

January 2015

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Peter Hershey

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Hershey, Peter (2015) "Regulating Jolly Roger: The Existing and Developing Law Governing the Classification of Underwater Cultural Heritage as "Pirate-Flagged"," *University of Massachusetts Law Review*: Vol. 10: Iss. 1, Article 4.
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Regulating Jolly Roger: The Existing and Developing Law Governing the Classification of Underwater Cultural Heritage as “Pirate-Flagged”

Peter Hershey

10 U. MASS. L. REV. 94

ABSTRACT

This article explores the existing law governing Underwater Cultural Heritage (UCH) which is classified as “pirate-flagged.” First, this article discusses the discovery of the *Whydah Galley*, an 18th century slave trader vessel, which was captured by pirate Captain Samuel Bellamy and transformed into the flagship of his pirate fleet, and the subsequent discoveries of additional “pirate-flagged” shipwrecks, including the international regulatory scheme governing ownership of the property on these sunken vessels. This article discusses both 20th century international conventions which define piracy and historic case law which clarifies these definitions. Then, the article analyzes both the early American and contemporary American applications of the definition of piracy in the courts. This article concludes by evaluating the various approaches which may be used to define piracy, and thus classify a vessel as “pirate-flagged,” with an eye towards future opportunities for application of this definition and its implications on UCH which has yet to be found. The spelling and syntax of much of the source material is maintained as it originally appeared at the time of its publication.

AUTHOR NOTE

Peter Hershey is an Associate with Rich & Henderson, P.C.; J.D., 2011, William and Mary Marshall-Wythe School of Law; B.A., 2008, College of William and Mary in Virginia. The author would like to thank all those who helped with the research and writing of this article; and especially his historical research assistant and consultant, Jeff Hershey; his wife, Rachel Ganong Hershey; and the UMass Law Review staff for their editorial work.

I. INTRODUCTION	97
II. PIRATE-FLAGGED UNDERWATER CULTURAL HERITAGE: IS SUCH A CLASSIFICATION CONSISTENT WITH INTERNATIONAL LAW?	101
A. The Protection of Underwater Cultural Heritage in the Law of the Sea	101
B. Pirate Ships in the Law of the Sea	104
C. Sovereign Immunity as a Limitation on the Definition of “Pirate Ship”	106
III. DEFINING PIRACY: THE MODERN FRAMEWORK.....	110
A. Twentieth Century International Conventions.....	110
B. Piracy Under the Criminal Codes of Coastal States	113
C. Interpreting and Applying Modern Piracy Laws	115
IV. DEFINING PIRACY: THE HISTORICAL FRAMEWORK	118
A. From Civil to Common Law Offense	122
1. Evolution of the Statutory Scheme.....	122
2. The Trial of Captain Henry Avery’s Crew in London, 1696	123
B. A Statutory Supplement to the Common Law.....	126
C. Post-1698 Pirate Trials.....	127
1. The Trial of Captain William Kidd and his Crew in London, 1701.....	127
2. The Trial of Captain John Quelch and His Crew in Boston, 1704.	133
3. The Trial of Captain Thomas Green and his Crew in Scotland, 1705	135
D. The Golden Age of Piracy	137
1. The Trial of Major Stede Bonnet and his Crew in Charleston, 1718	139
2. The Trials of Eight of Bellamy’s Crew in Boston, 1718.....	145
E. The Legacy of Colonial Pirates.....	151
V. QUALIFICATIONS FOR CLASSIFICATION AS PIRATE-FLAGGED.....	153
A. Circumstances Appropriate for Classification of Underwater Cultural Heritage as Pirate-Flagged	153
1. Conviction of the Captain.....	153

2. Conviction of a Large Number of the Crew under the Captain's Command.....	156
3. Begging the King's Pardon	157
B. Circumstances Insufficient for Classification of Underwater Cultural Heritage as Pirate-Flagged	159
1. By Proclamation.....	159
2. Retrospective Adjudication	160
VI. THE <i>WHYDAH</i>	160
VII. CONCLUSION.....	161

I. INTRODUCTION

In February 1716, pirate Captain Samuel Bellamy and his crew captured the slave trader *Whydah Gally* (the “*Whydah*”)—a three-mast, 300-ton galley ship—off the coast of the Exuma Islands in the Bahamas.¹ Bellamy declared the *Whydah* his new flagship, armed her with additional cannon and shot, staffed her with 130 men, and, soon thereafter, set sail for mid-coast Maine (which was at that time part of the colony of Massachusetts). On April 16, 1717, en route to Maine, the ship encountered into a fierce storm off the coast of Cape Cod, ran aground, capsized, and broke apart in the surf. The hull and its contents were scattered across a debris field stretching four miles in length. Bellamy, and all but two of his crew, perished.²

In July 1984, more than 250 years after its wreck, underwater archeologist Barry Clifford and his dive team discovered the remains of the *Whydah*.³ This discovery, which unveiled a debris field filled with gold and silver jewelry and currency, cannon, grenades and other weaponry, the ship’s bell, tableware, nautical equipment, human remains, and a host of other items,⁴ was the first documented encounter with underwater cultural heritage (“UCH”) that belonged to or was under the dominant authority and control of pirates at the time of its sinking—i.e., the first documented encounter with what this article will refer to as “pirate-flagged UCH.”⁵

Since 1984, more than a dozen claims have been made concerning the discovery of alleged pirate-flagged UCH. For example, in 1996, Intersal, Inc. announced that it had found the remains of the *Queen Anne’s Revenge*, the flagship of notorious pirate captain Edward Teach

¹ BARRY CLIFFORD & KENNETH J. KINKOR, *REAL PIRATES: THE UNTOLD STORY OF THE WHYDAH FROM SLAVE SHIP TO PIRATE SHIP* 76 (2007); COLIN WOODARD, *THE REPUBLIC OF PIRATES* 156-58 (2007).

² CLIFFORD, & KINKOR *supra* note 1, at 7, 130-32, 144; WOODARD, *supra* note 1, at 169-193.

³ *See generally* BARRY CLIFFORD & PAUL BERRY, *EXPEDITION WHYDAH: THE STORY OF THE WORLD’S FIRST EXCAVATION OF A PIRATE TREASURE SHIP AND THE MAN WHO FOUND HER* (2000).

⁴ CLIFFORD & KINKOR, *supra* note 1, at 9-10, 36, 54.

⁵ For a generally accepted definition of underwater cultural heritage, see the Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, art. (1)(1)(a) [hereinafter the “2001 UNESCO Convention”]. *See discussion infra* Part II(A).

(or Thatch, i.e. Blackbeard) in Beaufort Inlet, off the coast of North Carolina.⁶ More recently, Barry Clifford and his team made discovery claims to several wrecks off the coast of Madagascar believed to be the *Adventure Galley* and *Rouparelle*, two ships that sailed under the command of William Kidd,⁷ and the *Mocha Frigate*, a vessel captained by an acquaintance of Kidd's named Robert Culliford.⁸ Others have boasted of the discovery of the *Quedagh Merchant*—another of Kidd's vessels—off the coast of the Dominican Republic;⁹ Captain Henry Morgan's *Satisfaction* off the coast of Panama;¹⁰ Sir Francis Drake's ships *Elizabeth* and *Delight* off the coast of Panama;¹¹ the *Port-au-Prince*, a legendary pirate ship that sank off the coast of

⁶ Richard W. Lawrence & Mark Wilde-Ramsing, *In Search of Blackbeard: Historical and Archaeological Research at Shipwreck Site 0003BUI*, SOUTHEASTERN GEOLOGY, Vol. 40, No. 1, at 1 (February 2001); ANGUS KONSTAM, THE HISTORY OF SHIPWRECKS 144-45 (2002); WOODARD, *supra* note 1, at 255.

⁷ Mary Ann Bragg, *P'town Explorer Heading to Pirate Ships*, CAPE COD TIMES, August 19, 2010, <http://www.capecodtimes.com/article/20100819/News/8190316>; RICHARD ZACKS, PIRATE HUNTER 139-159, 203-222 (2003).

⁸ Bragg, *supra* note 7; ZACKS, *supra* note 7, at 161-180.

⁹ Sean McLachlan, *Captain Kidd's Pirate Ship to Become Underwater Museum*, GADLING (May 7, 2011), <http://gadling.com/2011/05/07/captain-kidds-pirate-ship-to-become-underwater-museum/>; *Captain Kidd Ship Found*, LIVE SCIENCE (Dec. 13, 2007); <http://livescience.com/2132-captain-kidd-ship.html>; ZACKS, *supra* note 7, at 203-222.

¹⁰ Chris Bickford, *Captain Morgan's Pirate Ship Found*, DISCOVERY (Nov. 27, 2012); STEPHEN TALTY, EMPIRE OF BLUE WATER: CAPTAIN MORGAN'S GREAT PIRATE ARMY, THE EPIC BATTLE FOR THE AMERICAS, AND THE CATASTROPHE THAT ENDED THE OUTLAWS' BLOODY REIGN 219 (2007).

¹¹ FIRST COAST NEWS, *St. Augustine Pirate Museum Founder Pat Croce Has Found Sir Francis Drake's Shipwrecks*, Oct. 24, 2011, <http://www.firstcoastnews.com/news/article/223922/483/St-Augustine-Pirate-Museum-Founder-Pat-Croce-Has-Found-Sir-Francis-Drakes-Shipwrecks>; SUSAN RONALD, THE PIRATE QUEEN: QUEEN ELIZABETH I, HER PIRATE ADVENTURERS, AND THE DAWN OF EMPIRE 255, 2008). There exists widespread dispute as to whether captains such as Henry Morgan and Francis Drake were, in fact, pirates. Compare TALTY, *supra* note 10, at 35-36 (pirates and/or privateers) with RONALD, *supra* note 11, at xix (pirates) with WOODARD, *supra* note 1, at 2 (privateers). Because these men are often alleged to have committed piratical acts, we have included them in the aforementioned list. For assistance in determining whether the wreck sites of ships commanded by Morgan, Drake, or other similarly situated persons should be categorized as "pirate-flagged," see *infra* Part V.

Tonga in the Polynesian Islands;¹² and the *La Marquise de Tourny*, a ship purportedly used for piratical activities that sank in the English Channel off the coast of Plymouth, England.¹³

In addition to these empirical examples, significant potential for new discoveries—or purported discoveries—of pirate-flagged UCH exist. For example, in Beauford Inlet, Blackbeard intentionally sank one of his sloops of war, which has yet to be located.¹⁴ Sir Francis Drake lost more than a dozen ships during his voyages around the Americas, especially off the coasts of North Carolina and Panama.¹⁵ Captain Henry Morgan lost four ships in addition to the *Satisfaction* in a storm near the Lajas Reef off the coast of Panama.¹⁶ Charles Vane shipwrecked his flagship off the coast of Honduras.¹⁷ Indeed, the historical record is replete with wrecked vessels, or other items lost at sea, which were, at least arguably, owned by or under the dominant authority and control of pirates at the time of their demise.¹⁸ Moreover, because pirates continue to operate in seas worldwide, there exists

¹² *Divers Find Wreck of Legendary Pirate Treasure Ship*, THE TELEGRAPH, August 9, 2012, <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/tongafrenchpolynesia/9463622/Divers-find-wreck-of-legendary-pirate-treasure-ship.html>.

¹³ *Wreck of a Feared 18th Century French Pirate Ship Found Off Plymouth*, THE HERALD, Nov. 16, 2010, <http://www.plymouthherald.co.uk/Wrecked-feared-18th-century-French-pirate-ship-Plymouth/story-12694548-detail/story.html>.

¹⁴ Recounted in Bonnet Trial, *infra* note 236, at 45; CHARLES JOHNSON, A GENERAL HISTORY OF THE PYRATES 76-77 (Manuel Schonhorn ed., University of South Carolina Press 1972) (1724). There is a current dispute among scholars as to the identity of the author of A GENERAL HISTORY OF THE PYRATES. One scholarly theory attributes authorship of the work to Daniel Defoe, the author of ROBINSON CRUSOE, writing under the pen name of Captain Charles Johnson. Several subsequent re-printings of the work attribute the work to Defoe, including the 1972 edition edited by Manuel Schonhorn cited here. For the purposes of this article, authorship shall be attributed to Charles Johnson.

¹⁵ RONALD, *supra* note 11, at 248-255, 280-90.

¹⁶ TALTY, *supra* note 10, at 219.

¹⁷ WOODARD, *supra* note 1, at 308. Vane was eventually captured, and tried and convicted of committing acts of piracy. *Id.* at 309-10.

¹⁸ *See, e.g.*, WOODARD, *supra* note 1, at 19, 20 (pirate captain Avery burns and sinks vessels under his authority and control); *id.* at 153 (pirate captain John Martel wrecks and sinks ships off the coast of St. Croix); *id.* at 158 (identifying dozens of pirate shipwrecks off the coast of Nassau, Bahamas); *id.* at 174 (pirate captain Sam Bellamy intentionally sinks a ship under his command).

continuing potential for the creation of what will eventually become pirate-flagged UCH.¹⁹

There can be little doubt that international law recognizes the historical, social, and scientific value of pirate-flagged UCH, and, therefore, requires its protection and preservation.²⁰ But the clarity ends there. Despite the increasing number of purported discovery claims, and in contrast to the attention received by other classifications of UCH,²¹ significant gaps and ambiguities in the international regulatory scheme governing the wrecks of pirate ships still exist. This article focuses on one such gap—namely, whether, and if so, how, the laws of piracy in a criminal context interact with and/or apply to the laws governing the preservation of UCH. The questions abound: Can there be such a thing as pirate-flagged UCH? Does this classification fit within the international regulatory scheme established for the preservation of UCH? If so, what types of UCH fall within its scope? Before UCH can be classified as “pirate-flagged,” must the owner of the vessel, or the captain and/or members of the crew, be convicted of piracy? What if the owner/captain/crew took the King’s Pardon, or were the subject of an official proclamation? This article will analyze and assess these and other issues involving the classification of UCH as “pirate-flagged.”

The analysis will begin by exploring the constitution of, and the international regulatory scheme governing, underwater cultural heritage. In so doing, it will focus on whether the classification of UCH as “pirate-flagged” fits within the current regulatory framework. After determining that such a classification is both consistent with current law and appropriate in certain cases, the analysis will turn to the parameters of classifying UCH as pirate-flagged. Because this classification necessarily involves or relates to acts of piracy, the analysis will briefly examine the historical evolution of the criminal

¹⁹ See, e.g., *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

²⁰ See, e.g., the 2001 UNESCO Convention, *supra* note 5; U.N. Convention on the Law of the Sea arts. 149 & 303, Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter “UNCLOS” or the “1982 Convention”).

²¹ See, e.g., *Sea Hunt v. The Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000); *Int’l Aircraft Recovery v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000); *United States v. Steinmetz*, 973 F.2d 212 (3rd Cir. 1992); and *Hatteras v. The U.S.S. Hatteras*, 698 F.2d 1215 (5th Cir. 1982).

laws of piracy in order to assess whether, and if so how, these laws should be applied in the UCH context. The analysis will conclude by applying these observations to the wreck site of the *Whydah*.

II. PIRATE-FLAGGED UNDERWATER CULTURAL HERITAGE: IS SUCH A CLASSIFICATION CONSISTENT WITH INTERNATIONAL LAW?

In its current form, international law encompasses two distinct concepts that provide a basis for the recognition of pirate-flagged UCH. The first is the idea that UCH—objects of archeological and historical nature found at sea—are worth protecting and preserving.²² The second is that of a “pirate ship;” what customary international law generally defines as a vessel used in the commission of acts of piracy.²³ These two concepts overlap in at least one instance: the discovery of UCH that belonged to or was under the dominant authority and control of pirates at the time of its sinking. The following will demonstrate that the combination of these concepts for purposes of categorizing UCH is not only consistent with the current international regulatory scheme but also useful in determining the rights and obligations of parties with respect to certain types of UCH.

A. The Protection of Underwater Cultural Heritage in the Law of the Sea

From 1973 to 1982, state representatives met in New York at the third United Nations Conference on the Law of the Sea. The resulting convention—the 1982 Convention on the Law of the Sea (the “1982 Convention”)—was the first multi-lateral convention to recognize that member States have a continuing obligation “to protect objects of an archeological and historical nature found at sea.”²⁴ In addition, Article 149 of the 1982 Convention provided that: “[a]ll objects of an archeological and historical nature found in the Area [i.e., the international commons] shall be preserved or disposed of for the

²² See, e.g., the 2001 UNESCO Convention, *supra* note 5; UNCLOS, *supra* note 20, at arts. 149 and 303.

²³ See, e.g., UNCLOS, *supra* note 20, at art. 303; Convention on the High Seas art. 17, April 29, 1958, 450 U.N.T.S. 11 [hereinafter “the 1958 High Seas Convention”].

²⁴ UNCLOS, *supra* note 20, at art. 303.

benefit of mankind as a whole.”²⁵ The 1982 Convention has remained in force since November 16, 1994, has more than 160 member States, and is widely considered to represent customary international law (in most respects, at least).²⁶

In 2001, building upon the protections recognized by the 1982 Convention, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) formed the Convention on the Protection of the Underwater Cultural Heritage (the “2001 UNESCO Convention”) in order “to ensure and strengthen the protection of underwater cultural heritage.”²⁷ To assist in this endeavor, Article (1)(1)(a) of the 2001 UNESCO Convention defined “underwater cultural heritage” to mean

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.²⁸

The 2001 UNESCO Convention entered into force on January 2, 2009, but has not to date enjoyed the extensive support for which many had hoped; at present, it has only forty-five members States.²⁹ However, while certain provisions of the convention have caused objection and concern over such things as “creeping coastal state jurisdiction,”³⁰ the 2001 UNESCO Convention’s definition of

²⁵ *Id.* at art. 149.

²⁶ *See, e.g.*, *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012); *see also* Anastasia Strati, *Protection of the Underwater Cultural Heritage*, in *UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA: TIME BEFORE & TIME AFTER* 21 (Strati ed., 2006).

²⁷ 2001 UNESCO Convention, *supra* note 5, at art. (2)(1); *see also* Ole Varmer, *Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf*, 33 *STAN. ENVTL. L. J.* 251, 253, 261 (2014).

²⁸ 2001 UNESCO Convention, *supra* note 5, at art. (1)(1)(a).

²⁹ *States Parties: About the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO.ORG, www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha (last visited Oct. 16, 2014).

³⁰ *See* Ole Varmer et al., *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 5 *J. MAR. ARCHEOLOGY* 131 (2010).

“underwater cultural heritage” is, with the exception of its centurial requirement, consistent with prior, more widely adopted conventions concerning the preservation of historic resources.³¹ Perhaps the most comparable example is the Convention on the Protection of the World Cultural and Natural Heritage (the “1972 UNESCO Convention”). That convention, which had 190 member States at the time of this writing, defines cultural heritage as including the following:

[M]onuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

[G]roups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

[S]ites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.³²

As seen above, while international conventions such as the 1972 UNESCO Convention and the 1982 Convention, along with the domestic laws of many coastal States (including the United States), appear to call for the protection of historical, cultural, and scientific resources that are not yet 100 years of age, few, if any, laws or regulations exist which impose a greater age requirement. In other words, international and state law, by and large, agree with Article (1)(1)(a)’s proposition that objects meeting the requirements set forth therein constitute UCH, even if other authorities extend their protections to items of a younger age.³³ For this reason, among others,

³¹ See, e.g., Convention on the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 V.S.T. 37.

³² *States Parties: About the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO.ORG, www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha.

³³ Compare the 2001 UNESCO Convention, *supra* note 5, at art. (1)(1)(a) (object must be at least 100 years old) with the Antiquities Act, 16 U.S.C. § 431 *et seq.* (no express age requirement); the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-mm (object must be at least 100 years old); National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (objects must be at least 50 years old);

the 2001 UNESCO Convention is a helpful tool, and a persuasive authority, in assessing whether objects found at sea constitute UCH.³⁴

Applying the applicable provisions of the 1982 Convention and the 2001 UNESCO Convention to objects of archeological and/or historical value that were, at the time of sinking, owned by or under the dominant authority and control of pirates (e.g., the *Whydah* and its contents) leaves little doubt that such items are afforded protection under the current international regulatory scheme.

B. Pirate Ships in the Law of the Sea

In April 1958, state representatives met in Geneva, Switzerland, at the first United Nations Conference on the Law of the Sea in order to “codify the rules of international law” relating to the seas.³⁵ The codifications that emerged were separated into four conventions: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the Continental Shelf, the Convention on Fishing and Conservation of Living Resources of the High Seas, and the Convention on the High Seas.³⁶ The last of these, the Convention on the High Seas (hereinafter the “1958 High Seas Convention”), was the first multi-lateral international convention to set forth a cognizable definition of “pirate ship.”³⁷ Article 17 of the 1958 High Seas Convention provides:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15 [defining acts of piracy]. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.³⁸

National Marine Sanctuaries Act, 16 U.S.C. § 1431 *et. seq.* (no express age requirement); RMS Titanic Memorial Act of 1986, 16 U.S.C. §§ 450 rr-450 rr-6 (no express age requirement).

³⁴ See Varmer, *supra* note 27, at 261 (“The 2001 UNESCO Convention is now considered by many nations, archaeologists, and legal experts to provide the minimum standards and requirements for protecting UCH.”).

³⁵ See, e.g., 1958 High Seas Convention, *supra* note 23.

³⁶ See LOUIS B. SOHN ET AL., LAW OF THE SEA IN A NUTSHELL 2-3 (2d ed. 2010).

³⁷ 1958 High Seas Convention, *supra* note 23, at 6.

³⁸ *Id.*

The Convention has remained in force since September 30, 1962, and has approximately sixty member States, including the United States.³⁹

The 1982 Convention adopted the 1958 High Seas Convention's definition of pirate ship with only minor stylistic changes.⁴⁰ Article 103 of the 1982 Convention states:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 [defining acts of piracy]. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.⁴¹

The 2001 UNESCO Convention does not set forth a separate or distinct definition of pirate ship for use in the UCH context. It does, however, provide in Article 3 that:

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.⁴²

The definitions of "pirate ship" codified in the 1958 High Seas Convention and the 1982 Convention on the Law of the Sea are silent as to their applicability to UCH (due most likely to the fact that both were formed prior to the adoption of a cognizant definition of UCH).⁴³ However, Article 3 suggests that the definitions are properly applied to

³⁹ 1958 High Seas Convention, *supra*, note 23. For a list of signatories to the convention, see *Convention on the High Seas, Geneva, 29 April 1958*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en (last visited Dec. 3, 2014).

⁴⁰ UNCLOS, *supra* note 20, at 61.

⁴¹ *Id.*

⁴² 2001 UNESCO Convention, *supra* note 5, at art. 3.

⁴³ As seen above, these conventions were adopted in 1958 and 1982, respectively, whereas the 2001 UNESCO Convention was adopted in 2001. *Cf.* Varmer, *supra* note 27, at 254-55 (reciting the evolution of the terminology used to describe, and the standards used to protect, historic artifacts, including those lost at sea).

UCH, at least in circumstances where a sufficiently definitive determination can be made as to whether the UCH belonged to or was under the dominant authority and control of pirates at the time of its sinking.

C. Sovereign Immunity as a Limitation on the Definition of “Pirate Ship”

That UCH satisfies the aforesaid standards does not necessarily mean that it should be classified as “pirate-flagged.” Instead, there are several limitations recognized in the law of the sea that curb the applicability of this classification, the most significant of which, for our purposes, involves the concept of sovereign immunity.⁴⁴ Sovereign immunity, as applied to seafaring vessels, means that one State cannot exercise authority and control over a public ship of another State unless that other State expressly consents to the first State’s actions or expressly abandons its rights and interests in the ship.⁴⁵ Accordingly, under both the 1958 High Seas Convention and the 1982 Convention, sovereign vessels enjoy “complete immunity from the jurisdiction of any State other than the flag State.”⁴⁶

There are two types of public ships generally recognized in the law of the sea. The first is the “warship.” The 1958 High Seas Convention defines “warship” to mean

a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.⁴⁷

⁴⁴ Ownership claims by individuals or insurers to UCH wreck sites have empirically been rare, if not non-existent. Despite this observation (and although the topic is generally outside the scope of this article), it is worth noting that such private property claims should not affect the classification of UCH as pirate-flagged, but may, however, play a role in deciding whether salvage rights should be granted to a non-owner.

⁴⁵ See THOMAS BUERGENTHAL ET AL., PUBLIC INTERNATIONAL LAW IN A NUTSHELL 243-59 (4th ed. 2007).

⁴⁶ UNCLOS, *supra* note 20, at 59 (immunity of sovereign warships); *id.* at 59 (immunity of vessels on “government non-commercial service”).

⁴⁷ 1958 High Seas Convention, *supra* note 23, at 59 (immunity of sovereign warships); *id.* at 59 (immunity of vessels on “government non-commercial service”).

The 1982 Convention adopted a slightly broader definition of warship:

“[W]arship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.⁴⁸

The second type of public ship recognized by the 1958 High Seas Convention and the 1982 Convention is classified as a “government non-commercial service” vessel.⁴⁹ While neither convention expressly defines the constitution of such a vessel, this category presumably includes vessels used for research, diplomatic, and police purposes, among other functions.⁵⁰

The concept of sovereign immunity surfaces in the instant analysis in two important respects. First, as explained in Part III, public vessels cannot, by definition, commit acts of piracy, nor can their crew, so long as they remain under the authority and control of the sovereign or its agents.⁵¹ Thus, under the current international scheme, no public vessels under proper authority can satisfy the definition of “pirate ship” set forth in either the 1958 High Seas Convention or 1982 Convention.

Second, even if an unauthorized individual or group were to illicitly take actual control of a sovereign vessel and use the vessel to commit acts of piracy, both the 1958 High Seas Convention and the 1982 Convention provide a mechanism for the sovereign to retain legal authority and control over the ship. For example, both conventions provide the following:

“The acts of piracy...committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.”⁵²

⁴⁸ UNCLOS, *supra* note 20, at 34-35.

⁴⁹ *See, e.g.*, UNCLOS, *supra* note 20, at 59.

⁵⁰ *See, generally*, JAMES BRADLEY, *THE IMPERIAL CRUISE* (2009) (recounting the voyage of a vessel used for diplomatic purposes).

⁵¹ 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61.

⁵² 1958 High Seas Convention, *supra* note 23, at 5.; UNCLOS, *supra* note 20, at 60-61.

Thus, crew who mutiny and commit, or attempt to commit piratical acts using a sovereign vessel may be captured and tried as pirates.⁵³ But, both conventions also firmly establish that this conceptual public to private conversion is limited to the individual or individuals committing the acts of piracy, and does not generally extend to the vessel itself. Instead “[a] ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.”⁵⁴

Thus, regardless of whether a private individual uses a sovereign vessel to commit acts of piracy, legal authority and control over the public ship remain with the sovereign unless the sovereign expressly states otherwise or has abandoned the vessel.⁵⁵

An empirical example of the application of these principles to shipwreck sites is found in the United States’ Sunken Military Craft Act of 2004 (the “SMCA”).⁵⁶ The SMCA makes it clear that the United States retains legal authority and control over its “sunken military craft” unless it has expressly abandoned said craft by law, treaty, or other means. Section 1401 of the SMCA provides the following:

Right, title, and interest of the United States in and to any United States sunken military craft—(1) shall not be extinguished except by an express divestiture of title by the United States; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.⁵⁷

⁵³ 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61.

⁵⁴ 1958 High Seas Convention, *supra* note 23, at 6; UNCLOS, *supra* note 20, at 61.

⁵⁵ 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 61; *see also* 2001 UNESCO Convention, *supra* note 5, at 4 (“Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State’s rights with respect to its State vessels and aircraft.”).

⁵⁶ Pub. L. No. 108-725, div. A. tit. XIV, 118 Stat. 2094 (codified at 10 U.S.C. app. § 113).

⁵⁷ *Id.*

In similar fashion to the definition of “warship” provided in both the 1958 High Seas Convention and the 1982 Convention, the SMCA defines the term “sunken military craft” to mean

all or any portion of—(A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank; (B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and (C) the associated contents of a craft referred to in subparagraph (A) or (B), if title thereto has not been abandoned or transferred by the government concerned.⁵⁸

Comparable schemes are also found in bi-lateral and multi-lateral treaties and case law. For example, in *Sea Hunt v. The Unidentified Shipwrecked Vessel*, the Fourth Circuit, in assessing the applicability of the terms of the 1902 Treaty of Friendship and General Relations between the United States and Spain, to two wreck sites off the coast of Virginia, explained

[a]s sovereign vessels of Spain, LA GALGA and JUNO are covered by the [treaty]. The reciprocal immunities established by this treaty are essential to protecting the United States shipwrecks Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts.⁵⁹

The above observations support three general conclusions. First, when assessing issues involving alleged pirate-flagged UCH, a preliminary determination must be made, if possible, as to whether the wreck is of a sovereign vessel—i.e., a warship or other ship conducting government non-commercial service. Second, if sovereign, the wrecked vessel cannot be adjudged pirate-flagged unless the laws of the sovereign permit such a classification, or the sovereign has expressly abandoned the vessel. Third, conversely, if permitted or abandoned, a sovereign vessel may be classified as pirate-flagged if it was taken over by unauthorized individuals who thereafter used, or attempted to use, the vessel for piratical purposes until its sinking.

With these conclusions in mind, and using the 1958 High Seas Convention, the 1982 Convention on the Law of the Sea, and the 2001 UNESCO Convention as a framework, the analysis will now shift to

⁵⁸ *Id.*

⁵⁹ *Sea Hunt v. The Unidentified Shipwrecked Vessel*, 221 F.3d 634, 638 (4th Cir. 2000).

the question of how to determine whether a ship belonged to, or was under the dominant authority and control of, pirates at the time of its sinking.

III. DEFINING PIRACY: THE MODERN FRAMEWORK

Although use of the terms “pirate” and “piracy” or their equivalents date to ancient times,⁶⁰ neither term has historically enjoyed the benefits of a precise definition. Due most likely to the international nature of piracy and its impacts, many nations, including the United States, have opted, in part, to define piracy and identify those who commit piracy not pursuant to precise definitions, but in accordance with “international law” or “the law of nations.”⁶¹ This definitional fluidity lends difficulty to our analysis, but, as explained *infra*, is inescapable in light of the historical evolution of the laws of piracy. Yet, the law of nations has, within the last sixty years, taken a shape less amorphous than its predecessors of past eras, at least with respect to piracy and pirates.⁶² For this reason, this article begins with the modern doctrine, which is found primarily in multi-lateral international conventions and the criminal codes of coastal States.

A. Twentieth Century International Conventions

As with the term “pirate ship,” the 1958 High Seas Convention was the first multi-lateral international convention to set forth a more precise definition of “piracy” to be adopted and applied by member States. Article 15 of the Convention provides the following:

⁶⁰ Ryan Kelly, *UNCLOS, But No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 MINN. L. REV. 2285, 2288 (2011); TALTY; *supra* note 10, at 36; WOODARD, *supra* note 1, at 2.

⁶¹ *See, e.g.*, 18 U.S.C. § 1651 (1948) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

⁶² *See, e.g.*, 1958 Convention on the High Seas, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61.

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation,⁶³ committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.⁶⁴

Rephrased in simpler terms, under the 1958 High Seas Convention, piracy includes: 1) illegal acts of violence, detention, or depredation against another ship, or a person or property on another ship, when such acts are accomplished for private ends; 2) voluntarily assisting in the operation of a pirate vessel; and 3) inciting or facilitating an act of piracy.⁶⁵

The 1982 Convention adopted the 1958 High Seas Convention's definition of piracy with only minor stylistic changes. Article 101 of the 1982 Convention provides as follows:

Piracy consists of any of the following acts:

(a) [A]ny illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) [O]n the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) [A]gainst a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) [A]ny act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

⁶³ Depredation is “[t]he act of plundering; pillaging.” BLACK’S LAW DICTIONARY (8th ed.1999).

⁶⁴ 1958 High Seas Convention, *supra* note 23, at 5.

⁶⁵ *Id.* at 5.

(c) [A]ny act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁶⁶

In other words, the 1982 Convention reiterates that piracy includes: 1) illegal acts of violence, detention, or depredation against another ship, or a person or property on another ship, when such acts are accomplished for private ends; 2) voluntarily assisting in the operation of a pirate vessel; and 3) inciting or facilitating an act of piracy.⁶⁷

The piracy definitions contained in the 1958 High Seas and 1982 Conventions are subject to two important limitations. First, as indicated in Part II, “piracy” is limited to acts committed by those aboard a “private ship.”⁶⁸ Accordingly, neither sovereign vessels under proper authority, nor crew acting within the scope of sovereign authority, can commit acts of piracy.⁶⁹ Second, “piracy” is limited to acts committed on the “high seas.”⁷⁰ Under the 1958 High Seas Convention, the high seas constitute “all parts of the sea that are not included in the territorial sea [up to twelve miles from shore] or in the internal waters of a State.”⁷¹ Coastal States carry the responsibility for defining piracies, or like crimes, occurring in their territorial and internal waters.⁷² In light of the maritime jurisdictional framework established by the 1982 Convention, a change in this scheme was necessary.⁷³ Accordingly, the 1982 Convention defines high seas to consist of “all parts of the sea that are not included in the exclusive economic zone [up to 200 miles from shore], in the territorial sea [up to twelve miles from shore], or in the internal waters of a State, or in

⁶⁶ UNCLOS, *supra* note 20, at 60-61.

⁶⁷ *Id.* at 60-61.

⁶⁸ 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61.

⁶⁹ See discussion *supra* Part II(C).

⁷⁰ 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61.

⁷¹ 1958 High Seas Convention, *supra* note 23, at 2.

⁷² See Convention on the Territorial Sea and the Contiguous Zone arts. 1 and 2, Apr. 29, 1958, 516 U.N.T.S. 205.

⁷³ See Peter Hershey, *Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites*, 27 J. ENVTL. L. & LITIG. 363, 368-76 (2012) (defining and examining the various maritime jurisdictions recognized in the law of the sea).

the archipelagic waters of an archipelagic State.”⁷⁴ Under the 1982 Convention, as with the 1958 Conventions, coastal States carry the responsibility for defining piracies, or like crimes, occurring in their territorial and internal waters.⁷⁵ However, the 1982 Convention leaves ambiguous which, if any, definition of “piracy” is to be applied to acts committed in the exclusive economic zone (the “EEZ”). On the latter point, colorable arguments can be made that, for purposes of criminal enforcement in the EEZ, flag States retain jurisdiction to define and punish piratical acts aboard or using its ships in certain circumstances; in other scenarios, citizen States retain jurisdiction to define and punish piratical acts committed by its citizens; and, in all other circumstances, the EEZ constitutes a “place outside the jurisdiction of any State” such that Article 101’s definition is applicable.⁷⁶

B. Piracy Under the Criminal Codes of Coastal States

The modern criminal codes of most, if not all, coastal States define and address piracy to some extent. Some of these States have simply adopted the definitions set forth by the 1958 High Seas Convention or the 1982 Convention. For example, in the United Kingdom, the Merchant Shipping and Maritime Security Act, passed by Parliament in 1997, restates *verbatim* the definition of piracy provided in Article 101 of the 1982 Convention.⁷⁷ Because this definition is limited to acts occurring on the high seas, those who commit pirate-like acts in the internal or territorial waters of the United Kingdom cannot be prosecuted as pirates, and, instead, can be charged only with similar crimes such as robbery, murder, or theft.⁷⁸

Other States have adopted dual approaches to defining piracy. On one hand, the criminal codes of these States recognize the international nature of piracy by adopting, or adopting modified versions of, the piracy definitions codified in the 1958 High Seas or 1982 Conventions, or by defining piracy according to “the law of nations.”⁷⁹

⁷⁴ UNCLOS, *supra* note 20, at 57.

⁷⁵ *Id.* at 27.

⁷⁶ Compare *id.* at 60-61 (defining piracy) with *id.* at 43-53 (setting forth the rules applicable to activities in the EEZ).

⁷⁷ Merchant Shipping and Maritime Security Act, § 26, sch. 5 (1997) (Eng.).

⁷⁸ See, e.g., Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict., c. 73 (Eng.).

⁷⁹ See, e.g., 18 U.S.C. § 1651 (1948).

Such acts of piracy are generally subjected to universal jurisdiction—i.e., any State can prosecute those who commit said acts “irrespective of the presence of a jurisdictional nexus”⁸⁰—but enforcement has traditionally been limited to acts occurring on the high seas.⁸¹ At the same time, the codes of these States also identify certain other acts that, while not necessarily recognized as acts of piracy under customary international law, are so defined in the criminal laws of the coastal State.⁸² To prosecute these acts as piracy, a jurisdictional nexus to the coastal State is required; but, in return, enforcement may span, in addition to the high seas, the territorial waters and contiguous zones of coastal States, and possibly further, subject to flag State, citizen State, and other jurisdictional limitations.⁸³

Title 18 of the United States Code employs a dual approach to defining piracy. On one hand, 18 U.S.C. § 1651 defines piracy according to “the law of nations.”⁸⁴ As with the 1958 High Seas and 1982 Conventions, piracy under § 1651 is limited to acts committed on “the high seas.”⁸⁵ At the same time, however, other provisions of Title 18 provide that those guilty of piracy also include: 1) citizens of the United States who commit murder, robbery, or other acts of hostility against the United States or its citizens on the high seas pursuant to letters of marque or commissions issued by a foreign governmental authority;⁸⁶ 2) seafaring foreign nationals who cruise against or make war on the United States, its citizens, or its property, contrary to treaty;⁸⁷ 3) seamen who, by violent means, prevent the captain or crew

⁸⁰ United States v. Hasan, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010).

⁸¹ See, e.g., 1958 High Seas Convention, *supra* note 23, at 5; UNCLOS, *supra* note 20, at 60-61; 18 U.S.C. § 1651 (1948).

⁸² See, e.g., 18 U.S.C. § 1661 (1948).

⁸³ For a more in-depth discussion on this topic, see, e.g., Blair v. United States, 665 F.2d 500, 504 (1981); United States v. Harper, 617 F.2d 35, 38 (1980).

⁸⁴ 18 U.S.C. § 1651 (1948).

⁸⁵ *Id.*

⁸⁶ 18 U.S.C. § 1652 (1948) (“Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person is a pirate....”).

⁸⁷ 18 U.S.C. § 1653 (1948) (“Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same,

of a vessel from defending the vessel or its goods;⁸⁸ and 4) those who cruise or associate with piratical vessels that land and commit robbery on shore.⁸⁹ These provisions may be enforced against all those with a sufficient jurisdictional link to the United States, and, except where expressly indicated, are not limited to acts occurring on the high seas.

C. Interpreting and Applying Modern Piracy Laws

Two relatively recent cases demonstrate the difficulty courts face in interpreting and applying these definitions to particular acts. In *United States v. Said*, the defendants approached in a skiff and fired shots at the USS *Ashland*—a Navy transport ship—near the Horn of Africa.⁹⁰ They were subsequently caught, detained, and charged with, among other crimes, violating 18 U.S.C. § 1651—i.e., committing piracy under “the law of nations.”⁹¹ The defendants moved to dismiss the piracy charge, contending, in relevant part, that: (1) under the law of nations, piracy required a showing of robbery or forcible depredation; and (2) there was no dispute that the indictment failed to allege facts sufficient to find that the defendants had committed either.⁹² The District Court granted the motion. In so doing, it adopted the definition of piracy set forth by the Supreme Court in a series of piracy decisions rendered in the 1820s, near in time to the original enactment of § 1651.⁹³ These cases, according to the *Said* Court, established that, under “the law of nations,” piracy was “robbery or forcible depredations on the high seas, *i.e.*, sea robbery.”⁹⁴

contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate...”).

⁸⁸ 18 U.S.C. § 1655 (1948) (“Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate...”).

⁸⁹ 18 U.S.C. § 1661 (1948) (“Whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate...”).

⁹⁰ *United States v. Said*, 757 F. Supp. 2d 554, 556-57 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

⁹¹ *Id.* at 557.

⁹² *Id.* at 558-59.

⁹³ *Said*, 757 F. Supp. 2d at 559-61 (citing, among other authorities, *United States v. Smith*, 18 U.S. 153, 5 Wheat. 153 (1820)).

⁹⁴ *Id.* at 562, 566-67.

A few months later, on nearly identical facts, the District Court in *United States v. Hasan* reached a different conclusion.⁹⁵ In *Hasan*, the defendants attacked the USS *Nicholas*—a Navy frigate—with rifles and rocket-propelled grenades from a small boat off the coast of Somalia.⁹⁶ The defendants were chased, caught, and charged with committing piracy under the law of nations pursuant to 18 U.S.C. § 1651.⁹⁷ As in *Said*, there was no dispute that the indictment failed to allege facts sufficient to establish that the defendants had committed robbery or forcible depredation. Contending that piracy required a showing of such acts, the defendants moved to dismiss the piracy count against them.⁹⁸ The District Court denied the motion. The court concluded that piracy, under the law of nations, was “a changing body of law,” and that, therefore, regardless of how piracy had been defined in the past, the applicable definition was the one encompassed by customary international law at the time when the alleged acts were committed.⁹⁹ Applying this rule, the court determined that, at the time the defendants attacked the USS *Nicholas*, the international consensus as to the definition of piracy was accurately reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 Convention on the Law of the Sea (which the court viewed as being essentially the same).¹⁰⁰ Based on this definition, the court found that the indictment sufficiently alleged acts of piracy because it

allege[d] that, while on the high seas, [the defendants] boarded an assault boat, cruised towards the USS *Nicholas*, and opened fire upon the Navy frigate with AK-47s. No lawful right to take such actions having been alleged in the indictment, such facts constitute an (1) illegal acts of violence, (2) committed for private ends, (3) on the high seas, (4) by the crew of a private ship, 5) and directed against another ship, or against persons on board such ship....¹⁰¹

⁹⁵ *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

⁹⁶ *Id.* at 601.

⁹⁷ *Id.*

⁹⁸ *Id.* at 620.

⁹⁹ *Id.* at 629-30, 633.

¹⁰⁰ *Id.* at 640-41.

¹⁰¹ *Id.* at 641.

At trial, the jury convicted the defendants of, among other crimes, committing piracy.¹⁰²

In *United States v. Dire*—the direct appeal from *Hasan*—the Fourth Circuit addressed the conflicting conclusions of the District Courts in *Said* and *Hasan*.¹⁰³ After evaluating the approaches taken by the courts in each case, the Circuit Court adopted the views set forth in *Hasan*, namely: (1) that piracy was an evolving doctrine, to be defined in accordance with customary international law at the time of the alleged offense; (2) that, at the time of the acts in question, customary international law was accurately reflected in the 1958 High Seas and 1982 Conventions; and (3) that the more restrictive definition of piracy set forth by the defendants, and adopted by the *Said* Court, i.e., that piracy required a showing of robbery or forcible depredation, would “render [§ 1651] incongruous with the modern law of nations.”¹⁰⁴ Accordingly, the Circuit Court affirmed the District Court’s decision in *Hasan*, and vacated the court’s decision in *Said* and remanded that case for further proceedings.¹⁰⁵

Despite their differing conclusions, both the *Said* and *Hasan/Dire* Courts recognized that piracy must be understood in light of its “modern origins and historical development.”¹⁰⁶ *Hasan* and *Dire* recognized that piracy under the law of nations is a changing body of law that must be defined at the time of the alleged transgression.¹⁰⁷ While such rules are, perhaps, effective mechanisms to effectuate modern piracy prosecutions, applying the aforementioned standards to those who once owned, controlled, or operated UCH is replete with difficulties. Pirates have sailed the world’s oceans and seas since ancient times, and have wrecked their vessels for as long a period. Laws defining and governing piracy have changed with the passage of time and the rise and fall of nations and governments.¹⁰⁸ Is it possible, in light of this lengthy and complicated history, to retroactively define

¹⁰² *United States v. Dire*, 680 F.3d 446, 450 (4th Cir. 2012).

¹⁰³ *Id.* at 450-52. (*Dire*, a co-defendant of *Hasan*, was named first on appeal because he was the first to file an appeal).

¹⁰⁴ *Id.* at 468-69.

¹⁰⁵ *Dire*, 680 F.3d at 477; *United States v. Said*, 680 F.3d 374 (4th Cir. 2012).

¹⁰⁶ *United States v. Hasan*, 747 F. Supp. 2d 599, 603 (E.D. Va. 2010).

¹⁰⁷ *Id.* at 629-30, 633.

¹⁰⁸ See TALTY, *supra* note 10, at 36; WOODARD, *supra* note 1, at 2.

piracy at the time of the alleged transgression for purposes of classifying UCH? We turn to this question.

IV. DEFINING PIRACY: THE HISTORICAL FRAMEWORK

The *Hasan* Court began its historical analysis in 1787 with the ratification of the United States Constitution.¹⁰⁹ Because many, and some of the most famous, alleged pirate-flagged UCH pre-date this period, including the *Whydah*, this article will, instead, start with and focus on the Anglo-American laws of piracy in effect during the height of the British Colonial Period (circa. late 1500s to early 1800s). Indeed, all of the ships mentioned in the introduction to this paper sank during this time period:¹¹⁰ Drake's ships *Elizabeth* and *Delight* wrecked in 1596;¹¹¹ Henry Morgan's *Satisfaction* sank in 1671;¹¹² Captain Kidd's *Adventure Galley* and *Rouparelle* were lost in 1698;¹¹³ the *Quedagh Merchant* sank in 1699;¹¹⁴ Sam Bellamy's ship, the *Whydah*, wrecked in 1717;¹¹⁵ Blackbeard's *Queen Anne's Revenge* was lost in 1718;¹¹⁶ Charles Vane's sloop sank in 1719;¹¹⁷ the *La Marquise de Tourny* disappeared in the 1750s;¹¹⁸ and the *Port-au-Prince* sank in 1806.¹¹⁹ By tracing the development of piracy laws during this time period, as set forth primarily in statutes and the common law, this article will demonstrate the difficulty inherent in applying the *Hasan/Dire* test to UCH—i.e., retroactively defining

¹⁰⁹ *Hasan*, 747 F. Supp. 2d at 603-04.

¹¹⁰ See also ARTHUR HERMAN, TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD 136-56 (2004) (the rise of piracy in the Americas coincided with British attempts to control the sea).

¹¹¹ RONALD, *supra* note 11, at 255.

¹¹² TALTY, *supra* note 10, at 219.

¹¹³ WILLIAM H. BONNER, PIRATE LAUREATE: THE LIFE AND LEGENDS OF CAPTAIN KIDD 12 (1947).

¹¹⁴ BONNER, *supra* note 113, at 14; ZACKS, *supra* note 7, at 203-22.

¹¹⁵ WOODARD, *supra* note 1, at 156-58.

¹¹⁶ Lawrence & Wilde-Ramsing, *supra* note 6, at 3; KONSTAM, *supra* note 6, at 144-45.

¹¹⁷ WOODARD, *supra* note 1, at 308.

¹¹⁸ THE HERALD, *supra* note 13.

¹¹⁹ THE TELEGRAPH, *supra* note 12.

“piracy” for purposes of classifying UCH in accordance with the term’s definition at the time of the alleged transgression.¹²⁰

Our examination will show that, as the *Said* Court suggested, piracy, at its core, is, and almost always has been, robbery at sea.¹²¹ In other words, throughout the evolution of the piracy doctrine, Anglo-American courts have consistently held that the commission of a robbery at sea is a piratical act.¹²² But, as the *Hasan/Dire* Courts noted, piracy is, and has historically been, defined to be more than just robbery at sea. Indeed, as set forth in numerous statutes and judicial records, piracy has often been defined to include such things as committing, or attempting to commit, mutiny, committing unauthorized or unjustified acts of violence or hostility at sea, an unauthorized taking and carrying away (i.e., stealing) at sea, voluntarily turning a ship’s goods over to pirates, impeding a ship’s

¹²⁰ See *Hasan*, 747 F. Supp. 2d at 629-30, 633.

¹²¹ Compare *Said*, 757 F. Supp. 2d at 562, 566-67 (defining piracy under the law of nations as “robbery or forcible depredations on the high seas, i.e., sea robbery”) with *Smith*, 18 U.S. at 161 (stating that “whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy”); *Dawson*, *infra* note 147, at 6 (defining piracy as “a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty”). See also OXFORD ENGLISH DICTIONARY (1909) (a pirate is “one who robs and plunders on the sea, navigable rivers, etc., or cruises about for that purpose); BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND: BOOK IV 71 (1766) (“the offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there”); SIR EDWARD EAST, PLEAS OF THE CROWN 796 (1803) (same as Blackstone); SIR MATTHEW HALE, PLEAS OF THE CROWN 305 (1737) (“it is out of the question that piracy by the statue is robbery”); WILLIAM HAWKINS, PLEAS OF THE CROWN 267 (1737) (“a pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure”); Alfred Rubin, *The Law of Piracy*, INTERNATIONAL LAW STUDIES, Vol. 63, 1-3 (1988) (Grotius defined pirates as “armed bands or individuals whose primary object was to plunder regardless of place” (quoting HUGO GROTIUS, MARE LIBERUM (Ralph Deman Magoffin trans., Oxford Univ. Press, 1916)(1609)). Many early piracy laws were derived from the views of legal commentators who, as seen above, often agreed that piracy involved some type of armed and illicit taking but otherwise disagreed as to the requisite elements of the crime. See Rubin, *supra* note 121, at 87.

¹²² See Rubin *supra* note 121, at 87.

defenses in certain ways, or even sending certain types of threatening messages at sea, among other formulations.¹²³ These peripheral acts of piracy have waxed and waned, creating inconsistencies in the legal and historical record that confuse courts to this day, as exemplified by *Said*.¹²⁴

Making matters even more complicated is that, throughout most of the pertinent time period, privateering—i.e., the taking and carrying away of goods of another at sea pursuant to letters of marque or commissions issued by an authorized governmental entity—was legal, lucrative, and widespread.¹²⁵ Privateering was often viewed as an effective weapon capable of stifling the international trades and economies of wartime enemies and/or economic competitors, and was employed frequently to wreak havoc on the merchant marines of foreign nations.¹²⁶ Many of those now considered to be pirates sailed with such commissions, including Henry Morgan,¹²⁷ William Kidd,¹²⁸ and Thomas Green,¹²⁹ among others. Although the legal consequences for committing acts of piracy were drastically different than those for committing acts of privateering, in practice, one closely resembled the other, and courts often struggled to differentiate which had occurred on a given set of facts.¹³⁰

¹²³ See, e.g., An Act for the More Effectual Suppression of Piracy, 28 Hen. VIII c. 15 §§ VII-VIII (1698) (Eng.); 18 U.S.C. § 1651 *et seq.*

¹²⁴ See, e.g., *Dire*, 680 F.3d at 468-69.

¹²⁵ See CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION 12 (2010); TALTY *supra* note 10, at 35-36; WOODARD *supra* note 1, at 2-3; see, e.g., L'Invincible—The Consul of France, and Hill & M'Cobb, 14 U.S. 238 (1816); Hudson v. Guestier, 10 U.S. 281, 6 Cranch 281 (1810); Rose v. Himley, 8 U.S. 241 (1807); Ketland v. The Cassius, 2 U.S. 365 (1796); United States v. Peters, 3 U.S. 121 (1795); Talbot v. Janson, 3 U.S. 133 (1795).

¹²⁶ TALTY, *supra* note 10, at 35-36; RAPPLEYE, *supra* note 125, at 12; WOODARD, *supra* note 1, at 2-3.

¹²⁷ TALTY, *supra* note 10, at 194.

¹²⁸ JOHNSON, *supra* note 14, at 441; ZACKS, *supra* note 7, at 100-8, 116-17.

¹²⁹ Green Trial, *infra* note 210, at 27.

¹³⁰ The distinction between privateer and pirate is incredibly important, and modern sources too often blur the two classifications together. See, e.g., TALTY, *supra* note 10, at 32-51 (using the terms “pirate” and “privateer” interchangeably); JACQUES-YVES COUSTEAU, DIVING FOR SUNKEN TREASURE (1971) (describing privateers as “official pirates”); RAPPLEYE, *supra* note 125, at 12 (describing privateers as “freelance pirates”). The adoption of such imprecise definitions

Another complexity was the legal system's varying treatment for different classifications of people on board a pirate vessel. For example, both slaves and indentured servants commonly served on pirate ships—some by choice, some by coercion.¹³¹ These persons, even if they partook in piratical activities alongside the captain and crew, were often treated differently than all others if captured and tried on charges of piracy.¹³² Indeed, many courts deemed slaves and servants to lack the requisite *mens rea* to be convicted of piracy if, in engaging in piratical activities, they acted at the instruction of their masters, and, more often than not, courts instructed the jury in accordance with this view.¹³³ Such perceptions often resulted in slaves and servants being acquitted at trial, or in some cases, not standing trial in the first place.¹³⁴ In contrast, whether a captive—i.e., a person held on board against their will¹³⁵—or a member of the crew was

would result in several important public figures in American history, Thomas Paine as one example, being adjudged pirates for their service aboard privateers. See CRAIG NELSON, THOMAS PAINE 20-22 (2006). The confusion lies most likely in the historical reality that many individuals signed up to serve aboard both privateer and pirate ships at various times in their lives, or engaged in both legitimate privateering and piracy while serving on the same vessel, switching between the two depending on the current political tides and the availability of economic opportunity. Confusion may also exist due to the fact that governments against which privateers legally operated often referred to them incorrectly as pirates, refusing to acknowledge the authority under which they acted or otherwise ignoring it for purposes of vessel condemnation or enforcement of trade or other laws. See WOODARD, *supra* note 1, at 51; RUBIN, *supra* note 121, at 67.

¹³¹ WOODARD, *supra* note 1, at 3, 193.

¹³² See, e.g., Kidd Trial, *infra* note 171, at 334-35; Johnson, *supra* note 14, at 449 (servant boys acquitted of charges of piracy even though they participated in piratical activities).

¹³³ See, e.g., Kidd Trial, *infra* note 171, at 334-35; JOHNSON, *supra* note 14, at 449 (servant boys acquitted of charges of piracy even though they participated in piratical activities).

¹³⁴ See, e.g., WOODARD, *supra* note 1, at 193 (black or native boy—his precise ethnicity is unknown—who survived the *Whydah* wreck was captured and sold into slavery rather than tried on charges of piracy with the rest of Bellamy's crew); ZACKS, *supra* note 7, at 374, 376 (noting that several young servants were acquitted of various piracy charges in the Kidd trial).

¹³⁵ Captives usually included doctors, carpenters, pilots, and other persons possessing professional skills not commonly held by those who willfully joined pirate crews. Though sometimes held in holding cells below deck, captives were

guilty of piracy generally depended on whether that person participated in the piratical acts and, perhaps more importantly, whether they shared in the plunder following a successful capture.¹³⁶ Unlike slaves or servants, neither captives, nor the crew, escaped the gallows in circumstances where evidence of both, or even one, of these factors was elicited at trial.¹³⁷ Completing the cast was the captain, the least sympathetic of those aboard the vessel when it came to allegations of piracy.¹³⁸ Indeed, absent strong evidence of mutiny, the captain was generally held responsible for the piratical actions of his crew.¹³⁹

Below, are several examples—from both the statutory and case law—which highlight these observations and provide empirical cases showing the levels of consistency (or, in many cases, inconsistency) between the laws governing piracy during this time period, as well as some of the uncertainty and ambiguity in the legal record left to us by lawmakers and courts of ages past.

A. From Civil to Common Law Offense

1. Evolution of the Statutory Scheme

In its earliest form, piracy was a civil law offense.¹⁴⁰ In Great Britain, the High Court of Admiralty was established in the 1340s as a prize court to preside over disputes involving piratical and other

often given free range of the ship on threat of death should they try to escape. *See* WOODARD, *supra* note 1, at 145; *see, e.g., id.* at 203-04 (recounting story of a captive surgeon); *id.* at 181 (recounting story of a captive pilot held to steer vessel through unfamiliar waters); Davis Trial, *infra* note 276, at 22 (acquittal of a carpenter forced by Bellamy to serve aboard the *Whydah*); Bonnet Trial, *infra* note 236, at 18-20, 40-41 (instructing the jury as to the law applicable to “captives” found aboard pirate vessels).

¹³⁶ *See, e.g.,* Bonnet Trial, *infra* note 236, at 15, 17, 24, 31.

¹³⁷ *Id.*

¹³⁸ *See, e.g.,* Kidd Trial, *infra* note 171; ZACKS, *supra* note 7, at 355-380 (recounting the Kidd trial with historical detail).

¹³⁹ *See* DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 227 (1996).

¹⁴⁰ Peter T. Leeson, *Rationality, Pirates and the Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1220 (2010); Lucas Beuto, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 399, 403 (2011).

captures at sea.¹⁴¹ Under this system, an act constituted piracy if the alleged pirate confessed to committing piratical acts or if the complaining party produced two witnesses able to testify about the alleged piratical acts.¹⁴² Both of these requirements were difficult to satisfy, and, as a result, few were convicted of committing piracy prior to the 1530s.¹⁴³

This status quo changed dramatically in 1535 with Parliament's passage of "An Act concerning Pirates and Robbers of the Sea," as supplemented and modified in 1536 by "An Act for Punishment of Pirates and Robbers of the Sea."¹⁴⁴ Under these Acts, alleged pirates—along with those charged with committing treasons, felonies, robberies, murders, and confederacies on the sea—could be tried under the common law, before a jury, making it easier (in theory, at least) to convict and punish perpetrators.¹⁴⁵ The 1536 Act did not, however, define what constituted piracy, opting, instead, to leave such definitions to the operation of the common law.¹⁴⁶

2. The Trial of Captain Henry Avery's Crew in London, 1696

The most prominent piracy trial to proceed during this period was *Rex v. Joseph Dawson*, which commenced in London in October 1696.¹⁴⁷ The operative facts originated three years earlier, when Henry

¹⁴¹ *High Court of Admiralty*, THE NATIONAL ARCHIVES (last visited Oct. 21, 2014), <http://www.nationalarchives.gov.uk/records/research-guides/high-court-admiralty.htm>.

¹⁴² Leeson, *supra* note 140, at 1219; *Procedure for the Trial of a Pirate*, 1 AM. J. LEGAL HIST. 251, 253 (1957).

¹⁴³ *In re Piracy Jure Gentium*, 1934 A.C. 586, 588-90 (1934) (Eng.).

¹⁴⁴ National Archives, *supra* note 141; *see* Leeson, *supra* note 140, at 1219; *see also* Offences at Sea Act, 1536 28 Hen. 8 c. 15, sec. 1(1) (Eng.) (observing that the new statutes were necessary because, under the old scheme, "traytors, pirates, thieves, robbers, murtherers and consederates upon the sea, many times escaped unpunished, because the trial of their offences hath heretofore been ordered, judged and determined before the admiral, or his lieutenant or commissary, after the course of the civil laws").

¹⁴⁵ Leeson, *supra* note 140, at 1219; National Archives, *supra* note 141.

¹⁴⁶ *See* 1536 28 Hen 8 c 15, sec. 1(4) (Eng.); [1934] A.C. 586, 590; *see also* Rubin, *supra* note 121, at 77 (there existed much confusion and many conflicting views as to what constituted piracy under the 1536 act).

¹⁴⁷ *Or: THE TRYALS OF JOSEPH DAWSON, EDWARD FORSEITH, WILLIAM MAY, WILLIAM BISHOP, JAMES LEWIS, AND JOHN SPARKES FOR PIRACIES AND*

Avery (or Every) and several dozen crew, including Dawson, were hired to serve as mariners aboard a privateer christened the *Charles II*.¹⁴⁸ However, instead of setting sail, the vessel remained at anchor due to the failure of the Spanish crown to deliver the letters of marque it had previously promised.¹⁴⁹ Sometime thereafter, the crew—restless in their idleness and unhappy with their lack of pay—mutinied and Avery took command of the vessel and began capturing prizes.¹⁵⁰ The *Gunsway* (or *Ganjisawai*), a treasure ship of the Mughal Empire filled with riches destined for Mecca, was one such prize.¹⁵¹

Several months after taking the *Gunsway*, six of Avery's crew (but not Avery himself) were caught and indicted for “feloniously and piratically taking, and carrying away, from persons unknown, a certain ship called the *Gunsway* with her tackle, apparel and furniture ... and of goods ... together with 100000 pieces of eight, and 100000 chequins, upon the high seas....”¹⁵² Dawson pleaded guilty, but the remaining five defendants proceeded to trial, where the jury rewarded them with an acquittal.¹⁵³

Undeterred, the government brought new piracy charges against the defendants for their alleged involvement in the mutiny on board the *Charles II*.¹⁵⁴ The new indictment alleged that the defendants

did ... by Force of Arms upon the High and Open Seas ... Piratically and Feloniously set upon one Charles Gibson, a subject of our Sovereign Lord the King ... being then and there Commander of a certain Merchant-ship, called, *The Charles the*

ROBBERIES BY THEM COMMITTED (London, 1696) [hereinafter the “Dawson Trial”].

¹⁴⁸ WOODARD, *supra* note 1, at 10-27; JOHNSON, *supra* note 14, at 50-52. The *Charles II* sported 46 guns and about 100 crew. WOODARD, *supra* note 1, at 22.

¹⁴⁹ WOODARD, *supra* note 1, at 10-27; JOHNSON, *supra* note 14, at 50-52.

¹⁵⁰ WOODARD, *supra* note 1, at 10-27; JOHNSON, *supra* note 14, at 50-52.

¹⁵¹ WOODARD, *supra* note 1, at 20-23; JOHNSON, *supra* note 14, at 53. The *Gunsway* was a massive ship, featuring 80 guns and 800 crew and passengers. Due to the size, military capacities, and sheer number on board the *Gunsway*, Avery's taking of it came at a violent cost, with the crews of both ships exchanging cannon and musket fire before Avery's men boarded the opposing vessel and continued the violence hand-to-hand. WOODARD, *supra* note 1, at 22-23.

¹⁵² Dawson Trial, *supra* note 147, at 3.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

Second, And then and there put the said Charles Gibson in bodily fear of his life. And then and there ... Feloniously and Pyratcally did steal take and carry away from the said Charles Gibson, the said Ship called *The Charles the Second*, her Tackle, Apparel and Furniture ... Forty Peices of Ordnance...; One Hundred Fusees...; Fifteen Tun of Bread...; and two Hundred pair of Woollen Stockings...; the Ship, Goods, and Chattels, of the Subjects of our said Sovereign Lord the King....¹⁵⁵

This time, the jury found the defendants guilty of committing piracy. In so finding, the jury applied the following instruction provided by the Chief Judge of the Admiralty Court:

Piracy is only a Sea-term for Robbery, Piracy being a Robbery committed within the Jurisdiction of the Admiralty. If any man be assaulted within that Jurisdiction, and his Ship or Goods violently taken away without Legal Authority, this is Robbery and Piracy. If the Mariners of any Ship shall violently dispossess the Master, and afterwards carry away the Ship it self, or any of the Goods, or Tackle, Apparel, or Furniture, with a felonious Intention, in any place where the Lord Admiral hath, or pretends to have Jurisdiction; this is also Robbery and Piracy.¹⁵⁶

These instructions, viewed in light of the indictments, suggest that piracy under the early common law had two core components: 1) a taking and carrying away of items of value by violent means, i.e., robbery, 2) on the seas.¹⁵⁷ Thus, a piracy was necessarily a robbery, but the converse was not always true.¹⁵⁸ Under the language employed in *Dawson*, piracy included instances where vessels and their contents were violently and illicitly captured as prizes or obtained via mutiny, but did not necessarily include failed attempts at committing piratical

¹⁵⁵ *Id.* at 10.

¹⁵⁶ *Id.* at 6.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*

acts (i.e., failing to take and carry away items of value),¹⁵⁹ nor instances of mere illicit or unauthorized violence at sea.¹⁶⁰

B. A Statutory Supplement to the Common Law

While an improvement from the civil law system, the 1536 Act ultimately failed to stifle the rise of piracy. To remedy certain deficiencies in the Act, Parliament, in 1698, passed “An Act for the More Effectuall Suppressions of Piracy,” which, like its predecessors, applied to those charged with committing treasons, felonies, robberies, murders, and confederacies on the sea.¹⁶¹ The 1698 Act was the first to effectively adopt a dual approach to defining piracy. On one hand, it left the crime of piracy as defined by the common law intact. On the other, it codified parts of the common law and, in addition, identified specific acts as constituting piracies, felonies, and robberies. For example, Section VII of the 1698 Act provided:

That if any of His Majesties naturall borne subjects or denizens of this kingdome shall commit any piracy or robbery or any act of hostility against other His Majesties subjects upon the sea under colour of any commission from any forreigne prince or state or pretence of authority from any person whatsoever such offender and offenders and every of them shall be deemed and adjudged and taken to be pirates felons and robbers. . . .¹⁶²

Another example is found in Section VIII, which stated:

That if any commander or master of any shipp or any seaman or marriner shall in any place where the Admirall hath jurisdiction betray his trust and turne pirate enemy or rebell and piratically and feloniously run away with his or their shipp or shippes or an barge

¹⁵⁹ “Attempt” was not officially recognized as a crime until 1784. *See Rex v. Scofield*, Cald. 397 (1784). However, by at least the late 1710s, commentators had proposed, and prosecutors often argued, that attempts to commit particular crimes, including piracy, should be considered as though the crime had actually occurred. *See, e.g., Mary Anne Trial, infra* note 276, at 8.

¹⁶⁰ Dawson Trial, *supra* note 147, at 6. Although not necessarily apparent on the face of the jury instructions given in the Dawson Trial, the court’s legal reasoning was later interpreted, not as setting forth an “exhaustive definition of piracy,” but, rather, merely as the definition applicable to the facts at issue in that case. 1934 A.C. at 588-90; *see, e.g., Offences at Sea Act, 28 Hen. VIII. c. 15, § VII* (1698).

¹⁶¹ Offences at Sea Act, 28 Hen. VIII. c. 15 (1698) (Eng.).

¹⁶² *Id.* at § VII.

boate ordnance ammunition goods merchandizes or yield them up voluntarily to any pirate or shall bring any seducing messages from any pirate enemy or rebell or consult combine or confederate with or attempt or endeavor to corrupt any commander master officer or marriner to yield up or run away with any shipp goods or merchandizes or turne pirate or goe over to pirates or if any person shall lay violent hands on his commander whereby to hinder him from fighting in defence of his shipp and goods committed to his trust or that shall confine his master or make or endeavor to make a revolt in the shipp shall be adjudged deemed and taken to be a pirate felon and robber....¹⁶³

For the most part, the Act's provisions were consistent with the definition of piracy traditionally found at common law. For example, piracy under the Act, as at common law, included instances of robbery and mutiny at sea. But, in certain circumstances, the Act's definition of piracy was more expansive than previous articulations. For example, under the Act, pirates also included those who: (1) committed certain unjustified acts of hostility, or acts of hostility under false pretenses, even if such acts did not amount to robbery; (2) voluntarily turned over goods to those committing piratical acts; (3) impeded the defense of a ship in certain ways; (4) delivered certain types of seducing or threatening messages; (5) confederated or consulted with those committing piratical acts; and (6) solicited others to turn pirate; among other actions.¹⁶⁴

C. Post-1698 Pirate Trials

1. The Trial of Captain William Kidd and his Crew in London, 1701

Captain William Kidd was among the first to be tried under the scheme established by the 1698 Act. Kidd was a Scotland native but came to reside in New York, where he made a name for himself as an able seaman and capable privateer.¹⁶⁵ In 1695, King William III commissioned Kidd "with full power and authority to apprehend, seize, and take into custody ... as all such pirates, free-booters, and sea-rovers ... which you shall meet ... with all their ships and vessels, and

¹⁶³ *Id.* at § VIII.

¹⁶⁴ *See id.* at §§ VII-X.

¹⁶⁵ *See* BONNER, *supra* note 113, at 2; ZACKS, *supra* note 7, at 7-21, 59-77 (recounting the early life and privateering career of Captain Kidd).

all such merchandises, money, goods, & wares as shall be found on board, or with them....”¹⁶⁶ After recruiting crew for the expedition, Kidd set off in the *Adventure Galley*, a privately commissioned galley warship that had been financed primarily through the support of several wealthy and prominent Englishmen.¹⁶⁷ Over the next three years, Kidd and his crew sailed from London to New York, to Madagascar, to the Red Sea, to India, to the Caribbean, and to Boston, capturing several prizes along the way.¹⁶⁸ One of these prizes was an Armenian ship named the *Quedagh Merchant*, which was captained by an Englishman and filled with goods belonging to the East India Company.¹⁶⁹ Upon their arrival in Boston in 1699, Kidd and several of his crew were arrested on charges of piracy and shipped to London to await trial.¹⁷⁰

In 1701, Kidd and his crew were indicted on, among other crimes, five counts of “Piracy and Robbery.”¹⁷¹ The indictment for the first piracy count provided

that the prisoners ... upon the High Seas ... did pyratically and feloniously set upon, board, break, and enter a certain ship called the *Quedagh Merchant* and pyratically and feloniously assault the mariners of the said ship, and put them in corporeal fear of their lives, and did pyratically and feloniously steal, take, and carry away the said ship, with the apparel and tackle thereof..., seventy chests of opium....¹⁷²

Nowhere in the charges or the indictment did the government specify whether Kidd and his crew were charged with piracy as defined at common law, or pursuant to the 1698 Act, or both, but it is sufficiently clear from the indictment that the charges were predicated on a belief that Kidd and his crew had, without proper authority, taken

¹⁶⁶ See GRAHAM HARRIS, TREASURE AND INTRIGUE: THE LEGACY OF CAPTAIN KIDD 103-04 (2002); JOHNSON, *supra* note 14, at 441; BONNER, *supra* note 113, at 7-9; see also ZACKS, *supra* note 7, at 95-159 (recounting the history of Kidd’s expedition).

¹⁶⁷ BONNER, *supra* note 113, at 5-6; HARRIS, *supra* note 166, at 326-39.

¹⁶⁸ ZACKS, *supra* note 7, at 95-159, 181-251.

¹⁶⁹ BONNER, *supra* note 113, at 11; ZACKS, *supra* note 7, at 153-59.

¹⁷⁰ ZACKS, *supra* note 7, at 250-86, 311-30.

¹⁷¹ THE TRYAL OF CAPTAIN WILLIAM KIDD FOR MURDER AND PIRACY, UPON SIX SEVERAL INDICTMENTS 323 (London, 1701) [hereinafter the “Kidd Trial”].

¹⁷² *Id.* at 322.

and carried away both the *Quedagh Merchant* and its goods by violent means while at sea—i.e., had committed sea robbery.¹⁷³

At trial, the *Adventure Galley*'s surgeon, Robert Braddinham, was the key witness against the defendants.¹⁷⁴ In large part, Braddinham testified in accordance with the acts as alleged in the indictment, stating that

[s]ome time in *January*, Capt. *Kidd* put up *French* colours, and gave chase to the *Quedah Merchant*, and when he came up with her he commanded the master on board, and there came first an old *French* man, who was the gunner: then *Kidd* sent for the captain, who was one *Wright*, an *English* man, and when he was brought on board, *Kidd* told him he was his prisoner, and ordered his men to go aboard and take possession of the ship; and he dispos'd of the goods on that coast....¹⁷⁵

In contrast to the allegations in the indictment—that *Kidd* and his crew assaulted the crew of the *Quedagh Merchant* and put them in corporal fear of their lives, i.e., took the ship by violent means—Braddinham's and the other witnesses' testimony did not focus on the method of taking or whether any violence had been involved, but instead on whether the *Quedagh Merchant* had been sailing under French passes.¹⁷⁶

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 326-28.

¹⁷⁵ *Id.* at 326.

¹⁷⁶ See ROBERT RITCHIE, CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES 108-09 (1989) (suggesting that the *Quedagh Merchant* was taken without actual violence); CORDINGLY, *supra* note 139, at 184 (same); JOHNSON, *supra* note 14, at 445-47 (same). To be sure, there is evidence in the historical record suggesting that, though actual violence may not have been used by *Kidd* to effectuate the taking, the threat of violence was, in fact, used. But, on the other hand, there also exists some evidence that the *Quedagh Merchant*, its captain relying on inaccurate rumors that *Kidd* was a vicious pirate, surrendered upon sight of *Kidd*'s vessel in order to avoid what he perceived to be a looming violent confrontation rather than first determining whether *Kidd* did, in fact, harbor piratical intentions. See, e.g., JOHNSON, *supra* note 14, at 445-47; see also WOODARD, *supra* note 1, at 7, 206 (pirates most often used fear and terror to capture prizes, rather than actual violence). Greater evidence as to the violence issue should have been presented at trial, and the issue should have thereafter been given to the jury for a determination, with accompanying jury instructions.

In similar fashion, the Court glossed over the violence requirement in its instructions to the jury. The Chief Judge of the Admiralty Court instructed:

That to make the Fact Piracy, there must be a piratical and felonious taking upon the High Sea ... the Goods of a Friend; *viz.* Such as are in Amity with the King. That if this *Quedah Merchant* had belong'd to the *French* or the Ship had been sailed under *French* Passes, then it was lawful Prize, and liable to Confiscation. But if they were the Goods of Persons in Amity with the King, and the Ship was not Navigated under *French* Passes, then it was very plain, it was a Piratical Taking. . . .¹⁷⁷

While in large part consistent with the instructions given in *Dawson*,¹⁷⁸ these instructions failed to expressly require the jury to find that Kidd and his crew had “violently taken away” the *Quedagh Merchant* and its goods.¹⁷⁹ Instead, the instructions allowed the jury to ultimately find Kidd and his crew guilty of piracy by concluding that they: 1) acted outside the scope of their commission; 2) by taking and carrying away items of value; 3) from a vessel in amity with England; 4) while at sea—no violence required.¹⁸⁰ This oversight is surprising because predecessor cases like *Dawson* clearly articulated that violence was a required element of piracy;¹⁸¹ and, moreover, because, under the common law, violence was an element of robbery, and piracy was robbery at sea.

The most likely explanation for this omission is that the Court simply assumed that Kidd’s taking had been by violent means. Indeed, by the time Kidd stood trial, he had already been publicly adjudged a pirate by local periodicals¹⁸² and had been called before the British Parliament to explain his piratical actions—which, for the most part,

¹⁷⁷ Kidd Trial, *supra* note 171, at 334-35.

¹⁷⁸ See Dawson Trial, *supra* note 147, at 6.

¹⁷⁹ Compare Dawson Trial, *supra* note 147, at 6 with Kidd Trial, *supra* note 171, at 336-44 (applying these instructions, Kidd and his crew were convicted of a total of five counts of piracy, only some of which the evidence indicated involved acts of violence.). See also RITCHIE, *supra* note 176, at 108-09; ZACKS, *supra* note 7, at 368-77.

¹⁸⁰ See Kidd Trial, *supra* note 171, at 335.

¹⁸¹ See Dawson Trial, *supra* note 147, at 6.

¹⁸² See ZACKS, *supra* note 7, at 347-49.

he failed to do to the satisfaction of its members.¹⁸³ Further, Kidd was tried, first, on a count for allegedly murdering one of the members of his crew, to which a verdict of “guilty” was announced in the middle of his separate trial on the first piracy count, within earshot of the judges and the jury.¹⁸⁴ Thus, by the time the court instructed the jury as to the crime of piracy, it had likely been established, at least in the eyes of those involved in the trial, that Kidd was a violent person.¹⁸⁵ With this assumption in hand, the Court’s instructions (as well as the witnesses’ testimony) focused, not on whether Kidd’s violent tendencies permeated his activities at sea, but instead on rebutting the primary argument made at trial in Kidd’s defense—that the *Quedagh Merchant* was a French ship, i.e., that it sailed under French passes—and that, therefore, he was authorized by his commission to take the ship as a prize.¹⁸⁶ Kidd asserted that Lord Bellomont—the then-colonial governor of Massachusetts, New York, and New Hampshire, and one of the original backers of Kidd’s expedition—had taken the *Quedagh Merchant*’s passes from Kidd at the time of his arrest, and that, therefore, he could not produce them in court in his defense.¹⁸⁷

¹⁸³ ZACKS, *supra* note 7, at 347-49; JOHNSON, *supra* note 14, at 448.

¹⁸⁴ Kidd Trial, *supra* note 171, at 315-21; ZACKS, *supra* note 7, at 355-80.

¹⁸⁵ See Kidd Trial, *supra* note 171, 315-21; ZACKS, *supra* note 7, at 355-80.

¹⁸⁶ Kidd Trial, *supra* note 171 at 325, 330-31, 334 (Kidd arguing, in his defense, that “the *Quedah Merchant* was under a *French Commission*”). Kidd also asserted on several occasions before and during trial that his crew had mutinied, and that he had not ordered nor acquiesced in the piratical activities in which they might have engaged. See, e.g., *id.* at 330, 334; ZACKS, *supra* note 7, at 373; JOHNSON, *supra* note 14, at 445, 450-51. The judges gave this contention a swift rebut, and, in similar fashion to the court’s omission of the violence requirement, did not instruct the jury as to the laws applicable to an alleged mutiny. The trial record suggests that one of the reasons the Admiralty judges did not believe Kidd’s contention that he had a valid commission to take the ships was because he failed to properly condemn the prize ships, as required by law. When questioned about this failure, Kidd responded, “I was not at the sharing of the Goods. I knew nothing of it” and “I could not, because of the Mutiny in my Ship.” Kidd Trial, *supra* note 171, at 330, 334. In contrast to the mutiny issue, the jury was provided some instruction as to the law of prizes. *Id.* at 334; see also RUBIN, *supra* note 121, at 99 (suggesting that Kidd was convicted of piracy, in part, because he failed to properly condemn his prize takings).

¹⁸⁷ Kidd Trial, *supra* note 171, at 331, 334; see also BONNER, *supra* note 113, at 14-15.

Kidd never raised the violence issue nor contended that his taking of the *Quedagh Merchant* had been non-violent, and, as a result, the issue was not addressed nor discussed at trial.

The trial devolved after Kidd had been convicted of murder and, along with his crew, of committing piratical acts against the *Quedagh Merchant*. Due most likely to the fact that their prior convictions carried death sentences, Kidd and his crew stopped trying to defend themselves with respect to the latter counts of piracy (some, in fact, pled guilty).¹⁸⁸ As a result, the prosecutor's evidence against them became increasingly sparse with each count and conviction.¹⁸⁹ Far from informing our analysis as to the requisite elements of the crime of piracy at the time of the alleged transgressions, the trial record for these counts remains unclear, at best, and inconsistent with the indictment and the instructions given to the jury as to the first piracy count, at worst.

One aspect of the trial, however, remained remarkably consistent throughout—the treatment of the three servants on board the vessels that sailed under Kidd's command. When asked about the allegations against them, the servants admitted to participating in piratical activities, but responded that they had been required to do so by their masters, who were among the members of the crew.¹⁹⁰ In support of their claims, the servants maintained that they had not shared in the bounty seized during the various piratical endeavors.¹⁹¹ As to these points, the court instructed the jury as follows:

“There must be Freedom of Will to denominate a Fact, either Felony or Piracy; and if these Men did so under the Compulsion of their Masters, and not voluntarily, it might distinguish their Case from the rest.”¹⁹²

Applying this standard, the jury acquitted all three servants of the piracy counts against them.¹⁹³

This treatment was in stark contrast with the court's dealings with Kidd's crew. For example, several members of the crew argued that,

¹⁸⁸ Kidd Trial, *supra* note 171, at 336-44.

¹⁸⁹ *Id.*; see also ZACKS, *supra* note 7, at 376-77.

¹⁹⁰ Kidd Trial, *supra* note 171, at 331-32.

¹⁹¹ *Id.*

¹⁹² *Id.* at 334-35.

¹⁹³ *Id.* at 335, 343.

although they had participated in the piratical activities alleged, they had been forced to do so by Kidd or other crew members.¹⁹⁴ Others argued that they had acted under a mistaken but honest belief that Kidd's commission authorized their piratical takings.¹⁹⁵ The Admiralty judges were not persuaded, and, on this point, instructed the jury as follows:

As to those who would excuse themselves, as being under Captain *Kidd's* Command; that would justify them in nothing, but the obeying his lawful Commands. And it was not contested but that these Men knew, and were sensible of what was done; and did take part in it, and shar'd what was taken. And if the taking of this Ship, and Goods, was unlawful, then these Men could claim no Advantage from acting under *Kidd's* Commissions: Because those Commissions gave them no Authority to act what they did. They acted quite contrary to them.¹⁹⁶

Using this standard, the jury convicted those members of Kidd's crew standing trial with him, and all were sentenced to hang at the gallows (although some were later pardoned).¹⁹⁷

2. The Trial of Captain John Quelch and his Crew in Boston, 1704

In 1703, John Quelch and more than two dozen others signed up to sail with the *Charles*, a well-armed privateer commissioned by the governor of Massachusetts to capture French and Spanish ships and goods.¹⁹⁸ Soon after setting sail from Marblehead, Massachusetts, the ship's captain, a man named Daniel Plowman, fell violently ill.¹⁹⁹ Sensing opportunity, the crew locked Plowman in his quarters (where he later died),²⁰⁰ mutinied, and elected Quelch as their new captain. Quelch steered the vessel to the Brazilian coast, where they attacked and took goods from nine Portuguese vessels before returning to

¹⁹⁴ *Id.* at 331-32.

¹⁹⁵ *Id.* at 332.

¹⁹⁶ *Id.* at 335.

¹⁹⁷ *Id.* at 335, 343.

¹⁹⁸ THE ARRAIGNMENT, TRIAL, AND CONDEMNATION OF CAPT. JOHN QUELCH AND OTHERS OF HIS COMPANY 1-2 (London, 1705) [hereinafter "Quelch Trial"].

¹⁹⁹ *Id.* at 8-11. There was conflicting testimony given as to when, exactly, the captain died, and whether he was killed by the crew or died from illness.

²⁰⁰ *Id.*

Marblehead. Once back in Massachusetts, a majority of the crew dispersed and went on their way.²⁰¹ Nine members of the crew, including Quelch, elected to stay in Marblehead, where six of them were eventually arrested and charged with multiple counts of piracy, robbery, and murder.²⁰² The other three crew members were captured but turned the King's Evidence and escaped the gallows.²⁰³

Trial commenced in Boston in June of 1704.²⁰⁴ As the first piracy trial held outside the confines of the Old Bailey in London, the defendants were not given the benefit of a jury.²⁰⁵ Instead, a bench of Admiralty judges was tasked with assessing the sufficiency of the evidence against the defendants, a case resting largely on circumstantial testimony.²⁰⁶ The first indictment against Quelch and his crew was representative of the other eight. That indictment charged that Quelch and the others

by Force and Arms upon the High Sea ... Piratically and Feloniously did Surprize, Seize, and Take a small Fishing Vessel, (having Portuguese Men on Board) and belonging to the Subjects of the King of *Portugal*, (Her Majesty's good Allie) and out of her then and there ... Feloniously and Piratically, did by Force and Arms take and carry away a quantity of Fish and Salt....²⁰⁷

The remaining indictments asserted that, in addition to fish and salt, Quelch and his crew took and carried away, by force of arms, items including salt, sugar, molasses, rum, rice, beef and other food items, silk and linen cloth, ceramics, slaves, weaponry, and gold, silver, and other currency, from various other Portuguese-flagged vessels.²⁰⁸

²⁰¹ See Colonial Williamsburg Foundation, "An account of the behaviour and last dying speeches of the six pirates, that were executed on Charles River, Boston side on Fryday June 30th 1704" first printed by Nicholas Boone, Boston, Massachusetts, 1704, available at, <http://www.history.org/History/teaching/eneewsletter/volume7/june09/primsources.cfm>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Quelch Trial, *supra* note 198, at 1-2.

²⁰⁵ *Id.* at 1-7.

²⁰⁶ *Id.* at 1-7.

²⁰⁷ *Id.* at 2.

²⁰⁸ *Id.* at 2-4.

Because the case was not tried before a jury, the record contains no jury instructions from which the applicable definition of piracy can be gleaned. However, the indictments, coupled with the prosecutor's arguments during trial, give the clear impression that Quelch and his men were charged with, and eventually found guilty of, violently taking and carry away the goods of a friend while at sea—i.e., committing sea robbery.²⁰⁹ However, due to the sparseness of the surviving trial and historical record, we may never know precisely the elements of which Quelch and his crew were found guilty.

3. The Trial of Captain Thomas Green and his Crew in Scotland, 1705

Another infamous trial under the 1698 Act was that of Thomas Green and his crew.²¹⁰ The historical record of Green's voyage is scant. What is known is that, sometime in the 1690s or early 1700s, Green set out from England with a commission from the English crown "to act in hostility against all pirates."²¹¹ At some point thereafter, he and several members of his crew returned to the British Isles and were subsequently arrested. In 1705, they were indicted in Scotland for committing piracy, robbery, and murder on the following allegations:

The said Captain *Thomas Green* and his Crew ... did without any Lawful Warran[t], or just cause, atta[ck] the said other Vessel or Ship, while expecting no such Treatment and invading her first by their Sloup, which they laid manned with Gunns and other Arms for that purpose, they fell upon the said other Vessel in a Hostile manner, by shooting of Gunns and other ways, and after some time spent in fighting against her by their Sloup, and partly by the approach of the said *Thomas Green* Ship the *Worcester*, they overcame, and Boarded the said other Vessel, and having seized their Men, they killed them, and threw them over-board, and then carried, or caused [to be] carr[ied] away the Goods that were aboard the said other Vessel to their said Ship the *Worcester*, and

²⁰⁹ *Id.* at 6. At trial, the prosecutor emphasized: 1) the type of goods taken, 2) the type of violence used by the crew in taking the ships and the goods, 3) that the ships were Portuguese, 4) that the crew did not protest the piratical actions undertaken, and 5) that they shared in the resulting plunder.

²¹⁰ THE TRIAL OF CAPTAIN THOMAS GREEN AND HIS CREW 1 (London, 1705) [hereinafter the "Green Trial"].

²¹¹ *Id.* at 27.

then disposed upon the said Ship, by felling her ashore on the said Coast.²¹²

At trial, several witnesses testified about the attack, including in their testimony bloody descriptions of the violence committed against the other vessel and her crew (including that the crew had been chopped up with hatchets).²¹³ In stark contrast to the evidence presented at the *Kidd* trial, the grotesque violence allegedly committed by Green and his crew was of primary importance in the case presented by the prosecution.²¹⁴ While the trial record fails to indicate what, or if, the jury was instructed as to the crime of piracy, the prosecutor's arguments appear to be illustrative of the view of piracy generally accepted by the Court. The prosecutor argued that the crime committed by Green and his crew was "[t]o attack and invade a free ship without any Cause or Warrant, and to kill her men and rob her goods...."²¹⁵ and that, "[i]t was certainly piracy, robbery, and murder to attacque a ship, hostilely, and to destroy the men, and rob the goods."²¹⁶ Although the prosecutor contended that the crime of piracy was more "atrocious" than either robbery or murder, by themselves, he never distinguished between the requisite elements of the three crimes.²¹⁷ Instead, the prosecutor argued that, "[t]he crime of piracy is complex, and is made up of oppression, robbery, and murder committed in places far remote and solitary... [in this case,] in the vast ocean."²¹⁸

At the close of evidence, the jury convicted Green and his crew of committing piracy.²¹⁹ To the extent that the jury relied on the prosecutor's definition of piracy in so finding, the jury could have applied the narrowest definition of piracy ever articulated—i.e., that piracy consists, not only of robbery, which itself contains a violence element, but also of oppression and murder committed in places

²¹² *Id.* at 3.

²¹³ *Id.* at 39-40.

²¹⁴ *Id.* at 16-19; *see also, generally*, *Kidd Trial supra* note 171 (noting the lack of violence at issue).

²¹⁵ *Green Trial, supra* note 210, at 15.

²¹⁶ *Id.* at 16.

²¹⁷ *Id.* at 19.

²¹⁸ *Id.* at 48.

²¹⁹ *Id.* at 56-57.

remote and solitary.²²⁰ Or, more appropriately, the jury could have interpreted the prosecutor's explanation as simply a less-than-perfect articulation of the prevalent view that piracy includes aspects of the crimes of robbery, murder, and oppression, but does not require the existence of all three at the same time, and is, moreover, distinguishable from them in that piracy can only be committed on the seas, rather than ashore.²²¹ However, based on the surviving record, the answer to this quandary remains unclear.

D. The Golden Age of Piracy

Notwithstanding the highly publicized Kidd trial and the crown's attempts to make it easier to prosecute pirates, the 1700s and 1710s experienced a dramatic rise in incidents of piracy. This resulted from a variety of political, social, and personal reasons, including: an increase in European colonial conquests worldwide and a corresponding expansion of trade across the world's seas;²²² a brief cessation of war among the prominent powers of Europe, which, in effect, negated the commissions of hundreds, if not thousands, of career privateers, forcing them to either turn pirate or find a new profession;²²³ the ability of small bands of private individuals to finance and/or commandeer seagoing vessels capable of matching the best ships in any country's navy in size and firepower;²²⁴ an influx of slaves and indentured servants to the Americas, who escaped from their masters and joined pirate ranks to gain freedom;²²⁵ and the brutal and oftentimes inhumane treatment of sailors aboard navy and merchant marine vessels, which, along with poor pay, inspired many to abandon their posts and join pirate crews.²²⁶

Many of the most infamous pirate captains sailed during this period: Benjamin Hornigold, Blackbeard, Sam Bellamy, Charles Vane, Mary Read, Calico Jack, Anne Bonny, Stede Bonnet, Bartholomew

²²⁰ *Id.* at 48.

²²¹ For a more articulate explanation of this view, see Mary Anne Trial, *infra* note 276, at 6.

²²² WOODARD, *supra* note 1, at 4.

²²³ See *id.* at 52-85.

²²⁴ *Id.* at 8.

²²⁵ *Id.* at 3.

²²⁶ *Id.* at 3, 37-38.

Roberts, and many others.²²⁷ These captains controlled fleets ranging from one or two ships to more than twenty, commanded crews numbering in the hundreds, and operated with little to no constraint from bases located throughout the Bahamian archipelago and the Carolinas, among other places.²²⁸ They were responsible for taking hundreds, if not thousands, of prizes during the early 1700s, and damaging and disrupting the international trades and colonial economies of, among others, the English, Spanish, French, and Dutch.

Despite the vast number of pirates operating worldwide during the Golden Age and the magnitude of the prizes they took during this period, relatively few were captured and prosecuted in courts of law.²²⁹ Some, such as Bellamy and the majority of his crew, met their fate at sea, perishing in storms and other natural calamities.²³⁰ Others, such as Blackbeard, died in armed engagements with royal navies, privateers, or while attempting to capture prizes.²³¹ Some, such as Benjamin Hornigold, were pardoned for their misdeeds without ever facing the scrutiny of a court or a jury.²³² Others perished in prison awaiting trial.²³³ The remnant were neither prosecuted nor caught, and instead lived out their days scattered throughout the colonial hemisphere in places such as Virginia, the Carolinas, Madagascar, Jamaica, and the Bahamas.²³⁴

²²⁷ See generally JOHNSON, *supra* note 14 (portraying the lives of these and other alleged pirate captains in exciting fashion). The first volume of Johnson's book, *A General History of the Pyrates*, was released in 1724 and was an immediate bestseller. Johnson followed with a second volume in 1728, which was also immensely popular.

²²⁸ WOODARD, *supra* note 1, at 87-88; see, e.g., *id.*, at 223 (noting that, at one time, Blackbeard commanded approximately 700 men and a small fleet of vessels); CORDINGLY, *supra* note 139, at 248-49 (detailing the size of several Golden Age pirate crews).

²²⁹ CORDINGLY, *supra* note 139, at 227 (explaining that it was not until the early 1720s that pirates began to be widely hunted, captured, and tried in courts of law).

²³⁰ WOODARD, *supra* note 1, at 182-85.

²³¹ *Id.* at 291-96 (recounting Blackbeard's demise).

²³² *Id.* at 236.

²³³ CORDINGLY, *supra* note 139, at 247.

²³⁴ See, e.g., WOODARD, *supra* note 1, at 77, 97 (mutinous crew never prosecuted for piracy).

The records of many pirate trials that took place during this period have been lost to the tests of time. For example, the transcript for the trial of members of Blackbeard's crew, who were tried, convicted, and hanged in Williamsburg, Virginia, was most likely burned with the rest of Richmond, Virginia, during the Civil War.²³⁵ Of the records that survive, the most helpful, and indeed most well-known pirate trial, is that of Major Stede Bonnet, who was tried on charges of committing acts of piracy along with thirty-three members of his crew in the courts of Charleston, South Carolina, in 1718.²³⁶

1. The Trial of Major Stede Bonnet and his Crew in Charleston, 1718

Major Stede Bonnet had a brief but illustrious career as a pirate captain during piracy's golden age. He hailed from a wealthy,

²³⁵ The trial of Blackbeard's crew took place in Williamsburg, Virginia, in 1719. Thirteen were found guilty of the piracies alleged, one was acquitted, and many were hanged. WOODARD, *supra* note 1, at 297; JOHNSON, *supra* note 14, at 86-87. The indictment of Blackbeard's quartermaster, William Howard, survives. It provided:

That the said Will Howard . . . did Sometime in the year of our Lord 1717 Join and Associate himself with one Edward Tach (Teach—Blackbeard), and other Wicked and disolute Persons, & with them did Combine to fit out in Hostile manner, a Certain Sloop or Vessel called the Revenge, to Committ Pyracys and depredations upon the High Seas, on the Subjects of our Lord the King and of other Princes, & States in Amity with his Majesty trading in America, &c.

And in pursuance of the said Felonious and Pyratial Combination the said Will Howard did, together with his Associates and Confederates, on or about the 29th day of Sept in the year Affordsaid, in an Hostile manner with force and arms on the high seas, near Cape Charles in this Colony . . . attack & seize a Sloop called the Betty of Virginia, belonging to the Subjects of our said Lord the King, and the said Sloop did then and their Rob and Plunder of Certain Types of Medera Wine, and other goods and Merchandizes, and thereafter the said Will Howard did Sink and destroy the said Sloop, &c &c—

W.M. P. PALMER, *CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 1652-1781*, VOL. I, 196 (1875); *see also* LYON TYLER, *TYLER'S QUARTERLY HISTORICAL AND GENEALOGICAL MAGAZINE*, Vol. I, 36-39 (1967).

²³⁶ *THE TRYALS OF MAJOR STEDE BONNET AND OTHER PIRATES* (London, 1718) [hereinafter the "Bonnet Trial"]; *see also* WOODARD, *supra* note 1, at 300-01 (summarizing and describing the impacts of the Bonnet trial); JOHNSON, *supra* note 14, at 104-06 (same).

plantation-owning family from Barbados, and carried on the family tradition until sometime in mid-1717 when, for reasons unknown (but which may have been related to marital troubles or mental health issues), he abandoned the plantation life and turned to the sea.²³⁷ Bonnet purchased a private sloop, renamed it the *Revenge*, outfitted it for war (ten guns), recruited crew (eighty men), and then went pirating throughout the Caribbean and the North Atlantic, taking many prizes along the way.²³⁸ Several months after setting off from Barbados, Bonnet joined forces with Blackbeard (or more likely, Blackbeard took command of the *Revenge* and Bonnet's crew, and, lacking options, Bonnet ceded his ship and authority to Blackbeard), and together they continued to take prizes throughout the remainder of 1717 and the early months of 1718 (including the infamous blockade of Charleston harbor).²³⁹ That spring the pirates lost the *Queen Anne's Revenge* in Topsail Inlet, off the coast of North Carolina, along with a second vessel, thus severely weakening the force of their military capabilities.²⁴⁰ This change of circumstance inspired most of the pirates, including Blackbeard and Bonnet, to take the King's Pardon and cease their piratical activities.²⁴¹

The oath, however, proved to be nothing more than a temporary arrangement. Indeed, by the end of the summer, both Blackbeard and Bonnet had outfitted sloops, recruited crews, and returned to piracy, although, this time they remained as distinct outfits.²⁴² In July or August of 1718, Blackbeard marooned a dozen or more of his crew on a sandbar island off the coast of North Carolina. Bonnet happened upon them, picked them up, and the men sailed with Bonnet along the North Atlantic coast, taking prizes and sharing in the booty.²⁴³ While engaging in these activities, Bonnet at first acted under the false pretenses that he had obtained a commission to take Spanish vessels

²³⁷ See JOHNSON, *supra* note 14, at 95.

²³⁸ WOODARD, *supra* note 1, at 197-225, 240-43 (describing Bonnet's background, setting forth the possible reasons for his decision to go pirating, and detailing his preparations to embark on the *Revenge* for said purposes).

²³⁹ *Id.*; JOHNSON, *supra* note 14, at 95-96.

²⁴⁰ WOODARD, *supra* note 1, at 255.

²⁴¹ *Id.* at 256-58; JOHNSON, *supra* note 14 at 97.

²⁴² WOODARD, *supra* note 1, at 255-58.

²⁴³ *Id.* at 255-58.

from the Dutch (he apparently intended to seek such a commission but never, in fact, did so), though he eventually abandoned all efforts at disguising his piratical takings behind legal formalities.²⁴⁴ His illicit career continued until September 1718, when his fleet (which had, by this point, grown to several vessels), while anchored in an inlet in the Cape Fear River to conduct repairs, unexpectedly encountered a naval contingent sent by the Governor of South Carolina. After a two-day sea battle, Bonnet and thirty-three of the surviving members of his crew surrendered.²⁴⁵

The crew was tried in Charleston in groups of five to nine on two counts of piracy²⁴⁶ (although during trial the prosecutor and witnesses often referenced many of the other takings not formally charged).²⁴⁷ Bonnet was tried separately, due in large part to his brief escape from house arrest prior to the commencement of proceedings.²⁴⁸ After his recapture, Bonnet, like his crew, was brought to trial before a jury, the judges of the Admiralty presiding.²⁴⁹ The first indictment against Bonnet and his men was illustrative of the second. It charged as follows:

That Stede Bonnet ... [and the other defendants] by Force & upon the High Sea . . . did piratically and feloniously set upon, break, board, and enter a certain Merchant-Sloop, called the *Francis*, Peter Manwareing Commander, ... and then and there piratically and feloniously did make an Assault in and upon the [Commander], and other [of] his Mariners.... In the same Sloop, then and there being, piratically and feloniously, did put the aforementioned [Commander], and others [of] his Mariners of the same Sloop ... in Corporal Fear of their Lives ... upon the High Sea ... and . . . piratically and feloniously did steal, take, and carry away said Merchant-Sloop, called the *Francis* [and its goods]....²⁵⁰

²⁴⁴ JOHNSON, *supra* note 14, at 97-98.

²⁴⁵ *Id.* at 99-105.

²⁴⁶ Bonnet Trial, *supra* note 236, at 5, 10.

²⁴⁷ *Id.* at 3, 9, 16.

²⁴⁸ *Id.* at 9.

²⁴⁹ *Id.* at 37-41.

²⁵⁰ *Id.* at 7. The goods allegedly stolen included, among other items, rum, molasses, sugar, cotton, indigo, weaponry, silver, sold, and jewelry. *Id.* The second count of piracy brought against the defendants was a similar indictment for taking a vessel called the *Fortune*, along with its contents. *Id.* at 21.

The trial transcript does not reflect whether and, if so, how the jury was instructed as to the definition of the crime of piracy; however, in opening statement the prosecutor explained to the jury: “Now as to the Nature of the Offense: *Piracy* is a Robbery committed upon the Sea, and a Pirate is a Sea-Thief.”²⁵¹ It appears from the record that the admiralty judges fully accepted this definition and operated pursuant to it throughout the trial.²⁵² For example, at one point during the proceedings, the Chief Judge of the Admiralty stated to the jury, “not only did they [Bonnet’s crew] break and board the said *Manwareing’s* Sloop, which was an Act of Piracy, but [. . .] they were at the taking of thirteen Vessels after they left *Topsail-Inlet*.”²⁵³ Applying this conception of piracy to the evidence against the defendants (which included the testimony of members of Bonnet’s crew who had turned the King’s Evidence), the jury convicted Bonnet and the majority of his crew of the first piracy count charged.²⁵⁴ Thereafter, Bonnet and several others pleaded guilty to, and the jury found all but four of the remaining members of the crew guilty of, the second count of piracy alleged against them.²⁵⁵

Bonnet, in his defense, contended that he had a commission to take Spanish ships (he did not).²⁵⁶ The judges of the Admiralty Court were not persuaded (Bonnet was understandably unable to procure any hard evidence of his nonexistent commission), and, in any event, there was no evidence procured at trial that the vessels Bonnet and his men were charged with piratically taking were Spanish.²⁵⁷ Alternatively, Bonnet contended that he had not given his consent to the taking of the *Francis*, that “[i]t was contrary to [his] inclinations; and [he] told [the crew] several times if they would not leave off that course of life, [he] would leave the sloop” and that, when the ship was taken, “[he] was

²⁵¹ *Id.* at 3.

²⁵² *See id.* at 24.

²⁵³ *Id.* at 19-20.

²⁵⁴ *Id.* at 20-21.

²⁵⁵ *Id.* at 24-27, 31-36.

²⁵⁶ *Id.* at 37-41.

²⁵⁷ Offences at Sea Act, 28 Hen. VIII. c. 15 § VII (Eng.). If the ships were British, the alleged commission, likewise, would not have saved Bonnet from the gallows. British citizens—such as Bonnet—who attacked British vessels while acting under commissions issued by foreign States were still committing acts of piracy.

asleep.”²⁵⁸ The defense fell on deaf ears. At the end of trial, the Chief Judge summarized the evidence against Bonnet as follows: that “Major *Bonnet* was Commander in chief” of the *Revenge*, that the goods aboard the *Francis* had been “sent off by Major *Bonnet*’s order; and that his share was brought into the round-house to him,” and that, “[a]s for his pretence, that his men forced him against his will, it appears by the evidence he did not act like a person under constraint.”²⁵⁹ The jury, siding with the Admiralty judges, convicted Bonnet of committing acts of piracy against the *Francis*.²⁶⁰ Bonnet pled guilty to the remaining count and was thereafter sentenced to death by hanging.

Most of the crew attempted to defend themselves by asserting one, or a combination of, the following arguments: many contended that they had joined Bonnet’s crew under the false, but honest belief that Bonnet had a commission to take Spanish vessels;²⁶¹ some maintained that they had no choice but to join Bonnet’s crew because they had been marooned on an island by Blackbeard and were in dire need of food and water;²⁶² others asserted that they were forced to engage in piratical acts by threat of death or other injury from Bonnet and/or members of the crew;²⁶³ and finally, a minority contended that they had been held captive by Bonnet against their will, and they had neither engaged in the piratical acts committed by the crew, nor shared in the resulting plunder.²⁶⁴

To illustrate the effect of these defenses, a brief comparison of the arguments presented by two alleged members of Bonnet’s crew is helpful. Neal Paterson asserted a two-fold defense at trial. First, he argued that he had been forced to join Bonnet’s crew because he had been marooned on an island. Alternatively, he argued that he had acted

²⁵⁸ Bonnet Trial, *supra* note 236, at 40.

²⁵⁹ *Id.* at 41; *but see* WOODARD, *supra* note 1, at 274-77 (observing that the historical record contains some evidence indicating that Bonnet did not wish to return to piracy after taking the King’s Pardon, but was forced to do so by his crew at the threat of losing the *Revenge*).

²⁶⁰ Bonnet Trial, *supra* note 236, at 41.

²⁶¹ *Id.*

²⁶² *See, e.g., id.* at 16 (Thomas Carman trying to defend himself).

²⁶³ *See, e.g., id.* at 14-15 (Neal Paterson attempting a defense).

²⁶⁴ *See, e.g., id.* at 18-20 (Thomas Nichols asserting his defenses).

under the assumption that Bonnet had, or would soon obtain, a commission to take Spanish ships.²⁶⁵ As Paterson stated:

Thatch [Blackbeard] came on board and carried away fourteen of our best Hands, and marooned twenty-five of us on an Island; and Maj. Bonnet came and told us he was minded to go to *St. Thomas's*, and if there were any Commissions from the Emperor, to get one, and go a privateering against the *Spaniards*; so I was willing to go with him, and when I was on board, he forced me to do what he pleased, for it was against my will.²⁶⁶

These defenses failed, however, for a variety reasons, including that Paterson was unable to establish that Bonnet had a legitimate commission, that the evidence against Paterson was that he appeared to be an active and willing participant, if not an instrumental force in the taking of the vessels identified in the indictment, and even more damning, the undisputed fact that Paterson had shared in the plunder of the vessels after they had been robbed.²⁶⁷ In light of this evidence, the jury convicted Paterson of the charges of piracy alleged against him.²⁶⁸ Indeed, in similar fashion, all those who contended that they had participated in the piratical enterprise due to force or threat of force, or otherwise against their will, but had thereafter shared in the plunder, were found guilty of committing acts of piracy.²⁶⁹

In contrast, Thomas Nichols successfully convinced the jury that he was neither a felon nor a pirate.²⁷⁰ The evidence established that Nichols had been captured and brought on board the *Revenge* by force and against his will, that he had been held below deck in a holding cell, that he did not partake in the piratical taking nor take up force of arms against the merchant vessels identified in the indictment, and most importantly, that he did not share in the plunder extracted from those vessels as did the rest of the crew.²⁷¹ This evidence, according to the Admiralty judges, established that Nichols “seems to be under a constraint indeed,” and that his unique circumstances “must be taken

²⁶⁵ *Id.* at 14-15.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 24.

²⁷⁰ *Id.* at 18-20.

²⁷¹ *Id.* at 18.

into consideration” by the jury in determining whether Nichols had engaged in acts of piracy.²⁷² The jury was persuaded and Nichols was acquitted of the charges against him, along with several other captives similarly situated.²⁷³

2. The Trials of Eight of Bellamy’s Crew in Boston, 1718

The analysis returns, finally, to Bellamy and his crew. Only two members of Bellamy’s crew survived the wreck of the *Whydah*.²⁷⁴ However, at the time of his demise, Bellamy was commodore of three vessels, two of which survived the storm. One of these vessels returned to the Caribbean unscathed. The remaining vessel, the *Mary Anne*, was damaged and ran aground in the storm, forcing the crew to take to shore.²⁷⁵ Seven members of the crew were subsequently captured by local authorities, and indicted and tried in Boston on charges of piracy.²⁷⁶ Similarly, Thomas Davis, a carpenter by trade and one of the survivors of the *Whydah* wreck (the other, “a black or native boy of unknown origin,” was sold into slavery), was separately indicted and tried in Boston on charges of piracy.²⁷⁷

The crew of the *Mary Anne* was tried on the following four counts of piracy:

And first, the said [defendants] . . . without lawful Cause or Warrant, in Hostile manner with Force & Arms, Piratically & Feloniously did surprise, Assault, Invade, and Enter on the High Sea . . . a free Trading Vessel or Pink, called the *Mary Anne of Dublin*, bound from this Harbour to His Majesty’s Colony of New York, which said Vessel or Pink was owned by His Majesty’s Subjects of *Ireland*, having on board her own Cargoe, and Navigated by her own Crew, belonging to His Majesty’s Kingdom aforesaid.

²⁷² *Id.*

²⁷³ Bonnet Trial, *supra* note 236, at 20, 26, 31, 33, 36.

²⁷⁴ WOODARD, *supra* note 1, at 185.

²⁷⁵ WOODARD, *supra* note 1, at 182-85.

²⁷⁶ WOODARD, *supra* note 1, at 185-193; *The Trials of Eight Persons Indicted for Piracy* (London, 1718), reprinted in *BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660-1730, VOL. 2*, 289-313 (Joel H. Baer ed., 2007). We hereinafter will refer to the trial against the crew of the *Mary Anne* as the “Mary Anne Trial.” We will refer to the separate trial of Thomas Davis as the “Davis Trial.”

²⁷⁷ WOODARD, *supra* note 1, at 185-193.

Secondly, the said [defendants] having in manner aforesaid, Piratically and Feloniously seize and imprison [the] Master [of the vessel, and] did force & constrain with five of his Crew to leave and abandon the said Vessel or Pink, and to go on board a Ship named the *Whido* [the *Whydah*], which Ship was then employed and exercised by the said [defendants], and others their Accomplices and Confederates in continued acts of Piracy & Robbery on this, and other Coasts of America.

Thirdly, The said [defendants] Did on the day, and at the place aforesaid, Piratically and Feloniously Imbezil, Spoil and Rob the Cargoe, of the said Vessel or Pink, consisting chiefly of Wines and also the Goods & Wearing Apparel of the said Master and his Crew.

Fourthly, the said [defendants] having at the time and place, and in manner aforesaid, over powered and subdued the said Master and his Crew, and made themselves Masters of the said Vessel or Pink, did then and there Piratically and Feloniously Steer and Direct their Course after the above-named Piratical Ship, the *Whido*, intending to joyn and accompany the same; and thereby, to enable themselves better to pursue and accomplish their Execrable designs to oppress the Innocent, and cover the Sea with Depredations and Robberies.²⁷⁸

The first, third, and fourth of these counts set forth allegations of sea robbery, for taking the *Mary Anne* and her goods, as recognized under the traditional common law and codified at § VII of *An Act for the More Effectuall Suppression of Piracy*. The second count included allegations of hostility and violence at sea, for capturing and imprisoning members of the legitimate crew of the *Mary Anne*, in violation of § VII of the 1698 Act. The second and fourth counts also alleged that, subsequent to the taking, the defendants had confederated with pirates, namely Bellamy and the crew of the *Whydah*, in violation of § IX of the 1698 Act. The defendants pleaded not guilty to the charges and the case proceeded to a bench trial before the judges of the Admiralty Court.²⁷⁹

In his opening statement, the prosecutor set forth his views on the crime of piracy, explaining in more articulate fashion than the prosecutor in the Green Trial, that: “Piracy is in its self a complication of Treason, Oppression, Murder, Assassination, Robbery, and Theft, so it denotes the Crime to be perpetrated on the High Sea, or some part

²⁷⁸ *Mary Anne Trial*, *supra* note 276, at 2-3.

²⁷⁹ *Id.* at 4-5.

thereof, whereby it becomes more Atrocious”²⁸⁰ The prosecutor further explained that piracy was more atrocious than the other enumerated crimes because “of it being committed . . . where the [crime] cannot easily be prevented nor discovered,”²⁸¹ and because “Ships are under the Publick Care” and “It is in the Interest of the State, that Shipping be Improved.”²⁸² The prosecutor later added that: “Masters of Ships are Publick Officers, and therefore every Act of Violence and Spoilation committed on them or their Ships, may justly be accounted Treason.”²⁸³

Unlike in the above-discussed trials, the prosecutor also contended that an attempted piracy still constituted piracy under the applicable law, even if the attempt ultimately failed to succeed. The prosecutor argued

[t]he Man, for instance, who goes armed on purpose to assassinate or rob [or] attempts to steal, [among other attempted misdeeds] is in the eye of the Law no less an Assassin or Robber [or] a Thief . . . than if he had succeeded in the Attempt, and effectually completed his design. And consequently the attacking, invading or entering a free Ship . . . the attempting to Rob or Steal the goods on board, the offering violence to the Master or his Crew or putting them under restraint, are so many direct acts of Piracy tho’ there be no capture nor taking, nor any damage done, and the Aggressor, if he is overcome and taken on the High Seas, may be lawfully hang’d up at the Yard-Arm. . . .²⁸⁴

After summarizing the laws of piracy, the prosecutor turned to the evidence against the defendants. Doing so, he first summarized and assessed what several of the defendants had allegedly confessed to a pre-trial examiner:

They Robb’d the Cargo and Goods on board, and Navigated the Vessel in company with their Accomplices, who were then possessed of several Ships and Vessels under the command of the Capital Ship the *Whido*, in order to carry Destruction to the utmost parts of our Territories. The bare naming of these facts is enough

²⁸⁰ *Id.* at 6. To be sure, treason and piracy differ in at least one respect: the nationality of the one committing treason is important; the nationality of a pirate is generally not. See RUBIN, *supra* note 121, at 76.

²⁸¹ Mary Anne Trial, *supra* note 276, at 6.

²⁸² *Id.* at 7 (emphasis removed).

²⁸³ *Id.* at 7.

²⁸⁴ *Id.* at 8.

to prove the first point, *viz.* That the Facts laid in the Indictment amount to Piracy, & That the [defendants] are all and each of them Guilty of these Facts will eventually appear [from the testimony].²⁸⁵

Eight witnesses were called to testify as the King's Evidence. These witnesses, many of whom were members of the legitimate crew of the *Mary Anne*, testified that the defendants had sailed with "the *Whido*, whereof *Samuel Bellamy* a Pirate was Commander," and that they were among those who, contending that they had a commission to take English ships, had boarded the *Mary Anne* "all Armed with Musquets, Pistols, and Cutlashes, except [two of them]," threatened harm to the *Mary Anne's* crew, stole wine from the ship's hold along with the crew's extra clothing, and, finally, "made a Prize of" the vessel, adding it to Bellamy's fleet.²⁸⁶

In defense, and in similar fashion to the arguments raised by Bonnet's crew, all but one of the defendants asserted that Bellamy and/or other members of the crew had forced them to engage in the piracies undertaken, and that, though they had never effectuated an escape, they had been awaiting an opportune moment to do so.²⁸⁷ The remaining defendant contended that Bellamy had picked him up while he was sick, and that he was forced, due to his illness, to remain on the pirate ship until he was healthy (although he failed to explain why he remained in the employ of Bellamy upon his cure).²⁸⁸

As with Bonnet and his crew, plunder was the defendants' downfall. Upon seizure of the *Mary Anne*, its more valuable contents had been transferred to the *Whydah*, and, thus, sank along with the *Whydah* in the tempest. But, despite the fact that the crew had not had an opportunity to, and did not, in fact, share in the plunder, there was evidence—albeit circumstantial evidence—produced indicating that the defendants had intended to—indeed, were "intitled" to—share in

²⁸⁵ *Id.* at 8; *see also* Crawford v. Washington, 541 U.S. 36, 43-46 (2004) (discussing in greater detail the practice of requiring defendants to submit to pre-trial examination by hearing examiners, justices of the peace, or other persons of authority); AM. J. LEGAL HIST., *supra* note 142, at 252-53 (observing that pre-trial examinations of defendants accused of serious crimes were generally conducted).

²⁸⁶ *Mary Anne Trial*, *supra* note 276, at 9-12.

²⁸⁷ *Id.* at 12.

²⁸⁸ *Id.*

the booty aboard the *Whydah*.²⁸⁹ This evidence, along with the testimony of the witnesses and the confessions of the crew, led the Admiralty judges to a finding of guilty as to six of the seven defendants.²⁹⁰

The remaining defendant, Thomas South, was found not guilty. The testimony elicited at trial suggested that South had been a sailor aboard another vessel captured by Bellamy, that he had been held captive by Bellamy on board the *Whydah* “utterly against his Will,” and that, at some point soon after the *Mary Anne* was captured, South boarded her, but did so unarmed and in a “civil and peaceable” manner.²⁹¹ The evidence also established that South told several witnesses on multiple occasions, including the members of the legitimate crew of the *Mary Anne*, that he intended to escape from Bellamy at the first opportunity.²⁹² The Admiralty judges were not persuaded that South was a pirate, and, accordingly, acquitted him of the charges alleged.²⁹³

Thomas Davis was tried separately at the bench on an indictment similar to the one used in the *Mary Anne* Trial, but for taking the *Whydah* and its goods and imprisoning the legitimate crew of the *Whydah*, and for doing the same and more to an unnamed ship and its crew off the Capes of Virginia (present-day Virginia Beach).²⁹⁴ In assessing the charges against Davis, the prosecutor argued to the judges as follows:

To attack a Free trading Ship is unquestionably an act of Piracy, and the subsequent Facts, *viz.* Entering on board, seizing and imprisoning the Master and his Crew, carrying away one Ship & her Cargoe, and robbing the Cargoe of another, and sinking the Vessel, are so many distinct Supervening Crimes, which differ only according to the several degrees of the wrongs and oppressions, which necessarily flow thence.²⁹⁵

²⁸⁹ *Id.* at 13.

²⁹⁰ *Id.* at 14.

²⁹¹ *Id.* at 10.

²⁹² *Id.* at 10.

²⁹³ *Id.* at 10.

²⁹⁴ Davis Trial, *supra* note 276, at 15-16.

²⁹⁵ *Id.* at 17.

Because most of the *Whydah* crew had perished at sea, and the only other person to survive the wreck was unavailable to testify at trial, the prosecutor's case against Davis was largely circumstantial. Seven witnesses testified as the King's Evidence. This testimony indicated that Davis was detained aboard the *Whydah* by Bellamy because "he was a Carpenter & a single Man," "that [Davis] was very unwilling to go with *Bellamy*," and that Bellamy had promised to release Davis on the next vessel they intercepted.²⁹⁶ The evidence further suggested that Davis was not released as promised because the crew voted to keep him on board due to concern that other captives would similarly want to be released and because of Davis's skill set.²⁹⁷ As one witness testified, the crew "[s]wore that they would shoot him before they would let him go from them."²⁹⁸

Davis, in his own defense, explained to the judges how he came to be aboard the *Whydah*. As summarized by the transcriptionist as follows:

[Davis] said, That he was Carpenter of the Ship *St. Michael* whereof *James William* was Capt. And Sailed out of *Bristol* in Great Britain in the month of Sept. 1716 bound for *Jamaica*; and in Decemb. following the Ship was taken about Twenty Leagues off *Sabria* by two Pirate Sloops commanded by Capt. *Samual Bellamy*, and Monsieur *Lebous*, who carried the Ships company to the Island of *Blanco* where they were detained till the Nine day of January last, when he and fourteen other Prisoners were put on board the *Sultan* Galley, then under the said *Bellamy's* command who had taken her [previously]: And afterwards took another ship called the *Whido*, in which Ship to his great grief & sorrow, he was forced to come up on this Coast [the North Atlantic], where [the ship] was cast-away: And he with one *John Julian* only escaped Drowning. He further saith, That he was no way active among the Pirates, only as he was compelled by them.²⁹⁹

Despite the prosecutor's subsequent attempts to convince the court that Davis's story was a lie, and that he was, indeed, an active member of Bellamy's crew,³⁰⁰ the Admiralty judges were not persuaded. Instead, speaking on behalf of the court, the Chief-Judge explained,

²⁹⁶ *Id.* at 18-19.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 19-20.

³⁰⁰ *Id.* at 21.

“That there was good proof of [Davis] being forced on board the Pirate Ship *Whido* . . . which excused his being with the Pirates; and that there was no Evidence to prove that he was Accessory with them, but on the contrary that he was forced to stay with them against his will.”³⁰¹

E. The Legacy of Colonial Pirates

Piracy rapidly declined in the latter part of the 1730s, but did not disappear. Indeed, piracy prosecutions occurred with relative frequency throughout the early part of the nineteenth century, and in the United States, continuing concern over the impacts of piracy during the late 1700s and early 1800s can be seen in the Articles of Confederation,³⁰² the United States Constitution,³⁰³ the Federalist Papers,³⁰⁴ and early court cases.³⁰⁵ Many of these subsequent authorities relied on, or were influenced by, the British Colonial Period’s legal and historical legacy of piracy. For example, in *United States v. Smith*, the seminal piracy case on which the *Said* Court based its decision, the Supreme Court expressly relied, in part, on the law of piracy as articulated in the Dawson and Kidd Trials in concluding that

whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. . . . whether we advert to writers on the common law, or the maritimo law, or the law of nations, we shall find that they universally treat of piracy as an

³⁰¹ *Id.* at 22.

³⁰² See ART. CONFED. ART. VI (“ . . . nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal . . . unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.”).

³⁰³ See U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. . . .”).

³⁰⁴ See, e.g., THE FEDERALIST PAPERS 40 & 41 (1788) (referencing pirates).

³⁰⁵ See, e.g., *United States v. Smith*, 18 U.S. 153 (1820).

offence against the law of nations, and that its true definition by that law is robbery upon the sea.³⁰⁶

Likewise, many treaties established throughout the next century built upon the piracy principles introduced during the piracy trials of the colonial period. For example, the 1778 Treaty of Amity and Commerce between the United States and France provided the following:

No Subjects of the Most Christian King [i.e., France] shall apply for or take any Commission, or Letters of marque, for arming any Ship or Ships to act as Privateers against the said United States, or any of them, or against the Subjects People or Inhabitants of the said United States, or any of them, or against the Property of any of the Inhabitants of any of them, from any Prince or State with which the said United States shall be at War. Nor shall any Citizen Subject or Inhabitant of the said United States, or any of them, apply for or take any Commission or letters of marque for arming any Ship or Ships to act as Privateers against the Subjects Of the most Christian King, or any of them, or the Property of any of them, from any Prince or State with which the said King shall be at War: And if any Person of either Nation shall take such Commissions or Letters of Marque, he shall be punished as a Pirate.³⁰⁷

Similarly, the 1794 Jay Treaty provided the following:

And if any Subject or Citizen of the said Parties respectively shall accept any Foreign Commission or Letters of Marque for Arming any Vessel to act as a Privateer against the other party, and be taken by the other party, it is hereby declared to be lawful for the said party to treat and punish the said Subject or Citizen having such Commission or Letters of Marque as a Pirate.³⁰⁸

Indeed, many of the piracy-related criminal law principles first articulated during the colonial period are found, at least in part, in the refined piracy definitions set forth in the modern-day criminal codes of coastal States, as well as the provisions of the 1958 High Seas Convention and the 1982 Convention on the Law of the Sea.³⁰⁹ The

³⁰⁶ *Smith*, 18 U.S. at 161-62 (1820); *see also* *United States v. Klintock*, 18 U.S. 144 (1820); *United States v. Furlong*, 18 U.S. 184 (1820); *United States v. Holmes*, 18 U.S. 412 (1820).

³⁰⁷ Treaty of Amity and Commerce, U.S.-France, art. XXIII, Feb. 6, 1778.

³⁰⁸ Jay's Treaty, U.S.-Britain, art. XXI, Nov. 19, (1794).

³⁰⁹ Compare *id.* Part II with *id.* Part III.

legacy of the colonial period being apparent in these subsequent authorities, the question arises as to whether and, if so, how this legacy impacts the present-day classification of UCH as pirate-flagged.

V. QUALIFICATIONS FOR CLASSIFICATION AS PIRATE-FLAGGED

In light of the history recounted in Part IV, it would be incredibly difficult, if not factually impossible, to retrospectively adjudge certain acts as piratical in all but three instances. Indeed, under most circumstances, the surviving legal and historical records are simply too sparse for modern-day archeologists, historians, lawyers, and others to determine, with any degree of precision or certainty, whether someone was a pirate as opposed to a privateer, or whether certain acts fell within the scope of the piracy definitions recognized under the common law or by statute. This does not, however, mean that the legal and historical record is of no use. Instead, as noted above and set forth below, there are three instances in which it is appropriate to classify UCH as pirate-flagged.

A. Circumstances Appropriate for Classification of Underwater Cultural Heritage as Pirate-Flagged

1. Conviction of the Captain

Of the trials examined above, four resulted in a ship's commander—who is generally referred to as a “captain”—being convicted of piracy: the Kidd Trial (Captain William Kidd); the Green Trial (Captain Thomas Green); the Quelch Trial (Captain John Quelch); and the Bonnet Trial (Captain Major Stede Bonnet). These examples suggest that pirate captains typically obtained authority and control over the vessels under their command in one of three ways. First, some captains, such as Kidd and Green, held legitimate commanding posts aboard validly commissioned privateering or merchant vessels but nonetheless became pirate captains when they and their crews committed piratical acts during a commissioned voyage.³¹⁰ Second, other captains, such as Quelch, were democratically elected to a commanding post by the majority of a

³¹⁰ See ZACKS, *supra* note 7, at 103-06; Green Trial, *supra* note 210, at 27. This occurred most often when the captain and/or crew acted outside the scope of the authority granted to them by their commission, a fairly common occurrence during the late 1600s to early 1700s. See, e.g., RUBIN, *supra* note 121, 78-80, 99.

vessel's pirate crew after taking control of the vessel by mutiny or illicit capture.³¹¹ Third, a relative few, including Bonnet, privately commissioned their own vessels, declaring themselves commander, in order to pursue piratical endeavors.³¹²

For purposes of the instant analysis, the method by which the pirate captain obtained authority and control over the ship is unimportant. Instead, under both the 1958 High Seas and 1982 Conventions, the important determination in assessing whether a ship is a pirate ship is whether the ship was under the "dominant control" of pirates.³¹³ In all three instances highlighted above, the captain's piratical actions were representative of those in dominant control of the ship. In the first and third scenarios, where the captain held a legitimate rank prior to turning pirate and continued in said role thereafter, and where the captain commissioned and commanded his own vessel, the captain often retained control of the ship only by courting the continuing support of the crew.³¹⁴ Similarly, in the remaining scenario, where the captain was democratically elected by the majority of his or her pirate crew to command a vessel illicitly seized, the captain generally acted in accordance with the will of the crew on threat of deposition.³¹⁵ These observations suggest that, in the event a captain is adjudged a pirate, the vessel under his or her command should properly be deemed a pirate ship.

The most reliable way to determine if a captain was a pirate is to look to the trial records of the applicable time period to determine whether the captain was convicted of committing acts of piracy. Indeed, absent a piracy conviction (or, as discussed below, an official pardon), the only remaining option is to attempt to retrospectively apply the rule set forth in *Hasan/Dire* to the captain's actions—i.e., attempt to discern, based on the historical record, whether the captain

³¹¹ See Quelch Trial, *supra* note 198, at 1-7.

³¹² WOODARD, *supra* note 1, at 197-99.

³¹³ 1958 High Seas Convention, *supra* note 23, at 6; UNCLOS, *supra* note 20, at 61.

³¹⁴ See, e.g., Bonnet Trial, *supra* note 236, at 41; WOODARD, *supra* note 1, at 274-77 (suggesting that Bonnet maintained control of the *Revenge* only by acquiescing in the piratical desires of his crew).

³¹⁵ CORDINGLY, *supra* note 139, at 98; see, e.g., WOODARD, *supra* note 1, at 307 (Charles Vane ousted from his position as captain of a pirate ship due to the displeasure of the crew over his failure to attack a potential prize).

committed acts of piracy pursuant to the laws of piracy in effect at the time of the alleged transgression—a task which, based on the record left to us by ages past, is nearly impossible to do with any degree of precision or certainty.³¹⁶ Of course, we recognize that historians and legal commentators often criticize the processes used and laws applied in early pirate trials, the Kidd Trial being one of the most prevalent examples.³¹⁷ And, as this article explored in Part III, the records of many early piracy trials, including the Kidd Trial, the Quelch Trial, and the Green Trial, among others, certainly contain what, to our modern senses, appears to be unfairness, violations of due process and other inherent rights, and/or omissions or defects in the law as applied.³¹⁸ But, despite their flaws, the past trials of those convicted of piracy represent our best opportunity to fairly judge an alleged pirate captain in accordance with the laws of piracy in effect at the time of the alleged piratical offense.

Applying these conclusions to UCH discerns the following rule: if UCH was, at the time of its demise, captained by an individual later convicted of committing acts of piracy using the vessel, said UCH is properly classified as pirate-flagged.

However, although an effective mechanism to determine whether UCH should be deemed pirate-flagged, a captain's conviction is not, and cannot be, the sole criteria for such a classification. Indeed, were we to apply this standard exclusively, vessels commanded by some who were most certainly pirates, including, for example, Henry Avery, Sam Bellamy, and Blackbeard, none of whom stood trial for their offenses, would be excluded. To remedy this apparent inadequacy, this article proposes two additional circumstances under which UCH can be appropriately classified as pirate-flagged.

³¹⁶ See *United States v. Dire*, 680 F.3d 446, 468-69 (4th Cir. 2012).

³¹⁷ See, e.g., ZACKS, *supra* note 7 (maintaining that Kidd was improperly convicted of piracy).

³¹⁸ See, e.g., Kidd Trial, *supra* note 171; Green Trial, *supra* note 210; HARRIS, *supra* note 166, at 39 (suggesting that Kidd was a scapegoat for the general dismay of the East India Trading Company and the displeasure of its stockholders and directors over losses suffered at the hands of other pirates); see also WM. & MARY Q., Vol. 5, No. 2, 241 (1925) (noting that, “some of the highest officials of the [colonial] courts were not free from imputation of the most corrupt conduct.”); RUBIN, *supra* note 121, at 99-100, 101-103 (highlighting inadequacies in the Kidd and Quelch trials).

2. Conviction of a Large Number of the Crew under the Captain's Command

As with pirate captains, the convictions of a large number of the crew of a vessel used to commit acts of piracy demonstrate that the ship was under the dominant authority and control of pirates. Most, if not all, pirate ships operated as small-scale democratic institutions where decisions were made by majority vote of the pirate crew in all circumstances but during the heat of battle, when the captain held overriding authority.³¹⁹ Put another way, the decision to engage in piratical acts represented, not only the decision of the captain, but also the will of the majority of the crew.³²⁰ The dissenting members of the crew were expected to act in accordance with the will of the majority, on threat of physical harm or other punishment, such as being marooned on an island or set adrift in the ship's boat.³²¹ Thus, the conviction of a large number of a vessel's crew for committing acts of piracy establishes that the majority of the crew—those in dominant control—acquiesced in the piratical activities undertaken, even if particular individuals did not. Such convictions are, therefore, sufficiently reliable indicators that the vessel used by those convicted was a pirate ship.

In such an analysis, it is important to accurately distinguish between members of a pirate crew, on one hand, and other individuals serving aboard a pirate ship, on the other. As demonstrated by the Kidd Trial, the Bonnet Trial, and the Mary Anne Trial, among others, slaves, servants, and captives were often acquitted of the piracy charges brought against them—even if they had, in fact, participated in the piratical offenses alleged—due to their lack of willful participation in the overall piratical enterprise.³²² The acquittal of such individuals should be understood in proper legal and historical context, as set forth above, and should not be interpreted as establishing that the majority of a ship's crew lacked piratical intent or that a ship used to commit piratical offenses was something other than a pirate ship. As noted

³¹⁹ WOODARD, *supra* note 1, at 2.

³²⁰ *Id.*

³²¹ *See, e.g.*, WOODARD, *supra* note 1, at 307 (after disagreement with majority of crew, Vane was removed from the pirate flagship, placed in a small sloop, and sent on his way with other dissenters).

³²² *See, e.g.*, Kidd Trial, *supra* note 171, at 334-35.

above, in some pirate trial transcripts, the classification of such persons—slaves, servants, or captives—are clearly indicated. In other cases, the classification of the person acquitted can be gleaned from the jury instructions given, or the arguments presented to the court.³²³

Likewise, it is necessary to distinguish between the actions of a large number of the crew versus those of a small minority. This is because some piratical offenses, such as, for example, attempted mutiny, delivering certain types of seducing or threatening messages, or soliciting others to turn pirate, are capable of being effectuated solely by individuals, or a small group of individuals, contrary to the will of a legitimately commissioned crew.³²⁴ In most circumstances, this distinction is readily discernable from the allegations as charged in the indictment. Indeed, most piracy indictments expressly alleged that the defendants, with the assistance of the other members of the crew, illicitly seized one or more ships as part of a larger piratical enterprise, and prosecutors often emphasized these facts during trial.³²⁵ In contrast, where an indictment or trial transcript indicates that an individual acted alone, or with the help of one or two others, such facts fail to establish that the piratical individuals were in dominant control of a vessel, and, thus, that the vessel was a pirate ship.

To summarize, the conviction of a large number of a ship's crew for piracy indicates that the vessel used to commit said acts is properly deemed a pirate ship. If the UCH sank while under the dominant authority and control of said crew, it is rightfully classified as pirate-flagged. In making this determination, the intentions and actions of slaves, servants, and captives should not be imputed to the crew, nor should those of a distinct few.

3. Begging the King's Pardon

On several occasions during the British Colonial Period, monarchs and other authorized government officials issued official pardons forgiving the piracies of those who, confessing their piratical activities, turned themselves in to proper authorities. The most famous of these pardons, King George I's "PROCLAMATION for Suppressing of PYRATES," provided:

³²³ *Id.*

³²⁴ *See, e.g.,* Offences at Sea Act, 28 Hen. VIII. c. 15, §§ VII-X (1698) (Eng.).

³²⁵ *See, e.g.,* Bonnet Trial, *supra* note 236 at 3, 9, 7, 16.

And we do hereby promise, and declare, that in Case any of the said Pyrates, shall on, or before, the 5th of September, in the Year of our Lord 1718, surrender him or themselves, to one of our Principal Secretaries of State in Great Britain or Ireland, or to any Governor or Deputy Governor of any of our Plantations beyond the Seas; every such Pyrate and Pyrates so surrounding him, or themselves, as aforesaid, shall have our gracious Pardon, of, and for such, his or their Piracy, or Pyracies, by him to them committed, before the fifth of January next ensuing.³²⁶

As with a conviction, those who begged and received the King's Pardon are rightfully adjudged pirates for purposes of classifying UCH as pirate-flagged. Accepting an official pardon was tantamount to pleading guilty to allegations of piracy in return for a commuted sentence. Those who surrendered to such proclamations in proper fashion were given a certificate of pardon, their names were placed on an official list of pardoned pirates, and they were released to continue about their daily lives.³²⁷

Many of the most famous pirates, including Benjamin Hornigold, Blackbeard, Stede Bonnet, and Charles Vane accepted pardons at some point during their piratical careers.³²⁸ Some, such as Blackbeard, Bonnet, and Vane, thereafter returned to piracy.³²⁹ Others, including Hornigold, accepted their forgiveness as a profound opportunity and became, instead, honest privateers or merchantmen (in appearance, at least).³³⁰ However, regardless of their post-pardon activities, all who accepted the King's Pardon are rightfully adjudged pirates, even if they did not ultimately stand trial or receive punishment for their misdeeds. It follows then that if a ship's captain took the pardon, or a large number of a ship's crew took the pardon, the ship is properly deemed a pirate ship. If under the dominant authority and control of said persons at the time of its demise, the ship is properly categorized as pirate-flagged.

It is worth noting that, unlike in the trials of a captain or his crew, where the indictments, evidence, or argument often disclosed the vessels used by the defendants to commit piratical activities, no

³²⁶ King George I, *A Proclamation for Suppressing of Pyrates* (September 5, 1717).

³²⁷ WOODARD, *supra* note 1, at 226, 235.

³²⁸ *Id.* at 226-27, 256-58.

³²⁹ *Id.* at 256-58, 274-77.

³³⁰ *Id.* at 236.

judicial record exists with respect to the vessels so employed by those who took the King's Pardon. This does not mean, however, that it is impossible to determine if those in dominant control used a particular vessel for piratical purposes. Even though recourse to the historical record is, admittedly, more difficult, it is not impossible to accurately determine whether a ship was under the dominant authority and control of those who begged the King's Pardon.³³¹

B. Circumstances Insufficient for Classification of Underwater Cultural Heritage as Pirate-Flagged

1. By Proclamation

Colonial governors or others in positions of authority often issued proclamations identifying certain individuals as pirates.³³² Such proclamations identified Avery, Kidd, Blackbeard, and Calico Jack, among others, as pirates.³³³ For example, one of the governors' proclamations (there were several) so identifying Captain Kidd ordered that Kidd be detained "to the end that he and his accomplices may be prosecuted for the notorious piracies they have committed in the East Indies."³³⁴

The proclamation declaring Calico Jack to be a pirate read: "[T]he said John Rackum [i.e., Calico Jack] and his said Company are hereby proclaimed Pirates and Enemies to the Crown of Great Britain, and are to be so treated and Deem'd by all his Majesty's subjects."³³⁵

Governor Alexander Spotswood's declaration naming Blackbeard as a pirate provided:

[T]hat all and every person or persons who . . . shall take any Pyrate . . . or, in the Case of Resistance, shall kill any such Pyrate . . . upon the Conviction, or making due Proof of the killing

³³¹ *Id.* at 158 (noting that one or more ships once captained by Hornigold lay wrecked along the coast of Nassau, Bahamas).

³³² CORDINGLY, *supra* note 139, at 206; *see, e.g.*, WOODARD, *supra* note 1, at 143 (King-issued declaration named certain individuals as pirates).

³³³ *See, e.g.*, CORDINGLY, *supra* note 139, at 58 (describing governor's proclamation declaring Calico Jack and others as pirates); JOHNSON, *supra* note 14, at 78-79 (quoting Governor Spotswood's proclamation declaring Blackbeard a pirate); JOHNSON, *supra* note 14, at 448 (describing a proclamation identifying Captains Avery and Kidd as pirates).

³³⁴ ZACKS, *supra* note 7, at 210.

³³⁵ CORDINGLY, *supra* note 139, at 58.

of all, and every such Pyrate . . . shall be entitled to have . . . the several Rewards following: . . . for Edward Teach, commonly called Captain Teach, or Black-beard, one hundred Pounds. . . .³³⁶

Proclamations of these varieties are not sufficiently reliable indicators that a captain or members of a crew were, in fact, pirates. In contrast to a conviction for piracy in a court of law, or a confession of piracy via taking the King's Pardon, an official proclamation involved neither a presentation of facts nor a confession. Many proclamations were vaguely worded and often premised on nothing more than hearsay or rumor. Indeed, there exist valid arguments that some proclamations, such as those declaring Kidd to be a pirate, were based entirely on mischaracterized or inaccurate facts, or, contrary to their intentions, forced legitimate privateers into piracy by blacklisting their names.³³⁷

2. Retrospective Adjudication

As discussed above, the surviving legal and historical records are simply too sparse to determine, with any degree of certainty, whether an individual was a pirate as opposed to a privateer, or whether certain acts fell within the scope of the piracy definitions recognized under the applicable statutes or common law in effect at the time of the alleged offense. Attempts to engage in such retrospective adjudications should be avoided as unreliable and ineffective.

VI. THE *WHYDAH*

Applying the aforesaid conclusions to the *Whydah* demonstrates that the ship, its contents, and its wreck site are properly classified as pirate-flagged UCH. There can be little doubt that the *Whydah* is properly classified as UCH. The ship sank on April 16, 1717, more

³³⁶ JOHNSON, *supra* note 14, at 78-79 (quoting Spotswood, *A Proclamation Publishing the Rewards given for apprehending or killing, Pyrates* (Nov. 24, 1718)); *see also* WM. & MARY Q. MAGAZINE, *Notes from the Journal of the [Virginia] House of Burgesses*, Vol. XXI, No. 1, 249-52 (July 1912) (noting that a reward for the capture of Blackbeard and his officers and crew was offered on November 14, 1718).

³³⁷ *See, e.g.*, WOODARD, *supra* note 1, at 143 (suggesting that one of the King's piracy proclamations named certain individuals who were privateers, not pirates, and thereby forced them into piracy by destroying their opportunity to earn an honest living).

than 100 years ago, and provides unique cultural, historical, archaeological, and scientific opportunities.³³⁸ Although Bellamy perished in the wreck without standing trial for his alleged misdeeds, a large enough contingent of the crew serving aboard vessels in his fleet were so convicted, as memorialized in the transcript of the Mary Anne Trial.³³⁹ The subsequent acquittal of Thomas Davis, a captive aboard the *Whydah*, does not change the ship's proper classification.³⁴⁰ Finally, the *Whydah* was, at the time of its capture, a merchant slave trader and not a sovereign vessel of any variety.³⁴¹ These observations establish that the *Whydah* is properly pirate-flagged UCH.

VII. CONCLUSION

This article has established that classifying underwater cultural heritage as pirate-flagged is consistent, not only with the historical and archeological reality that pirates sailed and wrecked what is now UCH, but also with the piracy and archeological protection provisions found in international conventions such as the 1958 Convention on the High Seas, the 1982 Convention on the Law of the Sea, and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. This classification is appropriately applied to non-sovereign UCH in cases where the UCH was under the dominant authority and control of pirates at the time of its demise, and to other UCH in like circumstances if the laws of the sovereign expressly permit such a classification or the sovereign has expressly abandoned the UCH.

In assessing whether these standards are satisfied with respect to particular UCH, retroactive piracy adjudications should be avoided except where the captain or a large contingent of the crew were convicted of committing acts of piracy using the vessel, or took the King's Pardon for acts committed using the vessel. In making this determination, it is important to distinguish between the actions of the crew, as opposed to those of slaves, servants, or captives, because the standard is neither triggered nor affected by the involvement of those participating in piratical endeavors against their will. For similar

³³⁸ See CLIFFORD & KINKOR, *supra* note 1, at 7, 130-32, 144; WOODARD, *supra* note 1, at 169-193.

³³⁹ See Mary Anne Trial, *supra* note 276.

³⁴⁰ See Davis Trial, *supra* note 276.

³⁴¹ See WOODARD, *supra* note 1, at 156-57.

reasons, it is important to distinguish between the actions of a majority of the crew from those of an individual or a distinct minority. As with slaves, servants, and captives, neither the actions of an individual nor those of an identifiable minority affect the proper classification of UCH. Lastly, it is important to recognize that official piracy proclamations, by kings, governors, or other authorized government officials, are not sufficiently reliable indicators of the subject's involvement in piracy to justify classifying UCH as pirate-flagged.

Pursuant to these standards, the wreck site of the *Whydah* is properly classified as pirate-flagged UCH. It was a non-sovereign vessel that was, at the time of its demise, under the dominant control and authority of a sufficiently large contingent of persons convicted of committing acts of piracy using the vessel. Other examples of pirate-flagged UCH abound. Some, such as Blackbeard's *Queen Anne's Revenge*, have already been discovered. Others remain to be located or identified. In either case, the aforementioned standards provide the most legally and historically appropriate way to determine whether the wreck of a vessel and its contents are properly classified as pirate-flagged UCH.

These standards are also helpful in identifying what will eventually become pirate-flagged UCH in the future. Pirates continue to be active in the world's seas, especially in the South China Sea and off the coast of Africa, and continue to wreck their vessels and lose their cargo. Meanwhile, the piracy laws governing these illicit activities continue to change and evolve, and those implicated in piratical endeavors will, as the *Dire* Court recognized, ultimately be prosecuted according to the definitions of piracy in effect at the time the alleged transgressions were committed. In light of the inevitable evolution of the applicable piracy standards, the most legally and historically sound method of determining whether the wreck of a vessel or its contents is appropriately classified as pirate-flagged will in future times, as is presently the case, continue to be: 1) if the captain was convicted of piracy; 2) if a large enough contingent of the crew was so convicted; or 3) if the captain and/or a large number of the crew received a pardon forgiving their piratical misdeeds. Indeed, because even the most generous historic preservation laws recognize that wrecked vessels and/or their contents must be at least 50 years old—and often at least 100 years old—to meet the threshold for qualification as UCH, the determination of whether a particular wreck site should be classified as pirate-flagged will most likely be made in an age far-removed from the period in which the piratical offenses were

committed, and well after the piracy definitions applicable to those offenses, or the interpretations thereof, have evolved in one way or another.