclusion, and punishment that turns on becoming "like a pirate"; the bestiality of the pirate that makes him "the enemy of all" is associated with wrong*doing*. I have suggested an opposition between a criminality predicated on an essential quality and one associated with punishment for particular actions. What a close reading of Gentili and Grotius reveals, however, is that these two versions are not incommensurate. Among the key criminal figures of early modern international—and, as I have argued, English common—law, punishment was justified by this loss of status, but that status was linked to wrongdoing.

This notion of criminality, articulated in Grotius's account of the laws of war, is at the heart of Locke's account of punishment and political authority. More than simply rhetorical links between pirates, highwaymen, and felons, the conceptual account of pirates and punishment we have outlined above grounds the canonical proto-liberal account of the state. Men leave the state of nature and enter political society by relinquishing "every one his Executive Power of the Law of Nature, and . . . resign[ing] it to the publick."[142] Political authority is therefore the collective "Executive Power" of a commonwealth's members. This "Executive Power" is the right to punish. Locke, like Grotius, asserts there is a natural right of punishment, although he does not reference Grotius as the author of this "strange doctrine."[143] However, his treatment of criminals with reference to this account of the right to punish is uncannily similar to that of his international legal theorist predecessor. This natural right of punishment is necessary

> to secure Men from the attempts of a Criminal, who having renounced Reason . . . hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*, one of those

141. *See* LEPS, *supra* note 4, at 44.
142. LOCKE, *supra* note 80, at 325.
143. *Id.* at 275.

> wild Savage Beasts, with whom Men can have no Society nor Security.[144]

Just like the pirate, the criminal is at war with *all* mankind and may be killed like a beast. Just like a pirate any particular wrongdoing or theft is extrapolated to imply an inability to socialize. Whereas pirates lacked the forms of a state that would enable lasting peace treaties, criminals lack reason necessary for peaceful relations with others. Punishment is justified by a loss of status associated with the universality of the *criminal*'s threat. What the pirate was to Grotius's account of the laws of war, the criminal is to Locke's account of the commonwealth.

## CONCLUSION

A heightened interest in pirates among legal scholars over the past decade has been largely concerned with parallels between pirates and terrorists. These accounts have emphasized the pirate as an "exceptional" figure who conflated two pre-existing legal spheres, the laws of war and the criminal laws. A close and contextualized reading of early modern sources that discuss piracy, however, suggests a very different conclusion: The pirate actually functioned as the forerunner to the modern criminal and offers us important insight into the notion of criminality that early modern political philosophers adopted.

The linkage between pirate and criminal was both rhetorical and historical—the pirate and highwaymen were figures of popular mythos and concrete economic concern; highwaymen, in particular, became the object of new forms of state control. While the pirate and highwaymen operated in parallel both historically and rhetorically for much of the seventeenth century, the development of a distinctive criminal substantive and modern procedural law in England began well after Gentili and Grotius brought the pirate to prominence in international legal discourse. Thus, rather than, as Heller-Roazen has argued, collapsing the distinction between criminal and enemy,[145] the figure of the early modern pirate was—as a matter of intellectual historical development—at least partially constitutive of justifications of state punitive violence and of the concept of the criminal who merits that violence.

This is an intellectual historical claim about how seventeenth-century political and legal thinkers conceived of and justified state violence. It is also a social historical claim, as the highwayman was not just a rhetorical figure but the object of actual statutes in the late seventeenth century that were, for their time, the most muscular assertion of state power into local crime control. Both these claims have important consequences for how we

144. *Id.* at 274.

145. HELLER-ROAZEN, *supra* note 37, at 11.

understand contemporary Anglo-American criminal law and practices of criminal punishment. What justified violence against the pirate under international legal norms was a universal right to punish. Rather than political authority—as earlier international legal theorists held—what made punishment permissible was the loss of moral consideration by the wrongdoer. The pirate's significance in international legal thought hinged on his status, not his actions; excluded from the international legal community, he became the "enemy of all" and was no longer protected by the laws of war. If, as I have argued, it was the pirate and the highwayman that seventeenth-century English political theorists, writers, and members of Parliament had in mind when justifying or constructing state prosecution or punishment, this suggests that the roots of Anglo-American criminal law may in fact be deeply illiberal.