



THE INVISIBLE HOOK: THE LAW AND ECONOMICS OF PIRATE TOLERANCE*

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ABSTRACT

Can criminal profit-seeking generate socially desirable outcomes? This article investigates this question by examining the economics of pirate tolerance. At a time when British merchant ships treated blacks as slaves, some pirate ships integrated black bondsmen into their crews as full-fledged and free members. This racial tolerance was not the product of enlightened notions of equality. Rather, it was forged in the self-interested context of the criminally-determined costs and benefits of pirate slavery. Analogous to Adam Smith's invisible hand, whereby lawful commercial self-interest seeking can generate socially desirable outcomes, among pirates there was an "invisible hook," whereby criminal self-interest seeking produced a socially desirable outcome in the form of racial tolerance.

INTRODUCTION

Can criminal profit-seeking generate socially desirable outcomes? Most economists and legal scholars would answer this question with an unequivocal "no." According to these academics, thieves transfer resources from wealth producers to themselves. In doing so, they generate deadweight losses. Although legitimate persons' self-interest seeking can lead to socially desirable outcomes, these scholars believe that criminal self-interest seeking cannot achieve the same beneficial result.¹

This conventional wisdom is highly sensible. To be sure, thievery is socially destructive. But this assessment fails to appreciate that criminal self-interest seeking, like all self-interest seeking, may generate unintended and, in some cases, even desirable consequences. Although thievery cannot make society materially richer, this may not mean the invisible hand is totally palsied when it comes to criminal self-interest seeking. In fact, criminals' pursuit of profit may produce publicly laudable outcomes where legitimate persons' self-interest seeking cannot.

¹ See, e.g., Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225 (1993); Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 W. ECON. J. 224 (1967).

Nobel Prize-winning economist Gary Becker was the first to apply the logic of rational-choice decision making to criminals.² Following him, a number of other scholars extended this logic to decision making in the context of organized outlaws. Fiorentini and Peltzman provide the best and most comprehensive collection of essays that consider the economics of criminal organization.³ In addition to this scholarship, there is a large literature discussing the economic impact of organized crime and criminal organizations, the optimal strategies for preventing organized crime, and the reasons for its emergence.⁴

Unlike these topics, the “public benefits” of organized criminal activity have received virtually no attention. This article investigates the desirable, unintended consequences of criminal self-interest seeking by examining the economics of late seventeenth- and early eighteenth-century pirate racial

² See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169–70 (1968).

³ See THE ECONOMICS OF ORGANISED CRIME (Gianluca Fiorentini & Sam Peltzman eds., 1995).

⁴ See, e.g., ANNEISE GRAEBNER ANDERSON, THE BUSINESS OF ORGANIZED CRIME: A COSA NOSTRA FAMILY (1979); PINO ARLACCHI, MAFIA BUSINESS: THE MAFIA ETHIC AND THE SPIRIT OF CAPITALISM (Martin Ryle trans., Verso 1986); DIEGO GAMBETTA, THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION (1993); MARTÍN SÁNCHEZ JANKOWSKI, ISLANDS IN THE STREETS: GANGS AND AMERICAN URBAN SOCIETY (1991); PETER REUTER, DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND (1983); PETER REUTER, RACKETEERING IN LEGITIMATE INDUSTRIES: A STUDY IN THE ECONOMICS OF INTIMIDATION (1987); Juin-Jen Chang, Huei-Chung Lu & Mingshen Chen, *Organized Crime or Individual Crime? Endogenous Size of a Criminal Organization and the Optimal Law Enforcement*, 43 ECON. INQUIRY 661 (2005); Andrew R. Dick, *When Does Organized Crime Pay? A Transaction Cost Analysis*, 15 INT'L REV. L. & ECON. 25 (1995); Nuno Garoupa, *The Economics of Organized Crime and Optimal Law Enforcement*, 38 ECON. INQUIRY 278 (2000); William P. Jennings, Jr., *A Note on the Economics of Organized Crime*, 10 E. ECON. J. 315 (1984); Kai A. Konrad & Stergios Skaperdas, *Extortion*, 65 ECONOMICA 461 (1998); Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON. 1049 (2007) [hereinafter Leeson, *An-arrgh-chy*]; Peter T. Leeson, *Pirational Choice: The Economics of Infamous Pirate Practices*, (2008) [hereinafter Leeson, *Pirational Choice*] (unpublished article, on file with author); Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. ECON. 755 (2000); Stergios Skaperdas, *The Political Economy of Organized Crime: Providing Protection When the State Does Not*, 2 ECON. GOVERNANCE 173 (2001).

tolerance.⁵ Centuries before the civil rights movement, the American Civil Liberties Union, or the Equal Opportunity Act, some pirates had already adopted a policy of hiring black sailors in their crews. Further, these pirates extended suffrage to black crewmembers and subscribed to the practice of “equal pay for equal work,” or rather, “equal pay for equal prey.” This situation is remarkable considering the views and policies toward blacks in the legitimate seventeenth- and eighteenth-century world. In Great Britain, for example, the courts did not abolish slavery until 1772, and slaves in the British colonies did not enjoy freedom until 1833. In the United States,

⁵ This paper is also connected to a small but insightful literature building on Fogel and Engerman’s seminal book that discusses the distribution of slave labor. See ROBERT FOGEL, WILLIAM ENGERMAN, & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974). Important work by Fenoaltea and Findlay, for example, argues that the effort versus care intenseness of different labor tasks determines producers’ reliance on slave labor. See Stefano Fenoaltea, *Slavery and Supervision in Comparative Perspective: A Model*, 44 J. ECON. HIST. 635 (1984); Ronald Findlay, *Slavery, Incentives, and Manumission: A Theoretical Model*, 83 J. POL. ECON. 923 (1975). While the former responds positively to slave-type motivation, such as beatings, the latter responds negatively to such “motivation.” Thus, we can explain the distribution of slave labor by differences in the kind of labor different industries require. Hanes, in contrast, argues that differences in labor-turnover cost drive the distribution of slave labor. See Christopher Hanes, *Turnover Cost and the Distribution of Slave Labor in Anglo-America*, 56 J. ECON. HIST. 307 (1996). Where labor turnover is more costly, slave labor, which reduces turnover costs, is more efficient, and vice versa. Both of these accounts do an admirable job of explaining the distribution of slave labor in antebellum America, which they are focused on. However, neither sheds light on pirates’ greater reliance on free black labor compared to legitimate vessels. The effort versus care-intensive labor explanation fails here because nearly all of the labor performed on merchant and pirate ships was identical. The labor-turnover cost argument does not explain the relative racial tolerance displayed by pirates because it was not less costly for pirate crews to go without the sailors they required than it was for merchant ships to do so. Indeed, if there was any difference in the difficulty of finding replacement laborers for merchant as opposed to pirate ships, it was more difficult for pirates because of their criminality. My analysis offers an alternative determinant of the distribution of slave labor that explains the case of pirates versus legitimate ships: the dispersed benefits and concentrated costs of pirate slaves.

slavery persisted until 1865, and blacks did not enjoy equal rights as citizens—politically or in the workplace—until even later.⁶

In contrast, some pirate crews granted black sailors the same perquisites and privileges of “citizenship” in their floating societies as white sailors in the early 1700s. To be sure, pirates’ treatment of black sailors was far from consistent: some pirates participated in the slave trade, others granted equal rights to blacks and whites aboard their ships, and still others did both of these at the same time. Even so, pirates practiced greater racial equality than their legitimate counterparts.

Pirates were not the only seventeenth- and eighteenth-century mariners to have black crewmembers. Merchant ships, Royal Navy vessels, and slavers also relied on black sailors for labor. Some blacks even nominally captained smaller ships engaged in coastal or inter-island transport. A few of these black seamen were freemen. However, the vast majority were runaways who found employment on vessels in need of men, or slaves operating on behalf of, or hired out by, their owners. On these legitimate vessels, sailors invariably treated blacks as slaves. Most significantly, this meant they sailed without pay or voice in their crews. In contrast, pirate ships had a larger proportion of black crewmembers than their legitimate counterparts and they sometimes enjoyed the same rights as their white colleagues.

I argue that pirate self-interest seeking—in the context of the criminally determined costs and benefits of pirate slavery—led to progressive racial practices. Criminality required pirates to use a compensation scheme for their employees based on equal shares of seized booty. This compensation scheme created highly dispersed benefits of enslaving a black sailor. At the same time, an important part of the cost of using slave labor on pirate ships—slaves aiding authorities in the capture of pirates—remained concentrated fully on each free pirate employee. In contrast, since they were legitimate, seventeenth- and eighteenth-century merchant ships did not operate under a pirate-like

⁶ While officially the Fifteenth Amendment (1870), U.S. CONST. amend. XV, § 1, denied states the ability to prevent blacks from voting based solely on their race, various state practices—particularly in the South—effectively denied black citizens voting rights on other grounds (e.g., literacy) until the 1965 Voting Rights Act, which empowered the Justice Department to monitor the treatment of black voters. 42 U.S.C. § 1973 (1965).

compensation scheme.⁷ Instead, they paid traditional “fixed wages” to their employees. This payment scheme concentrated the benefits of keeping a slave in servitude on slave owners. Further, since merchant shippers were legitimate, the concentrated cost of slaves that pirates confronted—capture by law enforcement—was totally absent. Unlike pirates, merchant ships did not have reason to fear an escaped slave leading to the crew’s capture and execution.

As a result of the different nature of costs and benefits of slavery between pirates and merchant ships (driven by the difference in each enterprise’s legitimacy), self-interested behavior dictated different practices toward slaves in each case. Pirates often had an incentive to grant slaves equal rights in their crews; merchant vessels, in contrast, universally had an incentive to maintain slavery. Analogous to Adam Smith’s invisible hand,⁸ whereby legitimate persons’ self-interest seeking can generate socially desirable outcomes, among pirates there was an “invisible hook,” whereby criminal self-interest seeking produced a socially desirable outcome in the form of racial tolerance. It was this invisible hook—rather than enlightened pirate thinking—that fostered pirates’ racial tolerance.

To examine the economics of pirate tolerance, this investigation draws on the most important primary source historical documents relating to pirates. The first of these is Captain Charles Johnson’s *A General History of the Pyrates*, which contains reports on a number of history’s most famous pirates related by a

⁷ Whaling (and some fishing) vessels compensated sailors via a share system called the “lay system.” Although also based on a kind of profit sharing, the lay system was markedly different from pirates’ compensation arrangement. Unlike pirates’ roughly equal shares, on whalers, shares were steeply skewed, officers earning far larger lays than ordinary sailors. Further, unlike pirate ships, which had no external financiers to compensate, absentee owners financed whalers and took a large cut of their ships’ proceeds. The differences between pirate and whaling ships’ share systems reflect the former’s criminality and the latter’s legitimacy. This paper considers how pirates’ criminality critically shaped their share system. Davis, Gallman, and Gleiter’s excellent study of American whaling considers the very different economic considerations that critically determined whalers’ lay system. See LANCE E. DAVIS, ROBERT E. GALLMAN, & KARIN GLEITER, IN PURSUIT OF LEVIATHAN: TECHNOLOGY, INSTITUTIONS, PRODUCTIVITY, AND PROFITS IN AMERICAN WHALING, 1816–1906 (1997).

⁸ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner eds., Clarendon Press 1976) (1776).

pirate contemporary.⁹ I also draw extensively on court records from pirate trials, eighteenth-century newspaper accounts of pirates, and the *Calendar of State Papers, Colonial Series, America and West Indies*,¹⁰ which contains correspondence from colonial governors and others relating to piracy. Additionally, this article utilizes papers from London's High Court of Admiralty Records ("HCA") which contains important primary source historical materials relating to seventeenth- and eighteenth-century pirates. Finally, a few pirate captives, such as William Snelgrave, who were ultimately released by their captors, published longer works describing their harrowing captivities.¹¹ This article also draws on these accounts, which provide important first-hand records relating to pirates.

⁹ DANIEL DEFOE, *A GENERAL HISTORY OF THE PYRATES* (Manuel Schonhorn ed., Courier Dover Pub'ns 1999) (1724). Although this edition of *A General History or the Pyrates* names Daniel Defoe as its author, the first edition (and many subsequent editions) of this book appeared under the authorship of "Captain Charles Johnson." Captain Johnson is a pen name used by the author of *A General History of the Pyrates*. His true identity remains unknown. In 1932, John R. Moore claimed that Johnson was in fact Daniel Defoe. P.N. FURBANK & W.R. OWENS, *THE CANONISATION OF DANIEL DEFOE* 100 (1988). In the late 1980s, however, this view was repudiated, see generally *id.*, and today many pirate historians do not believe that Defoe is the author of this important book. See, e.g., DAVID CORDINGLY, *UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES* xx (1995); MARCUS REDIKER, *VILLAINS OF ALL NATIONS: ATLANTIC PIRATES IN THE GOLDEN AGE* (2004); COLIN WOODARD, *THE REPUBLIC OF PIRATES* (2007). But see JAN ROGOZINSKI, *HONOR AMONG THIEVES: CAPTAIN KIDD, HENRY EVERY, AND THE PIRATE DEMOCRACY IN THE INDIAN OCEAN* (2000). Whatever Johnson's true identity, it is agreed that he "had extensive first-hand knowledge of piracy." ANGUS KONSTAM, *SCOURGE OF THE SEAS: BUCCANEERS, PIRATES AND PRIVATEERS* 12 (2007). While it is acknowledged that Johnson's work contains some errors and apocryphal accounts (such as the community of Libertalia), "Johnson is widely regarded as a highly reliable source for factual information" on pirates, REDIKER, *supra*, at 180 n.24, and remains a definitive source historians rely on in constructing their accounts of late seventeenth- and early eighteenth-century piracy. As eminent pirate historian David Cordingly put it, this book "is the prime source for the lives of many pirates of what is often called the Golden Age of Piracy." CORDINGLY, *supra*, at xx.

¹⁰ *CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1574-1739* (Karen Ordahl Kupperman, John C. Appleby, & Mandy Banton eds., Routledge CD-ROM, 2000) [hereinafter *CALENDAR*].

¹¹ See, e.g., WILLIAM SNELGRAVE, *A NEW ACCOUNT OF SOME PARTS OF GUINEA, AND THE SLAVE TRADE* (London 1734).

I. PIRATES, INC.: THE ORGANIZATION OF THE PIRATICAL FIRM

The “Golden Age of Piracy” extended from roughly 1680 to 1730.¹² The period from 1716 to 1726 is when the most flamboyant and consequently best-remembered sea bandits prowled the sea. These rogues include infamous pirate captains such as Blackbeard (real name Edward Teach); the pirate dandy “Calico” Jack Rackam; and the outspoken pirate philosophizer Sam Bellamy. The pirates of the Golden Age haunted the Caribbean Sea, the Gulf of Mexico, America’s Atlantic coast, Africa’s Atlantic coast, and the Indian Ocean.¹³ In any single year between 1716 and 1722, an estimated one to two thousand sea bandits actively engaged in life “on the account,” searching for merchant ships containing cargo they could plunder.¹⁴

Piracy was a well-organized criminal enterprise, and pirates’ profit-maximizing strategies were fundamentally no different from those that modern legitimate firms pursue.¹⁵ To facilitate their criminal enterprise, pirates organized themselves into crews. The average early eighteenth-century pirate crew carried about 80 men, though some were much larger.¹⁶ Pirate crews of 150–200 men were common, and even more populous companies could also be found. Blackbeard’s crew aboard the *Queen Anne’s Revenge*, for instance,

¹² See, e.g., BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660–1730 (Joel H. Baer ed., 2007).
(citing the years 1660–1730).

¹³ See Leeson, *An-arrgh-chy*, *supra* note 4.

¹⁴ See CALENDAR, *supra* note 10; Letter from Jeremiah Dummer to the Council of Trade and Plantations (Feb. 25, 1720), in 31 CALENDAR, *supra* note 10, at 365; Letter from Lt. Governor Bennett to the Council of Trade and Plantations (July 30, 1717), in 29 CALENDAR, *supra* note 10, at 360; Letter from Mr. Gale to Col. Thomas Pitt, junr. (Nov. 4, 1718), in 31 CALENDAR, *supra* note 10, at 10; DEFOE, *supra* note 9, at 132; MARCUS REDIKER, BETWEEN THE DEVIL AND THE DEEP BLUE SEA 256 (1987).

¹⁵ The particular forms such strategies took for pirates differed considerably, of course. The imaginative pirate flag Jolly Roger; bizarre pirate tortures, such as the “sweat,” which involved prodding a victim with sharp objects to keep him dancing until he collapsed from exhaustion; and other unusual pirate behaviors resulted from rational profit-seeking in the uniquely piratical context sea dogs operated in, not from some inherent strangeness in pirates themselves. See Leeson, *An-arrgh-chy*, *supra* note 4; Leeson, *Pirational Choice*, *supra* note 4.

¹⁶ REDIKER, *supra* note 14, at 256 n.4.

carried 300 pirates.¹⁷ Similarly, 228 pirates sailed together aboard pirate captain Bartholomew Roberts's *Royal Fortune*. Several pirate crews were too large to fit in one ship, in which case they would form squadrons. For example, Captain Roberts at one point commanded a squadron of four pirate vessels carrying 508 pirates in all.¹⁸

The piratical "firm" was the pirate crew. Typically, eighteenth-century pirate firms operated independently. However, in some cases, due to chance meetings, or occasionally planned multi-firm expeditions, they joined forces. Three pirate crews captained by Thomas Cocklyn, Howell Davis, and Oliver La Bouche, for instance, temporarily joined forces while operating off the west coast of Africa.¹⁹

Each pirate firm was headed by a captain, democratically elected by his crew. The crew could popularly depose its captain for any reason and enthusiastically exercised this right. Captain Benjamin Hornigold's crew, for example, deposed him from command because he "refused to take and plunder English Vessels."²⁰ Pirates wanted to make sure that captainship "falls on one superior for Knowledge and Boldness, *Pistol Proof*, (as they call it),"²¹ so they also removed captains who showed cowardice. For instance, Captain Charles Vane's "Behaviour was obliged to stand the Test of a Vote, and a Resolution passed against his Honour and Dignity . . . deposing him from the Command."²²

Some pirates deposed their captains from command for violating firm policy, such as the rule that required them to mercilessly slaughter resisters.²³ Captain Edward England, for example, "was turned out of Command" by his crew for this violation.²⁴ Finally, pirates might depose their captains because they demonstrated

¹⁷ Deposition of Henry Bostock, Master of the Sloop Margaret of St. Christophers (Dec. 19, 1717), in 30 CALENDAR, *supra* note 10, at 150, 150.

¹⁸ CORDINGLY, *supra* note 9, at 111.

¹⁹ For an account of this merger, see SNELGRAVE, *supra* note 11.

²⁰ THE TRIALS OF EIGHT PERSONS INDITED FOR PIRACY &C. OF WHOM TWO WERE ACQUITTED, AND THE REST FOUND GUILTY (Boston, John Edwards 1718), reprinted in 2 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 289, 317 (Joel H. Baer ed., 2007).

²¹ DEFOE, *supra* note 9, at 214.

²² *Id.* at 139.

²³ See Leeson, *Pirational Choice*, *supra* note 4, at 6 (describing the "no quarter" policy of killing targets that resisted assault).

²⁴ Information of Richard Moore, 1/55 High Court of Admiralty Papers, fol. 96 (1724) (on file with the New York University Journal of Law & Liberty).

poor judgment. Captain Christopher Moody's pirate crew, for instance, grew dissatisfied with his behavior and "at last forced him, with twelve others" who supported him "into an open Boat . . . and . . . they never were heard of afterwards."²⁵

Pirate captains wielded autocratic power only in times of battle. When not engaged in chasing, fighting, or being chased, a second officer in the piratical firm exercised the greatest authority. This officer was the quartermaster, whose purpose was to check the captain's power.²⁶ As with their captains, pirate employees democratically elected their quartermasters.

On merchant ships, which most pirates formerly sailed on as legitimate maritime laborers, captains wielded near-complete authority over important aspects of their ships and sailors. Merchant ship captains determined crewmembers' tasks, provisions, and wages, and they retained the right—supported by Admiralty law—to administer physical "correction" to their crewmembers at their discretion. Endowed with this authority, some merchant captains used their power to prey on their sailors.²⁷ According to several pirates, this predatory environment drove them into piratical employment.²⁸ In their capacity as pirates, these sailors sought to limit their captains' ability to abuse them. Indeed, the piratical firm's very ability to function required such limitations: if pirate captains were unconstrained and could prey on their sailors, pirates could not cooperate for mutual gain; this would lead the piratical firm to break down. To prevent this result, pirates relied on the quartermaster. The quartermaster had numerous important roles in the piratical firm including administering victual provisions, paying pirate employees, selecting

²⁵ SNELGRAVE, *supra* note 11, at 198.

²⁶ See 1 LIVES OF THE MOST REMARKABLE CRIMINALS WHO HAVE BEEN CONDEMNED AND EXECUTED FOR MURDER, HIGHWAY ROBBERIES, HOUSEBREAKING, STREET ROBBERIES, COINING, OR OTHER OFFENSES 42 (Arthur L. Hayward ed., 1874).

²⁷ For a description of culture onboard merchant ships, see generally RALPH DAVIS, THE RISE OF THE ENGLISH SHIPPING INDUSTRY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (1962); REDIKER, *supra* note 14; Leeson, *An-arrgh-chy*, *supra* note 4.

²⁸ See, e.g., A FULL AND EXACT ACCOUNT, OF THE TRYAL OF ALL THE PYRATES, LATELY TAKEN BY CAPTAIN OGLE, ON BOARD THE SWALLOW MAN OF WAR, ON THE COAST OF GUINEA (London, J. Roberts 1723), reprinted in 3 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 67, 123; DEFOE, *supra* note 9, at 351; COTTON MATHER, THE VIAL Poured OUT UPON THE SEA 26 (Boston, T. Fleet 1726).

booty from prizes his crew would keep, administering punishments of rule violations, and adjudicating intra-firm disputes.

As one pirate captive described the relationship between the captain and quartermaster he observed among his captors, “the Captain of a Pirate Ship, is chiefly chosen to fight the Vessels they may meet with. Besides him, they chuse another principal Officer, whom they call *Quarter-master*, who has the general Inspection of all Affairs, and often controuls the Captain’s Orders.”²⁹ Another eyewitness to the pirates’ system of democratic checks and balances, merchant captain Richard Hawkins, described the same division of power: “The Captain seems to have no Manner of Command, but in Time of Chace or Engaging, then he is absolute: the Quarter-Master is chief Director.”³⁰ At the trial of pirate captain Stede Bonnet, for instance, Ignatius Pell, Bonnet’s boatswain, testified that the captain “went by that Name; but the Quarter-Master had more Power than he.”³¹

In addition to these democratic constraints, pirate firms also created constitutions, which they called “articles,” laying out the crew’s laws, punishments for breaking these laws or the mechanism for determining punishment, identifying the terms of the firm’s health insurance program, and so forth. A typical set of articles of agreement is that which pirate captain Edward Low’s firm used to govern its enterprise, circa 1723:³²

1. The Captain is to have two full Shares; the Master is to have one Share and one half; The Doctor, Mate, Gunner[,]

²⁹ SNELGRAVE, *supra* note 11, at 199–200.

³⁰ BRITISH JOURNAL, Aug. 22, 1724, *reprinted in* 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 313, 313.

³¹ THE TRYALS OF MAJOR STEDE BONNET, AND OTHER PIRATES (London, Benj. Cowse 1719), *reprinted in* 2 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 321, 368.

³² Johnson attributes these articles to Captain Edward Low’s one-time pirate consort, Captain George Lowther. See DEFOE, *supra* note 9, at 307–08. However, see BOSTON NEWS-LETTER, Aug. 1–8, 1723, *reprinted in* 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 358, and TRYALS OF THIRTY-SIX PERSON FOR PIRACY, TWENTY-EIGHT OF THEM UPON FULL EVIDENCE WERE FOUND GUILTY, AND THE REST ACQUITTED (Boston, Samuel Kneeland 1723), *reprinted in* 3 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 167 (documenting the trial of pirates from Edward Low’s and Captain Charles Harris’s pirate crews), for attributions of these articles to Low, a practice I follow here.

and Boatswain, one Share and one Quarter [and everyone else to have one share].

2. He that shall be found guilty of taking up any Unlawful Weapon on Board the Privateer or any other prize by us taken, so as to Strike or Abuse one another in any regard, shall suffer what Punishment the Captain and Majority of the Company shall think fit.

3. He that shall be found Guilty of Cowardice in the time of Engagement, shall suffer what Punishment the Captain and Majority of the Company shall think fit.

4. If any Gold, Jewels, Silver, &c. be found on Board of any Prize or Prizes to the value of a Piece of Eight, & the finder do not deliver it to the Quarter Master in the space of 24 hours shall suffer what punishment the Captain and Majority of the Company shall think fit.

5. He that is found guilty of Gaming, or Defrauding one another to the Value of a Ryal of Plate, shall suffer what Punishment the Captain and Majority of the Company shall think fit.

6. He that shall have the Misfortune to lose a Limb in time of Engagement, shall have the Sum of Six hundred pieces of Eight, and remain aboard as long as he shall think fit.

7. Good Quarters to be given when Craved.

8. He that sees a sail first, shall have the best Pistol or Small Arm aboard of her.

9. He that shall be guilty of Drunkenness in time of Engagement shall suffer what Punishment the Captain and Majority of the Company shall think fit.

10. No Snaping of Arms in the Hould.³³

Besides establishing the rules of the firm's private governance system, pirate articles also constrained the quartermaster's authority by rendering explicit the terms of compensation, insurance, and employee behaviors that were subject to his discipline. Like all other aspects of the piratical firm's organization, the crew's articles were a purely private creation and could only be privately enforced: pirates were outlaws and therefore operated outside the purview of government or its formal apparatus of peacekeeping and enforcement.

³³ BOSTON NEWS-LETTER, Aug. 1-8, 1723, *supra* note 32, at 358.

To work, pirate organization therefore had to be—and was—self-enforcing.³⁴

Pirate crewmembers—the piratical firm’s employees—jointly owned and operated the piratical firm. Unlike merchant ships, which were typically owned by groups of a dozen or so landed merchants who financed and outfitted their vessels, pirate ships had no absentee owners. The reason for this state of ownership is simple enough: pirates jointly stole their ships and other capital, such as armaments and provisions, required for the firm’s operation. Unlike merchant ships, pirates did not require external financiers. Thus, in stark contrast to crewmembers on legitimate vessels who were merely paid employees, each employee of the piratical firm was nearly a partner: a near-equal firm-owner with an equal say in firm activities, such as whether the crew would continue on the account (or retire), who would lead the crew, and so on.

Pirate compensation was based on the principle of “no prey, no pay.” Since there were no external financiers to advance wages to crewmembers, pirates worked for themselves “on commission.” If the firm failed to take any prizes, no crewmember received any payment. When a crew succeeded in capturing a prize, each pirate received a share of the seized booty as compensation. The pirate pay scale was extremely flat. According to the articles on Captain Bartholomew Roberts’s ship, for instance, “*The Captain and Quarter-Master [were] to receive two Shares of a Prize; the Master, Boatswain, and Gunner, one Share and a half, and other Officers one and a Quarter,*” with everyone else receiving one share.³⁵ The difference between the highest and lowest paid person in this pirate crew was thus only a single share.

The same barely progressive pay scale prevailed on pirate captain Edward Low’s ship, whose articles, considered above,³⁶ stipulated: “The Captain is to have two full shares; the Master is to have one Share and one half; The Doctor, Mate, Gunner[,] and Boatswain, one Share and one Quarter,” everyone else to receive one share. Shallow progressivity was also the norm on Captain John Phillips’s pirate ship *Revenge*, whose articles read: “*the Captain shall have one full Share and a half in all Prizes; the Master, Carpenter, Boatswain and*

³⁴ See Leeson, *An-arrgh-chy*, *supra* note 4.

³⁵ DEFOE, *supra* note 9, at 212.

³⁶ See *supra* text accompanying note 33.

Gunner shall have one Share and [a] quarter," and everyone else a single share.³⁷ These allotments contrast sharply with merchant vessel pay scales, where captains routinely earned four or five times as much as regular sailors during peacetime.³⁸

One interpretation of the significantly smaller "wage gap" between pirates is that sea bandits were somehow more interested in equality, "social justice," and egalitarian outcomes than merchant ship owners. But this is a peculiar interpretation given what we know about pirates: they were self-interested opportunists who would have happily taken ten times as many shares as their fellow pirates if they could. The less romantic but more accurate explanation for the relative flatness of pirate pay scales is an economic one: pirates' inability to rely on government.

To ease the burden borne by their private system of governance, pirates needed to avoid conflict, which could potentially erupt into fighting and tear their criminal organization apart. Unsurprisingly, the most divisive force on pirate ships was money. Suspicions of unfairness, favoritism, and simple envy all created unhappy specters for pirate firms. To minimize the chance that these natural human emotions would disrupt or undermine their profit-making enterprise, pirates eliminated the greatest potential source of these emotions—large material inequalities. A relatively flat pay schedule, which preserved some progressive elements but essentially split booty evenly, achieved this goal nicely and prevented undo stress on the pirates' private system of governance.

This relatively equal splitting of ill-gotten proceeds also facilitated cooperation because it induced crewmembers to agree on whether to continue plundering or "hang up the cutlass" and dissolve the company. If nearly all pirates in a particular crew received the same payout from plunder, they were more likely to agree about whether to continue "on the account" or to retire their expedition. This comity was important because it helped ensure that most pirates engaged in an ongoing plundering expedition had their "hearts in it" and therefore would exert full effort, thereby improving the firm's chance of success.

³⁷ DEFOE, *supra* note 9, at 342.

³⁸ DAVIS, *supra* note 27, at 138.

In contrast, wildly different payouts could create divisive factions within a pirate crew. After seizing a large prize, the fortunate faction that received a very large payout might be interested in ending the expedition immediately. These pirates might consider themselves rich enough to discontinue their expedition. On the other hand, the faction that received a very low payout may be interested in keeping the whole crew together until its members have also earned enough to retire for a while. The result would be intra-crew conflict that might cripple the ship. Thus eminently reasonable economic considerations are responsible for pirate “egalitarianism” (if one wants to call it that), not a quasi-socialist pirate ideology.

The piratical firm’s organization proved remarkably successful in facilitating pirate cooperation, which in turn led to considerable success for some pirates. In 1695, for example, Henry Every’s pirate fleet captured a prize carrying more than £600,000 in precious metals and jewels. The resulting share-out earned each crewmember £1,000,³⁹ the equivalent of nearly 40 years’ income for an able merchant seaman at the time.⁴⁰ In the early eighteenth century, Captain John Bowen’s pirate crew plundered a prize “which yielded them 500 l. per Man.”⁴¹ Several years later, Captain Thomas White’s crew retired to Madagascar after a marauding expedition, each pirate £1,200 richer from the cruise.⁴² In 1720 Captain Christopher Condent’s crew seized a prize that earned each pirate £3,000.⁴³ Similarly, in 1721, Captain John Taylor and Oliver La Bouche’s pirate consort earned an astonishing £4,000 for each crewmember from a single attack.⁴⁴ Even the small pirate crew captained by John Evans in 1722 took enough booty to split “nine thousand Pounds among thirty Persons”⁴⁵—or £300 a

³⁹ THE FLYING POST, Oct. 17–20, 1696, reprinted in 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 315, 315.

⁴⁰ For other examples of impressive late seventeenth-century pirate hauls, see Copies of Extracts from Letters Received by the East India Company (1696–1697), in 16 CALENDAR, *supra* note 10, at 68; Deposition of Samuel Burgess (May 3, 1698), in 16 CALENDAR, *supra* note 10, at 227.

⁴¹ DEFOE, *supra* note 9, at 480, 485.

⁴² *Id.*

⁴³ Jenifer G. Marx, *The Pirate Round*, in PIRATES: TERROR ON THE HIGH SEAS FROM THE CARIBBEAN TO THE SOUTH CHINA SEA 140, 161 (David Cordingly ed., Turner Publ’g 1996).

⁴⁴ *Id.* at 162–163.

⁴⁵ DEFOE, *supra* note 9, at 340.

pirate—in a matter of months “on the account.” To put these earnings in perspective, between 1689 and 1740 the average able merchant seaman’s annual income varied between £15 and £55.⁴⁶

This evidence must be interpreted with caution: more modest prizes were more common. And it is likely that many pirates nearly starved searching for the score that would make them rich. Nevertheless, unlike employment as a merchant sailor, which guaranteed a low, if regular, income, a single successful pirating expedition could make a sailor wealthy enough to retire. And at least a few pirates did just that. Richard Moore, for example, whom a crew of pirates captured and brought to their destination at Réunion, overheard some of pirate captain Christopher Condent’s men say “that they had got Riches enough (by pirating) to maintain them handsomly as long as they lived & that therefore . . . they had left off pirating.”⁴⁷ Although pirates were little more than “confederated Villains,” as one advocate general styled them,⁴⁸ the pirate firm’s organization permitted them to be remarkably successful villains.

II. EQUAL PAY FOR EQUAL PREY: BLACK PIRATES AND THEIR STATUS

W. Jeffrey Bolster, whose book *Black Jacks* extensively explores black seamen in the age of sail, notes that although data are hard to come by, “the impression is that” black sailors in pirate crews “were more numerous than the proportion of black sailors in commercial or naval service at that time.”⁴⁹ In 1719, for instance, 80 members of Captain Edward England’s pirate crew were black.⁵⁰ Eighty-eight pirates who went on the account with Captain Roberts’s crew in 1721 were black.⁵¹ Sixty black pirates sailed on one of Blackbeard’s ships in 1717,⁵² and at least one of these—Caesar—was close to Blackbeard personally.⁵³

⁴⁶ See DAVIS, *supra* note 27, at 136–37.

⁴⁷ Information of Richard Moore, *supra* note 24, at fol. 98.

⁴⁸ THE TRIALS OF EIGHT PERSONS INDITED FOR PIRACY, *supra* note 20, at 301.

⁴⁹ JEFFREY W. BOLSTER, BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL 13 (1997).

⁵⁰ Kenneth J. Kinkor, *Black Men Under the Black Flag*, in BANDITS AT SEA: A PIRATES READER 195, 201 (C.R. Pennell ed. 2001).

⁵¹ *Id.*

⁵² *Id.*

⁵³ DEFOE, *supra* note 9, at 82 (discussing Caesar the pirate).

Table 1 presents data Kenneth Kinkor compiled on the racial makeup of 23 pirate companies active between 1682 and 1726.⁵⁴

Captain	Year	Crew	White	Black	% Black
Anstis	1723	60	40	20	33
Bellamy	1717	180	<153	>27	>15
Charpes	1713	68	48	20	29
Cooper	1726	19	15	4	20
Davis		250	<210	>39	>16
Edmonson	1726	10	6	4	40
England (est. one)	1718	180	130	<50	<28
England (est. two)	1719	380	300	80	21
Franco	1691	89	39	50	56
Hamann	1717	25	1	24	96
Hamlin	1682	36	16	22	61
Harris	1723	48	42	6	13
La Bouche	1719	64			50
Lewis		80	40	40	50
Lowther	1724	23	16	9	39
Philips	1724	20	17	3	15
Roberts (est. one)	1721	368	280	88	24
Roberts (est. two)	1722	267	197	70	26
Shipton	1725	13	9	4	31
Thatch (est. one)	1717	100	40	60	60
Thatch (est. two)	1718	14	9	5	36
Unnamed	1721	50	1	<49	<98
Williams	1717	40	<25	>15	>38

⁵⁴ See Kinkor, *supra* note 50, at 201. The numbers in Kinkor's table include all pirate ships for which data was available.

The data portray highly racially mixed piratical firms, with percentages of black crewmembers ranging from 13 to 98 percent. None of these pirate companies maintained an exclusively white crew. In seven of the 23 crews, or nearly a third, half or more of the pirate crew was of African descent. If this sample is representative, 25 to 30 percent of the average pirate crew operating in the height of piracy's Golden Age between 1715 and 1726 was black.⁵⁵

Pirates' acceptance of black sailors had little to do with open-mindedness. There is nothing in the historical record that suggests pirates were more racially enlightened than legitimate members of society. According to David Cordingly, "[t]he pirates shared the same prejudices as other white men in the Western world."⁵⁶ There is good reason to believe this statement. As I have emphasized elsewhere, pirates were profit seekers and therefore opportunists.⁵⁷ Pirates had no qualms about doing whatever they deemed necessary to enhance their hauls, and many times this meant selling captured slaves. Other times this meant keeping captured slaves for menial tasks aboard their ships.

But the fact that pirates probably shared the same racist *beliefs* as their legitimate contemporaries does not mean pirates always *behaved* as prejudicially as their legitimate contemporaries did. Becker discusses why prejudiced employers, for instance, will often not discriminate against minority workers despite their prejudice.⁵⁸ The reason for such disparity is that indulging one's racism can be very expensive. If two workers of different races are equally productive, but one charges less for his services, a profit-motivated employer will make his hiring decision *as if* he were not prejudiced even if he is. To indulge his prejudice the employer would incur a significant cost and in doing so jeopardize his ability to compete with employers who are not similarly prejudiced. Thus recognition of racist thinking does not *ipso facto* imply that the racist will discriminate.

⁵⁵ *Id.* at 200.

⁵⁶ CORDINGLY, *supra* note 9, at 16.

⁵⁷ See Leeson, *Pirational Choice*, *supra* note 4.

⁵⁸ See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39-54 (2d ed. 1971).

This example means that it is difficult to know how pirate racism—where it existed—influenced the status of black crewmembers on pirate ships. Like racist employers, it is entirely possible that pirates could have “thought racist” without “acting racist” when it came to their enterprise. In short, it is incorrect to conclude from the fact that pirates held the same detestable views about blacks as their legitimate contemporaries that pirates necessarily treated blacks in the same detestable ways as their legitimate counterparts. Pirates, after all, were profit seekers; they cared more about gold and silver than they did about black and white.

It is impossible to say what percentage of black pirates identified in Table 1 were free and what percentage of them were slaves. But the evidence suggests that a significant number of black sailors on pirate ships—and certainly a larger number than on legitimate vessels—were “regular” free pirate crewmembers in good standing. One fact supporting this claim is that some black sailors in pirate companies carried arms and actively participated in battle.⁵⁹ A number of black pirates, for instance, fought alongside Blackbeard.⁶⁰ Similarly, a black pirate in Bartholomew Sharp’s crew displayed courage in combat when, after “his Leg [was] shot off, being offered quarter, [he] refused it, and killed four or five of their Men, before he was shot dead on the spot.”⁶¹ Unless pirates were in the dangerous habit of arming slaves, and slaves enjoyed fighting to enrich their enslavers, the presence of armed black sailors among pirates suggests they were freemen rather than slaves. The black pirate in Sharp’s crew, for example, was certainly free. “This fellow,” one of Sharp’s white pirates remarked, “had been a Slave, whom our Commander had freed, and brought from Jamaica.”⁶²

Several black pirates also rose to positions of importance and authority within their crews. Caesar, for instance, was given the

⁵⁹ Kinkor, *supra* note 50, at 201.

⁶⁰ See BOSTON NEWS-LETTER, Feb. 23–Mar. 2, 1719, reprinted in 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 295.

⁶¹ THE VOYAGES AND ADVENTURES OF CAPT. BARTH. SHARP AND OTHERS, IN THE SOUTH SEA: BEING A JOURNAL OF THE SAME (London, Philip Ayres 1684), reprinted in 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 99, 178. Consistent with pirates’ opportunistic racial tolerance, however, this same crew, one of its members remarked, “ke[pt] . . . Negroes to do our drudgery.” *Id.* at 187.

⁶² *Id.* at 179.

important task of blowing up the ship should authorities overtake Blackbeard's crew. Further, as Marcus Rediker points out, "[b]lack crewmen made up part of the pirate vanguard, the most trusted and fearsome men designated to board prospective prizes. . . . [M]ore than half of Edward Condent's boarding party on the *Dragon*," for instance, "was black."⁶³ Other black pirates' behavior also points to their free status. A black pirate in Stede Bonnet's crew, for instance, verbally accosted a white prisoner, Jonathan Clarke, with the same gusto as other pirates, likening Clarke to a black slave.⁶⁴ As Clarke described it: "I was abaft, and one of the Negroes came and damned me, and asked me what I did there? Why I did not go and work amongst the rest? And told me I should be used as a Negroe."⁶⁵

The experience of mixed-race mariner Thomas Gerrard, who this same crew captured, suggests that pirates treated black sailors as freemen so long as they entered the pirates' company voluntarily. According to Gerrard, when "one of the [pirate] Men came and asked if I would join with them? I told him, No. he said, I was but like a Negro, and they made Slaves of all of that Colour, if I did not join them."⁶⁶ The implication of Gerrard's remark is corroborated by a comment from the governor of Bermuda who, in his correspondence with the Council of Trade and Plantations, wrote: "[A]s for the negro men they are grown soe very impudent and insulting of late that we have reason to suspect their riseing, soe that we can have noe dependence on their assistance but to the contrary on occasion should fear their joyning with the pirates."⁶⁷ This is a peculiar fear to have if by "joyning with the pirates" blacks would be merely trading one form of slavery for another. But it makes sense if by voluntarily joining pirate crews, slaves received their freedom.

Finally, although courts sometimes acquitted black crewmembers aboard pirate ships on the grounds that they were slaves, at least one court viewed black pirates as "regular" pirate crewmembers on equal footing with the white members of their company.

⁶³ REDIKER, *supra* note 9, at 54.

⁶⁴ See THE TRYALS OF MAJOR STEDE BONNET, AND OTHER PIRATES, *supra* note 31, at 359.

⁶⁵ *Id.*

⁶⁶ *Id.* at 360.

⁶⁷ Letter from Lt. Governor Bennett to the Council of Trade and Plantations (May 31, 1718), in 30 CALENDAR, *supra* note 10, at 260, 261.

The court presiding over the trial of five black pirates in Blackbeard's company characterized them as follows: "being taken on Board a Pyrate vessell and by what appears equally concerned with the rest of the Crew in the Same Acts of Piracy ought to be Try'd in the same Manner; and if any diversity appears in their Circumstances the same may be considered on their Tryal."⁶⁸ Evidently no "diversity . . . in their Circumstances" appeared. The court convicted the black pirates and sentenced them to death for their crime. If, as this example suggests, "circumstances" were the same for these black pirates as they were for the white ones, black pirates must have received an equal share of plunder and equally enjoyed the other rights of crew membership.⁶⁹

Eyewitness testimony to one pirate crew's operations, for example, demonstrates not only that free black pirates existed, but also that they had the same voting rights as white pirates. In 1721 a conscripted "surgeon's mate" named Richard Moore sailed as a prisoner in Captain Richard Taylor's pirate crew.⁷⁰ Moore's deposition following his release sheds important light on both the presence of free black sailors on pirate ships and the rights of black pirates vis-à-vis whites. In his deposition Moore records an important vote Taylor's crew took in which "a hundred & twelve white men & forty Blacks voated to go to the West Indias" "to endeavour to get a Pardon."⁷¹ This could not have been a situation in which simply everyone on the pirate ship was allowed to vote, including slaves and other forced men, because "the Surgeons," Moore noted, who like him were conscripts, "had no vote" in the affair.⁷² Although Moore's deposition does not speak to the issue of black pirates' pay directly, it is likely that voting black pirates also received shares equal to every other free member of the crew. According to Kinkor, for example, after Henry Bostock's captivity

⁶⁸ Kinkor, *supra* note 50, at 203 (quoting ROBERT E. LEE, BLACKBEARD THE PIRATE: A REAPPRAISAL OF HIS LIFE AND TIMES 136 (1974)).

⁶⁹ Indeed, courts required evidence of accused pirates sharing in booty, happily participating in the company's affairs, or other evidence that satisfied court officials of accused pirates' uncoerced status to find them guilty. See, e.g., DEFOE, *supra* note 9, at 249-50, 449.

⁷⁰ Information of Richard Moore, *supra* note 24, at fols. 95-96.

⁷¹ *Id.* at fol. 96.

⁷² *Id.*

in Blackbeard's crew, Bostock deposed that Blackbeard's black pirates received booty along with the white members of the company. "Rewards and incentives therefore appear to have been based on an individual's ability to function effectively within the pirate crew rather than on skin color."⁷³

III. THE LAW AND ECONOMICS OF PIRATE SLAVERY

A. DISPERSED BENEFITS, CONCENTRATED COSTS, AND PIRATE TOLERANCE

The fact that some (or perhaps even many) blacks sailing on pirate ships were slaves is not surprising given the historical practices on land. What *is* surprising is that *any* blacks sailing on pirate ships were treated as freemen. If anything, we would expect pirates to enslave even the free blacks they captured from merchant vessels. Merchant ship captains could not enslave these sailors whose free status the law protected. But pirates, who were full-blown criminals and thus totally unconstrained by such legal protections, could enslave anybody they wanted—freeman or not. Even if the number of free black pirates was small, which as discussed above there is good reason to doubt, how can we account for pirates' extension of freedom to any blacks who they could enslave? The answer to this question lies in the specific nature of pirates' costs and benefits of enslaving sailors. As I discuss below, it was often in pirates' economic interest to treat black sailors as freemen.

The benefit of a slave in any productive activity was the additional revenue his "costless" labor earned for his owner. Typically, a slave had only one owner who therefore enjoyed all of the slave's additional revenue. If adding a slave to a sugar plantation, for example, created \$1,000 per year in additional revenue for the plantation owner, the plantation owner benefited from the slave in the amount of \$1,000. On pirate ships, however, things were different. As with their ships, pirates jointly "owned" slave labor. This was because pirates' pay system, discussed above, pooled the proceeds of the entire crew's labor and divided it into roughly equal shares (except for a few pirate officers who received slightly more).⁷⁴ So if

⁷³ Kinkor, *supra* note 50, at 200.

⁷⁴ See *supra* text accompanying notes 35–48.

a pirate crew enslaved a black sailor, or any sailor for that matter, the additional piratical revenue his labor created was combined with the revenue created by everyone else's labor and divided among the crew. Of course, booty was only shared among free pirates, which is where the benefit of slavery came in. While a slave's labor was "costless" to the crew in the sense that the crew didn't pay the slave a share of the loot, the slave's labor contributed to greater booty, allowing a larger pool of revenue to be divided among the same number of pirates. Simplifying a bit, in a pirate crew with n free sailors, if by enslaving a black sailor the crew could take a prize worth, say, \$1,000 more than it could take without him, each free pirate earned an extra $\$1,000/n$ from enslaving the black sailor. Note how this situation differs from the plantation owner who enjoyed \$1,000 of the additional \$1,000 his slave's labor generated. Each free pirate crewmember, in contrast, enjoys only $\$1,000/n$ of the additional \$1,000 the slave's labor generates. In this sense the benefits of slavery were "dispersed" among the members of a pirate crew.

Adding concrete numbers to this example illustrates just how dispersed these benefits were. As noted above,⁷⁵ the average pirate ship had about eighty crewmembers. This figure, however, includes both free and enslaved pirates (assuming there are any of the latter). If, as Kinkor's data suggests,⁷⁶ 25 percent of the average pirate crew was black and we further assume for the sake of argument that all black pirates were slaves, the remaining crew, among whom booty would be distributed in equal shares, numbered sixty. That means, if, as in the example above, enslaving a black sailor enabled our pirate crew to take a prize worth an additional \$1,000, each free pirate earned only $(\$1,000/60 \approx)$ \$16.67 extra, or about 1.67 percent of the total additional revenue the slave's labor created. Under pirates' pay system, then, an individual pirate received less than 2 percent of the benefit of a slave that he could potentially enjoy if, like the plantation owner, he was the exclusive owner of the slave's labor.

Slaves or other kinds of conscripted and thus unpaid sailors generated several costs for pirate firms. One of the costs of a coerced sailor was the damage his presence could inflict on intra-firm

⁷⁵ See *supra* text accompanying notes 15–18.

⁷⁶ See *supra* text accompanying notes 49–55.

harmony. As noted earlier, since pirates were outlaws, self-governance was critical to their criminal enterprise's success. Pirates could not rely on government to maintain cooperation between them, to squelch discontent, and so forth; they had to do these things themselves. As the forgoing discussion pointed out, piratical firms achieved governed themselves through privately created constitutions. Pirate crews unanimously consented to the articles governing their ships. As eighteenth-century pirate hunter Clement Downing observed, "When ever any enter on board of these Ships voluntarily, they are obliged to sign all their Articles of Agreement."⁷⁷ These agreements helped prevent conflicts and disagreements that might otherwise jeopardize pirates' ability to successfully cooperate for plunder.

Although a pirate crew could compel enslaved seamen to sign its articles, since the seamen did not do so voluntarily, they did not consent to the firm's rules in the same way the rest of the crew did. By undermining the genuine unanimity pirates used to secure cooperation in their firms, slavery could undermine the very purpose the articles served. Bartholomew Roberts, who "several times openly declared . . . and ask'd of them [he overtook], who was willing to go, for he would force no Body," seems to have understood this well.⁷⁸ Coerced men, Roberts appreciated, "might hazard, and, in Time, destroy his Government."⁷⁹

Enslaved sailors were also prone to try to desert their pirate oppressors at the first opportunity. If they constituted a substantial portion of the pirate crew they were deserting, their departure could leave the pirates high and dry, with insufficient sailors to man the ship in overtaking prizes. Even if enslaved sailors never managed to escape, provided they comprised a significant proportion of the crew, they nevertheless significantly weakened the ship they sailed on. Since they had no stake in the firm's success, slaves, of course, were less willing to "give it their all" in battle and might even deliberately "give little" so their crew would be captured. For instance, Captain Cornelius, who shortsightedly stocked his pirate

⁷⁷ CLEMENT DOWNING, *A COMPENDIOUS HISTORY OF THE INDIAN WARS* 107 (London, T. Cooper 1737).

⁷⁸ DEFOE, *supra* note 9, at 248.

⁷⁹ *Id.*

crew with 70 conscripts, spotted several Men of War and “was for giving Chase, but finding his Men unwilling, there being, as they gave for Reason 70 forc’d Men on board,” had no choice but to sail elsewhere.⁸⁰ Similarly, Captain Gow’s pirates had to flee from a prospective French quarry, Gow giving “as a Reason against engaging with the Martinico Ship, that he had a great many Prisoners on Board.”⁸¹

Like the benefit of enslaving a sailor, each of these costs of enslaving a sailor was dispersed among the free employees of a pirate firm. If, for instance, a slave created conflict that stifled the pirates’ productivity or shirked in his duties (since he gained little by behaving productively) the crew’s haul would be smaller. These losses incurred because of the slave would be spread among the whole crew, each individual pirate bearing only a fraction of the total loss.

In contrast, the other cost associated with enslaving a black sailor fell fully on each free member of the pirate crew. An escaped slave could provide the government with information it could use to capture, convict, and ultimately execute the pirates. For example, a prisoner on pirate captain John Gow’s *Revenge* escaped, “surrender’d himself to the Government . . . and inform’d them who Gow was, and what the Ship’s Crew were . . . with what else he knew of their Designs.”⁸² Unlike an individual pirate’s benefit of slave labor—money and goods—which could be divided and shared, his cost of slave labor—his death—could not be. Although, as shown above,⁸³ under pirates’ pay system an individual pirate enjoyed only 1.67 percent of the benefit of a slave he could in principle enjoy, he suffered 100 percent of the cost of a slave he could in principle incur.

Collectively, the cost of a slave who led to his crew’s execution was sixty pirates’ lives. But from the perspective of an individual, self-interested pirate’s cost-benefit calculus, his comrades’ fifty-nine lives do not enter the equation. The only death that is costly to him

⁸⁰ *Id.* at 601.

⁸¹ DANIEL DEFOE, AN ACCOUNT OF THE CONDUCT AND PROCEEDINGS OF THE LATE JOHN GOW, ALIAS SMITH, CAPTAIN OF THE LATE PIRATES, EXECUTED FOR MURTHUR AND PIRACY 24 (G. Wright Pub’g 1978) (1725).

⁸² *Id.* at 32.

⁸³ See *supra* text accompanying notes 75–76.

is his own, and that one he always bears fully. The “collective benefit” of a slave, in contrast, *could* in principle be enjoyed exclusively by an individual pirate. If, like the plantation owner, a pirate singly owned a slave’s labor, he would reap 100 percent of the benefits associated with the slave. The only reason he does not is because of the slave labor ownership arrangement on pirate ships—the result of pirates’ pay system—which makes every free pirate an equal “owner” of a slave’s labor.

Slaves could contribute to a pirate’s capture in multiple ways. For example, if authorities found and engaged a pirate ship, slaves could hinder the crew from prevailing in the contest; this would allow authorities to overtake the pirate enslavers. Even more important, enslaved sailors could revolt against their pirate enslavers and deliver them directly to the law. Pirate captain John Phillips discovered this downside of forced labor when seven forced men in his crew, led by pressed carpenter Edward Cheeseman, designed “to overthrow the pyratival Government” on Phillips’s ship and succeeded, owing to “how few voluntary Pyrates there were on board.”⁸⁴ Cheeseman and the other conscripts revolted, delivered their pirate captors to the authorities, and must have been quite pleased when officials convicted and executed the brutes.

Cheeseman was a white conscript in Phillips’s piratical firm, but he was joined by a “Spanish Indian” conscript—a slave—in executing the revolt.⁸⁵ According to one of the white prisoners aboard the ship, this slave was not merely a participant in the revolt; he was the critical reason for its success. As the white captive put it, had “it not . . . been for him our plot would most probably have failed in the execution.”⁸⁶ Forced men also overwhelmed pirate captain William Fly on the *Fame’s Revenge*, delivering Fly and his pirates to authorities who ultimately condemned the pirates to death. These slaves were white, but black prisoners aboard Captain Grinnaway’s pirate sloop helped to successfully overwhelm their captors.⁸⁷ As noted

⁸⁴ DEFOE, *supra* note 9, at 346.

⁸⁵ See BOSTON GAZETTE, Apr. 27–May 4, 1724, reprinted in 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 307.

⁸⁶ INCREASE MOSELEY, A NARRATION OF THE CAPTIVITY OF JOHN FILLMORE AND HIS ESCAPE FROM THE PIRATES 20 (Bennington, Haswell & Russell 1790).

⁸⁷ See BOSTON NEWS-LETTER, Aug. 4–11, 1718, reprinted in 1 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 339. For an example of black and white prisoners at-

above,⁸⁸ when such revolts succeeded, each free pirate shouldered the full brunt of the resulting cost, which was the end of his piratical employment and often his life. Together with pirate slavery's dispersed benefits, this concentrated cost created an incentive for many pirates to treat black sailors as freemen instead of slaves.

It is interesting to contrast the logic of dispersed benefits and concentrated costs associated with enslavement on pirate ships with that of merchant ships. Since merchant shipping was legitimate, one of pirates' chief costs of slavery—slaves' contribution to crewmember capture and execution—was not only not concentrated on merchant ships but was totally absent. Equally important, rather than facing dispersed benefits of enslaved black sailors as pirate ships did, on merchant vessels the benefits of enslavement were concentrated. Landed masters or captains owned the slaves who manned merchant ships, so the full additional earnings associated with the slave accrued to his owner. Instead of being dispersed among many pirates, this benefit was concentrated on the master who therefore had a much stronger incentive to keep his slave a slave.⁸⁹ This stronger incentive for the continuing enslavement of blacks sailing on legitimate vessels explains why black slaves on legitimate ships were always slaves, while black slaves who made their way onto pirate ships were sometimes granted their freedom.

B. CONDITIONS FOR THE PROFITABILITY OF PIRATE SLAVERY

The foregoing discussion explains why pirates often had an incentive to grant "equal rights" to black sailors, treating them as freemen despite the fact that, on the surface at least, pirates might have wanted to enslave all black sailors. But some pirates *did* in fact

tempting to escape their pirate captors together, see A FULL AND EXACT ACCOUNT, OF THE TRYAL OF ALL THE PYRATES, LATELY TAKEN BY CAPTAIN OGLE ON BOARD THE SWALLOW MAN OF WAR, ON THE COAST OF GUINEA, *supra* note 28.

⁸⁸ See *supra* text accompanying notes 83–84.

⁸⁹ Although whalers relied on a share system of compensation, their legitimacy, like merchant ships', created the same incentive for them with respect to black slaves. A black slave employed on a whaling vessel would also be owned by a landed master or captain who enjoyed the full benefit of the slave. Similarly, since whaling was a legitimate enterprise, whalers did not confront a concentrated cost of slavery in the form of slaves' contribution to the crew's capture by authorities, as pirates did.

have slaves. As a result, the dispersed benefits and concentrated costs of pirate slavery did not in all cases lead pirates to practice racial tolerance. In some cases the benefits of pirate slavery, albeit dispersed, outweighed the costs of pirate slavery, even though an important part of these costs was concentrated.

Several factors could contribute to slavery's profitability for pirates despite its dispersed benefits and concentrated costs. The discussion above primarily focused on slave labor. But pirates also desired slaves for another reason: trading. In this case the benefit of enslavement was not only the additional earnings associated with "free" slave labor, but also a portion of the price that slave could fetch when sold. If slave prices were high, this benefit, though dispersed, could be significant. More importantly, if pirates expected to find a ready market for stolen slaves, the concentrated cost of slaves could be very low. In this case pirates only needed to hold slaves for a short time before unloading them, shrinking slaves' window of opportunity to revolt. Under these circumstances the probability that slaves would contribute to pirates' capture, and thus pirates' cost of slavery, was much lower.

Two other factors could also contribute to the profitability of pirate slavery despite the dispersed benefits and concentrated costs discussed above. Like all ships, pirate ships required certain skilled sailors to function. Surgeons, carpenters, and coopers, for example, had special skills pirates needed that unskilled sailors did not have. As I have pointed out elsewhere, pirates did not typically have trouble finding volunteers among the unskilled sailors they overtook.⁹⁰ However, the skilled varieties were more difficult to come by. If pirates could not find volunteers to fill a needed position but a captured black sailor could perform this role, the black sailor's indispensability significantly increased the benefit of enslaving him.

Similarly, if pirates captured slaves who did not have sailing or navigational expertise, this could also impact pirates' cost/benefit calculus of resorting to slavery. Enslaved sailors who revolted against their pirate oppressors posed a considerably lesser threat to their captors if they couldn't bring the ship to authorities. In such cases pirates' cost of enslaving captives, while

⁹⁰ See Leeson, *Pirational Choice*, *supra* note 4, at 26.

still concentrated, was much lower. In turn, pirates had a greater incentive to resort to slavery.

Perhaps the most important factor that could contribute to pirates' incentive to enslave a sailor, however, was the probability they would be brought to justice if slaves succeeded in wresting control of the ship and delivered the crew to authorities. Between 1536 and 1700 England's Offenses at Sea Act governed procedures for bringing pirates to justice under the law.⁹¹ While this statute was an improvement over even earlier anti-piracy legislation, the Offenses at Sea Act was seriously flawed. Most significantly, it did not provide a practical way for England's growing colonies to handle the pirates they captured. Although a few colonies adopted their own legal procedures relating to piracy, colonial piracy trials were rare and the High Court of Admiralty could overturn their decisions. Most of these trials halted in 1684 when the English government decided that the colonies did not have jurisdiction to try any cases of piracy.⁹² The 1536 statute obligated colonial officials to ship accused pirates and witnesses to pirates' alleged crimes to England to attend trial. Since a great deal of piracy took place around England's distant colonies, the Offenses at Sea Act left a serious impediment to effectively dealing with sea bandits. The legislature, acknowledging these problems, stated that:

it hath been found by experience, that Persons committing Piracies, Robberies and Felonies on the Seas, in or near the East and West Indies, and in Places very remote, cannot be brought to condign Punishment without great Trouble and Charges in sending them into England to be tried within the Realm, as the said Statute directs, insomuch that may idle and profligate Persons have been thereby encouraged to turn Pirates, and betake themselves to that sort of wicked Life, trusting that they shall not, or at least cannot be easily questioned for such their Piracies and Robberies,

⁹¹ OFFENSES AT SEA ACT, 1536, 28 Hen. 8, c. 15. For an excellent and more in-depth account of anti-piracy legislation, upon which my discussion is largely based, see JOEL BAER, *PIRATES OF THE BRITISH ISLES* (2005). *See generally* BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12.

⁹² BAER, *supra* note 91, at 25.

by reason of the great trouble and expence that will necessarily fall upon such as shall attempt to apprehend and prosecute them for the same⁹³

In response to this problem, in 1700 England introduced An Act for the More Effectual Suppression of Piracy.⁹⁴ The new statute empowered colonies with commissions from the crown or Admiralty to preside over Vice-Admiralty courts to try and punish pirates on location. The 1700 legislation was a marked improvement over the 1536 legislation, and for the first time made it widely feasible for colonial authorities to bring pirates to justice. Parliament set the act to expire in only seven years. Owing to its helpful effect on prosecuting and convicting pirates, Parliament renewed the act sporadically following the War of Spanish Succession. However, it was not until 1719 that the act became permanent.⁹⁵ Not coincidentally, Parliament's permanent establishment of the 1700 statute corresponded with the beginning of the precipitous decline of the Anglo-American pirate population.⁹⁶ The year 1719 consequently marked a significant moment in government's war against the pirates.

In light of this legal development, a pirate's probability of government trying and convicting him from 1719 onward increased considerably. Since the concentrated cost of pirate slavery was slaves' potential contribution to bringing pirates to justice, pirates' incentive to hold slaves before 1719 was considerably greater than it was from 1719 onward. This analysis suggests that those pirate crews most likely to have slaves were those operating before this date, while those operating after 1719 had a significantly stronger incentive to treat black sailors as freemen, per the concentrated cost reasoning

⁹³ An Act for the More Effectual Suppression of Piracy, 1700, 11 & 12 Will. 3, c. 7, reprinted in 3 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 12, at 59, 59.

⁹⁴ *Id.*

⁹⁵ 1719, 6 Geo. 1, c. 19.

⁹⁶ Anti-piracy law also strengthened following 1719 as a result of government committing to a greater naval presence in waters frequented by pirates for the purposes of hunting them down, stipulating punishments for naval vessels who were not diligent in this task, stipulating punishments for armed merchant vessels that did not attempt to defend themselves against pirate attack, and stipulating punishments for anyone who traded with pirates. Parliament introduced these additional anti-piracy policies in 1721.

discussed above.⁹⁷ As Part III noted, there are no data on the number of enslaved as opposed to free black sailors on pirate ships that would allow us to examine this issue directly. However, the data from Table 1 on the proportion of black sailors in 23 pirate crews operating between 1682 and 1726 allows us to indirectly investigate this issue. The evidence is indeed consistent with the argument that pirate crews active before 1719 were more likely to carry enslaved black sailors than pirate crews active between 1719 and 1726.

Table 1 contains racial composition data for nine pirate crews active before 1719 and 12 pirate crews between 1719 and 1726. While the average pre-1719 pirate crew in Table 1 was 46.6 percent black, the average 1719-1726 pirate crew was only 34.2 percent black. The 12.4 percentage point difference between the proportion of black sailors in pirate crews before and after Parliament made the Act for the More Effectual Suppression of Piracy permanent suggests that pirate crews operating in the less stringent legal environment before 1719 carried more black slaves than pirate crews operating in the more stringent legal environment that existed from 1719 onward. It is uncertain what portion of this difference is attributable to the difference in the probability of being brought to justice after 1719. But in light of the concentrated cost of pirate slavery, which becomes more binding on pirates' policy toward blacks as the probability of being brought to justice increases, there is good reason to suspect that at least part of this difference is due to black slaves present in earlier pirate crews that were not present in later ones.

IV. CONCLUDING REMARKS

My analysis of the economics of pirate tolerance leads to several conclusions. First, even criminal self-interest seeking is capable of generating socially desirable outcomes. Although pirate profit-seeking was directed at others' loss, as an unintentional byproduct, pirates' criminal self-interest seeking led some pirates to integrate black slaves into their firms as free, full-fledged "citizens" at a time when legitimate societies treated blacks as slaves. At least in the case of pirates' criminal enterprise, there existed an "invisible hook" in some ways analogous to Adam Smith's invisible hand.

⁹⁷ See *supra* text accompanying notes 81-83.

Of course, the invisible hook differs in some important respects from the invisible hand. Legitimate producers' self-interest seeking, discussed by Adam Smith,⁹⁸ leads to general social benefits. Pirate self-interest seeking, in contrast, did no such thing. Pirates thrived parasitically off of others' production, siphoning off others' wealth for themselves, rather than producing new wealth. But this does not mean piratical self-interest seeking produced no socially desirable outcomes. Just as Smith noted that "[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest,"⁹⁹ so, too, was it not from noble intentions to free black slaves or enlightened ideals about equality that some pirates treated black sailors as equals. Rather, pirate racial tolerance stemmed from these criminals pursuing their self-interest. It is this crucial commonality that fastens the invisible hook to the invisible hand.

In this respect, the popular depiction of pirates as barbaric brutes is only half right. It is true, pirates were violent criminals; they also held the racist views of their legitimate contemporaries. However, unlike their legitimate contemporaries, some pirates' behavior toward blacks was remarkably progressive, at least partially anticipating behavior toward blacks that Britain and the United States only adopted more than a century later. This state of affairs is especially remarkable since, on the surface, pirates had nothing holding them back from enslaving black sailors they captured—bondsmen or free.¹⁰⁰

Second, it was precisely the *criminal* component of pirates' self-interest seeking that led to their racial tolerance. Because they were outlaws, pirates could not rely on government to maintain social harmony within their firms. They had to rely on a private system of self-governance to achieve social order. To avoid taxing this system of self-governance, pirates sought to remove the greatest source of potential intra-firm conflict, large disparities in compensation. Pirates' flat, share-based compensation structure in turn dispersed pirate employees' benefits of slavery. However, owing again to

⁹⁸ See Smith, *supra* note 8, at 26–27.

⁹⁹ *Id.*

¹⁰⁰ As discussed *supra*, merchant vessels could not enslave free blacks. Pirate crews, however, had no such constraints.

their criminality, an important part of pirates' cost of slavery was concentrated on each individual pirate. In these ways pirates' criminality crucially shaped the costs and benefits of slavery they confronted. Given these criminally determined costs and benefits, pirates' self-interest was often served by granting slaves "equal rights" within the pirate firm.

In contrast, the very legitimacy of merchant vessels created a different cost-benefit structure of slavery for these ships. On the one hand, because they were legitimate, merchant ship captains and owners could rely on government backing to enforce contracts with their crewmembers. Consequently, merchant ships did not have a private system of self-governance to protect by leveling crewmember compensation. Therefore, they did not employ a flat, share-based system of compensation that dispersed the benefits of slaves. On the contrary, because captains owned or "rented" slaves, they internalized the full benefit of their bondsmen. Further, because merchant shipping was a fully legal enterprise, merchant shippers did not face the concentrated cost of slavery that pirates faced in terms of bondsmen contributing to their capture and execution. Self-interest seeking in this legitimate context thus ensured that legitimate vessels invariably held black slaves as slaves.