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The Phantom Fleet of Porto Principe: Piracy and Admiralty Jurisdiction in the Atlantic Colonies, 1666-1698

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To speak of the “law” in the seventeenth-century English Atlantic is to open an enormous can of worms. Whose law was it exactly? How was it articulated? How was it enforced? These are not trivialities, but matters of empire. It was through the law that England maintained dominion over its colonial possessions, and English identity was defined in no small part by existence within the juridical boundaries of the Crown; in theory, the common law was indeed common to all, colonists and Englishmen alike. Colonial law, however, lacked the immediacy of its English counterpart: the intricate system of justices and sheriffs, of itinerant courts and magistrates, all tasked with communicating the sovereign’s law to his or her subjects and ensuring their compliance. In the Atlantic colonies this duty was vested in a single personage, the governor. While local assemblies had some jurisdiction over matters within the colony, governors were the conduits through which all Crown law passed. Given this, and the vast distance between the colonies and their mother country, it is not surprising to find heterogeneity among colonial legal systems.

1 Jack Greene writes: “For English people migrating overseas….the capacity to enjoy and possess the English system of law and liberty was crucial to their ability to maintain their identity as English people…and to be thought of by those who remained in England as English.” Jack Greene, “Empire and Identity from the Glorious Revolution to the American Revolution,” in P.J., Marshall, ed. The Oxford History of the British Empire, v. II (Oxford: Oxford University Press, 2001), 208-230.
2 Nelson, Common law, 6-15.
The difficulty of administering an empire under multiple legal orders and understandings is amply illustrated by that most singular of seventeenth century crimes, piracy. For decades England and her colonies engaged in a jurisdictional tussle over the pirates, touching every aspect of the law from definition to adjudication. Examined in the broader context of Crown-colonial relations, the legal concept of piracy assumes an importance that the pirates themselves never achieved. As an act of rebellion, piracy lay at the very heart of colonial law and civil order. Thus when evaluating the role of piracy in colonial legal structures, the first and most salient question must be: did local administrators themselves regard it as illegal?

The answer is complex, which perhaps explains why it has never been fully explored. English law neither defined piracy in absolute terms nor firmly established courts of jurisdiction. What was unclear in England was chaotic in the colonies. Moreover, until early in the seventeenth century the Crown still granted privateer commissions as a matter of course: a practice which colonial administrators eagerly pursued and ardently defended. Add to this the extraordinary latitude given governors to adapt and implement English law to individual circumstances, and ultimately we find a confused situation where piracy, as a crime and as a practice, was very much in the eye of the beholder.

This is not to suggest that governors did not take advantage of the legal obscurity. They did. But to comprehend fully the role of piracy in legal relations between Crown and colony, it is crucial to inquire why they did, what motives compelled them, and what reasons they offered in justification to Whitehall.

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That is the purpose of this article. In fact, as we shall see, divisions in the law at home and abroad helped define relations between England and her Atlantic colonies for decades. While legal disputes over piracy jurisdiction have been documented, scholars typically place the ongoing feud between civil and common law courts in a separate sphere from later events in the colonies. Helen Crump concludes the first chapter of her study of colonial admiralty jurisdiction with the anticipatory comment, “Having proved their use in England, the vice-admiralty courts...were ready for transplantation across the Atlantic.” The presumption is that this was a smooth process. In fact it was anything but. Rather than the orderly transfer Crump implies, the Atlantic colonies inherited a murky and contradictory set of rules which colonial governors adapted at will, to their own and their colonies’ advantage.

Historians have only relatively recently come to the task of examining the importance of crime in the formation of states. Since the groundbreaking work done by Charles Tilly, a small but growing cadre of scholars have begun considering how the very act of creating law, of classifying certain acts legal and illegal, leaves behind an historical footprint of the “mind” of the state itself. This idea first found expression in Michel Foucault’s suggestion that states have no intrinsic essence at all, but rather are merely a collection of mutable practices reflecting changes in power relations. Saskia Sassen recently applied Foucault’s thesis to state-building in the early modern period, the

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6 Helen Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London: Longmans’s, 1931), 23.
“sorting out” process whereby states erect formal mechanisms to legitimate some claims and invalidate others. She concludes, “Crime has no ontological reality. Criminalization is one of the many ways of constructing social reality.”\(^{10}\)

In this view, criminals are as important within the social order as lawmakers, for their status defines the state itself. Historian Thomas Gallant comments, “Bandits helped make states, and the state made bandits.”\(^{11}\) Gallant cites the example of the privateers, whom the English state employed for several centuries before abruptly outlawing them in the seventeenth. Until that time, privateers were “military entrepreneurs,” assisting the state through sanctioned violence. Yet once the English state gained control over the means of coercion, it renounced the military entrepreneurs and outlawed them. Thus, in a very real way, the creation of piracy law in the early modern period was an expression of state-formation.\(^{12}\)

But what happens when this exercise is applied to the colonies? That is the question that this article will explore in two examples, Jamaica under Governor Thomas Modyford (1666-1670) and New York under Benjamin Fletcher (1691-1698). The sequence of dates is significant. Just as Governor Modyford adopted, adapted and profited from English precedent, Governor Fletcher did the same from Modyford’s experience. Hence we might liken the crime of piracy to a radioactive particle released in


the colonial body politic: how it traveled, what it illuminated, and what forms it took all convey a great deal about the organism as a whole.

I. The Development of Piracy Law and Jurisdiction in England

To understand the dichotomy between the laws against piracy as expressed by the English government and its application in the colonial context, we must first consider the nature of English anti-piracy law in the early modern period.

This inquiry breaks down into two parts. The first is definition. How did England define crimes of piracy? What legal status did they give the accused? What were the elements of the crime and, most importantly, what role did the presence or absence of war play in determining when a crime had been committed? The second is jurisdiction. Which courts could try piracy cases? Did the determination of jurisdiction have any bearing on how the crime would be perceived? It is crucial to raise these questions now, as we will have to make a similar enquiry when we turn to look at piracy trials and jurisdiction in the colonies.

Sir Edward Coke, in his Institutes, cites a Roman precept coined by Marcus Tullius Cicero at the height of the Republic. Pirates, Coke writes, are hostis humani generi, “enemies of the human race.”13 This was excerpted from Cicero’s commentary in De Legibus to the effect that “pirata non est ex perdullium numero definitus, sed communis hostis omnium.”14 Piracy was more than the aggregate sum of its separate offenses; Cicero segregated it from other similar crimes—looting, murder, and the like—

on the basis of its perceived threat not merely to the property or persons in question, but
the state as a whole. The threat of piracy came from its implied challenge to the laws and
trade of the state: pirates removed themselves from the state’s jurisdiction, formed extra-
territorial enclaves, and waged private war for pecuniary ends. Hence one could not
speak of them merely as ordinary robbers, as the locus of that theft (beyond the state’s
borders) transformed it.

The best articulation of the English interpretation of pirates as *hostis humani
generi* appears in Blackstone’s *Commentaries on the Laws of England*. Writing in the
mid-eighteenth century, a time when the menace of piracy had waned to little more than
nuisance, Blackstone credits Coke for being among the first to re-articulate the Roman
precept and goes on to offer a concise definition in the English context: “As, therefore, he
[the pirate] has renounced all the benefits of society and government, and has reduced
himself afresh to the savage state of nature by declaring war against all mankind, all
mankind must declare war against him.”15

Other aspects of the definition of piracy devolved from this premise. Blackstone
draws a sharp distinction between the elements of the crime under common law (law
articulated in case precedent) and statute law (law articulated by Parliament). The former
is defined shortly as “those acts of robbery and depredation on the high seas, which, if
committed upon land, would have amounted to felony there,”16 while the latter may
include all manner of non-piratical offenses, subject to the whim of the monarch or

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16 Ibid., 67. This was also the definition of piracy articulated by Parliament in 28 Hen. VIII c.15. It does
not mean, however, that piracy was a felony. As will be discussed later, piratical acts were treated “as if
they were” felonies by the Common law courts, but piracy itself was a Civil law crime.
Parliament, including “running away with any ship, boat, ordnance, ammunition or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any persons assaulting the commander of a vessel to hinder him from fighting in defense of his ship, or confining him, or making…a revolt on board.”\textsuperscript{17}

Were pirates enemies of the human race, or ordinary thieves? Conflicts over definition fueled cognate conflicts over jurisdiction. If pirates were ordinary criminals, in the same class as highway robbers, then they should be tried by jury under the common law. But if they were \textit{hostis humani generis}, their acts became of form of “petit treason,”\textsuperscript{18} removing them from common to civil law, under the jurisdiction of the Admiralty. The recognition that acts of piracy transcended the common law devolved principally from the transnational aspects of the crime. When English pirates attacked foreign vessels, it threatened the peace between those countries. Consequently, as early as 1289, Edward I established a commission to inquire into “trespasses” committed by English vessels against the King of France. The commission found that an equal number of English vessels had been plundered by the French, among others.\textsuperscript{19} This led to the first “letters of marque” (\textit{licentia marcandi}) granted by the Crown to English sailors to reclaim stolen property at sea from foreign pirates. These commissions also recognized the newly created post of the Lord Admiral as the proper venue for declaring and disposing of captured goods.\textsuperscript{20} Thus began the long and immensely profitable business of state-sanctioned piracy, or privateering, that reached its apex in the Spanish wars of Queen Elizabeth I.

\textsuperscript{17} Ib\textit{id.}, 67.
\textsuperscript{18} Sir Matthew Hale, \textit{Pleas of the Crown} (London: Richard Tonson, 1678), 77. Hale writes that piracy was a species of “petit treason, if done by an English subject.” A similar argument was made by Coke, which is discussed later.
Edward I’s more immediate intention was to limit legal remedies and prevent wars breaking out over petty mercantile squabbles: by granting Commissions, the Crown established the reverse prerogative that any English sailor engaging in piracy without such commission transgressed against the Admiralty. Thereafter piracy would not be construed as an act of war, but a crime against the Crown. And since that crime was directed against the King’s person (though his subordinate, the Lord Admiral) it was properly understood as petit treason. The actual elements of the crime—specifically, theft at sea—were secondary to the outrage of violating the King’s trust by sailing without commission.

Obscurity in the law left the Admiralty and the common law courts squabbling over jurisdiction. Both had a viable claim. Common law juries were notoriously reluctant to convict pirates. Ordinary folk, particularly in coastal communities, often identified with the accused, either through social or commercial ties. Edward III became so incensed at the rate of acquittal that in 1352 he attempted to wrest jurisdiction of piracy from the common law courts by declaring piracy a petit treason triable by civil law under the Statute of Treasons, 25 Edw. III, statue 5, c.2. Edward III’s efforts led to a revitalization of the claim for Admiralty prerogative, and ultimately to the dissolution of all common law piracy jurisdiction. In 1361, for example, a prior order to try a piracy case in a common law court was revoked and replaced by an order from the Crown for “our Admirals” to try the pirates “according to maritime law.” As legal historian Alfred Rubin writes, piracy law was “distinguished from the common law of England by the very fact of royal promulgation of a Code; the power of interpretation was given to

21 Ibid., 47.
22 Hale, Pleas of the Crown, 77.
23 Marsden, Documents, 88.
Admirals as beneficiaries of royal patronage rather than common law judges with their own traditions of independence.”

Yet until the sixteenth century there were no permanent tribunals under Admiralty jurisdiction, but rather ad hoc affairs convened by commission from the King. Meanwhile the problem of piracy was becoming increasingly acute. It was not that the Crown lacked the will or inclination to try pirates, but rather that the civil law lacked the mechanisms of the common law for dealing with “ordinary” crime. Predicated on the presumption that pirates were traitors, it required that “they must plainly confess their offenses (which they will never do without torture or pains) or else their offenses be so plainly and directly proved by witnesses indifferent, such as saw their offenses committed, which cannot be gotten but by chance at a few times…”

This quote, taken from the preamble to the statute of 27 Hen. VIII c.4 (1535), provided the justification for wresting piracy jurisdiction from the Admiralty and giving it back to the common law courts. Henceforth, piracy at sea would be treated the same as a felony committed upon land. This was accomplished by devaluing the term “piracy” and replacing it with a list of offenses committed at sea. A second statute passed one year later, 28 Hen. VIII c.15 (1536), made a telling alteration. The preamble to the first statute referred to “pirates, thieves, robbers, and murderers.” The second dropped the term “pirate” altogether, replacing it with “traitors” and “confederators” (an early term for mutineers). Piracy was a loaded word, carrying with it the concept of hostis humani generi and the weight of customary international law. Parliament clearly wanted to avoid the complexities of multinational transgressions at sea, which were more easily

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26 28 Hen. VIII c.15 (1536) in ibid., 441-443.
understood as an Admiralty prerogative, and focus instead on the elements of the crime—the \textit{actus reus}—which were synonymous with the common law felonies of robbery and homicide.

Convoluted law was compounded by convoluted practice. As mentioned earlier, sovereigns since Edward I had granted privateering commissions, often called letters of marque, to private individuals in time of war. Queen Elizabeth I extended this practice into peacetime (albeit a very tense peace) by commissioning such men as Francis Drake and Walter Raleigh, among others, to harass Spanish trade and Spanish colonies in the later decades of the sixteenth century. Her reasons were complex and open to interpretation, but the result was fortuitous: the Spanish king became so incensed that he rushed his nation into war with England before its Armada was fully prepared. How much of this could have been anticipated is a matter of dispute; on its terms, privateering nevertheless vastly enriched the English government and trained a future cadre of captains at a time when the Royal Navy had neither the ships nor the men to keep pace.

Peacetime commissions were problematic, however. Privateers in time of war were regarded as auxiliaries to the navy, but how to justify such belligerent actions in peacetime? This tautology was apparent even to the privateers themselves, who regarded the end of the Spanish wars as inconvenient but nevertheless continued to attack Spanish trade. Tasked with reining them in, James I failed signally. In 1604 he issued “A Proclamation concerning Warlike ships at Sea” which summarily recalled all privateers and cancelled their commissions.\footnote{Larkin, \textit{Stuart Royal Proclamations}, vol. 1. See also Clarence Brigham, ed. “British Royal Proclamations Relating to America, 1603-1783,” \textit{Transactions of the American Antiquarian Society} (Worcester: The American Antiquarian Society, 1911).} In a single instant over a third of England’s mariners were cut loose, legally and economically.
Yet the response was not what James had wished. Indeed his antipiracy policies, while laudable in concept, were so disastrous in practice as to constitute a serious rebuke to Crown authority. The 1604 Proclamation named only three pirates currently at sea and branded them for capture. By 1606 its successor listed twenty different ships and their captains, as well as “diverse other complices and associates.” Among these were the same three pirates—Henry Radcliffe, William Smith and John Banister—that the earlier proclamation had cited. Clearly James, like Edward III before him, had overreached: the punitive mechanisms of the state could not keep pace with Crown policy.

By the second decade of the seventeenth century a fissure had developed between Crown and Parliament on the proper jurisdiction for piracy. As it would throughout the following century, the Crown saw piracy as a means of extending its bureaucracy: by 1610, the Admiralty handled all matters of prize, commission, letters of marque and reprisal. It also held commission to capture and prosecute “pirates,” though the 1535 and 1536 statutes had gutted that term of all practical meaning. All “felonies” at sea committed by Englishmen were remitted to the common law courts, and even those who breached Admiralty commissions, or sailed without them, were beyond its purview. Sir Edward Coke, Lord Chief Justice of England, presided over a case in 1615 that sought to settle the issue. In Palachie’s Case, the defendant was a Moroccan subject who had seized goods at sea belonging to the King of Spain, with whom Morocco was at war. The Spanish prince exercised a form of diversity jurisdiction, claiming that as “a friend of the

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28 Ibid., n.67, 146.
King of England” he could remit the defendant for trial in England under 28 Hen. VIII c.15.30

Coke disagreed, and took the opportunity to define the scope of the 1536 act.31 An attack on England’s “friends” was not the same as an attack on England herself. Moreover, even if it had been an English ship attacked, it would still not be piracy if England and Spain were at war. “What is charged here as piracy is not piracy,” he concluded, “nor would it even be a felony had it been committed on land…because if the taking was by an enemy it was not robbery but lawful capture.” The case revealed the limitations of the common law, and could be interpreted as a test of the court’s prerogative; clearly a dispute involving multinational litigants (one of whom a King) and issues of war and statecraft was beyond the scope of “ordinary” felony, and thus logically beyond the purview of the common law. Yet by rendering judgment, Coke implicitly recognized the prerogative of the common law court to try it. Moreover, he avoided the issue by declaring that no felony had occurred: had there been one, it was apparent from his decision that the common law would have purview.

Ultimately a balance was struck between the two competing jurisdictions, allowing for piracy cases to be tried in England under Admiralty law but before Common law juries at the Old Bailey. Such was the case, for example, in the trial of Henry Every’s crew in 1696. Yet while tensions between common and civil law eventually cooled, the penumbra of confusion created by their ongoing feud provided early colonial governors with the opportunity to capitalize upon it and interpret their own jurisdiction over piracy cases (and indeed their own definitions of piracy itself) as they pleased.

30 Palachie’s Case, cited as 1 Rolle 175 (1615), King’s Bench, Easter Term. Also cited as King v. March, in George Sharswood, Reports of Cases Argued and Determined in the English Courts of Common law (Philadelphia: T.W. Johnson, 1872), 492.
II. Confusion and Opportunity: Piracy and Admiralty Jurisdiction in Jamaica

In the early decades of the seventeenth century, pirate hunting grounds shifted from the English Channel and its environs to the far more profitable Caribbean, a direct consequence of Spanish gold and silver mining in the Americas. Thus the vagaries of English piracy law were relocated from the administrative heart of the nation, Whitehall, to its hinterland. Now a very different sort of administrator would be forced to grapple with piracy: not lawyers or kings, but governors.

The inherent difficulties in such a move were compounded by the unique circumstances of colonial governance itself. An Atlantic governor had to contend first with the ever-present possibility of attack, and secondly with the myriad social, commercial and political tensions within the colony and between the colony and its neighbors. Either factor could induce governors to abandon or subvert some legal norms; the granting of dubious privateering commissions evidences both. Such commissions reflected an awareness of ongoing violence, a willingness to capitalize on it, a recognition of commercial realities in the colonies, and an overall resignation to the fact that the governor was powerless to alter any of these circumstances. Jack Greene describes a relationship based on “negotiated authority” between Crown and colony, wherein the Crown implicitly acknowledged the prerogative of colonies to adapt the law to individual circumstances.32

This latitude was not static, and between the middle and end of the seventeenth century a concerted effort was made at Whitehall to take a more active role in ensuring the enforcement of English law in the colonies. In the formative years, however, the

32 Greene, Negotiated Authorities, 1-23.
Crown lacked both the will and the ability to oversee its colonies; not until near the end of the century would a professional bureaucracy be established for colonial matters. Until that time governors were de facto potentates, tasked with maintaining order, encouraging trade and settlement, keeping the peace with colonial neighbors and—most importantly—safeguarding their colony from attack. The success of the colony lay in their hands. The Lords of Trade understood the enormity of this task, and vested these men with an enormous amount of personal prerogative. As late as 1746, the Lords of the Admiralty still maintained that they could not interfere with the depredations by colonial "privateers in America and the West Indies," as the governors "alone have power to curb [their] insolvencies."34

This prerogative rested on a recognition of the Crown’s limitations and of the existence of circumstances in the colonies that often mooted its law and counsel. Colonies, as Eliga Gould has written, were “beyond the pale” of the law, distant outposts where wars and skirmishes often continued long after their conclusion on the European continent.35

The perception of perpetual violence not only arose from external threats, but from the manner of colonization itself.36 In most territories in the Atlantic World, English colonization displaced native or pre-existing populations.37 In Jamaica, the English obtained the colony from its Spanish occupants by conquest in 1655, fostering an enmity

34 Quoted in Greene, *Authority*, 481.
35 “Theoretically, the law of nations was universal... In practice, the international customs and conventions of Europe often possessed less authority in the wider Atlantic....As developed during the sixteenth and early seventeenth centuries, the concept of autonomous international spheres made it possible for Europeans to wage war in the Atlantic, Indian, and Pacific Oceans, without such confrontations disrupting the peace (or "amity") of Europe.” Gould, “Zones of Law,” 481. See also Steele, *English Atlantic*, especially the chapter “Sending Peace and War beyond the Line, 1667-1739,” 189-209.
37 Ibid., 483.
between the two that made the threat of reconquest a constant worry for English administrators.\textsuperscript{38}

It is fitting to open this examination of colonial piracy with Jamaica, not only because it provided the earliest and most famous precedent—the buccaneers—but also because the political circumstances surrounding their piracies left a lasting precedent as well.\textsuperscript{39}

Politics and commerce are invariably intertwined in the history of colonial piracy, and never more so than in Jamaica. The “business” of privateering in Jamaica began as a military exercise, developing later into a commercial practice. As a former Spanish colony, Jamaica’s strategic position placed it in the epicenter of one of the most populous trade routes on earth, a central hub for sugar cane, molasses, tobacco, indigo, cotton, rum, slaves and, crucially, Spanish gold. Jamaica not only lay along the “golden road” between Spanish America and Spain, it also occupied a geographic location in the epicenter of the

\textsuperscript{38} A complete contemporary history of this undertaking appears in Robert Venables, \textit{Narrative of General Venables}, Ed. C.H. Firth (Camden: Camden Society Press, 1924).

\textsuperscript{39} Jamaica’s role as the cradle of colonial privateering has long been recognized. Early in the last century, Helen Crump devoted a chapter of her seminal work on colonial admiralty jurisdiction to “prize and piracy in Jamaica.” Crump was the first to identify the phenomenon that we will examine here: Jamaican governors assuming admiralty jurisdiction both to augment their own positions and to help preserve and foster privateering in the colony. “Indeed,” she writes, “prize and piracy are largely responsible for the rapid growth of admiralty jurisdiction in the colonies.” Yet even in this context Jamaica was exceptional. The privateering business became so entrenched within colonial society and commerce, Crump concludes, that “the admiralty court in Jamaica acquired, in the period following the Restoration, a wider jurisdiction over prize and piracy than was the custom in any English vice-admiralty court.” Crump, \textit{Admiralty Jurisdiction}, 94-115.  

More recently, other scholars have examined the growth of piracy and illegal trade in the colony, independent of governmental sponsorship. Here the work of Nuala Zahedieh is of particular note. Zahedieh examined the role of colonial merchants in fostering Jamaican piracy, and was among the first scholars (aside from Cyrus Karraker) to identify the close links between illegal trade and the rapid commercial growth of colonies. Yet while Zahedieh’s work is crucial (it may have inspired similar commercial studies of New York and Pennsylvania), by giving primacy to the commercial aspects of piracy it left largely unexplored the tempting avenues of research first identified by Crump: the equally crucial role of the Jamaican government. Nuala Zahedieh, “Trade, Plunder and Economic Development in Early English Jamaica,” \textit{Economic History Review} 39, 2 (1986), 205-222; … “A Frugal, Providential and Hopeful Trade: Privateering in Jamaica 1655-89,” \textit{Journal of Imperial and Commonwealth History} 18 (1990), 345-367; … “The Merchants of Port Royal, Jamaica, and the Spanish Contraband Trade, 1655-1692,” \textit{William & Mary Quarterly} 43, 3 (1986), 570-593.
Spanish Caribbean, nearby to Hispaniola and Cuba, where Spanish gold was held in fortified vaults for eventual transportation to Europe.\footnote{See Francisco Morales Padrone, \textit{Spanish Jamaica} (Kingston: Ian Randle, 2003).}

The easy availability of captured booty was made doubly tempting for Jamaican colonists by the Navigation Act of 1651. As a measure to bolster England’s trade with her colonial outposts, these authorized the creation of a body of commissioners at Whitehall to deal exclusively with the colonies: the Lords of Trade and Plantations. Secondly, Parliament resolved to assert governmental control over the colonies by limiting colonial trade to English vessels from English ports. This monopoly would (it was believed) foster English trade while at the same time draw the colonies closer into the fold.\footnote{Ibid., 92-94.} In fact, it put a stranglehold on colonial commerce and drove many colonists, including those in Jamaica, to pursue illegal avenues to obtain goods and currency.

Proximity to the so-called Spanish “golden road” predestined Jamaica’s rise to prominence in the mid-seventeenth century. Yet it was a double-edged sword. The colony’s location made it ideal to launch raids against the Spanish gold ships that passed to windward, as well as bedevil nearby Spanish colonies. But Jamaica was equally vulnerable to such raids itself.\footnote{Zahedieh, “Trade, Plunder.” 208.} In the mid-seventeenth century it had no navy to speak of, and its fortifications were sparse. Consequently Jamaican piracy grew out of these twin circumstances: the ready availability of Spanish gold, and the real threat of Spanish reconquest.\footnote{James Robertson, \textit{Gone is the Ancient Glory: Spanish Town, Jamaica} (Kingston: Ian Randle, 2005) 6-9.} Jamaica became the first true pirate colony, a paradigm for similar communities in New Providence, South Carolina and Madagascar, among others, and a precedent for pirate sponsorship throughout the Atlantic World. Also, and not coincidentally, Jamaica became a test case for the extension of admiralty jurisdiction to
the condemnation of prizes and the trial of captured pirates under admiralty law.\textsuperscript{44} Thus, both from a legal and an historical standpoint, Jamaica is a crucial precedent for later consideration of other Atlantic colonies. The behavior of its governors, their willingness to balance profit with possible retribution from the Crown, and their close relations with mariners like Christopher Myngs and Henry Morgan: all would find cognate examples in North America and elsewhere in the Caribbean.

The first record of Jamaican privateering occurred only a few years after the passage of the first Navigation Act. In 1657 Governor D’Oyley convened the first prize court for captured Spanish goods, appearing in the state papers as a request from Governor D’Oyley to the Lords of Trade to convene such proceedings on an ad hoc basis.\textsuperscript{45} The request went unanswered. Lacking Admiralty jurisdiction, D’Oyley (who, as a lawyer trained at the Inns of Court, knew something about the law) determined his prerogative as governor enabled him to proceed without it. The prize court assumed permanent status, and D’Oyley began granting privateering commissions as a matter of course.\textsuperscript{46}

By 1660, the year of the Restoration, the granting of privateering commissions had become one of D’Oyley’s chief duties, averaging between eight to fifteen per year.\textsuperscript{47} If the pirates extended the terms of the commission far beyond breaking point, even plundering English ships on occasion, D’Oyley did his best to conceal their

\textsuperscript{44} Crump, \textit{Admiralty Jurisdiction}, 115.
\textsuperscript{45} \textit{Calendar of State Papers Colonial Series, West Indies Addenda, 1574-1674}, 232.
transgressions. Yet scarcely had this unusual alliance begun when it was put to a severe test. In 1661 Governor D’Oyley received news that a treaty had been reached with Spain; the war was over. He dispatched a proclamation calling all privateering vessels back to Port Royal “to await further orders.” The proclamation was also posted in the marketplace, to the enormous consternation of a populace that had grown accustomed to contraband luxuries sold at auction off pirate vessels. D’Oyley looked on with dismay as, in his own words, “the order for cessation sufficiently enraged the populacy, who live solely upon spoil and depredations.” D’Oyley’s own position as governor also came to an abrupt close. A Parliamentarian, he could not have expected to remain long in power, and indeed by the summer of 1662 was replaced by Lord Windsor, a royalist who had fought for the king.

Despite the peace, Lord Windsor continued to grant privateering commissions and convene prize courts on the basis of “imminent threat” from Spanish invasion. Though much of the proceedings are lost, an action for the condemnation and sale of seven vessels and their cargoes survives in the High Court of Admiralty papers at the National Archives. It is remarkable for the conspicuous atmosphere of due process and legality, despite the fact that neither the commission nor the prize court had been recognized by the Crown.

The fact that D’Oyley and Windsor continued to grant privateering commissions against the Spanish, long after the conclusion of the Spanish wars, would seem to give

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48 One example of this can be found in the Calendar of State Papers, 1574-1660, 485. D’Oyley enclosed a letter to the Commissioners of the Admiralty assuring them that all the supposed pirates were in fact privateers acting on his express commission, and not exceeding it.
49 C.S.P. 1661-8, 17.
50 C.S.P 1661-8, 61.
51 Crump, 105.
credence to Eliga Gould’s argument for a “zone of violence” in the Caribbean. Yet it is wrong to assume that the English Crown was unmindful of or indifferent to these commissions. On the contrary, Charles II was infuriated by the news, as it posed a direct challenge to a cornerstone of his policy: continued peace with Spain. Upon learning of a series of raids launched against Spanish colonies under Captain Myngs, Charles drafted a letter to Governor Lyttleton (who had succeeded Windsor as governor) demanding that he obey the King’s law and suppress these raids at once. Lyttleton replied that the privateers were “not to be taken off by the King’s instructions, so [he, Lyttleton] has not thought it his duty to call them in.” This resulted in Lyttleton’s removal and replacement by a man chosen by Charles II himself, Thomas Modyford.

The change in governors did not result in a change in practice, which is a telling statement on the primacy which privateering had assumed in Jamaican society. Governor Modyford’s relationship with the buccaneer Henry Morgan is well documented, and does not need to be reiterated here in great detail. Suffice it that, despite explicit instructions from the Lords of Trade, Modyford continued the practice of his predecessors in granting privateering commissions. For the first time, however, a note of duplicity enters the correspondence. To the Lords, Modyford wrote, “upon my gentleness towards them, the privateers come in apace and cheerfully offer life and fortune for His Majesty’s service.” Yet in a private letter to his deputy, William Bennett, he acknowledged that little had been done to curtail the privateers. In justifying his lassitude, Modyford wrote that he “thought it more prudent to do by degrees and moderation what he had [formerly] resolved to execute suddenly and severely, hoping to gain them [the pirates] off more

53 C.S.P 1661-8. 443 of 23 April 1663.
54 Ibid., 566 of 15 October 1663.
55 For a complete record of Morgan’s relationship with Modyford, see A.P. Thornton, “The Modyfords and Morgan,” Jamaican Historical Review 2 (1952), 48-61.
56 Ibid., 946 of 12 April, 1665.
safely by fair means and reduce them to planting, to accomplish which he must somewhat
dispense with the strictness of his instructions.”57

The obfuscation hinted at in this exchange became increasingly marked as time went on. Previously, the Jamaican governors justified raids on Spanish soil by claiming the real danger to the colony of reconquest. Yet by 1668 that danger had passed. Consequently, the governor’s relationship with the Crown moved into a new stage, that of outright deception. In February 1668 Governor Modyford commissioned the buccaneer Henry Morgan for an assault on Portobello. Morgan, Modyford instructed him, would “draw together the English privateers and take prisoners of the Spanish nation, whereby he might inform [the government of Jamaica] of the intentions of that enemy to invade Jamaica.”58 Apprehending the hint conveyed in the idea of “the intentions of that enemy”, Morgan reported back from Porto Principe that a massive Spanish fleet was expected to rendezvous at Portobello and head on to Havana, where it would join a second fleet and turn again for an all-out assault on Jamaica.59

There has never been any evidence to support the existence of this phantom invading fleet, in either colonial or Spanish record. Morgan had deftly provided his patron with exactly the excuse he needed to justify the raid. Its success, and the silence from Whitehall thereafter, emboldened Governor Modyford still further. He began to prepare for an assault against Panama, the epicenter of Spanish trade, the seat of Spanish colonial government, and the depot for all the gold and silver mined from Peru. Modyford began bombarding the Lords of Trade with letters complaining of supposed

57 C.S.P. 1661-8,767 of 30 June, 1664..
58 C.S.P. 1661-8, 1838.
59 Ibid., 1838.
depredations against English trade. He entreated them to lift their ban on privateering commissions as a matter of necessity, carefully omitting the fact that he had already acknowledged granting such commissions without pause for several years since the peace. But the response from Lord Arlington was chilling: “His Majesty’s pleasure is that in what state soever the privateers are at the receipt of this letter you will keep them so till we have a final answer from Spain, with this condition…he obliges them to forbear all hostilities on land.”

Yet once again the Governor of Jamaica manufactured a spurious threat to the colony, and used it to justify privateering retaliation. In June, 1670, the Spanish launched a small and scattered attack on the north coast of the island. Modyford portrayed it as an all-out invasion. He summoned Morgan and made him “commander in chief of all the ships fitted or to be fitted for the defense of this island.” Morgan was further ordered to “use his best endeavors to surprise, take, sink, disperse or destroy the enemy’s vessels, and in case he finds it feasible, to land and attack St. Jago or any other place.” Then the two began to make plans to invade Panama.

Morgan’s raid on Panama, conducted over several months and culminating in a pitched battle which eventually resulted in the destruction of the city, netted him and Jamaica more than any other piratical capture in history. Though Morgan’s account put the actual figure of seized plunder at a very low £30,000, there is strong evidence to

60 C.S.P Colonial Series 1669-74, 162, 172, 206.
61 C.S.P. 1669-74, 194.
62 Ibid., 211.
63 Ibid., 211.
suggest that the actual figure was closer to £750,000 or more.\textsuperscript{65} The government got its share, and Modyford settled down to the pleasurable task of informing His Majesty’s government that the raid which he had done his best to prevent nevertheless netted the Crown a considerable sum of money.\textsuperscript{66}

The raid on Panama presented Charles II with a serious crisis in his relations with Spain. “It is impossible for me to describe the effect of this news upon Madrid,” the English Ambassador informed him.\textsuperscript{67} But the sovereign’s options were limited. Once again, as he had done with Lyttelton, Charles removed Modyford and replaced him. This time he went further. “Whereas Sir Thomas Modyford, late governor of Jamaica, hath contrary to the King’s express commands made many depredations and hostilities against the subjects of His Majesty’s good brother, the King of Spain,” his replacement, Thomas Lynch, was instructed that “as soon as he [Lynch] has taken possession of that government and the fortress so as not to apprehend any ill consequences thereupon, he [is to] cause the person of Sir Thomas Modyford to be made prisoner and sent home under a strong guard.”\textsuperscript{68}

The colony of Jamaica presents us with the earliest and most crucial precedent in the history of privateering and colonial policy, with aspects that surface repeatedly throughout the next half-century. These can be divided into two parts: relations with the Crown, and relations within the colony itself.

Of the former, we have seen an evolution from piracy as an act of military necessity to one of economic opportunity. Had piracy in 1671 been of the same character as it was in 1651, it would still have posed a serious challenge to England’s amicable

\textsuperscript{65} See, generally, Earle, \textit{Sack of Panama}.
\textsuperscript{66} \textit{C.S.P. Colonial Series 1671}, n.484, 534.
\textsuperscript{67} State Papers of Spain, v. 58, f.156.
\textsuperscript{68} C.S.P. Colonial Series 1669-74, 405.
relations with Spain. Yet it was actually worse: the frequency and scope of raids against the Spanish increased steadily throughout the mid-seventeenth century, culminating with Morgan’s raid on Panama in 1671. Correspondingly, Jamaican administrators relied on increasingly thin reeds to justify privateering, until the “military necessity” argument became nothing but fantasy. By the time of Modyford’s removal, the legal argument for privateering was bogus.

Yet despite the Crown’s negative response, the Jamaica precedent was not remembered as a warning to colonial governors not to overreach themselves, but rather as an inspiration for generations of mariners to match or exceed Morgan’s success. While Modyford was disgraced, Morgan’s star ascended: he not only survived a recall to England to face charges, but was eventually rehabilitated and named deputy governor of the colony. The granting of privateering commissions went on unchecked, not only in Jamaica but throughout the Atlantic world. Governors would cite the same military necessities raised by D’Oyley, Lyttelton, Winsor and Modyford, and couch their commissions in the same bellicose terminology. Similarly, the crises posed for the Crown by such commissions would reappear on an even greater scale at the end of the century, when the victim was not Spain but rather England’s pre-eminent trading partner, the Great Mughal of India.

Of the latter, the creation of prize courts under Admiralty jurisdiction by Governor D’Oyley fashioned a means whereby piratical activities might be legitimized. Governors capitalized on the obscurity of jurisdiction for piracy and prize courts in England, extending that jurisdiction *sui generis* in the colony.69 This does not suggest a

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deliberate attempt to defraud the Crown, at least initially. Instead, D'Oyley and others believed they were responding to the reality of circumstances: an ongoing colonial war with Spain. Even after the formal cessation of hostilities, the “zone of violence” in the Caribbean provided both the justification and the pretext for continuing to grant commissions and convene prize courts. Once in place, these courts and the assumed prerogative behind them provided later governors with the argument that the definition and prosecution of piracy was an exclusively colonial matter.

In 1684 the Lords of Trade submitted a request to the King’s Counsel and the Advocate General to clarify the issue of admiralty jurisdiction in the colonies, particularly with regard to piracy trials. The Advocate General responded to the Lords’ chagrin that the statute of 28 Henry VIII did not extend to the colonies; piracy therefore could properly be tried by Admiralty courts according to maritime law. However, it restricted cases before a vice-admiral to lesser offenses, not capital crimes. The net effect was to compel colonial administrations to remit captured pirates to England, a circumstance of considerable importance later on. This remained unchanged until 1698, when the proliferation of piracy and the unwillingness of colonial governors to hand them over for trial compelled William III to create special Admiralty courts in the colonies empowered to try capital crimes of piracy.

Nothing in the Advocate General’s opinion was specifically said regarding the condemnation of prizes, but as nothing was said against it, the inference was clear. After thirty years of illegal existence, the Admiralty courts in Jamaica finally became

70 C.S.P. Colonial Series 1681-85, 1578. See also Crump, Admiralty Jurisdiction, 113.
71 "The Procedure for Trial of a Pirate," The American Journal for Legal History V.1, 3 (1957), 251.
recognized. It would serve as a model for similar prize courts throughout the Atlantic World.\(^{72}\)

In legal terms, the significance of the early history of Jamaica lies in the evolution of a crime. Privateering began as a legitimate means of warfare, but when war no longer justified it, colonial administrators resorted to increasingly elaborate fictions to continue granting commissions and safeguard their jurisdictional prerogatives. This resulted in two very different perceptions of piracy. Governors believed that, under their assumed admiralty prerogatives, it was they who had the power to define the “crime” of piracy in their colonies. Practically, this meant that piracy was not defined at all—except as an act of aggression against the colony by foreign nationals.

Yet while the colonies and their governors continued to regard piracy as a legitimate practice within their own legal purview, the Crown’s attitude hardened. No monarch since Elizabeth I had granted privateering commissions, and not since the reign of Charles I had any of the King’s ministers done so on their own. For all practical purposes, England in the latter half of the seventeenth century was out of the privateering business.\(^{73}\) From 1660 onward, its policy on piracy and privateering was consistent: during wartime, commissions could only be granted by governors with the express permission of the Crown (and were limited to defined geographic areas); in peacetime, all commissions were invalid and illegal, amounting to open breaches of the peace.

For the first time, then, we can speak confidently of the “crime” of piracy, at least from the English standpoint. Yet the confusion lay in whether it was within the Crown’s power to define that crime, or whether the prerogative was vested in the colonies. Where,


\(^{73}\) There were, however, sporadic flirtations, as with the cadre of Whig lords (the so-called “junta”) which financed William Kidd’s 1696 expedition under the guise of “pirate hunting.”
ultimately, did admiralty jurisdiction reside? It is tempting to give primacy to the Crown, maintaining that as the source of law, it ultimately held all legal prerogatives unto itself. This, indeed, is the attitude expressed by many historians of the era, most notably I.K. Steele. Yet it does not account for the fact that in many cases admiralty jurisdiction had already been claimed by the colonies, through the creation of prize courts and other legal structures.

If the Crown was the final arbiter of piracy law, it would have to dismantle or otherwise supersede these courts (and the administrators that presided over them), which would undermine the very structure of colonial governance. It was also, as we shall see, well beyond the practical ability of the English state in this era. Ultimately, the Crown could only work with the means available to it: proclamations, increased oversight, and threats. These took two forms: threats to the colony to revoke its charter, and threats to the governor to be removed and replaced. Such were the parameters of a legal debate over piracy that would come to define Crown/colonial relations throughout the remainder of the century.

III. Piracy and Politics in Colonial New York

It can be argued that the English state was successful within its own borders in outlawing piracy, yet when it attempted to extend that criminality across the Atlantic, the colonies rejected it and instead formed their own definition of the crime that was markedly different and diametrically opposed. We have seen in the previous section how early governors in Jamaica capitalized on legal confusion to accrue admiralty jurisdiction

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and continue granting commissions in violation of Crown policy; in New York, however, we find a colony fully aware of the illegality of piracy (from the Crown’s perspective), yet continuing to employ myriad means of condoning and supporting the practice sub rosa. Consequently, under Foucault’s aforementioned thesis of state formation, the practice of piracy in the Atlantic colonies does not merely connote a flouting of Crown law, but the creation of a separate legal power structure.

While this phenomenon could be said to occur in any of the Atlantic colonies, I have chosen to focus on New York for two reasons. First, the city of New York was among the wealthiest centers of commerce in the Atlantic world, the cynosure of pirate brokering for several decades. As such, evidence of such sponsorship is well-documented. Second, it was the epicenter of a political tumult in the aftermath of the Glorious Revolution which, though reflected in the politics of other colonies, defined those of New York for the remainder of the century. Thus the “crime” of piracy was intricately woven within political factions seeking to discredit and destroy one another, often through denunciation. This melding of piracy and politics is illustrated in the career of Governor Benjamin Fletcher. Removed in disgrace by Lord Bellomont in 1697, Fletcher has traditionally been derided as the most corrupt and venal of the English colonial governors. Yet Fletcher’s activities in New York were no different from those of scores of other governors. His notoriety rests in the fact that he incurred the resentment of some very vocal and very powerful political enemies, arising from events that occurred half a world away.

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75 Cyrus Karraker, *Piracy was a Business* (Rindge: Richard Smith, 1953), 69-71; Robert Ritchie writes: “Money in any form warmed Fletcher’s heart; he never refused a present or a bribe, no matter how small.” Ritchie, *Captain Kidd and the War against the Pirates*, 38.
The Glorious Revolution and its aftermath had pivotal consequences in the American colonies. Since 1686 the colonies of Massachusetts, Rhode Island, New Hampshire, Connecticut and New York were combined in a single legislative body, the so-called “Dominion of New England.” Established by James II, its primary purpose was to enforce the Navigation Acts.\(^76\) If the Dominion was despised for that reason, it was doubly so for the man placed at its head: the dictatorial Edmund Andros. Andros, a Londoner, had nothing but contempt for the colonists under his charge. Legislative meetings were curtailed or abolished outright, town meetings limited to one per year, and martial law was established. Most galling of all, Andros was a devoted adherent to the Church of England and a good friend of the papist king, James II.\(^77\)

The sudden departure of Andros in 1689 created a vacuum of power in colonial governance. Local elites—long disenfranchised under the Dominion—moved quickly into key positions. Thus, when news of Andros’ imprisonment in Boston reached them, a small cadre of fervent Protestants in New York led by German-born Colonel Jacob Leisler responded by seizing Fort James at the southern tip of Manhattan Island (the present site of Battery Park) and renaming it Fort William.\(^78\) Leisler announced his intention to hold the fort until the arrival of a governor appointed by King William, most likely with the understanding that, possession being nine-tenths of the law, the appointment would fall to himself.

This brief flurry of independence ended abruptly with the arrival of Major Richard Ingolsby from England in January, 1691. Although the replacement governor,

\(^{76}\) Yet privateering was not entirely absent at this time. See J. LePelley, “The Jacobite Privateers of James II,” *Mariner’s Mirror* 30, 4 (1944), 185-193.


Henry Sloughter, had not yet reached New York, Ingolsby demanded that Leisler hand over the fort and relinquish all vestments of office. Leisler refused and called upon the militia to defend Fort William. So began the brief skirmish known as Leisler’s Rebellion, as Leisler and his followers repelled an attempted invasion by Ingolsby’s two companies of infantry. When Governor Sloughter made his belated appearance two days after the attack, Leisler quickly handed over the fort and publicly resigned. It was not enough, however, and in May, that year both Leisler and his son-in-law were convicted of high treason and executed.

The circumstances of Leisler’s Rebellion seem far removed from the world of the pirates. Yet the events of March 1691 were pivotal, for concealed behind the bare facts of the rebellion were the deep currents of a political, social and religious schism. Leisler and his followers have been termed proto-populists, a loose federation of lower middle-class shopkeepers, tradesmen, sailors, and farmers. They identified themselves as ardent Protestants, Whigs, and fervent supporters of William of Orange. The men they viewed as their political enemies were those who had profited most under Andros: wealthy merchants like Peter Schuyler, William “Tangier” Smith, Nicholas Bayard, and Frederick Phillipse. Though they had few political affiliations, all enjoyed amicable relations with James II’s government and were often called upon to fill vacant posts in local government. With a new king and a primarily Whig government in place, these merchants were uneasy. Their status was further undermined after Leisler’s execution,

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79 In one of the greatest ironies of colonial history, the man dispatched to inform Sloughter of Ingolsby’s raid was none other than Captain William Kidd, who accrued a handsome fee of £150 for aiding the new government in engineering Leisler’s ultimate capture. Robert Ritchie, Captain Kidd and the War Against the Pirates (Cambridge: Harvard University Press, 1986), 35.
81 Reich, 126.
when he became a martyr for disenfranchised Whigs who felt betrayed by the failure of the Crown to fulfill the promises of the Revolution. New York politics in the late seventeenth century rapidly devolved into a bitter feud between the Tory merchant class and the Whig middle class: the former desperate to reestablish relations with a hostile Crown, the latter equally desperate to unseat them and bring about their own Whig revolution in the colonies. The issue of the governor’s seat became a touchstone for all parties.

When Governor Sloughter died after less than one year in office, the Crown appointed a ‘compromise candidate,’ Benjamin Fletcher, a career military officer with no known political affiliations. Desired by neither faction, Fletcher was certain to incur the hostility of all. Perhaps in recognition of the weight of the task confronting him, his commission was exceptionally broad in scope. For the first time in almost a quarter century, a colonial governor was given explicit admiralty jurisdiction:

“AND WEE DO hereby Give and Grant unto you, the said Benjamin Fletcher, full power and authority…to exercise all powers belonging to the place and office of Vice admiral of and in all the seas & coasts about your Government…[and] full power & authority to Constitute and appoint Captains, masters of Shipps, and other Commanders, and to Grant to such Captains…commissions to execute the Law martall.”

Fletcher knew that he could not hope to maintain the colony without the support of the wealthy merchant class. The cabal—Stuyvesant, Phillipse, Bayard, Nicholls and Smith—were invited to take key posts in the Governor’s council and hold lucrative positions in trade and customs. This infuriated the Leislerians and their Whig

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86 Karraker, 71.
sympathizers. By aligning with the wealthy merchants and taking them into his Council, Fletcher not only left himself politically vulnerable, he became part of the commercial network of New York, a network that encompassed any kind of trade: slavery, smuggling and—most particularly--piracy.

The business of piracy had, by the 1690’s, assumed vast dimensions. As the Spanish empire in the New World declined, pirates began seeking new sources of plunder. They found them in a far-flung locale: the waters around the island of Madagascar. Along the route known as the “Golden Road,” stretching from Mocha in the East to the west coast of India, the riches of the Indian and Moslem lords were carried, mostly by the Moslems themselves or through a charter by the East India Company.

The “Red Sea fever”, which would culminate after the Peace of Ryswick between 1697 and 1704, would see literally hundreds of mariners (some professional privateers, many more honest merchants on moonlighting sprees) making the long trek across the Southern Atlantic, around the Cape of Good Hope, and into the fray. William Penn wrote in 1700: “As for Piracy, I must needs say that if Jamaica had not been the Seminary, where pirates have commenced Masters of Art after having practiced upon the Spaniard, and then launched for the Red & Arabian Sea…we [would] never [have] had a spot upon our Garment.”

The “spot” to which Penn referred was the sponsoring of pirates by local merchants in Pennsylvania and New York, among them several members of Governor Fletcher’s council. Commercial relations between council member Frederick Phillipse and the pirate Adam Baldridge (whose 1699 testimony would help bring down the

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90 William Penn to the Lords of Trade, *PRO Colonial Series*, 5/1260/43.
governor) were matched by Fletcher’s own dealings with local pirates, the most notable being Thomas Tew.\footnote{For a complete account of Frederick Phillipse’s relation with the pirate Baldridge, see Jacob Judd, “Frederick Phillipse and the Madagascar Trade,” \textit{William & Mary Quarterly} (1993), 354-359.} While Tew was not the only pirate to receive a dubious commission from Fletcher, his stunningly successful piracies in the Red Sea brought notoriety both to himself and those who had sponsored him. Sailing from New York in 1692, Tew returned with his ship’s hold entirely filled with captured specie. It has been suggested, in fact, that it was Tew’s example that touched off the “Red Sea fever,” inspiring hundreds of other colonial pirates to try their luck on the Moslem trade routes.

Fletcher’s dealings with Tew had not been clandestine. Nor should they have been: Tew was a respected mariner, the son of a prominent Rhode Island merchant, and a close friend of several members of Fletcher’s council. Yet in later years, when Tew’s piracies had become legendary, Fletcher’s political enemies would make much of their brief acquaintance. As early as June, 1695, the former Mayor of New York (and an ardent Whig) Peter Delanoy charged:

\begin{quote}
We have a parcel of pirates in these parts, which people call the Red Sea men, who often get great booties of Arabian gold. His Excellency [Fletcher] gives all due encouragement to these men….One Captain Tew who is gone to the Red Sea upon some errand, was before his departure highly caressed by His Excellency, in a coach and six horses, and presented with a gold watch to engage him to make New York his port at his return. Tew retaliated the kindness with a present of jewels.\footnote{Peter Delanoy to the Lords of Trade, June 13, 1695, \textit{Documents Relative to the Colonial History of the State of New York IV}, 221-224.}
\end{quote}

Delanoy’s accusation was substantively correct: Fletcher did grant Tew a commission, and did entertain the pirate when he returned to New York the following year. But what Delanoy neglected to mention was that Fletcher was neither the first nor the only governor to “caress” Tew. Nearly all accounts of the period make a great deal of Tew’s purchase of a commission from Fletcher for the sum of £300.\footnote{Leamon, “Recall,” 536.} Few, however, note...
that it was actually the third such commission: the first was purchased from Governor Richier of Bermuda and the second from Governor Easton of Rhode Island. Similarly, the amount involved was not exceptional; Governor Easton charged £200 more. Tew’s example thus negates the supposition that Fletcher was in some way anomalous in his favoring of pirates—a crucial point, as we turn to look at the careers of other governors and the political climate of the age. Indeed, Tew’s perambulations from one colony to the next, his collection of a diverse crew (including the Carolina men Want and Ware), his dealings with other pirates like Coates and Every, and his commerce in New York with Frederick Phillipse and in Madagascar with Adam Baldridge—all come together to create a vivid picture of the interconnectedness of piracy in this period, with the pirates acting as moving conduits between governor to governor, tradesman to tradesman, and so forth.

Nevertheless, it was Benjamin Fletcher alone who would suffer for his relations with Tew. His political enemies in New York had found an appropriate scandal, all the more so as it implicated the equally unpopular members of his council, Phillipse and Bayard, who likewise financed Tew. Delanoy’s agitation in London provoked a sympathetic response among the Whigs at Whitehall, who in turn demanded that Fletcher explain his actions. He did so at length. “Tew appeared to me not only a man of courage and activity, ” he wrote the Board in 1698, “but of the greatest sense and remembrance of what he had seen of any seaman that I ever met with. He was also what is called a very pleasant man, so that some times after the day’s labour was done it was divertissement as well as information to me to hear him talk.”

94 Case of Isaac Richier, August 31, 1694, NA CO 37/10. The full account of Richier’s pirate brokering is available at the Bermuda Archives in the Government Administration Building, 30 Parliament St, Hamilton Bermuda.
95 Leamon, 537-538.
96 Fletcher to the Board of Trade, C.S.P. Colonial Series, 1697-98, 587.
Despite this defense, Fletcher had the misfortune of falling within a transfer of power. As the Whig lords gained ascendancy late in the century, agitations against the Tory governor and his merchant cabal became increasingly widespread. Robert Livingston, another New York Whig, traveled to London for the express purpose of spreading word of Fletcher’s “corruption” as far and wide as possible. By 1698 the governor’s political support had evaporated, and he was called to Whitehall to answer charges. His replacement, Lord Bellomont, was a member of the Whig junta. Immediately after taking office, Bellomont wrote to the Board of Trade to prepare the ground for Fletcher’s trial. “Captain Tew has a commission from the Governor of New York to cruise against the French,” he informed them, “Colonel Fletcher told Tew he should not come there [New York] again unless he brought store of money, and it is said that Tew gave him £300 for his commission…This is the third time that Tew has gone out, breaking up for the first time in New England and the second time in New York.”

While Fletcher’s relationship with Tew was not singular, and his downfall was owed to political circumstances, it raises significant questions for historians. We are conditioned to regard the granting of commissions as evidence of corruption, just as we are to regard piracy as a crime. This amounts to giving primacy to the English view of the law in this era. But what of the colonies? Here I would suggest that Governor Fletcher’s case is critical, not because it was anomalous but, conversely, because it was common. From 1692 to 1697 Benjamin Fletcher granted some sixteen known privateering commissions, a number which is slightly higher than the average; Governor Richier of

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97 Lord Bellomont to the Board of Trade, C.S.P. Colonial Series, 1696-1697, 259-60.  
98 Documents Relative to the Colonial History of the State of New York, IV, 221-224, 304, 320-326.
Bermuda is recorded as having granted ten,99 while Governor Cranston of Rhode Island commissioned at least twenty.100

How did these administrators regard piracy? Fletcher’s address to the Pennsylvania Assembly gives us a clue: “There is an act against pyrates and privateers…which was drawn in England and sent with me to be enacted in New York. Pirates and privateers may become good men at last, and the design of that Law is to draw them from their evil courses, and that they may become good subjects & inhabitants amongst us, to help our government.”101

The men that made a profession of piracy came mostly from respected families, whose mercantile careers had made them, if not wealthy, at least solidly middle-class. Their depredations occurred far away, against men and nations for whom an insular New Yorker like Benjamin Fletcher felt contempt. When Fletcher spoke of pirates becoming “good subjects and inhabitants amongst us,” his only obfuscation was the tense; as far as he was concerned, they already were. Time and again, his writings and protestations made this clear: “Captain Tew brought no ship into this port. He came as a stranger and came to my table like other strangers who visit this province. He told me he had a sloop well manned and gave bond to fight the French… whereupon I gave him a commission and instructions accordingly…It may be my misfortune, but not my crime, if they turn pirates. I have heard of none yet that have done so.”102

99 Case of Isaac Richier, 31 August, 1694, Colonial Office Records, PRO 37/10.
101 Governor Fletcher to the Pennsylvania Assembly, May 17, 1693, Minutes of the Provincial Council of Pennsylvania, 406. Clearly Fletcher was not too committed to the passage of the act; shortly thereafter he wrote the assembly: “The Bill which I sent you was originally drawn at Whitehall. I cannot pass it as you have altered it. There are other laws to punish privateers & I am Vice Admiral as well as Governor here. Since you did not pass it in form I shall not insist. I remember some of you said it was too sanguinary; it can do you but little good or harm.”
102 C.S.P. Colonial Series 1697-98, 587.
Fletcher’s words echo those of Foucault, Sassen and Gallant, quoted earlier: when a distinct notion of a “crime” exists, it suggests the existence of an equally distinct legal structure underlying it. What we have seen is the evolution of the crime of piracy from its convoluted roots in the English system into two distinct and opposed forms: illegal practice in England, and legal commercial practice in the colonies. Much of the colonial definition is owed to individual circumstance: the threat of reconquest, the persistence of continental wars “beyond the pale,” the exigencies of the Navigation Acts, the sheer distance between New York and Whitehall. Most tellingly, as Fletcher’s case evidences, is the extraordinary prerogative vested in colonial governors, matched with the near-impossible task of maintaining order in their colonies and keeping them safe from attack.

This meant that a colonial governor’s duty was divided. On the one hand he must be a conduit for English law and policy, translating the will of the Crown into local practice. On the other, he must serve the best interests of his colony, as its chief magistrate. It is likely that those in Whitehall never anticipated that these two duties would ever conflict, yet they did, on the issue of piracy. When the conflict arose, most governors gave preference to their colonies. By so doing, they unwittingly created a separate sphere of law, one which placed itself in direct opposition to that of the Crown.

Conclusion

The legal and political history of England prior to the mid-seventeenth century manufactured the circumstances whereby a relationship between pirates and governors could develop. The law was crippingly divided: first over definition, second over jurisdiction. As a civil law crime tried by common law courts, confusion was inevitable. Customary law provided the seemingly inflexible definition of pirates as *hostis humani*
generi, yet justices repeatedly termed them “sea-robbers,” no different from highwaymen. To confuse matters still further, statute law granted the sovereign unlimited prerogative to extend or contract the meaning of piracy to include (or exclude) almost any dubious act undertaken at sea. Jurisdictional wrangling deepened this divide: common law courts often were reluctant to convict men who were their friends and neighbors (a phenomenon that reappears in the colonial context), while successive kings sought to remove piracy trials from this sympathetic atmosphere and place them instead under Admiralty jurisdiction, an extension of the Crown.

Until the sixteenth century the Crown policy on piracy was decidedly negative: it was ordinary juries, not the sovereign, that countenanced acts of piracy. This altered dramatically in the Elizabethan era, as privateers were regularly commissioned by the Crown to harass Spanish trade and Spanish ports in time of peace. The effect of these commissions was to blur the distinction between pirates and privateers and further undermine the common law definition. It also produced a crucial precedent: though not the first time that a monarch had sponsored piratical acts, the Elizabethans did so openly and notoriously in peacetime, daring the Spanish to respond. The underlying message was that incidents occurring well beyond the purview of the English state could not properly be called acts of war; what went on in the peripheries and on the high seas could be decried, but it was not casus belli. Colonial governors would learn from this example, and defend peacetime commissions on similar grounds.

These governors did not set out to challenge Crown law, nor did they cravenly protect a venal practice to line their own pockets, at least not exclusively. Piracy became enmeshed within the social and legal structure by degree. At the outset, privateering commissions to Jamaican buccaneers were scarcely distinguishable from those granted by
the Crown in the previous century, and fulfilled the veritable goal of guarding the island colony from Spanish attack. Over time the military justification waned and the profits of such expeditions rose. Concurrently, governors that had appropriated admiralty jurisdiction out of necessity (with the tacit, or—more rarely—explicit concurrence of the Crown) were reluctant to relinquish it, and so piracy and admiralty jurisdiction became intertwined: in the prize courts, in privateering commissions, and in the rare trials for piracy.

By the later decades of the century English and colonial views on the “crime” of piracy grew further apart, until it was possible to speak of two distinct legal cultures. This is illustrated by the example of New York, where piracy assumed a central place within the colony’s trade and livelihood. Colonial administrators like Benjamin Fletcher did not create the problem of pirate patronage: they inherited it. So too did they inherit a legal power structure that placed piracy within the realm of legitimate commerce, in direct opposition to the Crown’s attempts to quash it. This conflict between Crown and colonial law became increasingly pointed as the pirates shifted their hunting grounds from the Caribbean to the Red Sea, challenging England’s trade relations with the Great Mughal.

Piracy in the Atlantic World would eventually decline, and the challenges it posed for Crown/colonial relations be subsumed by other tensions: trade, customs duties, taxation without representation. These were the issues that brought the colonies to revolution in 1776, even as piracy—in law and practice—virtually disappeared. Yet the precedent is a crucial one. Not only were the disputes over piracy among the first outright challenges to English rule, a closer examination reveals that the crisis emerged from English law itself. It is a valuable lesson on how empires may contain the seeds of dissolution within themselves.