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Rationality, Pirates, and The Law: A Retrospective

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Rationality, Pirates, and The Law: A Retrospective

Abstract

In the late 1720s Caribbean piracy was brought to a screeching halt. An enhanced British naval presence was partly responsible for this. But most important in bringing pirates to their end was a series of early 18th-century legal changes that made it possible to effectively prosecute them. This short paper's purpose is to recount those legal changes and document their effectiveness. Its other purpose is to analyze pirates' response to the legal changes designed to exterminate them, which succeeded, at least partly, in frustrating the government's goal. By providing a retrospective look at anti-piracy law and pirates' reactions to that law, my hope is to supply some useful material for thinking about how to use the law to address the contemporary piracy problem.

Keywords

Antipiracy Law, Antipiracy Legal Reform

RATIONALITY, PIRATES, AND THE LAW: A RETROSPECTIVE

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TABLE OF CONTENTS

Introduction.....	1219
I. Antipiracy Law Before 1700	1220
II. Antipiracy Law After 1700.....	1222
III. The Hard-Plucked Fruit of Antipiracy Legal Reform and Pirates' Response.....	1224
Conclusion	1229

INTRODUCTION

In the late 1720s, Caribbean piracy was brought to a screeching halt. An enhanced British naval presence was partly responsible for bringing pirates to their end. But the most important factor contributing to this result was a series of early eighteenth-century legal changes that made it possible to prosecute pirates effectively.

This short Article's purpose is to recount those legal changes and document their effectiveness. Its other purpose is to analyze pirates' response to the legal changes designed to exterminate them, which succeeded, at least partly, in frustrating the British government's goal. By providing a retrospective look at antipiracy law and pirates' reactions to that law, my hope is to supply some useful material for thinking about how to use the law to address the contemporary piracy problem.

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My basic conclusion is that while the law can be used to combat piracy, it should not pretend that pirates will sit idly by as legal changes are introduced to curb their livelihood. Pirates have always been rational actors who will do what they can to offset legal changes that threaten them.

The good news about pirate rationality is that through careful rational-choice analysis, we can try to understand how pirates might adjust their behavior in response to various legal changes that influence their incentives. The bad news about pirate rationality is that we need to try to predict what pirates will do when we change the law to combat them. If pirates were like bumps on a log, legal systems could handle them much more easily. But pirates are clever people who are determined to circumvent legal reforms that seek to stop them. Using the law to address piracy therefore requires strategic, game-theoretic thinking. Because pirates are as interested in confounding legal changes designed to prevent and punish them as the persons making legal changes are interested in confounding pirates, thinking about how to use the law to address piracy is more like playing chess with a skilled opponent than playing “guess which hand” with a toddler.

I. ANTIPIRACY LAW BEFORE 1700

In the very early days of piracy, between 1340 and 1536, England tried pirates under the civil law in admiralty courts. The pre-1536 law relating to piracy was seriously flawed. Convicting someone of piracy required either the accused to confess or two eyewitnesses, neither of whom could be accomplices, to testify to his alleged act of piracy.

In 1536, England introduced the Offenses at Sea Act, which rectified this deficiency by mandating that acts of piracy be tried according to common law procedure—a procedure that permitted accomplice testimony.¹ This mandate put pirates’ fate in the hands of a jury of twelve “peers,” which heard cases during special “Admiralty Sessions” in England’s criminal courts.²

Like the law relating to piracy before 1536, piracy law under the Offenses at Sea Act was also flawed. Most significantly, it did not provide a practical way for England’s growing colonies to handle the

1. 1536, 28 Hen. 8, c. 15 (providing that offenses of piracy would be prosecuted based on the testimony of witnesses present on a ship when the offenses were committed). For an excellent and more in depth account of antipiracy legislation, see JOEL H. BAER, *PIRATES OF THE BRITISH ISLES* (2005).

2. 28 Hen. 8, c. 15 (providing that a jury of “twelve good and lawful inhabitants in the Shire” would serve in piracy trials).

pirates they captured. Although some colonies adopted their own legal procedures relating to piracy, colonial piracy trials were rare. Further, the High Court of Admiralty could overturn their decisions.

In 1684, most colonial trials came to a halt when the English government decided that the colonies did not have jurisdiction to try any piracy cases.³ The 1536 statute obligated colonial officials to ship accused pirates and witnesses to England to attend trial. Since a great deal of piracy took place in and around England's distant colonies, the Offenses at Sea Act left a serious impediment to effectively dealing with sea bandits. As a later law read:

[I]t hath been found by Experience, that Persons committing Piracies, Robberies and Felonies on the Seas, in or near the *East* and *West Indies*, and in Places very remote, cannot be brought to condign Punishment without great Trouble and Charges in sending them into *England* to be tried within the Realm, as the said Statute directs, insomuch that many idle and profligate Persons have been thereby encouraged to turn Pirates, and betake themselves to that sort of wicked Life, trusting that they shall not, or at least cannot easily, be questioned for such their Piracies and Robberies, by reason of the great Trouble and Expence that will necessarily fall upon such as shall attempt to apprehend and prosecute them for the same⁴

Colonial governments were interested in prosecuting pirates. But not if they had to foot the bill. Consequently, when they captured pirates, they often just let them go. The problem that this criminal "catch and release" policy created intensified in the late seventeenth and early eighteenth centuries when a new wave of watery bandits took to the sea.

Between 1690 and 1700, the "Red Sea Men," so-named because they did most of their prowling in the Red Sea, caused the East India Company considerable trouble. This situation in turn prompted the East India Company to lobby the English government to do something about the pirate problem. In 1701, the War of the Spanish Succession broke out, temporarily relieving the pirate problem by diverting would-be piratical energies to legitimate maritime marauding in the form of privateering instead. But the War

3. See JOEL H. BAER, *PIRATES OF THE BRITISH ISLES* 25 (2005) (explaining that attempts to try pirates under a 1684 law were "undermined by a finding that under the statute colonial courts lacked the jurisdiction to try pirates").

4. An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3, c. 7, reprinted in 3 *BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660–1730*, at 59 (Joel H. Baer ed., 2007) [hereinafter *BRITISH PIRACY IN THE GOLDEN AGE*].

of the Spanish Succession ended in 1714, leaving would-be pirates without a legitimate outlet for their desire to steal on the sea.

A few years later, piracy in the Caribbean exploded. With many more pirates roving about in the late seventeenth and early eighteenth-centuries, colonial officials' inability or unwillingness to send captured pirates to England for trial posed a serious problem. To address this problem, legal reform was needed.

II. ANTIPIRACY LAW AFTER 1700

In response to this need, Parliament introduced An Act for the More Effectual Suppression of Piracy.⁵ The new statute empowered colonies with commissions from the Crown or the Admiralty to preside over vice-admiralty courts to try and punish pirates on location. The Act provided:

That all Piracies, Felonies and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged, according to the Directions of this Act, in any Place at Sea, or upon the Land, in any of his Majesty's Islands, Plantations, Colonies, Dominions, Forts, or Factories, to be appointed for that Purpose by the King's Commission or Commissions under the Great Seal of *England*, or the Seal of the Admiralty of *England*⁶

In vice-admiralty courts, seven or more commissioners sat in judgment of accused pirates.⁷ An accused pirate still enjoyed trial by jury, per common law procedure, if he was tried in England. But these protections were not afforded to him if he was tried in one of the colonies, as was increasingly the case. In accomplishing this change, the Act did more than just empower vice-admiralty courts to prosecute pirates. From the government's perspective, the legal arrangements it established provided the best of both worlds: the Act permitted the eyewitness testimony needed to convict pirates, per common law procedure, but, per civil law procedure, dispensed with the pesky jurors who were less reliably antipirate—and, thus, less likely to convict captured sea scoundrels—and replaced them with more reliably antipirate colonial officials who were more likely to convict pirates.

5. 1700, 11 Will. 3, c. 7, *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 59.

6. *Id.*, *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 59.

7. *Id.*, *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 60.

The creation of regular colonial courts with the authority to try pirates proved to be a tremendous boon to the government's assault on sea robbers. Parliament originally designed the 1700 Act to expire in only seven years. But owing to the great effect it had in permitting the more regular prosecution of pirates, Parliament renewed it several times following the War of the Spanish Succession and made the law permanent in 1719.⁸

The Act for the More Effectual Suppression of Piracy stuck two additional thorns in the side of pirates. First, it treated active pirate sympathizers as accessories to piracy and stipulated the same punishments for them—death and property forfeiture—as for actual pirates.⁹ According to the Act:

And whereas several evil-disposed Persons, in the Plantations and elsewhere, have contributed very much towards the Increase and Encouragement of Pirates Be it enacted by the Authority aforesaid, That all and every Person and Persons whatsoever, who . . . shall either on the Land, or upon the Seas, knowingly or wittingly set forth any Pirate, or aid and assist, or maintain, procure, command, counsel or devise any Person or Persons whatsoever, to do or commit any Piracies or Robberies upon the Seas . . . [or shall] receive, entertain or conceal any such Pirate or Robber, or receive or take into his Custody any Ship, Vessel, Goods or Chattels, which have been by any such Pirate or Robber piratically and feloniously taken . . . are hereby likewise declared . . . to be accessory to such Piracy and Robbery . . . and . . . shall and may be . . . adjudged . . . as the Principals of such Piracies and Robberies¹⁰

Second, the law encouraged merchantmen to defend themselves against pirate attacks by providing them a reward “not exceeding two Pounds *per Centum* of the Freight, and of the Ship and Goods so defended.”¹¹ By 1717, England not only rewarded individuals for defensively resisting pirate aggression; it also rewarded them for offensively initiating aggression against pirates. These rewards, publicized in the *Boston News-Letter*, awarded “[f]or every Commander of any Pirate-Ship or Vessel the Sum of One hundred Pounds; [f]or every Lieutenant, Master, Boatswain, Carpenter, and Gunner, the Sum of Forty

8. Perpetuation of Acts, 1719, 6 Geo. 1, c. 19.

9. An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3, c. 7 (providing that a final determination of piracy in cases involving accessories would lead to a sentence of death or “Losses of Lands, Goods and Chattels, as if they had been attainted and convicted”), *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 60.

10. *Id.*, *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 63.

11. *Id.*, *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 64.

*Pounds; [f]or every Inferior Officer the Sum of Thirty Pounds; [a]nd for every Private Man the Sum of Twenty Pounds.”*¹²

In 1721, Parliament bolstered antipiracy law again, this time to hold accountable anyone who traded with pirates.¹³ Under the new law, any person who “any wise trade[d] with any Pirate, by Truck, Barter, Exchange, or any other Manner” was “deemed, adjudged and taken to be guilty of Piracy” and punished as the same.¹⁴ Further, to the carrot of reward money, which the 1700 law promised merchantmen that successfully defended their ships and cargo against a pirate attack, the 1721 law added the stick of wage forfeiture and six months imprisonment for armed merchantmen that did not try to defend themselves against pirate aggression.¹⁵

Another important addition in the 1721 law punished naval vessels charged with hunting sea rovers and protecting merchant ships from pirates that engaged in trade instead. It seems that His Majesty’s warships had taken to using the government’s vessels as their personal trading convoys rather than to defend merchantmen and capture pirates. In 1718, Jamaica’s governor complained to the Council of Trade and Plantations as follows:

[T]he neglect of the Commanders of H.M. ships of warr, who are said to be appointed for the suppressing of pyrates and for a security to this Island, and protection of the trade thereof, but in reality by their conduct, have not the least regard to the service they are designed for . . . [and are instead engaged in] transporting goods and merchandize which otherwise would be done by vessells belonging to the Island.¹⁶

By introducing stiff penalties for such behavior, the 1721 law reduced this problem, putting stronger screws to the pirates.

III. THE HARD-PLUCKED FRUIT OF ANTIPIRACY LEGAL REFORM AND PIRATES’ RESPONSE

Because of these legal changes, the risk of pirating increased considerably after 1719 and 1721. Following these years, the British government was finally able to begin to enjoy the hard-plucked fruit of its long campaign to reform antipiracy law. To get a sense of the

12. BOSTON NEWS-LETTER, Dec. 2, 1717.

13. An Act for the More Effectual Suppressing of Piracy, 1721, 8 Geo. 1, c. 24 (declaring that anyone who assisted or traded with pirates would be punished).

14. *Id.*

15. *Id.*

16. Letter from Governor Sir. N. Lawes to the Council of Trade and Plantations (June 21, 1718), reprinted in 30 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1574–1739, at 270–72 (Karen Ordahl Kupperman, John C. Appleby, & Mandy Banton, eds., Routledge CD-ROM, 2000).

effects of these legal reforms, consider the following: whereas only thirty-one percent of all pirates hanged between 1704 and 1726 were hanged in the fifteen years spanning 1704 to 1718, sixty-nine percent were hanged in the mere seven years spanning 1719 to 1726, with the vast majority of these occurring in the years spanning 1721 to 1726.¹⁷

This was great news for government officials. But it was terrible news for pirates. As the law made pirating riskier, it made it costlier to be a pirate and harder for pirates to find willing recruits, threatening the viability of their criminal enterprise.

Pirates responded rationally to this increased risk with their own tricks for circumventing punishment under the law. The primary trick they employed for this purpose was conscription. This conscription had one catch, however: in many cases, it was not real. More than a few sailors who pirates forced to join them were, in the words of eighteenth-century pirate chronicler Captain Charles Johnson, “willing to be forced.”¹⁸

Once authorities apprehended them, most pirates had little to offer in their defense at their trials. As a result, lame arguments abounded. A key piece of accused pirate William Taylor’s defense was that he was “given to Reading, not swearing and bullying like others of them.”¹⁹ This argument failed to persuade the court.

The one defense that did occasionally prove effective was that pirates had pressed a sailor into their service when they captured his ship. The law harshly punished individuals who willingly robbed on the sea. Most convicted pirates were hanged. Yet, courts were reluctant to condemn men who pirates compelled into service under the threat of death or bodily harm. If accused pirates could demonstrate to the court that they were in fact “pressed” men, they could escape their trials unscathed. As Captain Johnson observed, “the Plea of Force was only the best Artifice they had to shelter themselves under, in Case they should be taken.”²⁰ Under the law,

17. These execution statistics are based on the data provided in DAVID CORDINGLY, *UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES* 237 (1996).

18. DANIEL DEFOE, *A GENERAL HISTORY OF THE PYRATES* 65 (Manuel Schonhorn ed., Dover Publ’ns 1999) (1724).

19. *A FULL AND EXACT ACCOUNT, OF THE TRYAL OF ALL THE PYRATES, LATELY TAKEN BY CAPTAIN OGLE ON BOARD THE SWALLOW MAN OF WAR, ON THE COAST OF GUINEA* (1723) [hereinafter *A FULL AND EXACT ACCOUNT*], *reprinted in* *BRITISH PIRACY IN THE GOLDEN AGE*, *supra* note 4, at 139.

20. DEFOE, *supra* note 18, at 248 (noting that although pirate captains did not want to force their captives to become pirates, they knew that the men who wanted to volunteer would rather be forced because the men could use their conscription as a defense in the event they were tried for acts of piracy).

“[t]he court acquitted all those who could prove that they had been forced to join the pirates.”²¹

The court that tried several of pirate captain Bartholomew Roberts’s crewmembers in 1722 identified “the three Circumstances that compleat a Pyrate; first, being a Voluntier amongst them at the Beginning; secondly, being a Voluntier at the taking or robbing of any Ship; or lastly, voluntarily accepting a Share in the Booty of those that did.”²² Or, as the court that tried William Kidd indicated:

[T]here must go an Intention of the Mind and a Freedom of the Will to the committing an Act of Felony or Piracy. A Pyrate is not to be understood to be under Constraint, but a free Agent; for in this Case, the bare Act will not make a Man guilty, unless the Will make it so.²³

Voluntary complicity with a pirate crew was important to establishing guilt. Pirates exploited this loophole by pretending to conscript seamen who joined their ranks voluntarily. Since pirates did genuinely compel some seamen to join their companies, court officials considered the impressment defense plausible.

For their ruse to work, pirates needed to concoct evidence that they were conscripts. Although many pirates attempted to escape punishment by simply claiming they were forced, absent corroborating evidence to this effect, the impressment defense did not usually persuade the courts. Pirates generated convincing evidence of their impressment in two ways. First, conscripts, real and pretend, asked their captured fellow sailors, who the pirates released, to advertise their impressment in popular London or New England newspapers. If authorities ever captured the pirates the “conscripts” sailed with, “conscripts” could use the newspaper ads verifying their forced status as evidence in their defense. For instance, after being “forced on Board” Captain Roberts’s ship, Edward Thornden “desired one of his Ship-Mates . . . to take notice of it, and incert it in the *Gazette*.”²⁴

Out of guilt, pity, or perhaps even complicity, most released sailors were only too willing to place ads for their unfortunate friends. If they were not, a little palm grease could help things along. Sailors

21. CORDINGLY, *supra* note 17, at 233 (providing the example of Henry Glasby who, after escaping from capture, returned to the pirates and was “forced” to become a pirate).

22. DEFOE, *supra* note 18, at 249–50 (observing that the court wanted to ensure that the prisoners “[had] all fair Advantages to excuse or defend themselves” and would therefore allow any evidence regarding these three circumstances).

23. *Id.* at 449.

24. A FULL AND EXACT ACCOUNT, *supra* note 19, at 92.

considered these ads such important evidence of their innocence that they had no compunction about paying fellow crewmembers to place them. Mariner Nicholas Brattle “gave all his Wages” to his captain “to put him in the *Gazette* as a forced Man.”²⁵

“Ads of force” were a marvelous invention for conscripted sailors. They were equally useful to volunteers who wanted to insure themselves against conviction in the event of their capture. Such sailors could join the pirates, ask their released colleagues to place an advertisement in the paper verifying their conscription, and proceed to go roving about with the comforting knowledge that if the law caught up with them, they had a reasonable shot of getting off as forced men. Moreover, this invention was an excellent recruiting tool for pirates. By reducing the cost of piracy, “ads of force” made it easier for pirates to find volunteers in the face of a more dangerous legal environment.²⁶

The second ruse that seamen who were eager to join the pirates used to insure themselves against later conviction worked to enhance the first. Such sailors staged “shows” of pirate impressment in coordination with their attackers, which they acted out in front of their more scrupulous sailing companions who had no intention of becoming “Brethren in Iniquity.” For example, when pirates attacked a merchant ship, the ship’s crewmembers who wanted to join the pirates might devise a plan whereby one of the aspiring sea bandits would pull aside the pirate captain or quartermaster and inform him of their desire to join the company. The eager sailors would then request their pirate captor to make a public spectacle of compelling their service to convince their fellow crewmembers who did not desire to join that they were conscripted. “Their request was granted with much waving of cutlasses and brandishing of pistols and shouting in the hearing of the officers and men on the merchant ship who were not going to join the pirates.”²⁷ Captain Roberts asked one prize’s crewmembers “whether they were willing to go with them? for that he would force no body; but they making no Answer, he cry’d, these Fellows want a show of Force” and pretended to conscript the

25. *Id.* at 99.

26. See BOSTON NEWS-LETTER, Oct. 10, 1723 (providing an example of an “ad of force” for Francis Palmer and Philip Stokes).

27. PATRICK PRINGLE, JOLLY ROGER: THE STORY OF THE GREAT AGE OF PIRACY 115 (1953) (describing this additional method captured pirates used at trial to prove that they were forced to become pirates).

sailors, who in reality had “agree[d] one with another to enter.”²⁸ As Captain Johnson put it, “the pretended Constraint of *Roberts*, on them, was very often a Complotment between Parties equally willing.”²⁹

Shows of force helped legitimize the advertisements that pretend conscripts used to insure themselves against the risk of conviction if authorities captured them. Since honest captives believed they had witnessed their comrades’ conscription, they had no scruples about placing ads publicizing the “victims’” names in the newspaper. Further, since witnesses to shows of force believed this force was genuine, they could supply compelling testimony of their former crewmen’s compelled status at trial if authorities later captured the pirates.

According to historian Patrick Pringle, “[t]his ruse often worked.”³⁰ It worked because courts relied on observer testimony about accused pirates’ free or coerced status in determining their guilt or innocence. For instance, pirate prisoners Stephen Thomas, Harry Glasby, and Henry Dawson testified on accused pirate Richard Scot’s behalf at his trial. All three testified that Scot “was a forced Man.” What persuaded them of this was Scot’s demeanor and behavior while among the pirate crew. Scot, they deposed, “lamented his Wife and Child . . . with Tears in his Eyes” and “never received any Share” in the pirates’ plunder.³¹ “The Court from these several Circumstances concluded he must be a forced Man” and acquitted him.³²

Similarly, eyewitness testimony that a sailor seemed to act freely or was pleased to be among the pirates could be crucial in establishing his guilt. According to the testimony of one pirate captive:

I was a Prisoner, Sir, with the Pyrates when their Boat was ordered upon that Service, and found, upon a Resolution of going, Word was pass’d thro’ the Company, Who would go? And I saw all that

28. A FULL AND EXACT ACCOUNT, *supra* note 19, at 128 (indicating that pirate captains knew of the forced pirate’s defense and therefore played along with the captured sailors’ apparent resistance to volunteer).

29. DEFOE, *supra* note 18, at 248 (indicating further that forcing a captured sailor into piracy was often a strategy understood by both pirate captain and prisoner and used to preserve this defense).

30. PRINGLE, *supra* note 27, at 115 (noting that providing witnesses with a believable display of resistance to being forced to become a pirate, in addition to ads of force, sometimes worked in proving the defense).

31. A FULL AND EXACT ACCOUNT, *supra* note 19, at 105 (showing that courts would also take a suspected pirate’s behavior into account when determining whether he was “forced”).

32. *Id.*

did, did it voluntarily; no Compulsion, but rather pressing who should be foremost.³³

The court found the pirates he testified against guilty and sentenced them to hang. By the same token, a sailor stupid enough to publicly declare his piratical desires could expect eyewitness testimony to this effect at his trial if pirates later captured his crew and he went along with them. One such sailor, Samuel Fletcher, whose fellow seamen heard him say “several times [he] wish’d to God Almighty they might meet the Pyrates,” and later in fact did, was confronted with his wish at his trial and found guilty of piracy.³⁴

The artificial pirate press was not an iron-clad way to escape punishment. Courts viewed the common claim of conscription—even corroborated by an ad of force as evidence—with considerable suspicion. For example, accused pirate Joseph Libbey, who “said he was a forced Man, and was detained by [the pirate captain Ned Low], and produced an Advertisement of it” in his defense at his trial was nevertheless convicted of piracy and sentenced to hang.³⁵

Still, the pirates’ ploy was sometimes effective. The popularity of ads of force tracks the risk of pirating. This in turn tracks the implementation of eighteenth-century antipiracy legal reforms. Of all ads of force published in the *Boston News-Letter* between 1704 and 1726, only seven percent appeared in the fifteen years spanning 1704 to 1718. Ninety-three percent of these ads appeared in the mere seven years spanning 1719 to 1726, most of them between 1721 and 1726—the same years when most pirate convictions occurred.³⁶

CONCLUSION

The difficulties of prosecuting modern pirates are different from those of combating sea dogs in piracy’s “Golden Age.” Before 1700, the most important obstacle to prosecuting pirates was the absence of a colonial judicial apparatus for trying pirates seized in and around Britain’s North American and Caribbean territories. Today the biggest obstacles to prosecuting pirates are international. International law empowers nations to try pirates seized on the “high

33. DEFOE, *supra* note 18, at 261 (relating what he knew of the robbery of the *King Solomon*).

34. A FULL AND EXACT ACCOUNT, *supra* note 19, at 90 (demonstrating that evidence of willingness to join the pirates could be equally harmful to the defendant’s case).

35. TRYALS OF THIRTY-SIX PERSONS FOR PIRACY 171 (1723), *reprinted in* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 4, at 187.

36. The Author collected these data from his review of issues of the BOSTON NEWS-LETTER between 1704 and 1726.

seas” or off their coasts in their domestic courts. The problem is not that government officials lack the authority to try pirates “on location.” On the contrary: today the major problem seems to be that governments do not want to try pirates “on location” because of perceived obstacles of international law.³⁷ Thus the legal lessons from piracy’s Golden Age derive not from particular, substantive features of antipiracy law. Rather, they derive from what we learn about pirates and legal reforms designed to thwart them.

That lesson is clear: pirates are rational actors and should be treated as such. They will not sit by idly as governments attempt to use the law to blot them out of existence. They will respond to those attempts by offsetting them in unexpected ways where they can, and possibly by frustrating reforms that fail to account for their rationality. The pirates of the Golden Age succeeded with these approaches to a limited extent. But the antipiracy legal reforms introduced in the first two decades of the eighteenth-century so strongly stacked the deck against sea dogs that theirs became a losing battle. Pirate rationality prolonged pirates’ existence, but not for long.

There was nothing inevitable about this result, however; and there is no reason that governments should expect to be so fortunate again. As policymakers turn their attention to addressing contemporary pirates, it therefore behooves them to bear in mind that pirates, like other people, are not passive responders to the law. As (or if) the law becomes an important constraint on pirates’ behavior, they will seek to offset its effects. Pirates will manipulate the law as the law manipulates them.

37. See Eugene Kontorovich, “A *Guantánomo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. (forthcoming 2010) (discussing the difficulty of fighting pirates because of a tension between various sources of international law, including the Geneva Convention and the U.N. Convention on the Law of the Sea), available at <http://ssrn.com/abstract=1371122>.