Of Pirates, Empire, and Terror: An Interview with Lauren Benton and Dan Edelstein

A Search for Sovereignty: Law and Geography in European Empires, 1400–1900
Lauren Benton
Cambridge: Cambridge University Press, 2010

The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution
Dan Edelstein
Chicago: University of Chicago Press, 2009

Editor's note: These important new books, histories of the early modern period, are starkly different in their topics, approaches, and conclusions. Yet they both intersect the topic of piracy in its heyday. Lauren Benton's book offers a striking revisionist interpretation of how pirates understood themselves in relation to the imperial expansion of the age, where Dan Edelstein—in a remarkable new interpretation of the origins of the French Revolutionary Terror—contributes a new reading of how pirates were viewed, especially in sources in early international thought. Both, interestingly, are quite critical of the way pirates are being conceived in contemporary critical theory. *Humanity* interviewed the authors about the intent and implications of their work.

Humanity: Lauren, in your book you describe "pirates as lawyers." What do you mean?

Lauren Benton: Popular culture presents an image of pirates as rogues. Some scholars elaborate on this image, casting pirates as stateless proto-revolutionaries. Both portrayals connect loosely to a prominent definition in international law of pirates as enemies of all mankind.

But it turns out that most maritime violence in the early modern world was carried out by people who defined themselves as loyal subjects of particular sovereigns. Very few pirates ever sailed under the black flag. They were much more likely to carry multiple flags so that, depending on the encounter, they could hoist the one that would offer them the best legal protection. Pirates were sophisticated legal actors. Far from embracing the role of rogues, most sought to present themselves as privateers, that is, as legitimate agents of sanctioned violence.

I present evidence in the book that, even in the midst of open raiding, pirates

worked to develop stories about why what they were doing was lawful. They exchanged and even forged commissions. They coordinated testimony. And they learned about arguments to present if they ever had to appear in prize courts to claim booty or in criminal courts to face charges of piracy. I describe this behavior as one version of a broader phenomenon, "legal posturing," that occurred across legal cultures in imperial history.

H: How does viewing pirates as agents of a legal regime fit with the larger interpretation of the early modern imperial order in your book?
LB: By insisting on their ties to sovereigns, mariners helped to affirm the idea that ships carried law with them into ocean space. I describe ships as "vectors of law." Mariners extended imperial jurisdiction into the oceans as empires claimed control over sea lanes. Instead of lawless spaces, oceans were legal spaces, crisscrossed by thin jurisdictional corridors. I have always liked the way the historian James Muldoon described this legal regime of the seas. He called it a "condominium" and, even better, dubbed it "Christendom without the Pope."

In researching the book, once I began to understand the ways that mariners' legal strategies helped to shape oceans as spaces of law, I started to look for other patterns of association between legal practices and spatial representations in empires. Each chapter of the book explores this relation by pairing a set of legal practices with a geographic category. I analyze rivers and sea lanes as types of imperial corridors, and islands and hill country as examples of imperial enclaves.

The book is ordered chronologically because different geographic categories became salient in different periods. The control of rivers gripped the imagination of Europeans searching for entry points into Atlantic regions and improvising to form new political communities. Islands featured prominently in imperial projects of the late eighteenth century, when global rivalries drew attention to new regions for trade and resources. And mountainous zones, long represented as spheres removed from the influence of imperial conquests, became the focus of debates about the uneven territorial reach of colonial rule in the nineteenth century.

The resulting picture of the legal geography of European empires is very different from the one we imagine if we simply apply the idea of territorial sovereignty. And the book asks how this perception of fragmented imperial territories influenced thinking about international law—but I think I am getting ahead of your questions now.

H: Dan, in your book how do you situate the classic and now famous image of the pirate in a much lesser known long-term history of the category of the "enemy of all" (*hostis humani generis*)?
Dan Edelstein: While the pirate strikes us today as a very singular sort of individual, imbued with his own mythology, early-modern thinkers emphasized his family resemblance with other, equally unsavory types. Hence, Francis Bacon identified the pirate, the savage, the tyrant, and the brigand as different incarnations of one and the same enemy—the enemy of the human race. What united them, according to Bacon, was that they all violated the most sacred laws in existence, namely, the laws of nature.

In reality, Bacon and those who followed him had found secular equivalents for the Ur-model of the *hostis humani generis*, who is none other than the devil himself. Indeed, it is surprising that scholars interested in the history of piracy have missed the fact that this epithet was most commonly associated in Christian theology with the devil, from Tertullian to the *Rituale romanum* (1614). This meaning persisted in vernacular languages well into the nineteenth century.

What this complex genealogy highlights is how arguments concerning one incarnation often carried over to another. Claims by Hugo Grotius and other natural right theorists, for instance, that New World savages could be lawfully exterminated were subsequently cited by authors defending tyrannicide during the English Protectorate.

H: You then go on to claim that this background theme of "outlawry" informs first Louis XVI's trial then the Terror—how so?

DE: One might say that the execution of the king of France in 1793 was the last act of a legal drama that had begun with the European conquest of the New World. Obviously his death was not foreordained, and there were many steps in-between. But jurists reflecting on the colonization of the New World had introduced a loophole in natural right theory: they argued that whoever violated the laws of nature (e.g., the savages) automatically lost their own natural rights. Natural rights, in other words, were not inalienable; you could lose them, just as civic rights.

There was an ironic twist to this argument. Philosophers and jurists who turned natural right into the highest legal authority—often the very writers who feature most prominently in our liberal narratives of reform and progress—were also those most likely to demand the harshest penalties against those who violated it. The eighteenth-century jurist and diplomat Emmerich de Vattel is exemplary: seeking to prevent absolutist rulers from conducting war in a brutal fashion, he argued that opposing armies need no longer obey the laws of nature and of peoples when dealing with such sovereigns.

It was this logic, I suggest, that underpinned the arguments by French revolutionaries both for trying the king, who had been granted constitutional inviolability in 1791, and for extending the death penalty, which many deputies had sought to abolish, to the "outlaws" who defended the tyrant. Very soon, however, the definition of an "outlaw" was stretched to incorporate any "counter-revolutionary"—particularly one's political opponents. The trial of Louis XVI thus served as a legal laboratory for developing the laws of the Terror.

H: Lauren, let me pursue your work about actual pirates for a bit. Dan's arguments lead us to think immediately about how pirates stood for those who, if not put beyond the boundary of the law, were at least considered eligible for the most brutal penalties. Your point, however, is that actual pirates did not themselves seek "outlawry." Could you spell out further, then, the difference between piracy and privateering?

LB: The line between piracy and privateering was thin and fluid. A mariner might be tried as a pirate for conducting sea raids that weren't authorized by his commission. (He might also be tried for failing to bring a captured ship to a prize court, but this

happened more rarely.) The system encouraged mariners to seek commissions and interpret them creatively.

Conditions could change abruptly and edge mariners toward illegality. Peace treaties were the equivalent of privateering unemployment acts. They moved the line with regard to which acts were legal and which were illegal. Mariners sometimes feigned lack of knowledge about treaties so they could continue to engage in raiding that was legal only in a state of war.

We see this toggle switch operating neatly after the 1713 Treaty of Utrecht, which threw droves of Atlantic and Caribbean privateers out of work. The English, interested in protecting trade, offered amnesty to mariners who pledged to end their raiding. Then the crown pressed for the capture and trial of those who didn't come in under the amnesty. The result was a hanging spree around the Atlantic and the marginalization of some privateers-turned-pirates, who sailed in the 1720s under the black flag and provided rich material for public imagination—and for *Pirates of the Caribbean*.

Other sorts of political and economic pressures could convert privateers into pirates. William Kidd's case is one that I use in the book to illustrate how the privateering-piracy distinction shifted around the turn of the eighteenth century. Kidd sailed with a commission authorizing him to hunt for pirates and French merchant ships. In the Indian Ocean, he seized a series of ships, including one leased by someone influential in the Mughal court. When Kidd sailed back into the Atlantic, he found a changed political environment. Some of his high-level backers were out of favor, and investors in the East Indies trade were scrambling to appease the Mughal emperor by trying to contain Indian Ocean piracy. In keeping with the usual defense strategies in such cases, Kidd claimed that the two big ships he had seized in the Indian Ocean were carrying French passes and so were legal captures.

Under different political circumstances, he might have gotten off, but when he couldn't produce the passes at trial, he was convicted and hanged. There is not much doubt that he had intended to raid outside the terms of his commission, but both he and his backers hoped he would be successful in exploiting ambiguity in the maritime legal order. Neither he nor they ever intended him to operate outside it.

H: Obviously, though, both in the popular mind and—if Dan is right!—in some legal texts pirates were presented as threatening outlaws. And your theory of legal posturing suggests that not everyone saw them as "legitimate agents of sanctioned violence," as you put it. How do you account for these features in your book?
LB: I'm glad you asked this question because it gives me a chance to make it clear that I'm not arguing against Dan's findings that a discourse about pirates as *hostis humani generis* was influential within European broader political culture, or that it had a firm basis in European legal tracts. The idea coexisted with the framework I've just described for regulating privateering and punishing piracy.

As I outline in the book, the same European jurists who defined piracy as a crime against humanity continued to view state legal authority as extending into the sea in a variety of ways. Alberico Gentili, for example, defined pirates as *hostis humani generis*. But he also argued in a series of admiralty cases that crown jurisdiction followed ships

and subjects at sea and that it applied to territorial waters (which were then not clearly bounded).

The same is true for Hugo Grotius, who is always credited as making the most expansive argument that anyone could be punished for preventing others from freely navigating on the sea—that is, for blocking the exercise of a right under natural law. Grotius, too, was careful to develop the idea that Dutch jurisdiction traveled with Dutch ships and captains.

According to European jurists, then, pirates could be prosecuted for violating the law of nations (based in natural law), but mariners could also be tried and punished for committing acts defined as piratical by the laws of a particular polity (lawyers call this "municipal" law). In practice, it was difficult to get everyone else to agree that mariners were violating the law of nations. So European polities continued to try to establish jurisdiction in particular cases so they could punish mariners for violating municipal law. The legal actions against Kidd, and even against those more marginalized Caribbean pirates who refused amnesty, were brought under English law.

Now here's the trick: The usual basis for legal action did nothing to discourage a very active legal *rhetoric* about pirates as enemies of all mankind. In fact, pirate trials seemed to stimulate talk about pirates as enemies of all mankind. And the influence worked in the other direction, too. Public uproar about the villainy of pirates made it easier to gather support for campaigns against sea raiding enacted on narrower legal grounds.

In short, there was no settled international law of piracy. The suppression of piracy was taken up, in desultory fashion, within separate European legal orders. There was, at the same time, a strand of legal thinking, as well as a vibrant political-legal discourse, about pirates as the enemies of all mankind.

H: Dan, what is the difference, really, between saying that pirates were seen as criminals against the law of nature and saying—as it is much more common now to say—that "law-free" zones were crafted for them? Even if there is a theoretical difference, is there a practical difference?

DE: If you were staring down from the gallows, undoubtedly there didn't appear to be much of difference! But let us consider two cases, in which the practical implications of these different views become readily apparent. First, take the repression of the Vendée peasants by the French republican armies. These rebels were among the first social categories to be targeted as "enemies of the human race," and hence, were demoted to the same legal status as pirates. Their destruction was thus not only a political necessity, it was a moral imperative. It was also presented as entirely legal: as Robespierre told the soldiers heading to the Western front, "It is with the law in hand [*la loi à la main*] that you must exterminate our enemies." This legal cover had dramatic consequences: it led soldiers and commanders to ignore the traditional laws of war, thus producing what David A. Bell has called "the first total war." Had the Vendée area simply been declared a "law-free zone," it's doubtful that the republican armies would have acted with such brutality.

There is another case (my second) closer to home that further illustrates this point. In 2008, Philippe Sands came out with a book called *Torture Team*, which was a sequel

to his 2005 *Lawless World*. As its title indicated, this earlier book condemned the American and British administrations for creating "law-free zones." This was, in fact, an argument that many critics of Guantánamo had advanced: Neal Katyal, who successfully argued *Hamdan v. Rumsfeld* before the Supreme Court, called the Gitmo prison a "legal black hole." In his recent book, however, Sands presents a rather different account. Despite Bush's declaration that the Geneva Conventions did not apply to Taliban and Al Qaeda prisoners, the military did not treat them any differently. The declaration that Gitmo was a "law-free zone," in other words, didn't lead to any practices that violated the Geneva Conventions. Things only got messy (or rather, watery) when the Defense Department introduced a new set of rules governing the conduct of interrogations. These new laws, which codified how such "enemies of humanity" (as Bush repeatedly called the prisoners) could be treated, are what led the military to abandon previous procedures.

Ultimately, I'd say that the difference between declaring certain crimes as meriting "extreme measures" versus declaring certain criminals to be "beyond the law" boils down to the psychological difference between legality and impunity. When you act legally, you can be confident that you are acting in a proper manner. Accordingly, you may not stop to question your actions—it's the Milgram experiment all over. But impunity provides fewer guarantees. After all, what is the scope of impunity? Is anything and everything permissible, or are only certain tacit actions? There's an illuminating scene in *Generation Kill* (I confess to only having seen the TV series) in which a platoon of marines are told that the rules of engagement have been revised, and that anyone in the vicinity of a target is to be considered a hostile. In other words, the area around the target has been declared a "law-free zone"; the standard rules protecting civilians have been waived. One of the marines proceeds to shoot a civilian, who turns out to be a child. Despite the change in ROEs, the soldier is disciplined. So much for impunity.

H: Let me push you on this point, since I'm not sure how your book fits together with your answer. In *The Terror of Natural Right*, you imply at a couple of crucial points that your demonstration of appeals to natural law to authorize extreme measures shows that Giorgio Agamben is wrong in his portrayals of "states of exception" in his book of that name and other places. That is, while like Agamben you focus on the device of outlawry, for you the outlaw is subject to natural law rather than truly beyond all norms. How serious a disagreement is this, in spite of your discussion of the differing psychological implications for possible actors of the different models? Even if natural law applies to the "piratical" enemy, essentially any retribution seems to be licensed, so what exactly is wrong with Agamben's model of a kind of suspension of norms? The norms of natural law may apply, but they do not restrain conduct: they are simply a license to kill.

DE: I think there really are fundamental differences between suspending norms (Agamben's *anomie*) and crafting "extraordinary" legal categories. Most importantly, these measures entail completely opposite attitudes to the control of violence. In an "anomic" state, violence is unleashed. In such instances, "outlaws" truly are beyond all norms, as Agamben argues. A case in point would be the Roman practice of

proscription: if your name was on the list, then you were fair game—anyone could kill you and claim a reward. But now fast forward to the French Revolution. The last thing that the Jacobins wanted was vigilantism. They'd already experienced that with the September massacres, when crowds stormed Parisian prisons and performed summary justice. Accordingly, the French authorities sought above all to maintain a monopoly on violence. Here we touch upon the very real and very practical difference between our two models. French *hors-la-loi* could not just be killed by random strangers: there was a formal procedure for executing them (involving special military commissions, witnesses, etc.), precisely to ensure that the state did not lose control of the process. To be sure, sometimes the state *did* lose control, particularly when the trials of outlaws occurred in the midst of a full-blown civil war. But there were also times when the Committee of Public Safety recalled officials whose repressive tactics overstepped legal bounds. Such actions underscore the fact that for the state to maintain its monopoly on violence, there had to be laws specifying who could be executed, for what reasons, and by whom. Hence, the importance of using natural right to justify this sort of extraordinary justice.

Since you brought up Agamben, let me just say that my main problem with his theory is that he only conceives of "suspending the law" in Schmittian terms. Indeed, for both Schmitt and Agamben, states exercise absolute sovereignty—literally "absolute," since in the shadows of Schmitt lurks Bodin—whose primary expression is the power to declare a state of exception. But this is a very blanket view of exceptionality. The law isn't just a light switch to be turned on or off. One need only consider the famous "suspension clause" in the U.S. Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." When Lincoln suspended habeas corpus during the Civil War, the Union was not thrown into a Schmittian state of exception. On the contrary, the suspension clause functioned as a kind of "escape valve" that *preserved* the Constitution. It is, if you will, an exception that prevents a state of exception.

Arguably—and here I'm being somewhat polemical—the introduction of new legal categories can do more long-term damage than the targeted, short-term suspension of certain laws. Let's go back to the torture memos and the list of "enhanced" interrogation techniques that Donald Rumsfeld approved. These techniques are no longer in effect and have technically been expunged from the books—yet they still left a precedent. In future times, another generation of eager lawyers may well invoke this precedent to justify the re-implementation of such practices. Before Sulla, proscription was not part of Roman law; forty years later, Mark Anthony, Octavius, and Lepidus were able to call upon it. One advantage of targeted legal suspensions is that they do not introduce new, nefarious precedents. Most Americans are probably not even aware, for instance, that the writ of habeas corpus was suspended in the past.

H: Lauren, you conclude your book by developing a critique of Agamben, opposing to his "bare life" a conception of "bare sovereignty" that you extrapolate from your case studies of the geography of expansive if uneven legality. You therefore see what

one might at first take as legal black holes in the past—and perhaps in the present—as more like "the substitution of one kind of authorization of delegated legal authority for another" (p. 290). Can you explain?

LB: We have to begin with the basic point that law reached into every corner of imperial space. It reached unevenly, but it did reach everywhere. It traveled with sojourners, who held onto claims of subjecthood. And it traveled with delegated legal authorities, ranging from individuals like garrison commanders to corporate entities like merchant companies. These agents didn't just assume legal authority on their own. They were *supposed* to assume it in acting as proxies for sovereigns.

And, of course, Europeans were moving into worlds in which polities and peoples already had elaborate (and also unevenly distributed) legal institutions and practices.

In this law-infused world, few people thought of themselves as operating outside the law. In most cases (think of the pirates) it didn't make sense to think or act this way. Despite a lot of noisy claims about the lawlessness of some places, and even of whole regions, historical examples of zones of lawlessness are hard to find. Like the joke about the mythic origins of the world being held up by "turtles all the way down," empires were made up of law all the way down.

It's most helpful to think about the varied legal spaces of empires as "anomalous legal zones," a phrase I borrow from Gerald Neuman. Imperial officials used the word "anomalous" often. They were increasingly bothered by legal anomalies, and they tried to devise elaborate administrative structures and categories that would make it possible to incorporate the zones as settled parts of empires.

When we see how pervasive this pattern was, and how local legal politics continued to produce irregularities even as officials were trying to explain them away—that's when Agamben's Schmittian ideas about exception begin to look very flawed. There's no doubt that colonial officials announced the suspension of law frequently. But because they were operating in a context of layered sovereignty, in which it was commonplace for zones to have varying legal qualities, the suspension of law called for different kinds of law, not its absence.

Martial law is an example. In the book, I consider the governance of penal colonies in the late-eighteenth-century European imperial world. Some penal colonies were placed from the outset under military law. In others, local commanders declared martial law to deal with what they saw as crises of order. Like Guantánamo, the penal colonies operated under variant legal rules, but they were not legal voids. Penal colony commanders acted as petty despots but always claimed authorization for their violence. The distinction is important because it lets us see more clearly how law, and structures of sovereignty, could work to sanction violence.

I use the term "bare sovereignty" to describe the stripped-down legal capacities that attached to anomalous legal zones. The beauty of the term—besides the fact that it is a nice play on Agamben's "bare life"—is that it comes from the pen of a colonial official struggling to define the quality of sovereignty held by Indian princely states. In imagining sovereignty as divisible, officials and jurists also understood that the imperial state's sovereign capacity was sometimes strikingly "bare" itself. In India, officials described a right to intervene whenever the "paramount" power saw fit, but they also tried to justify seemingly extralegal interventions on specific legal grounds.

For example, when the British entered Manipur to put down a rebellion, they laid out the rationale that Manipur's residents were British subjects—in a "bare" sense that recognized their duty of allegiance but not many rights.

So that's the basic story. If you imagine sovereignty as divisible (and most people in the early modern world did), then it can be stripped down, reconfigured, unevenly distributed, and also selectively magnified, resulting in greater violence—without giving rise to exceptional states or "voids" of law.

I go up to the end of the nineteenth century, so I don't trace how these patterns morphed into the anomalous legal zones we see in the early twenty-first century: Guantánamo, Gaza, northern Pakistan, and a range of other places of long-standing anomalous status like U.S. Indian reservations and even Washington, D.C.—which was the example that Neuman first used to coin the term "anomalous legal zones." I don't want to make too much of the idea that it's all the same pattern. I stop at the end of the nineteenth century in the book precisely because I do think that strong state claims to territorial sovereignty changed the game in important ways—and so did the growing consensus that the global order is an order of states, not empires. But I also think that if we take empires and their uneven legal zones more seriously, we'll find many more continuities than we saw before. And we'll begin, too, to imagine international law differently, more as a form of truly globally produced law than as a European invention—but that's a subject that would probably need another interview.

H: Dan, what is the contemporary "moral" of your analysis, especially in view of the current renaissance of interest in and targeting of pirates, in Somalia and elsewhere? I take it you think that whenever one finds a law-free zone, or proposal to craft one, the key response is to offer a legalized one, even if the "enemies" in it have to be subjects of exceptional legal measures? Do the complex continuities and discontinuities with past theories and practices that Lauren sees also affect the current relevance of your work?

DE: It's very difficult to come up with palatable proposals for dealing with unconventional criminals, operating outside state jurisdiction. I think that the first, most important step is to recognize a number of basic, inalienable rights—a good place to start would be Common Article 3 of the Geneva Conventions. The difficult part is what comes next. Devising exceptional legal measures carries great risks, as exceptional categories have a nasty tendency to grow in scope: today's petty thief is tomorrow's pirate. Indeed, if you look at how categories like the "enemy of the human race" have grown in the past, it's always by analogy: the landmark *Filártiga v. Peña-Irala* case, for instance, ruled that "for purposes of civil liability, the torturer has become *like* the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind" (emphasis added). Few would disagree with this assessment today, but who else might become "like" the pirate? Are Taliban fighters? What about U.S. citizens suspected of terrorism? No one can draw a line in the sand, which means that exceptional categories will often expand under the pressure of political posturing.

The problem is that the alternatives are not that attractive, either. Suspending certain features of the law, as Laurie's colonial administrators did, has the advantage of not leaving behind a poisoned jurisprudential legacy. But its potential for abuse is

equally evident—think of the internment of Japanese Americans during World War II, which rested upon a de facto suspension of habeas corpus. Declaring martial law in certain zones is a third option, but one that entrusts commanding officers (or, in the case of prisoners, military commissions) with an inordinate amount of power.

Perhaps the best way forward, in thinking about piracy today, is to try to avoid the prickly debate about exceptionality altogether. After all, there already exists a UN treaty on the Law of the Sea (which the United States never ratified) that provides a legal framework for combating piracy. It defines acts of piracy and the right of "every State [to] seize a pirate ship or aircraft" and to "decide upon the penalties to be imposed" through its court system (article 105). How much more is needed? Our first effort should always be to keep exceptional law as exceptional as possible.