

A POSITIVE THEORY OF UNIVERSAL JURISDICTION

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ABSTRACT

Academic discussions of universal jurisdiction (“UJ”) have been almost entirely normative, focusing on what UJ “should” be in an ideal world. This Article breaks with the normative approach and analyzes UJ from a positive perspective, drawing on historical evidence and rational choice models to understand what UJ has in fact been and what it can be.

Piracy was for centuries the only UJ offense. This Article begins by isolating the characteristics of piracy that made it uniquely suitable for UJ. While these characteristics show why UJ over piracy would cause fewer problems than UJ over other crimes, they still fail to explain why nations would actually exercise UJ. The rational choice model of state behavior reveals that they would not. All that UJ adds to conventional bases of jurisdiction is the ability of unaffected nations to prosecute. Given that prosecution is costly, rational, self-interested states would not expend scarce resources to punish crimes that did not directly harm them. Nations using UJ would receive none of the benefits of enforcement, while bearing all the costs. UJ is a public good, and thus it would be provided at suboptimally low levels, if at all. Standard discussions of UJ entirely ignore the incentives faced by nations. When these incentives are taken into account, it appears that UJ cannot succeed in increasing enforcement or deterrence.

Yet the rational choice prediction appears inconsistent with the fact that piracy was for centuries treated as universally cognizable. This Article presents a new explanation of the function served by the universal principle. This explanation reconciles the historic evidence and the major cases with the rational choice model. Universal jurisdiction over piracy was useful to nations as a legal fiction rather than as a real expansion of jurisdiction. It was an evidentiary rule, a presumption designed to facilitate the proof of traditional territorial or national jurisdiction in cases where such jurisdiction probably existed but would be difficult to prove.

Modern efforts to broaden UJ invoke piracy as a precedent and a model. However, the new universal jurisdiction represents an entirely different phenomenon, one that does not share the characteristics that were necessary to piracy becoming universally cognizable, and that does not accord with the incentives of self-interested states. Thus the positive account of UJ suggests that the current efforts to expand it to human rights offenses will not succeed.

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INTRODUCTION

This Article develops a positive account of the nature and limits of universal jurisdiction (“UJ”). Unlike previous discussions, this Article explains UJ in a way that is consistent with the historic evidence, major cases, and with the incentives of rational, self-interested states. Modern universal jurisdiction over human rights offenses is still a new and tentative development. In international law, a nation’s jurisdiction is based on and congruent with the scope of its sovereignty: states have jurisdiction over crimes within their territory (territorial jurisdiction), or committed by or against their nationals (nationality and passive

personality jurisdiction).¹ Universal jurisdiction is an exception to sovereignty-based, or Westphalian, jurisdiction. If a crime is subject to universal jurisdiction, any nation can prosecute the offenders, even if there is no connection at all between prosecuting state and the crime.² Before the end of the Cold War, there was not a single prosecution of human rights offenses that depended on the universal principle. In recent years this has changed, and now several national courts and international tribunals exercise or claim the right to exercise jurisdiction over offenses such as war crimes, genocide and torture under the universal principle. The new universal jurisdiction (“NUJ”) is also among the most controversial developments in international law because it limits or qualifies nations’ jurisdictional sovereignty.

However, at least since the 18th century, piracy has been firmly established as a universal offense. It remains the oldest and least controversial offense subject to universal jurisdiction.³ Proponents of expanding universal jurisdiction to human rights offenses have always claimed piracy UJ as a precedent or model for

¹ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L. J. 183, 188-89 (2004) (explaining the different categories of jurisdiction in international law). This Article will refer to all of these traditional bases of jurisdiction as “traditional,” “sovereignty-based,” or “Westphalian” jurisdiction; these terms are used synonymously.

² See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) (“Where a state has universal jurisdiction, it may punish conduct although the state has no links of territoriality or nationality with the offender or victim.” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987))); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 323–24 (2001) (describing universal jurisdiction as jurisdiction with no “nexus between the regulating nation and the conduct, offender, or victim”).

³ See Kontorovich, *supra* note 1, at 190; Michael P. Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 80-81 (2001) (“The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.”).

their broader vision of UJ.⁴ Given the well established nature of piracy UJ and the still controversial and unsettled status of NUJ, one would expect international law scholars to have a keen interest in understanding *why* piracy was subject to UJ and why this enjoyed universal acceptance, an acceptance that NUJ has yet to win.⁵ Answers to these questions could help provide a more solid foundation for NUJ, while also suggesting its limitations. However, international law scholars have failed to explore what it was about piracy that made it universally cognizable. Instead, beginning with the assumption that piracy and modern UJ are creatures of the same species, scholars have, generally with little explanation or analysis, put forth anachronistic explanations for piracy UJ. As a result, these accounts can say little about what kinds of universal jurisdiction would work in practice, or about what kinds of offenses can be subjected to such jurisdiction without causing conflict among nations, unfairness to defendants, or failure to improve deterrence.

⁴ See Kontorovich, *supra* note 1, at 184-85 & nn.10-16, 203 & nn.117-18 (explaining the importance of the “piracy analogy” to modern universal jurisdiction and citing cases and commentary analogizing new universal offenses to piracy). As Judge Michael Kirby of the Australian Supreme Court put it recently:

[T]here are precedents that would encourage a common-law judge to uphold universal jurisdiction. Courts of the common-law tradition have done so in the past in relation to pirates . . . Such people were . . . the perpetrators . . . of grave crimes against mankind. To this extent the notion of universal jurisdiction is not entirely novel or extralegal. What is new is the expansion of crimes to which universal jurisdiction is said to apply.

Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points,”* in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES* 240, 258 (Stephen Macedo ed., 2004); Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 *YALE L.J.* 191, 194 (1997) (“Piracy served as . . . the progenitor of some of the later jurisdictional expansions.”).

⁵ Throughout this Article, UJ will be used as shorthand for the general principle of universal jurisdiction. To distinguish between universal jurisdiction as it existed for hundreds of years – a jurisdictional exception unique to piracy – and the modern universal jurisdiction that concerns itself primarily with human rights violations, this Article will refer to the latter as “modern universal jurisdiction,” “new universal jurisdiction” or “NUJ,” and the former as traditional or piracy UJ. See Kontorovich, *supra* note 1, at 184 n.9 (introducing the term “new universal jurisdiction” and explaining its relation to the “new customary international law” that began to develop after the Second World War).

This Article pursues an alternative to abstract grappling with the nature of universal jurisdiction. It identifies and explores the characteristics that made piracy a universal offense. By doing so, this Article in effect identifies what have long been the necessary conditions for universal jurisdiction itself – because until recently piracy has been the *only* universal offense. In developing a positive understanding of what made piracy suitable for UJ, a deeper set of questions arises, questions that have also been neglected by scholars.

While the unique characteristics of piracy explain why UJ over it would result in fewer *problems* than UJ over other offenses, this does not explain why nations would ever exercise UJ in the first place. Unlike the normative and optimistic treatments of UJ, a positive account must show why exercising UJ would be consistent with the incentives faced by self-interested and rational sovereign states. A nation exercising UJ expends scarce resources to punish crimes that have not injured it; thus it bears all the costs of enforcement while the benefits are enjoyed primarily by other nations. Indeed, universal jurisdiction over piracy was honored more on paper than in practice. According to the leading scholar of piracy law, there were almost no piracy prosecutions that could not have been sustained on traditional, sovereignty-based theories of jurisdiction such as territoriality or nationality.⁶ Thus a positive account of UJ would ideally explain why it was confined to piracy, and why it was affirmed by courts and commentators for centuries, yet almost never put into practice.

⁶ See ALFRED P. RUBIN, *THE LAW OF PIRACY* 348 n.50 (2d ed. 1998) (concluding that universal jurisdiction over piracy has been applied “very few times,” and enumerating fewer than five cases in the past 300 years). See also Kontorovich, *supra* note 1, at 192.

There is, to be sure, an existing account of piracy's jurisdictional status, but it lacks any historical basis. In the dominant view, piracy was universally cognizable because of its extraordinary heinousness.⁷ This account is convenient for proponents of NUJ, because the current roster of UJ offenses – genocide, war crimes, torture and so forth – are expressly selected based on their heinousness. Thus if UJ over piracy was also based on heinousness, it would provide a venerable and solid precedent for the emergent NUJ offenses.⁸ Modern scholars start at the end and try to reason backwards to the beginning. They begin with what they normatively believe should be the proper model of universal jurisdiction – the heinousness of the offense.⁹ Defining UJ in relation to

⁷ See Kontorovich, *supra* note 1, at 205-06 (“The modern argument for universal jurisdiction sees the historic treatment of piracy as evidence of an exception to standard jurisdictional limitations based on the “outrageousness” or “heinousness” of the crime.”). See also *id.* at 205-06 nn.125-28, 130-32 (citing cases and commentary asserting that the substantive heinousness of the conduct is the common rationale for universal jurisdiction from piracy onwards). See, e.g., Scharf, *supra* note 3, at 80-81 (“Many of the crimes subject to the universality principle are *so heinous in scope* and degree that they offend the interest of all humanity, and any state may, as humanity’s agent, punish the offender. . . .Piracy’s *fundamental nature* and consequences explained why it was subject to universal jurisdiction. Piracy often consists of *heinous acts of violence or depredation.*”) (emphasis added).

⁸ See Kontorovich, *supra* note 1, at 208. See, e.g., Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 166-67 (1996) (arguing that piracy provides a precedent under which war crimes and similar human rights offenses should also be universally cognizable because “[s]uch crimes are far more serious than piracy or slave trading, the oldest offenses subjected to universal jurisdiction”).

⁹ See, e.g., Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001) (arguing that human rights offenses are universally cognizable because they are “so heinous”); Joyner, *supra* note 8, at 164-65 (explaining that the “universality principle . . .holds that some crimes are so universally abhorrent . . . that jurisdiction may be based solely on securing custody of the perpetrator”). Cf. Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts*, 21 BERKELEY J. INT’L L. 111, 127 (2003) (“Many commentators and jurists incorrectly seek to divorce the assertion of universal jurisdiction from principles of states sovereignty. They assert that the basis of universal jurisdiction arises from the ‘heinous’ nature of the crime itself.”).

heinousness, they then attempt to shoehorn piracy UJ into that model.¹⁰ However, the model does not fit the historical facts.¹¹

In a previous article, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, in the current issue of the Harvard International Law Journal, I disproved this influential but fundamentally anachronistic explanation of piracy's jurisdictional status.¹² *The Piracy Analogy* demonstrates that piracy was not subject to UJ because of the substantive heinousness of the piratical conduct.¹³ The previous article was negative: it showed that the dominant explanation for universal jurisdiction simply did not fit the facts. But that conclusion raises an obvious question – if not heinousness, then what can explain piracy's special jurisdictional status?

¹⁰ See, e.g., Joyner, *supra* note 8, at 165 n.48 (“Piratical acts were made subject to universal jurisdiction . . . because they were considered particularly heinous and wicked acts of violence and depredation.”); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (arguing that the “rationale” for universal jurisdiction over piracy was that the “fundamental nature” of the offense consisted of “particularly heinous and wicked acts”).

¹¹ See generally, Kontorovich, *supra* note 1.

¹² *Id.*

¹³ See generally Kontorovich, *supra* note 1. The full proof cannot be reprised here, but the basic outlines can be sketched. First, the exact same behavior engaged in by pirates was perfectly legal, and certainly not universally cognizable, when committed with sovereign authorization – the letter of marque issued to privateers. *Id.* Privateers were simply licensed pirates, yet all maritime nations issued licenses authorizing the former to attack and plunder civilian shipping, and respected the licenses issued by other nations. *Id.* By contrast, heinousness as understood by NUJ refers to conduct that is so horrible that its character could not be mitigated by sovereign authorization; indeed the prototypical NUJ offenses of war crimes and genocide presuppose such authorization. *Id.* Second, *The Piracy Analogy* shows that piracy was a form of robbery and understood to be not significantly more heinous than robbery in general; in other words, it was regarded as culpable conduct but was not regarded among the most reprehensible crimes. *Id.* Finally, the previous article demonstrates that the historical evidence adduced to show that piracy was subject to UJ because of its heinousness does not actually support this proposition.

This Article picks up where the previous one left off. It develops a positive account of what *did* motivate piracy UJ.¹⁴ While the heinousness-based “piracy analogy” is invalid, piracy cannot help but inform modern discussions of universal jurisdiction. The jurisdictional approach that many wish to extend to major human rights violations was created in the specific context of piracy. Thus the characteristics of piracy are a natural place to start in understanding the nature and limits of universal jurisdiction. Moreover, piracy UJ was by the standards of international law an outstanding success -- universally accepted, of long service, and generally uncontroversial. Discussions of UJ usually begin with an ideal vision, and then may stoop to discuss the practical problems. This Article proceeds in the other direction. It examines the one historically successful instance of universal jurisdiction to determine the necessary ingredients. Then it can be determined what current international problems share those characteristics. This approach requires admitting, from the beginning, that it is by no means certain that the rationale for piracy UJ would justify a NUJ of the scope that some wish for it, if any. But the theory of UJ that emerges from this study will stand on a sounder basis, and stronger though it may be narrower.

Part I begins by identifying six characteristics of piracy that explain why it was singled out for universal jurisdiction. Piracy was committed by private actors, not public officials. Moreover, pirates were a subset of private actors particularly who had intentionally foregone the protection of sovereign states, since all nations were willing to authorize piratical conduct in exchange for a share of the proceeds

¹⁴ The positive task is more uncertain than the negative one; it is harder to explain the causes of a historical practice than to demonstrate that a purported explanation is erroneous.

through the practice known as privateering. Of all actors, pirates were particularly unlikely to have the solicitude of their home states. Second, piracy took place on the high seas. This did not render traditional jurisdictional concepts moot, as commentators often mistakenly assert. It did however make enforcement particularly difficult. Third, by preying on maritime commerce, which was implicated the economic interests of many states, pirates were likely to affect many nations; not in the sense of an abstract injury to their moral sensibilities, but in the sense of actual and tangible injury to their ships, nationals or trade. Fourth, piracy was recognized as wrongful and criminal (but not heinous) by all nations. Fifth, all nations prescribed the same punishment for the offense. This is crucial because under UJ, the prosecution by one nation acts as a double jeopardy bar to subsequent prosecution of the same offense, and thus disparities in punishment would result in forum shopping, unequal sentencing, and conflict among nations angered by what they perceived as overly lenient or overly harsh sentences for an offense that is within their common jurisdiction. Finally, piracy was a narrowly defined offense and there was general agreement as to its elements. Piracy subject to UJ was not simply crime on the high seas, it was forcible robbery on the high seas. Thus UJ over piracy would have relatively little opportunity to expand to other offenses or be applied outside its intended scope for political reasons.

Part II describes a deeper puzzle facing positive accounts of universal jurisdiction: why would rational, self-interested states ever prosecute crimes under the universal principle? All that UJ adds to traditional bases of jurisdiction is the ability of nations *without* any stake in the matter to prosecute. Yet UJ has no

positive theory to explain *why* a nation would incur the costs of enforcement when other nations would gain the immediate benefits. Expanding jurisdictional possibilities to nations with no stake in the matter should be expected to have no effect on enforcement or deterrence. A second enforcement paradox is that by allowing all nations to prosecute, UJ could be expected to create a collective action/free rider problem among nations where none would have the incentive to be the first to prosecute. Indeed, the history of piracy shows these paradoxes are not merely theoretical constructs. While nations repeatedly asserted the existence of UJ over that offense, they nearly never exercised it.

Part III presents a new positive explanation of the function of universal jurisdiction that is consistent with the piracy experience. It also shows why UJ was a useful concept despite the paradoxes described in Part II and despite the lack of actual UJ prosecutions. When UJ concepts were powerfully invoked in piracy cases, it was not to expand the frontiers of jurisdiction. Instead, the concept was used as an evidentiary rule to facilitate the *proof* of jurisdiction in cases where the forum state had substantial connection to the offense but this connection could not be established in court because of some unique characteristics of piratical conduct. Part IV concludes by considering the implications of this positive account of UJ for modern attempts to expand UJ to new offenses.

I. THE NECESSARY CHARACTERISTICS OF UNIVERSAL CRIME

This Part identifies and explores the significance of the characteristics of piracy that made it the only universal offense. Commentators have noticed the

importance of some of these characteristics, such as *locus delecti*, in explaining universal jurisdiction over piracy. Other important characteristics, like the uniformity of punishment meted out to pirates by various nations, have been overlooked. Moreover, no one has looked simultaneously at *all* of the defining characteristics of piracy relevant to its universal status. Many of these characteristics have been misunderstood or oversimplified by contemporary courts and scholars. Thus the commentators who stress the multinational nature of the piratical threat and its occurrence where nations cannot easily police against it ignore the salient fact that only private actors could be pirates; conversely, those who stress the oft-misunderstood private action requirement ignore the importance of location or other factors.

Understanding all of the relevant characteristics is crucial to appreciating the limited scope of the piracy universal jurisdiction. For in the case of piracy, all these factors coincided. There were numerous offenses that bore *some* of these traits, but none was subject to universal jurisdiction. Most of these characteristics were necessary to piracy's universal status, and the others helpful. Thus these characteristics in effect describe the limits of UJ itself as it was created and practiced for centuries.

A. Private actors who eschewed state protection.

Piracy consisted of purely private, non-governmental action. Pirates were by definition private parties: the exact same conduct that constituted piracy was perfectly legal when authorized by a sovereign state. From the 17th through early nineteenth centuries, all maritime states issued licenses, called letters of marque

and reprisal or writs of marque which authorized the bearer to attack and seize civilian ships on the high seas.¹⁵ The bearer of such a commission was not only outside the universal jurisdiction that applied to pirates, he was immunized from punishment.¹⁶

The limitation of UJ to those commerce-raiders who acted purely on private initiative serves two interrelated ends. First, as a positive matter, it lessens the chances that UJ will lead to hostilities between nations. Indicting a foreign official will be perceived as a grave insult by the government of the nation, and an interference with its self-government.¹⁷ Indeed, it can set the stage for war -- consider the U.S. invasion of Panama to arrest its president, Manuel Noriega, for trial in American courts. Second, official conduct is political conduct. Keeping political conduct outside the scope of UJ reduces the opportunities for UJ itself to become a tool of international politics,¹⁸ and keeps judges focused on their traditional task of righting retail wrongs rather than matters bearing closely on foreign policy.

¹⁵ ANGUS KONSTAM, *PRIVATEERS AND PIRATES, 1730–1830*, 3 (2001) (describing privateering as “a form of nationally sponsored piracy”).

¹⁶ See DAVID CORDINGLY, *UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES*, at xvii–xviii (1995).

¹⁷ For example, the Spanish indictment and request for extradition of Gen. Augustus Pinochet, a senator and former dictator of Chile, strained relations between Santiago and Madrid and London. See *Regina v. Bartle*, 1 A.C. 61, 89 (H.L. 2000). Lord Lloyd explained:

[o]n 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British Government had disregarded Senator Pinochet’s immunity from jurisdiction as a former head of state.

Id.

¹⁸ The limitation of UJ to private actors does not entirely purge the question of political considerations because private parties can act with political ends. During civil wars, insurrections and secession, the question of whether someone *is* a private actor can require, or at least imply, judgments about political legitimacy. See Kontorovich, *supra* note 1, at 222.

Some commentators have noted that the new universal offenses, such as war crimes and genocide, invariably involve state action, whereas piracy never did.¹⁹ As a result, critics of universal jurisdiction over human rights offenses argue that piracy cannot provide a precedent for most assertions of NUJ, and is particularly inapposite to the contentious question of universal jurisdiction over heads of state.²⁰ David Rivkin and Lee Casey point out in a recent article that modern multilateral *treaties* authorizing UJ – the only examples of UJ that clearly enjoy genuine and broad state consent – only apply to aircraft hijacking and related offenses, which are carried out by private actors.²¹

However, while it is true that pirates were private actors and thus clearly distinguishable from most potential NUJ defendants, this still does not explain why nations would allow for UJ over pirates. A state is likely to have some interest in the fortunes of its citizens, not just its officials, and thus it is not obvious why UJ over private parties would not also be objectionable. Countries often object when their nationals are prosecuted by the states where or against whom they committed their crimes; it could be even more obnoxious if, as with UJ, the prosecuting state has not even been injured by the defendant.

¹⁹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 236 (5th ed. 1998) (“The essential feature of the definition [of piracy] is that the acts must be committed for private ends.”).

²⁰ See Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute’s Unlawful Application to Non-State Parties*, 44 VA. J. INT’L L. 63, 75 & n.25 (2004) (“There was no state responsibility implicated by pirate offenses.”); Curtis A. Bradley & Jack L. Goldsmith, IV, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361 n.230 (1997) (observing that 19th century piracy jurisdiction “cannot be invoked as a basis to construe the original understanding of the [Alien Tort Statute] to extend to the acts of a foreign sovereign and its agents committed on foreign soil in violation” of international law).

²¹ See Casey & Rivkin, *supra* note 20, at 75 n.25

On closer examination, pirates were well suited for UJ because they were not simply private parties. Rather, they were private parties who often acted *against the interest of their home state* and who had intentionally *waived their home state's protection*. To understand this, one must recall that piracy existed side-by-side with privateering. Pirates engaged in the exact same conduct as privateers – seizing civilian ships and cargoes by force.²² Both drew their crews from a common labor pool, and many privateers, chafing at the restrictions imposed on them, “turned” pirates. And sometimes pirates could be induced to “go straight” and become licensed privateers.

The sole difference between the two types of sea-robbery was that the privateer obtained a license to capture prizes, while the pirate did not bother with licensing. Obtaining a writ of marque was notoriously easy – it was not a licensing system that required any demonstration of nautical prowess or moral probity.²³ Obtaining a writ of marque had two principal consequences. First, the writ limited the bearer to preying on ships of hostile nations. Neutral shipping was generally out of bounds. States that issued writs of marque wanted to channel commerce-raiding to where they regarded it most useful. At the same time, they did not want their nationals to embroil them in disputes and potential hostilities with neutral nations. Ironically, the ban on piracy and the concomitant acceptance of privateering sought to avoid precisely the kind of thing that a broad UJ would allow – confrontations between sovereign states.

²² See Kontorovich, *supra* note 1, at 214-16.

²³ See *id.* at 211-12 (describing procedures for securing a writ of marque).

The other major provision of letters of marque required privateers to split the proceeds of their captures – typically ten percent – with the sovereign that authorized them.²⁴ Pirates were those commerce-raiders who refused to share their earnings with any government. Since they were engaged in the same business as privateers, they competed for prizes with them. Every prize taken by pirates reduced potential revenues for the licensing state. Pirates acted *against* the interests of their home state. Thus they could expect little succor from it.

Universal jurisdiction was not confined merely to private as opposed to public sea-raiders. Privateers, though not subject to universal jurisdiction, were, as their name suggests, very much private parties seeking their private fortunes. Privateers were no more state actors than a restaurant owner with a restaurant license is a state actor. Rather, UJ was limited to the subset of private actors who had distanced themselves from their home states to an extent that one would not expect the home state to feel a proprietary interest in their fate.

This limitation explains the legal fiction of *statelessness* famously articulated by Blackstone²⁵ and subsequently by Chief Justice Marshall in *United States v. Klintock*.²⁶ In a case decided two years earlier, Marshall had held that the federal piracy statute²⁷ did not apply to piracies by foreigners against foreigners, despite the statute’s “any person” language.²⁸ Marshall recognized that such

²⁴ *See id.* at 214.

²⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (Chicago 1879) (1769) (explaining that pirates were universally punishable because they “renounced all the benefits of society and government”).

²⁶ 18 U.S. (5 Wheat.) 144 (1820).

²⁷ Act of Apr. 30, 1790, ch. 36, § 8.

²⁸ *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 633-34 (1818). Marshall wrote:

universal jurisdiction could result in judicial interference with other nations' sovereign prerogatives.²⁹ In *Klintock*, Marshall appended an odd qualification to the recent holding: while Congress did not intend the statute to apply to crimes against foreign nationals by foreign nationals, it does apply to piracies by those who are not nationals of any state.³⁰ The certificate of the Court upheld the indictment of the pirate at bar because they had “throw[n] off their national character by cruising piratically.”³¹

Marshall's entire discussion of statelessness appears unnecessary because *Klintock* was, as the Attorney General stressed, a citizen of the United States.³² One needs no special jurisdictional theory to allow a nation to punish its citizens for crimes committed abroad. It is not clear why Marshall did not simply look to *Klintock*'s citizenship. It may be because in the previous case, *Palmer*, he supported his notion that Congress did not intend to create universal jurisdiction

[t]he court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act.

Id. Quite unnecessarily, Marshall opined in unsupported dicta that Congress *could have* chosen to punish foreigners for piracies against foreigners, under the universal jurisdiction principle. *Id.* at 630 (“[T]here can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”). However, he interpreted the statute on the assumption that Congress had not *intended* to authorize universal jurisdiction. *Id.*

²⁹ *Id.* at 632-33.

³⁰ *Klintock*, 18 U.S. at 152. Speaking for the Court, Marshall opined:

[w]e think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State.

Id.

³¹ *Id.* at 153.

³² *Id.* at 143, 147.

with the statute's title, "an act for the punishment of certain crimes *against the United States*."³³ Klintock had seized a Danish vessel,³⁴ and so the victim's nationality would not provide for jurisdiction under Marshall's somewhat forced reading of the piracy statute. Thus to sustain jurisdiction over the crime committed by a U.S. national, the Chief Justice shoe-horned the prosecution of a U.S. national into the universal theory by arguing that the defendant was in fact stateless, and the statute authorize UJ over stateless (but not foreign) defendants.

The statelessness criterion is obviously a fiction, though one that continues to confuse accounts of the reasons for universal jurisdiction over piracy.³⁵ There is nothing magical about piracy that destroys its perpetrators' national connection. Modern piracy law is more positivist, recognizing that whether a pirate "throws off his national character" is a matter for his home state to decide.³⁶ This is consistent with the facts of *Klintock*, where the high court of the home state, the U.S., deemed him stateless, though it may with the same effect have treated him as an American national. Marshall's holding that universal jurisdiction could only extend to those who "acknowledge the authority of no state" is simply a shorthand

³³ Palmer, 16 U.S. at 631 (emphasis added).

³⁴ Klintock, 18 U.S. at 145.

³⁵ See, e.g., *United States v. Yousef*, 327 F.3d 56, 105 (2003) (stating that "States and legal scholars have acknowledged for at least 500 years" that piracy is a universal offense in part "because the crime occurs statelessly on the high seas").

³⁶ Geneva Convention on the Law of the High Seas, April 25, 1958, art. 18, 450 U.N.T.S. 82 ("A ship or aircraft may retain its nationality, although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived."). Under current U.S. law, a ship is treated as stateless only if the registering nation disclaims it (which can be done by not "affirmatively and unequivocally" confirming the ship's registry when queried by U.S. officials) or if the ship's captain does not claim national affiliation verbally or through adherence to formalities—the ship's activities do not affect its nationality. 46 U.S.C. app. § 1903 (c)(2) (2003) (defining "vessel without nationality" for purposes of the Maritime Drug Law Enforcement Act).

for the idea that UJ can only extend to those who rejected the licensing scheme of their home states and the protection it carried with it. Thus the home state would be expected to reciprocally refuse to protect them. Prosecutions of such offenders will probably not cause friction with the foreign state, unlike prosecutions of its officials, its nationals acting under color of its law, or its nationals acting in violation of its laws but still of concern to their home state. The lack of solicitude from the pirates' home state was considered a characteristic of piracy by contemporary jurists. As Justice Story put it, pirates were "not under the acknowledged authority, or *deriving protection* from the flag or commission of any government."³⁷ Yet in another purported piracy case, when the offender's home state did object to U.S. courts' assertion of jurisdiction over its nationals, Story yielded to the foreign interest and refused to exercise jurisdiction.³⁸

B. *Locus delicti* makes enforcement difficult.

Many modern discussions stress the importance of the *locus delicti* in establishing universal jurisdiction over piracy.³⁹ While the locus is very important to piracy's UJ status, commentators misunderstand its significance. Some have suggested that because no state has jurisdiction over international waters, piracy occurs where traditional notions of jurisdiction do not apply. Without universal jurisdiction, the argument goes, there would be no jurisdiction at all.⁴⁰ The flaw in

³⁷ United States v. Smith, 18 U.S. (5 Wheat.) 153, 163(1820) (emphasis added).

³⁸ United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C. Mass. 1822) (No. 15,551).

³⁹ See, .e.g., Scharf, *supra* note 3, at 80-81.

⁴⁰ These mistakes may also be attributable to an uncritical repetition of past legal fictions. See, e.g., *supra*, note 35 and accompanying text; LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL PERSPECTIVES 58 (2003) ("[T]he *locus delicti* and the private

this account is that piracy did not occur so much on the high seas as on *ships* sailing the high seas. Ships were considered within the territorial jurisdiction of the nation where they were registered; they were floating outposts of that nation's territory.⁴¹ Those ships that fell victim to pirates were almost always within the territorial jurisdiction of the nation whose flag they flew.⁴² Moreover, the victims of piracy came from somewhere, and thus were nationals of some state. Traditional jurisdictional concepts were adequate to deal with piracy without having to resort to universality.

The real problem was not the formal jurisdictional status of the high seas but the practical problem of enforcement.⁴³ There was almost no governmental control over the seas and no “on the spot” enforcement system, as there would be

act(or) requirement [] explain why universal jurisdiction over piracy is undisputed. Such jurisdiction cannot possibly infringe on another state's sovereignty.”). Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES, *supra* note 4, at 168, 169 (observing that the occurrence of piracy on the high seas made it “very difficult to exercise jurisdiction based on territoriality or nationality”); Sammons, *supra* note 9, at 126 (“[N]ations predicated their formulation of universal jurisdiction over piracy on the notion that the crime usually was committed in terra nullius, such as on the high seas where no nation exercised territorial control.”); Joyner, *supra* note 8, at 165 n.48 (“Piratical acts were made subject to universal jurisdiction . . . because those acts occurred on the high seas, beyond the limits of national jurisdiction.”); Osofsky, *supra* note 4, at 194 & n.18 (“[T]he peculiar character of piracy probably accounted for its internationalization as a crime; pirates committed offenses on the high seas, which were not within the jurisdiction of any country.”); *see also* *Universality – Piracy*, 20 AM. J. INT’L. L. 563, 566 (1926) (“[T]he competence is better justified at the present time upon the grounds that the punishable acts are committed on the high seas . . . where no State has territorial jurisdiction.”).

⁴¹ *See* S.S. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10; OLIVER SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 250–52 (1991).

⁴² *See* M. Cherif Bassiouni, *The History of Universal Jurisdiction*, in *DEFINING THE LIMITS: UNIVERSAL JURISDICTION AND NATIONAL COURTS*, *supra* note 4, at 47 (explaining that “early modern thinking about piracy was not linked to universal jurisdiction,” but rather to views such as Grotius’ that “ships on the high seas were an extension of the flag state’s territoriality” and thus, the flag state – and the flag state only – should be able to punish non-nationals for piracy against national ships).

⁴³ *See* Slaughter, *supra* note 40, at 169 (“The principle of universality . . . is the way in which international law has responded to the pragmatic difficulties . . . of prosecuting offenses recognized as illegal in domestic legal systems around the world.”).

for crimes within the body of a nation.⁴⁴ Because of the vastness of seas, pirates could easily commit their crimes undetected. Moreover, the open seas made escape easy and apprehension difficult.⁴⁵ The numerous largely uninhabited islands of the Caribbean, replete with unmapped coves and harbors, afforded perfect hideouts for pirates in between cruises. The difficulty of enforcement was stressed by Adam Smith in explaining why piracy, unlike ordinary robbery, is a capital offense.⁴⁶

The enforcement difficulties should not be overstated. The high seas are vast, but not as vast as one might think – merchant ships generally traveled in known sea-lanes defined by wind and tide, and pirates would be found there, too.⁴⁷ To be sure, maintaining a navy was among the most expensive activities a nation could engage in; the high cost of arming ships, and the need to employ them against foreign navies, made piracy perhaps the most expensive of crimes to police. But nations could and did police against piracy with their warships. During outbreaks of piracy they would sometimes dispatch vessels with specific instructions to hunt down the offenders.⁴⁸

⁴⁴ Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 193-94 (1945).

⁴⁵ See Scharf, *supra* note 3, at 81 (“[P]irates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.”); Osofsky, *supra* note 4, at 194 n.18 (“If the nation owning the ship were the only one that could assume jurisdiction, pirates could easily escape capture and prosecution by boarding ships far from their home ports and keeping them beyond the reach of the home navies.”).

⁴⁶ See ADAM SMITH, LECTURES ON JURISPRUDENCE 131 (Oxford 1978) (1762) (observing that piracy “requires a severe punishment” because of the “great opportunities there are of committing it”).

⁴⁷ See CORDINGLY, *supra* note 16, at 88-89.

⁴⁸ See Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529 (1911).

Given that piracy's occurrence on the high seas made enforcement so expensive, how would universal jurisdiction – which merely allows nations to punish conduct that had *not injured* them– make the piracy problem any more tractable? The same paradox has been observed with regards to today's universal jurisdiction. The extension of the universal principle to war crimes and genocide is motivated at least partly by the difficulty of preventing such conduct.⁴⁹ But precisely because stopping such atrocities is expensive and risky, the extension of universal jurisdiction to these offenses has done next to nothing to encourage nations unharmed by the conduct to intervene.⁵⁰

This suggests that the locus factor is more complicated than previously thought. The high seas locus was certainly crucial to piracy's universal cognizability. The same conduct occurring on land would be robbery, and not subject to universal jurisdiction. (But while necessary, the high seas locus is far from sufficient for universal jurisdiction: murder or any other offense was not universally cognizable even when committed on the high seas.⁵¹) Yet the conventional explanation for the importance of the high seas locus raises more

⁴⁹ See Cowles, *supra* note 44, at 194 (observing that “war crimes are very similar to piratical acts” in that there is no on-the-spot judicial system to punish it, and arguing that war crimes should thus also be universally cognizable).

⁵⁰ See Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003) (observing that international war crimes tribunals have little effect). Goldsmith explains that:

[n]ations do not lightly expend national blood and treasure to stop human rights abuses in other nations. The Europeans were unwilling and unable to do so in the Balkans for years. . . . The brute fact is that despite hundreds of thousands of deaths caused by human rights abuses during the past decade . . . no wellspring of support for intervention has developed in the industrialized democracies that possess the military muscle to intervene and stop the abuses.

Id.

⁵¹ See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197-99 (1820).

questions than it resolves, because the central feature of this explanation –high enforcement costs– suggests that making piracy subject to UJ would do nothing to encourage states to actually *use* universal jurisdiction. Part II will explore this paradox further, and Part III will suggest a new account of the function served by UJ, an account that makes sense of why the high seas locus was necessary.

C. Threatens or harms many nations.

Piracy imperiled international commerce and navigation,⁵² which many states had an interest in protecting. Some commentators see this as the crucial characteristic of piracy that made it universally cognizable.⁵³ Universal jurisdiction over crimes that harm many nations would be easier for sovereign states to accept than UJ over crimes that primarily injure one nation. This is because in the latter case, the affected nation may have a very strong interest in dealing with the matter. Thus it would particularly resent assertions of UJ by nations that can claim no injury at all.

But while UJ over local or internal crimes may be more problematic than UJ over crimes that affect many nations, this does not explain why affecting many nations justifies truly *universal* jurisdiction. States do not have an interest in the safety of commerce and navigation in general; they have an interest in the safety of *their own* commerce and navigation. And if a particular nation’s ship has been

⁵² See, e.g., *United States v. Yousef*, 327 F.3d 56, 105 (2003) (observing that piracy has long been subject to UJ in part “because of the threat that piracy poses to orderly transport and commerce between nations”); Sammons, *supra* note 9, at 126 (“[P]irates launched attacks . . . against the vessels and citizens of many nations”).

⁵³ See Sammons, *supra* note 9, at 126 (“The transnational aspect of piracy is the most significant factor in justifying the exercise of universal jurisdiction over it.”); *Universality – Piracy*, *supra* note 40, at 566 (suggesting that “all [states] have an interest in the safety of commerce”).

assaulted by pirates, that nation would have territorial jurisdiction over the offense. Moreover, to the extent that piracy did ramify broadly, the harm to individual nations would not be uniform. Nations have significantly different stakes in the prosecution and suppression of piracy. A nation would be threatened by piracy roughly in proportion to its share of international shipping.⁵⁴

Because piracy hurts some states more than others, one would expect a corresponding disparity in nations' willingness to prosecute piracy regardless of the applicable jurisdictional theory. Indeed, because enforcement was expensive, it was almost always done for parochial rather than universal ends: Britain would dispatch ships to hunt down pirates that preyed on British ships, or pirates of British nationality who, by attacking neutral vessels had complicated the Crown's foreign relations. Britain was not in the habit of "humanitarian" anti-piracy expeditions: it did not dispatch ships to hunt down pirates against the French.

As with the related characteristic of *locus delecti*, the current account of why multinational injury is an argument for UJ is unsatisfactory. Yet the importance of the international harm aspect should not be dismissed out of hand, because it was the characteristic of piracy that contemporary courts and commentators most often pointed to when explaining its unique status. The harm to many nations mattered; the question is why and how much. Part III will show that the international character of piracy did make UJ a useful concept, but not in the way commentators have assumed.

⁵⁴ Cf. Kirby, *supra* note 4, at 250 ("The international crime of piracy may be easy to justify as a crime of universal jurisdiction in a maritime, trading country such as the United States or Australia. But it may be less easy in other parts of the world.").

D. Uniform condemnation.

Piracy was not universally cognizable because of its heinousness. Indeed, it was not regarded as particularly heinous, at least in the sense that today's UJ crimes like genocide and torture are considered heinous. Piracy was regarded as roughly on par with aggravated robbery in terms of culpability or enormity.⁵⁵ However, the broad condemnation of piracy was not irrelevant to its universal status. Piracy was certainly regarded as wrongful by every (civilized) nation. There was no uncertainty over whether piratical conduct should be punishable. As well as being a crime under the law of nations, it was also a crime under the municipal laws of every nation. This was obviously necessary to piracy's undisputed status as a universal offense, though it clearly would not be a sufficient condition – countless offenses were crimes in all countries, from murder to coining, but no other was universally cognizable.⁵⁶

The importance of universal agreement as to wrongfulness is obvious. Firstly, there can be no universal consensus to make an offense universally punishable if there is not even universal agreement that it should be parochially punishable. If there is disagreement among nations as to whether conduct constitutes any kind of offense, then an exercise of universal jurisdiction over that conduct would be regarded as an encroachment on another nation's legislative

⁵⁵ See Kontorovich, *supra* note 1, at 223-26.

⁵⁶ See Yousef, 327 F.3d at 105 (“The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where crimes . . . are universally condemned by the community of nations.”).

sovereignty – jurisdiction to prescribe, and not just jurisdiction to punish. It would give UJ prosecutions an inevitable political element.

E. Uniform punishment and double jeopardy.

A related but less obvious aspect of piracy that facilitated universal jurisdiction is that all nations criminalized piracy *and all provided for the exact same punishment for the offense* – death.⁵⁷ The uniformity of punishment for the offense reduces the possibility that prosecutions under universal jurisdiction would result in one nation substituting its judgment about proper punishment over another's. If Britain had some interest in prosecuting pirates that attacked their ships, but the United States seized them first, Britain would not have to worry that U.S. courts would let them off easy. The problem becomes more acute because the first nation to prosecute will be the only nation to prosecute. (This could be simply because it imprisons or executes the defendant, precluding subsequent prosecution.)

Attempts to apply universal jurisdiction to human rights offenses have been plagued by problems arising from different tribunals imposing different punishments for the same crime. For example, the Rwandan government originally acquiesced to an international court sitting in Sierra Leone exercising universal jurisdiction over the Rwandan *genocidaires*. The International Criminal Tribunal for Rwanda, however, does not impose capital punishment. Rwandan courts, on the other hand, routinely imposed the death penalty for the same offense. So when the ICTR takes jurisdiction over a defendant, it saves him from

⁵⁷ See SMITH, *supra* note 46, at 181.

the death penalty, the punishment which Rwanda thinks appropriate to the crime. This creates obvious opportunities for forum shopping by defendants.⁵⁸ Indeed, the worst offenders turned themselves in to the international tribunal, sparing themselves the death penalty, while lower-level perpetrators were executed.⁵⁹ The disparity in punishment infuriated the Rwandan government, leading it to break off its relations with the International Criminal Tribunal for Rwanda and actively interfere with its operations. Similarly, the ICTY statute sought to track the sentencing practices of the former Yugoslavia, but the Tribunal abandoned this approach when it became clear it would require imposing the death penalty.⁶⁰

Different approaches to punishment will continue to pose serious problems for NUJ. European nations are the most vigorous proponents of expanding universal jurisdiction to heinous human rights offenses, but at the same time are adamantly opposed to the death penalty. By contrast, while the U.S. opposes universal jurisdiction for such crimes, it certainly does not oppose the death penalty. Even setting aside the question of capital punishment, there is little international consensus about appropriate penalties for the severe human rights offenses of NUJ. For example, the ICTY has thus far only imposed a life sentence on a single defendant, though the conduct for which others have been convicted

⁵⁸ See Brent Wible, “*De-Jeopardizing Justice*”: *Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*, 31 DENV. J. INT’L L. & POL’Y 265, 274 (2002) (commenting that “a system where a defendant could face the death penalty in one jurisdiction and life imprisonment in another . . . would seem arbitrary and undermine the notion of universality”).

⁵⁹ See *id.* at 274 & n.44.

⁶⁰ See *id.* at 273-74.

would certainly have resulted in multiple life sentences under, say, the U.S. approach to punishment.⁶¹

But more importantly, under universal jurisdiction, double jeopardy concepts prevent multiple prosecutions of the same underlying conduct. If there are variations between the penalties provided for by different nations, then the first nation to prosecute determines the penalties. This amplifies the importance of uniform punishment for universal offenses. In international law, the double jeopardy concept is known by the civil law term *non bis in idem*.⁶² Put simply, subsequent prosecutions of a defendant for a given universal offense by other nations or tribunals would be precluded as surely as multiple prosecutions of the same conduct by a single state.⁶³ The possibility that ineffective or lenient universal jurisdiction prosecutions will operate as a double jeopardy bar will make nations reluctant to subscribe to UJ principles, especially nations that favor more stringent punishment.⁶⁴

⁶¹ See Ambrose Evans-Pritchard, *Founder of Death Camps in Bosnia is Jailed for Life* DAILY TELEGRAPH, August 1, 2003, at 18. Of the remaining 25 defendants before the ICTY who have received final sentences, only two have been sentenced to terms in excess of 20 years, and ten have been given terms of ten years or less. See *The ICTY at a Glance*, at <http://www.un.org/icty/glance/index.htm> (last visited March 22, 2004).

⁶² The term literally means “not twice for the same.” See BLACK’S LAW DICTIONARY 1665 (7th ed., 1999).

⁶³ The Princeton Principles agree that a nation’s “good faith” exercise of universal jurisdiction should be recognized as final and binding on all subsequent nations. See THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (Stephen Macedo ed., 2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf. [hereinafter PRINCETON PRINCIPLES] (Principle 9). However, several participants in the project “questioned whether the prohibition on double jeopardy . . . was a recognized principle of international law.” *Id.* at 34, available at http://www.princeton.edu/~lapa/unive_jur.pdf.

⁶⁴ See, e.g., Caroline D. Krass, *Binging the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT’L L. & POL’Y 317, 357-58 & n.266 (1994) (“The United States is concerned that the court will develop an unacceptable interpretation of crimes and that risk of double jeopardy problems will preclude national courts from prosecuting individuals acquitted by a politicized international court.”) (citing a 1991 letter from Janet G.

Crucially, *non bis in idem* only bars subsequent prosecutions of *universal* crimes – it is thus a significant exception to the standard practice regarding prior foreign prosecution. This is because most nations adhere to some version of what the United States Supreme Court calls the “the multiple sovereignties principle.” If a single act violates the laws of multiple nations and each nation has jurisdiction over the offender, each nation can prosecute in sequence – double jeopardy does not bar subsequent prosecutions.⁶⁵ Violating the laws of each sovereign is a separate offence.

U.S. courts have consistently held that the United States can prosecute defendants for conduct that has resulted in foreign convictions.⁶⁶ Such multiple prosecutions do not violate the Fifth Amendment’s doublejeopardy clause – the defendant is not being put in jeopardy twice for violating the same law, but merely being prosecuted for all the laws broken by a given conduct.⁶⁷ As the Supreme Court has observed, the multiple sovereignties doctrine is most important when there is considerable variation between the penalties the different

Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Vice President Dan Quayle).

⁶⁵ See Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Dem*, 33 VAND. J. TRANSNAT’L L. 1263, 1272-73 (2000) (describing variety of state practices with regard to international double jeopardy and concluding that while some countries “afford foreign criminal judgments the same legal effect they do to domestic criminal judgments,” other states adhere to a multiple sovereignties approach and there is no “general consensus among nations” on the matter).

⁶⁶ See *id.* at 1279-81 (citing federal cases allowing for prosecution of defendants previously convicted in foreign nations). While the Fifth, Ninth and Eleventh Circuits, and district courts elsewhere, have consistently applied the multiple sovereignties principle to foreign prosecutions, the Supreme Court has only addressed the issue in the federal-state context. See *id.* at 1279 n.118. The multiple sovereignties doctrine has frequent application within the United States, where the federal government can prosecute a defendant based on the same conduct that has already resulted in state charges, and vice versa. *United States v. Lanza*, 260 U.S. 377 (1920).

⁶⁷ *Id.* at 382.

sovereigns provide for the offense. If the states provide for smaller punishments than the federal government, “the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.”⁶⁸

The reasoning behind the multiple sovereignties principle has no application in universal jurisdiction (which is in any case an exception to sovereignty). Under universal jurisdiction, states exercise a single shared jurisdiction. While conduct constituting a universal offense can be tried by any nation, it is not because it comes within the sovereign prerogatives of each nation. Rather it is because UJ treats “the community of nations . . . as a juristic community.”⁶⁹ Each nation’s courts act as agents for the world.⁷⁰ Thus a second nation prosecuting the same offense would be just like a second U.S. district court prosecuting a crime already adjudicated in another district court. It is not surprising that the ban on international double jeopardy has long been recognized as a consequence of universal jurisdiction. In *United States v. Furlong*, Justice Johnson described the bar on multiple prosecutions as a defining feature of universal jurisdiction over piracy:

Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be

⁶⁸ *Id.* at 385.

⁶⁹ Quincy Wright, *War Criminals*, 39 AM. J. INT’L. L. 257, 282 (1945).

⁷⁰ See Joyner, *supra* note 8, at 165 (arguing that the “only basis” for exercising universal jurisdiction is “the assumption that the prosecuting state is acting on behalf of all states”); Wright, *supra* note 69, at 280 (arguing that 19th century courts exercising UJ over pirates were acting as agents of the world community).

good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.⁷¹

Further confirmation of the view that nations prosecuting piracy as a universal offense do not act as sovereigns asserting their several jurisdiction but rather as agents of the international order can be found in some British extradition cases – which also suggest the abuses that could result from treating crimes as within a single universal jurisdiction. Questions of international double jeopardy often arise in extradition proceedings because many treaties prohibit extradition for crimes already prosecuted in the sending country. In *In re Tivan*, Britain arrested American pirates but refused to extradite them. The relevant treaty required rendering of defendants belonging to “each nation’s jurisdiction.” The British courts upheld the refusal to extradite. Since piracy was a *universal* offense, the pirates were not particularly within America’s jurisdiction. The treaty meant only parochial U.S. jurisdiction and not “the jurisdiction which the whole world shares with them.”⁷² Similarly, *Attorney-General v. Kwok-A-Sing* involved a Chinese pirate who attacked French shipping in international waters and fled to Hong Kong.⁷³ China requested his extradition under a treaty that allowed rendition of those who had committed “any crime or offence against the laws of *China*.” The Council held that “if he is punishable by the law of *China*, it is only

⁷¹ 18 U.S. 184, 197 (1820). Justice Johnson’s statement in *Furlong* remains the leading authority for the principle, at least in the United States. However, like most judicial pronouncements on universal jurisdiction over piracy, this one was dicta of the grossest sort. *Furlong* did not involve piracy; thus it did not present the issue of universal jurisdiction, let alone the implications of such jurisdiction for successive prosecutions by different sovereigns.

⁷² *In re Tivnan*, 5 Eng. Rep. 645 (Q.B. 1864) (Crompton, J.) (“Is this a piracy within the words of the statute? It is to be within the jurisdiction of the United States; but does that mean within the jurisdiction which the whole world shares with them.”) (quoted in *In re Stupp*, 23 F. Cas. 281, 291-92 (C.C.N.Y. 1873) (No. 13,562)).

⁷³ 5 L.R.- P.C. 179 (Q.B. 1873) (emphasis added).

because he committed an act of piracy which . . . is justiciable everywhere,” and the treaty did not contemplate extradition in such circumstances.⁷⁴

Thus *non bis in idem*, a correlate of UJ, is a limitation on the normal prerogatives of states to prosecute conduct that violates their laws even if it has already been prosecuted elsewhere. One would expect such a limitation of sovereignty to apply only in situations where there is little reason to worry that it would put nations at odds with each other. Thus the uniformity of punishment for piracy facilitated its universal cognizability by reducing the likelihood that a prosecution by one state would have different consequences than the prosecution by another.

F. Well-defined offense.

Without universal agreement about the defining elements of a universal offense, UJ would easily and often provoke conflicts between nations.⁷⁵ Unless the offense is precisely defined, it would be easy for nations to exercise UJ illegitimately, or for a nation to object to another’s exercise of UJ on the grounds that the conduct in question is not within the proper scope of the offense. Like any other customary international law norm, UJ requires that all nations consent to it,

⁷⁴ *Id.* at 200 (emphasis added).

⁷⁵ *Cf.* *United States v. Yousef*, 327 F.3d 56, 106 (2003) (holding that terrorism is not subject to UJ because “[u]nlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now *have fairly precise definitions* . . . ‘terrorism’ is a term as loosely deployed as it is powerfully charged”) (emphasis added); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir.1984) (Edwards, J., concurring) (arguing that “the nations of the world are so divisively split on the legitimacy of such [terrorist] aggression as to make it impossible to pinpoint an area of harmony or consensus”); *Id.* at 806-07 (Bork, J., concurring) (arguing that acceptability of terrorism is a question as to which there is “little or no consensus and in which the disagreements concern *politically sensitive issues*”) (emphasis added).

and the more precise the norm the easier to determine whether nations have actually assented to it. A precise and universally agreed-upon definition makes it harder for UJ to be asserted for political ends. Many of the human rights offenses suggested for universal jurisdiction have very vague and indeterminate contours.⁷⁶ This has led some critics to argue against nations consenting to a jurisdiction that would be administered according to the political inclinations of the prosecutors and judges.⁷⁷

In the same vein, the Second Circuit recently rejected the contention that UJ applies to international terrorism because there is no precise or neutral definition of the crime. As a positive matter, “one man’s terrorist is another man’s freedom fighter.”⁷⁸ Of course there are sound, narrow definitions of terrorism, such as violence committed by irregular combatants against civilian populations to change the policy of a government. The Second Circuit’s point was not that terrorism could not be narrowly defined, but that no precise definition has won general acceptance.

⁷⁶ See Kirby, *supra* note 4, at 250 (suggesting that judges should be cautious about accepting universal jurisdiction because “the crimes propounded may be ill-defined”); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 426-27 (2002) (“Defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law. Indeed, of the several definitions that have been ‘promulgated,’ no two are alike.”).

⁷⁷ See E.V. Kontorovich, *The ICC – Open and Shut*, JERUSALEM POST, May 10, 2002, at B8 (arguing that Israel would be subject to politicized prosecutions or politicized rulings because “the Rome Convention creates such vague offenses as ‘persecution,’ which involves violating ‘fundamental rights.’ . . . [T]here is vast disagreement over what rights are ‘fundamental, and which of these rights are legally enforceable”).

⁷⁸ Yousef, 327 F.3d at 107-08.

Piracy, unlike terrorism and crimes against humanity, had a narrow, precise and stable definition that all nations could agree on.⁷⁹ Piracy was everywhere defined as robbery on the high seas without statute authorization; tying the definition to the well-understood crime of robbery made it even more tractable, and it is important to note that other crimes on the high seas would not fall under the definition. In the seminal piracy case of *United States v. Smith*, Justice Story asked precisely this question: “whether the crime of piracy is defined by the law of nations with reasonable certainty.”⁸⁰ He quickly concluded that “[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . all writers concur, in holding, that robbery. . . upon the sea, *animo furandi*, is piracy.”⁸¹ It was because piracy has such a fixed definition in international law that the Court could easily conclude that Congress was within its rights in punishing it.

F. Necessary characteristics?

Piracy was a well-defined offense that was condemned by all nations; uniformly punished by all nations; committed by private actors who had rejected

⁷⁹ *Dole v. New Eng. Mut. Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3966) (“[R]obbery on the high seas is piracy under the law of nations by all authorities.”); *Fitfield v. Ins. Co. of Pa.*, 47 Pa. 166, 187 (1864) (“A pirate, according to the most approved definitions, is a sea robber.”); *HM Advocate v. Cameron*, 1971 S.L.T. 202, 205 (H.C.J. 1971) (“The essential elements of this crime are no more and no less than those which are requisite to a relevant charge of robbery where that crime is committed in respect of property on land and within the ordinary jurisdiction of the High Court.”); BLACKSTONE, *supra* note 25, at 72 (“The offence of piracy . . . consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there.”); James Kent, *Commentaries*, in 3 THE FOUNDERS’ CONSTITUTION 87 (Phillip B. Kurland & Ralph Lerner eds., 1987) (“Piracy . . . is the same offense at sea with robbery on land; and all the writers on the law of nations, and on maritime law of Europe, agree in this definition of piracy.”).

⁸⁰ 18 U.S. 153, 160 (1820).

⁸¹ *Id.* at 161.

the protection of sovereign nations including their home state; took place on the high seas where enforcement was very difficult; and harmed the economic interests of many nations because it was directed at international commerce. All of these features coincided in the case of piracy, but that does not mean they were all necessary to its universal cognizability. To extract lessons that could guide modern efforts at establishing universal offenses, the necessary elements must be separated from those that merely facilitated. And all of these elements must be separated from those that were merely characteristic of piracy but in no way helpful to its universal cognizability.

The private actor criterion is demonstrably a necessary one. If the same conduct was committed by non-private actors, it would not be universally cognizable. Sea-raiders who received the protection of a sovereign state (not necessarily even their own) by obtaining a writ of marque were not subjects of UJ, and indeed the very purpose of these commissions was to insulate the bearer from prosecution. Similarly, the high seas locus was essential to UJ -- the same conduct would not be universally cognizable if it occurred on land. Private crime on the high seas was also not universally cognizable when it did not affect the interests of many nations: murder within a ship was not universally cognizable, unlike attacks on international commerce. As for uniform condemnation and uniform punishment, one cannot say for sure whether they were necessary conditions. Because piracy was the only universal offense, one cannot compare it to others offenses where the punishment varied from nation to nation. Nor were these factors essential elements of the offense of piracy itself, like private action

was. Still, as Part I.E showed, uniform punishment greatly reduces the problems associated with UJ. And it is hard to imagine a crime becoming truly universally cognizable if it is not universally condemned.

The discussion in Parts I.B. and I.C. revealed the inadequacy of existing explanations as to *why* two of these factors – locus and international harm – would be important to UJ when they actually narrow UJ to a class of cases where it is unlikely to be implemented given the incentives of self-interested states. Still, it is clear as a historical matter that the negation of either element would have put the conduct outside of the scope of UJ. This suggests that UJ over piracy was either a badly conceived notion that none the less proved attractive to commentators and judges for centuries, or that subtler explanations exist for the phenomenon. Indeed, none of the necessary conditions explain why UJ would ever be exercised in practice. They are only the factors without which UJ would be so at odds with the interests of sovereign states that they would not even endorse it as an abstract principle. This begs the question of why universal jurisdiction over piracy would for so long be considered a useful concept. The puzzle of why nations would ever exercise UJ is explored in the next Part; Part III presents an explanation which reframes UJ as evidentiary rule, not an independent basis of jurisdiction.

II. THE RATIONAL CHOICE PARADOX OF UNIVERSAL JURISDICTION

This Part raises a fundamental problem with the instrumental view of UJ – why will disinterested states prosecute at all? The primary function of the new

universal jurisdiction is instrumental. It aims to deter violations of the relevant international human rights norms.⁸² Extending jurisdiction to every nation in the world will, NUJ advocates suggest, increase *ex post* enforcement, and thereby improve *ex ante* deterrence. At first glance, the increased deterrence prediction seems plausible: more possible prosecutors means less crime. But while UJ may increase deterrence if widely practiced (though even this is not obvious),⁸³ there is no reason for rational, self-interested states to actually exercise it.

A. The rational choice approach.

This Part looks at both the old and new UJ from a rational choice perspective. Rational choice models assume that states act to further their own interests (whatever those may be), and that they seek to achieve these goals in a

⁸² See, e.g., Joyner, *supra* note 8, at 166 (explaining “the necessity of extending universal jurisdiction” to war crimes to create a “viable means for deterring similar crimes in the future”); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION 20-21 (2001) (speculating that “the exercise of universal jurisdiction is likely to act as a general deterrent, at least to some extent, to crimes under international law” and observing that deterrence is “the most frequently cited grounds” for exercising universal jurisdiction).

⁸³ There are several reasons to doubt that NUJ will increase deterrence. Human rights violators do not expect to come to justice at all. They know that if they fall into the hands of their victims they will be called to account, perhaps brutally and summarily. That they carry out their crimes anyway suggests that they either do not expect to lose power, or that the prospect of defeat and apprehension is outweighed by the current benefits of their actions. The exercise of NUJ over war criminals in the Yugoslav civil war did nothing to deter them, or subsequent violations in Kosovo by some of the same actors. This is a powerful criticism, but NUJ is new enough to be able to insulate itself from empirical criticism with the argument that deterrence will only be established when it becomes even more widespread and institutionalized; perhaps the reality of NUJ prosecution has not yet sunk in. But a well-established NUJ might *reduce* the level of deterrence. The NUJ tribunal will likely treat the offender far better, and impose a much lower punishment, than the tribunal with traditional jurisdictional links. In particular, no courts that have exercised NUJ impose the death penalty, while the victims’ or offenders’ states do have capital punishment; and the European and international tribunals that use NUJ are more scrupulous about due process protections than most nations’ courts. In short, the problems with deterrence stem in part from the existence of different punishments for the same NUJ offense; pirates, by contrast, received the same punishment from all tribunals. See Part I.E., *infra*.

rational manner.⁸⁴ This approach has long been a staple of both international relations scholarship and economic analysis of law. And the use of rational choice methodology has become commonplace in private law scholarship through the influence of the law and economics school. But international law scholarship has until recently entirely ignored this methodology.⁸⁵ However, the rational choice approach has been gaining currency among an influential minority of international law scholars.⁸⁶ They recognize that without the admittedly simplifying assumptions of the model one cannot have “a workable, let alone parsimonious, tool for explanation and prediction.”⁸⁷

To the extent international law scholarship has been satisfied with purely normative approaches, the lack of a model would not be a loss.⁸⁸ Advocates of

⁸⁴ Fuller accounts of the rational choice model of state behavior, and its applicability to international law scholarship can be found in a pair of articles advocating the use of law and economics and international relations models. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 20-21 (1999); Kenneth W. Abbot, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335, 348-50 (1989).

⁸⁵ See Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2056 (2003) (“The systematic application of rational choice theory to international law—as opposed to international relations—is a recent phenomenon. . . . Although the number of international law scholars doing interdisciplinary work is expanding, scholars applying rational choice theory remain relatively few in number.”).

⁸⁶ See, e.g., Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113 (2003); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 573-621 (2002) (using rational choice theory to explain customary international law); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Symposium, *Rational Choice and International Law*, 31 J. LEG. STUD. 1 (2002).

⁸⁷ Abbot, *supra* note 84, at 351.

⁸⁸ Some commentators do posit purely non-instrumental goals for NUJ – various advocates stress different ones – but the deterrence rationale dominates. See *supra* note 82. See also AMNESTY INTERNATIONAL, *supra* note 82, at 20 (observing that deterrence is “the most frequently cited grounds” for exercising universal jurisdiction). Some advocate UJ for purely retributive or expressive purposes. In the retributive view, punishment is a worthy end in itself – offenders deserve punishment and victims have “a right to justice.” *Id.* at 13; see also PRINCETON PRINCIPLES, *supra* note 63, at 25, available at http://www.princeton.edu/~lapa/unive_jur.pdf. (noting that drafters of Princeton Principles were “united in their desire to promote greater legal accountability for those accused of committing serious crimes under international law”). A related

NUJ do not specify any model at all; they do not provide explanations of why nations would systematically enforce NUJ that are linked to real incentives, or consider the costs and benefits faced by a prosecuting state.⁸⁹ This Article, however, seeks to provide a positive explanation of UJ that is consistent with historical evidence. A model that generates a theory consistent with observed data can then be used to make predictions and not just normative recommendations about whether ongoing efforts to expand NUJ would be expected to succeed, and whether such success would cause conflict between nations. Universal jurisdiction seeks to affect, and thus depends, on assumptions about the behavior of the states and other actors; understanding these requires a model of state behavior. Rational choice theory provides the most plausible model.

purpose of universal jurisdiction is expressive: by elevating certain crimes above the standard rules of international jurisdiction, nations demonstrate their deep repugnance at such crimes. Other commentators assign essentially aesthetic purposes to universal jurisdiction: they argue that it is simply unseemly for NUJ over heinous offenses *not* to exist. A positive analysis such as this one cannot meet such inherently normative visions on their own territory. However, even for those who favor universal jurisdiction for its own sake, rather than to alter the behavior of real actors, it would seem that nations would have to actually exercise NUJ for these non-instrumental purposes to be satisfied.

⁸⁹ This is in part a consequence of international law scholarship's focus on developing and articulating norms rather than positive and predictive accounts of conduct connected to the incentives faced by states. *See generally* Swaine, *supra* note 86, at 561 (“Rational choice theory may be considered alien to international law's norm-laden nature, but perhaps the critical perspective is needed.”); Dunoff & Trachtman, *supra* note 84, at 3 (“[I]nternational legal scholarship too often combines careful doctrinal description—here is what the law is—with unfounded prescription—here is what the law should be. This scholarship often lacks any persuasively articulated connection between description and prescription, undermining the prescription.”); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 663 (2000):

The main problem with international law scholarship, however, is that it is too normative. International law scholars spend too much time proclaiming the value of international law and bemoaning its many “violations,” and too little time understanding how international law actually works. In our view the latter inquiry is more fruitful, and international law scholarship would do well to follow the example of international relations theory in political science and focus on positive rather than normative inquiries.

Id.

The notion of using universal jurisdiction to punish international offenses may be normatively attractive, but that alone cannot explain why states would actually do so. The previous Part showed why universal jurisdiction would cause relatively few problems in the context in which it originally arose and to which for centuries it was exclusively confined. But just because something is relatively unproblematic does not mean it should be expected to happen. It would be unproblematic if everyone just got along, yet that has not happened.

B. The paradox.

1. The public goods problem.

In the rational choice model of state behavior, universal jurisdiction appears to be a mirage, an empty set. Exercising universal jurisdiction is costly for the forum state.⁹⁰ This is why even directly-injured nations sometimes fail to prosecute. Gary Bass described the problem well:

The exercise of universal jurisdiction is politically costly for a state. It means embroiling one's diplomatic apparatus in an imbroglio, and, quite likely, a confrontation with one or more states . . . it means burdening one's court system with what will probably be an incredibly complex and problematic case; and it almost certainly means a great deal of domestic turmoil and controversy. Why would a country bother?⁹¹

⁹⁰ See REYDAMS, *supra* note 40, at 222 (observing that because exercising UJ is costly, it is a jurisdictional luxury only the wealthiest states can afford); PRINCETON PRINCIPLES, *supra* note 63, at 27, available at http://www.princeton.edu/~lapa/unive_jur.pdf (“The assembly recognizes that a scarcity of resources, time and attention may impose practical limitations on the quest for perfect justice.”).

⁹¹ Garry J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES 77-78, *supra* note 4 (suggesting that *Eichmann* suggests one reason a nation might exercise “universal jurisdiction” – namely, it feels directly and distinguishably injured by the offense). This describes Israel's position in *Eichmann* quite well, but it also explains why *Eichmann* was *not* an exercise of UJ.

The standard sovereignty-based varieties of international jurisdiction already allow states to punish crimes committed by or against their nationals or on their territory. These are crimes that affect the interests of the forum state in a direct and material way. All that UJ adds is authorization for states that *have not* been materially harmed by the conduct to prosecute it. Universal jurisdiction gives unaffected states power, but provides no reason for them to exercise it.

A nation exercising NUJ bears all the costs of prosecution while reaping none of the benefits. Nations have scarce prosecutorial and judicial resources. Given that universal jurisdiction is costly, one would expect it to be at best a last priority.⁹² While one might imagine nations exercising UJ when the costs are close to zero, this is not the situation in which UJ usually presents itself. Opportunities for UJ usually arise when the directly affected nations have chosen not to incur the costs of enforcement, even though they would reap most of the benefits. This suggests potential UJ cases involve a combination of high enforcement cost and low enforcement benefits. Thus as a rough approximation, one would expect to see no universal prosecutions. Self-interested states would not expend real resources for inchoate benefits, especially when doing so would bestow real and unreciprocated benefits on the nations that have in fact been harmed by the conduct.

In other words, punishing offenders of universal offenses entails the provision of a public good. A public good is one that is non-rivalrous – consumption of the good by one state does not reduce its availability for others,

⁹² See Kirby, *supra* note 4, at 256 (observing that judges with already heavy case loads could be expected to be hostile to claims of universal jurisdiction).

and that is non-excludable – nations that do not contribute to the provision of the good cannot be excluded from sharing in its benefits. As a result, there are severe free-rider obstacles to the production of public goods, and thus they will be supplied at “less than optimal levels, if at all.”⁹³ The provision of security on either a domestic or international level is a prototypical public good. International relations (“IR”) scholars have observed that international regimes that seek to produce public goods inevitably fail.⁹⁴ *Successful* international regimes create methods of excluding non-contributing states.⁹⁵ By contrast, a prosecuting state cannot exclude others from the benefits created by its exercise of UJ.

Universal jurisdiction over piracy thus cannot be explained simply by suggesting that it “allowed nations to cooperate in fighting this common scourge,”⁹⁶ because such cooperation does not appear consistent with the incentives faced by rational states. Nor does UJ provide a *method* or *incentives* for creating such cooperation. It does not attempt to change the incentives facing nations. Indeed, if as modern commentators casually assume, the harm caused by UJ offenses somehow affects all nations,⁹⁷ the problem would be more severe

⁹³ Abbot, *supra* note 84, at 378.

⁹⁴ *See id.* at 379 (describing the collective sanctions regime generally of the U.N. Charter’s Article VII and the Nuclear-Nonproliferation Treaty as examples of failed international efforts to produce the public good of security).

⁹⁵ Regional defense alliances, like NATO, do produce security because they can exclude non-producers from the benefits. Similarly, the ability of nations to withdraw from such treaties when they suspect the others of free-riding, as the United States did when it exited the ANZUS treaty, also “functions as a form of exclusion.” *See id.* at 387.

⁹⁶ *See* Osofsky, *supra* note 4, at 194 n.18.

⁹⁷ This argument has only been dimly articulated, but this is presumably what commentators mean when they argue that since “intercourse among states occurred primarily by way of the high seas,” and because piracy was indiscriminate in its targets, it was a matter of “concern to all states.” *See* Randall, *supra* note 10, at 795.

than if it disproportionately affected some nations. The high seas have been described as a global commons. To pursue the analogy, pirates are weeds or pests infesting the commons.⁹⁸ However, in the absence of centralized government, commons *do not get policed* – thus the problem of the commons.⁹⁹ Self-interested states would not be expected to police a commons any more than self-interested private individuals would, without compensation, mow the town square’s lawn.

2) *The coordination problem.*

The rational choice model reveals a related difficulty with UJ-based deterrence – a coordination or first-mover problem. The set of nations directly injured by a given international crime is small and defined. Often it is only one nation. Under traditional theories of international jurisdiction, the directly affected nations have proper incentives to prosecute, because if they do not no one will. Thus they must weigh the costs and the benefits of prosecution and act when the latter outweigh the former. Universal jurisdiction allows every nation in the world to prosecute international crimes, but does not affirmatively put the responsibility on any particular uninjured nation. Every uninjured nation is authorized to prosecute, but none is required to do so. No nation has any obvious reason to step in front and assume the burden; rather all would be expected to wait for another to step forward and act in the name of the “international community.”

Worse still, even the nations that have been directly injured by an international crime would have their incentive to take action diminished by the

⁹⁸ See Abbot, *supra* note 84, at 380.

⁹⁹ See Abbot, *supra* note 84, at 378-79 (describing commons problem in the international law context).

possibility of universal jurisdiction. The nominal possibility that other nations will shoulder the enforcement burden may make it more likely that the injured nation save itself the burden of prosecution in the hopes that some other state would launch a UJ prosecution. Of course UJ will only create moral hazard for an injured nation if it believes that UJ will be exercised by another nation, and it is not clear why nations would have such unrealistic expectations. But in situations where the benefits of prosecution only slightly outweigh the costs, even a small perceived probability that another state would assert UJ may deter prosecution by the state with traditional jurisdiction.

3) *General vs. local injury.*

The degree of the rational choice problem increases the more local is the injury caused by the UJ offense. As Part I.C. showed, many commentators and courts contend that the widespread injury caused by piracy contributed to its universal cognizability. Of course piracy injured some nations more than others, and any particular pirate ship may only have attacked the ships of one or a few nations. Still, merchant ships were the primary vehicles of international commerce, and carried multinational cargoes, and thus threats to merchant vessels would create real injury to the *economic* interests of many states. As this part has shown, when an injury is borne by many states, the incentives for all of them to deal with the conduct are reduced because enforcement is a public good.

But NUJ offenses do not harm many nations. They are usually purely internal human rights abuses, or in the case of war crimes, human rights abuses in a single neighboring state. When the conduct does not harm other nations at all, it

becomes even more unlikely that they would exercise UJ. Of course, proponents of NUJ sometimes contend that massive human rights offenses hurt all nations by weakening respect for international norms. But this purported “universal injury” argument is purely metaphorical. It is completely abstract and inchoate; it is at best a “words” rather than a “sticks and stones” injury.

To be sure, conduct can have remote and indirect consequences; how general an injury is is a matter of degree. Even purely internal conduct can have spillover effects. But piracy, directed against the ships of many nations and immediately harming the economic interests of even more nations, is clearly far removed on this continuum from genocide, torture, war crimes, and even the general-sounding “crimes against humanity.” These NUJ offenses are committed against specific internal populations. Spillover consequences are largely inchoate, moral or aesthetic. For example, the Rwandan genocide was a tremendous calamity for the inhabitants of that nation. And it outraged many who read about it outside of Rwanda. But this is not a direct or concrete injury, as evidenced by the fact that those foreign observers who were thus injured did not feel badly enough about it to stop the atrocities.

Of course, if conduct harms many nations, free rider problems may exist regardless of the jurisdictional rule. With piracy, the economic injury inflicted by pirates usually falls on several nations – the importing and the exporting nation, and any other nation with a commercial interest in the vessel or cargo. For while the cost of apprehension and prosecution must fall entirely on one nation, that nation would capture only a fraction of the benefit from its efforts, while

bestowing positive externalities on the other nations harmed by the particular pirates. This suggests that UJ over general injuries may simply recapitulate existing free rider problems. Even in this view, it seems that UJ cannot achieve any instrumental purposes such as deterrence.

4) The externalities problem.

There is also the opposite of the public good problem: while nations that exercise UJ do not internalize the benefits of their actions, they may also not internalize the full cost. This is the problem that arises when a UJ prosecution threatens to disrupt a post-conflict national amnesty or reconciliation program. These programs are like settlements of lawsuits: one side waives its claims against the other in exchange for some consideration, such as an admission of wrongdoing or a promise to not participate in politics. Settlements are designed, among other things, to reduce the volatility of outcomes for both sides. For one side, the release of claims accomplishes this. But UJ vests claims in all nations, making the release worth much less as an inducement to members of the former regime. Thus, as many commentators have observed, UJ may make a peaceful resolution of internal conflicts more difficult. Also, as discussed herein,¹⁰⁰ UJ may reduce the deterrent effect of domestic punishment. These are all real costs of UJ but none of them are internalized by the prosecuting nation.

The non-internalization of some costs by a nation asserting UJ does not eliminate the original paradox. So long as costs are positive and direct benefits non-existent (which again is the definition of UJ), then one would not predict

¹⁰⁰ See *supra* note 81.

regular enforcement. However, the lack of full cost internalization gives reason to be concerned about any observed UJ cases. There may be occasional situations where the cost of exercising UJ to the prosecuting state will be sufficiently close to zero. For example, the defendant may have been apprehended in the nation's territory on other charges; proof of his guilt is well documented and thus the administrative costs of prosecution are low; and his home nation is weak and far away, and thus incapable of creating problems for the prosecuting nation.

Prosecution may occur in such situations even though it would not be optimal from a "global" perspective because the prosecuting nation makes the enforcement decision without internalizing the full costs. Put differently, a prosecuting nation may be *externalizing* costs onto the nations with traditional jurisdiction – the costs of disrupting amnesty and reconciliation processes.

C. A piracy example.

An episode involving Chinese pirates amply illustrates the high costs of enforcement and the probable unwillingness of nations to incur such costs when the benefits would redound largely (but not entirely) to others. Both the South China Sea and the Yangtze River had long been infested with pirates (the former remains among the most dangerous waters in the world). British shipping companies owned many vessels that carried passengers and goods, primarily Chinese, in these waters. The British ships were regularly attacked by pirates.¹⁰¹ The cost of protecting these vessels in far-off waters was quite high, and the British government finally decided that it did not want to bear it. So the

¹⁰¹ See *China Navigation Co. v. Attorney-General*, [1932] 2 K.B. 197 (Eng. C.A.).

government required the British ship-owners themselves to pay the Crown for the cost of protection; otherwise, the forces would be withdrawn and the companies left to fend for themselves.¹⁰² In other words, Britain— at the time the world’s mightiest naval power, with considerable economic interests in China – did not want to bear the costs of protecting its *own* ships, admittedly extensions of its own territory,¹⁰³ from pirates. If even powerful nations were reluctant to expend resources on enforcement when they were directly harmed because they would not recoup the full benefits, this suggests at the very least that there was nothing about piracy that would inspire *disinterested* or tangentially affected nations to punish out of a general solicitude for the sanctity of international law.

The shipping companies filed suit for a refund of the monies paid to the government for their protection, arguing that the Crown was obligated to provide this service free of charge.¹⁰⁴ The suit failed on what amounted to standing grounds; the King’s decisions about the deployment of his forces are entirely discretionary and not subject to judicial challenge, much like prosecutorial discretion. However, in affirming this conclusion, the Court of Appeal made two observations quite relevant to the rational choice paradox of universal jurisdiction.

First, the justices noted that the ships belonged to commercial enterprises that internalize all the benefits of their journeys but seek to externalize the enforcement costs. The profits went to the companies but the costs were borne by

¹⁰² *Id.* at 198, 210.

¹⁰³ *Id.* at 212 (Scrutton, L.J.).

¹⁰⁴ *Id.* at 220-21.

the Crown.¹⁰⁵ The Court thought it reasonable to require those who obtain the benefit from the suppression of piracy to foot the bill.¹⁰⁶ Second, while the ships were British, the judgments repeatedly noted that the primary character of their commerce was Chinese – the vessels carried Chinese nationals and Chinese-owned cargo from one place in China to another.¹⁰⁷ Thus a large portion of positive externalities or surplus created by these activities was enjoyed by China, giving the Crown even less reason to expend its resources on the piracy problem. And one justice noted that need for British forces arose from the commerce taking place “in neighborhoods inefficiently policed by foreign Governments”¹⁰⁸ -- implying that a better solution would be for China itself to reign in its pirates.

D. Altruism and hegemony: rational choice explanations for UJ.

To be sure, there are gaps in the rational choice/self-interested state account of universal jurisdiction. Some nations with a direct stake may fail to prosecute not because it would not be worth their while, but because they are incapable of doing so, due to lack of judicial resources, insufficient security or general political instability in the wake of a ruinous war. While the rational choice

¹⁰⁵ See *id.* at 212 (Scrutton, L.J.) (“A shipowner, *without the assent of the Crown*, trades for purposes of his own profit. . . . Has the Crown a legal duty to protect the shipowner against the criminal action of the passengers whom the shipowner himself has invited aboard?”) (emphasis added); *id.* at 223 (Lawrence, L.J.) (“[T]he plaintiff company . . . has asked the Crown by means of its armed forces to assist it to continue its Chinese passenger traffic with more safety and thus enable it to earn the resulting profit.”) (emphasis added).

¹⁰⁶ *Id.* at 223 (Lawrence, L.J.) (“I entirely agree with the view expressed by the Crown to the shipowners that the provision of preventive measures against internal piracy is *essentially a matter for the owners* and forms no part of the duty of the Crown.”) (emphasis added).

¹⁰⁷ *Id.* (noting repeatedly that ships were engaged in “Chinese passenger traffic”); *id.* at 212 (observing that the plaintiff “for his profit . . . takes on board large numbers of *foreign passengers* . . . to a *foreign port*”) (emphasis added).

¹⁰⁸ *Id.* at 212 (Scrutton, L.J.).

model posits that nations act to advance their interests, like other economic models it does not stipulate what those interests are. Rather, it takes preferences as exogenous. Sometimes nations undertake costly actions for altruistic reasons, out of magnanimity and moral impulses.¹⁰⁹ Disaster relief, foreign aid and humanitarian military interventions are examples. NUJ can be seen as authorizing a kind of *ex post* humanitarian intervention. But such analogs also tell us about the limits of altruism-based NUJ. It will only be exercised when the costs are small, and when it coincides with other national interests¹¹⁰ – i.e., with a strong preference for helping friends and allies, or otherwise concurrently serving a nation’s foreign policy goals. Humanitarian intervention, after all, is quite rare, especially in proportion to the occasions for it.

Thus a finer estimate of states’ willingness to exercise UJ would predict rare and aberrant prosecution of offenders, limited to cases where the costs of doing so are particularly low (perhaps when there is strong political or public support for it, guilt is easy to prove, and the offender is already in custody). Such prosecutions would remain exceptional, and thus add little deterrent power to international norms. This prediction is consistent with the evidence. Over several hundred years, there were only a few UJ prosecutions of pirates. There is little historical evidence for the view that nations thought piracy so harmful to world order that they would set aside their parochial interests to punish it. Indeed, not only did nations almost never pursue pirates that had not directly wronged them,

¹⁰⁹ See Abbot, *supra* note 84, at 352 n.93 (observing that “states infrequently act in ways that even appear altruistic) (emphasis added).

¹¹⁰ See *id.* at 352.

they often openly tolerated pirates that preyed on rival nations.¹¹¹ And despite the growth of the concept in recent decades, actual exercises of UJ remain rare. Moreover, with both piracy and NUJ offenses, jurisdiction is exclusively exercised by wealthy and powerful industrialized states over defendants from poor and powerless states, precisely because such prosecutions are the least costly. In such cases there is little danger of international conflict over assertions of NUJ because weak nations cannot effectively defend against perceived incursions on their sovereignty, the political and military costs for powerful nations of exercising NUJ are relatively low.

Moreover, the few instances where UJ over pirates was put into practice fit the rational choice model -- not as examples of altruism, but rather as examples of “hegemonic stability.” Britain was invariably the nation exercising UJ.¹¹² Britain also accounted for a vast proportion of the world’s maritime trade. Generally, nations will not provide public goods because they receive only a fraction of the benefits but pay all the costs. However, when a nation or its interests is “large enough to realize benefits from production of a good greater than its total costs [it] should be willing to bear those costs itself, providing the [public good] for the entire beneficiary group.”¹¹³ (This is a general economic phenomenon: the larger an actor’s stake in something, the more likely they are to provide related public goods or not succumb to the tragedy of the commons.) Appropriately enough, one of the most famous examples of “hegemonic stability”

¹¹¹ See Barbour, *supra* note 48 at 545 -56 (describing English tolerance of piracy against the Spanish).

¹¹² See Rubin, *supra* note 6.

¹¹³ Abbot, *supra* note 84, at 383.

in international relations theory involves the related phenomenon of Britain's sponsorship of liberal trade regimes in the 19th century.¹¹⁴ It made sense for Britain to impose this unilaterally on other nations because Britain had such a large share of world trade.¹¹⁵

III. RESOLVING THE PARADOX: UNIVERSAL JURISDICTION AS AN EVIDENTIARY RULE

Part II showed that in a rational choice model, making an offense universally cognizable will not increase enforcement or deterrence. Yet a positive theory of UJ should also be consistent with observed phenomenon. Why would the courts of self-interested nations pay lip service to UJ over piracy if it would be useless? A good positive theory of UJ must answer this question, while also explaining why UJ applied only to piracy, and why it was used so rarely. This Part introduces a new way of thinking about the true purposes and functions of UJ over piracy, an explanation that is both consistent with the rational choice model and with facts of piracy's treatment as a UJ offense.

A. *Hostis humani generis* as an evidentiary presumption.

The "universal" status of piracy was not so much about jurisdiction as it was about *evidence* of jurisdiction. UJ was an evidentiary rule that facilitated the prosecution of crimes over which it would be difficult for nations to affirmatively prove the existence of traditional territorial or national jurisdiction. It was not primarily used to suspend or expand the traditional sovereignty-based rules of

¹¹⁴ *See id.* at 384.

¹¹⁵ *Id.* at 384-85.

international jurisdiction, but rather as an evidentiary presumption, an aid to the assertion of traditional jurisdiction.

This explanation has the advantage of being both consistent with the unique characteristics of piracy, while at the same time resolving the rational choice paradox . It explains why even purely self-interested states would find UJ over piracy useful, and how such jurisdiction could in fact improve enforcement. Moreover, it is consistent with the actual pattern of cases expounding on the universal jurisdiction principle – consistent, that is, with both the extraordinary paucity of such cases and the fact that, in the U.S. at least, universal jurisdiction principles were often proclaimed in cases where U.S. nationals seem to have real culpability. While the account presented here makes UJ over piracy far less mysterious as a positive phenomenon, it also shows that piracy UJ has nothing in common with NUJ. If UJ is really an evidentiary rule, then modern UJ appears as a new, untried and ambitious jurisdictional experiment untethered to the historical experience of piracy from which it claims to draw its inspiration.

B. Difficulties in proving jurisdiction over pirates.

As Part I showed, one of the outstanding characteristics of piracy was its multinational character. Piracy was international both on the side of the victim and the perpetrator. Indeed, maritime commerce always had a “peculiarly multinational complexion.”¹¹⁶ Ships, even men-of-war, were routinely crewed by sailors of different nationalities. A pirate ship, composed of outlaws, refugees,

¹¹⁶ Henry J. Steiner, Book Review, 76 HARV. L. REV. 1710 (1963).

exiles, deserters, escaped slaves and other outcasts was even more cosmopolitan than the typical merchantman.¹¹⁷ Traditional bases of jurisdiction already allowed many states to prosecute pirates -- those states with an incentive to do so.¹¹⁸

The international character of pirates' victims added a further layer of jurisdictional complexity. Because the ships of many nations plied the sea routes, and because pirates were generally (but not always) politically neutral, they could be expected to attack the ships of many different maritime states.¹¹⁹ Pirate ships were almost never caught in the act; rather, they were apprehended when they returned to port looking suspicious. And unless the pirate ship was caught in the act, the forum state might have little evidence as to *what particular* nation's ships the pirate had attacked. This again is a consequence of the locus of the crime. By the time the pirate has been apprehended, the victim ships could be on the other side of the world. There may be witnesses able to identify the pirate crew or their ships (though pirates frequently repainted, refitted and changed their vessels, wore befuddling costumes, and took more ruthless measures to avoid witness identification) but these witnesses would also be in parts unknown, their testimony expensive or impossible to secure. Thus a nation could have an obviously piratical vessel in custody, and as an abstract matter have jurisdiction

¹¹⁷ See CORDINGLY, *supra* note 16, at 12, 14-15 (describing multinational character of pirate crews in 17th and 18th centuries).

¹¹⁸ See Steiner, *supra* note 116, at 1710 ("The varied aspects of a ship – its nationality and that of its owner, the origin of its crew. . . and so on – create relationships with and invite the exercise of jurisdiction by several nations."); Cowles, *supra* note 44, at 185-87 (explaining universal jurisdiction over piracy by reference to the criminal groups being "made up of members of more than one nationality").

¹¹⁹ See generally, CORDINGLY, *supra* note 16, at 88 (describing cruising grounds of pirates).

over it under national or territorial principles of jurisdiction, but yet have no way of specifically proving the existence of such traditional jurisdiction.

The promiscuous nature of piratical attacks has long been associated with universal jurisdiction. Pirates were famously denounced as “*hostis humani generis*,” and this term has come to be nearly synonymous with universal jurisdiction itself.¹²⁰ However, modern courts and commentators have misunderstood the significance of the “*hostis humani generis*” characterization. The term has sometimes been regarded as one of opprobrium – the pirates are so bad that they are everyone’s enemy.¹²¹ This understanding of *hostis humani generis* proceeds from the assumption that piracy was, like NUJ offenses, universally cognizable because of its heinousness, and finds in that term evidence that it was regarded as uniquely heinous. The deficiencies of this account have been described in a previous article.¹²²

But it is no accident that this phrase became attached to piracy – the indiscriminate nature of piratical aggression made it probable that a maritime nation that apprehended a pirate in fact had been wronged by him and thus had jurisdiction over him. It may have been more likely than not that a pirate held in custody had either already attacked the shipping of the forum state, or would have done so had he not been apprehended. (The likelihood of this is increased given that nations would be most inclined to police the sea lanes most heavily traveled

¹²⁰ See Randall, *supra* note 10, at 794 & n. 51.

¹²¹ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become—like the pirate . . . before him—*hostis humani generis*, an enemy of all mankind.”).

¹²² See Kontorovich, *supra* note 1.

by their merchant ships.) Thus universal jurisdiction could be seen not as a suspension of traditional sovereignty-based jurisdiction, but rather as a pragmatic adoption of a *probabilistic* approach to Westphalian jurisdiction.

Having jurisdiction in the abstract is one thing, proving it in court is another. Some of the difficulties of proving *who* the pirates had attacked have already been mentioned. But even establishing the nationality of a piratical defendant or pirate ship – which could be a basis for municipal jurisdiction – would be very difficult as well. Indeed, pirates adopted numerous ruses to obscure their true nationality. A pirate ship carried the flags of many nations, flying each when it most suited its purposes,¹²³ and often carried registration papers (sometimes forged) identifying it as a ship of different states. The nationality of pirates itself could be obscure – they were a nomadic lot, who had often long since abandoned their native land.¹²⁴ Moreover, in the age of sail nations did not issue passports or otherwise keep any accounts of their nationals. Especially when the defendant’s purported home state is across the sea, determining his true nationality could be nearly impossible.

C. Presumptions and burden-shifting.

The previous section showed that, ironically, even though pirates injured multiple nations and were thus within the traditional jurisdiction of those nations, it might be impossible for any nation to prove that it had jurisdiction over them. The pirates would benefit from the very nature of their criminality. It is not

¹²³ See CORDINGLY, *supra* note 16, at 114-15.

¹²⁴ See *id.* at 89 (explaining seasonal migration of pirates).

surprising that no legal system found this result attractive or tolerable, and that the law devised tools to ensure pirates could be prosecuted despite a lack of evidence of jurisdiction. Universal jurisdiction was a legal fiction invoked to prevent those who hurt everyone from not being able to be punished by anyone .

Universal jurisdiction as an evidentiary rule in effect assumes that any nation wishing to exercise jurisdiction in fact has *Westphalian* (national or territorial) jurisdiction. Like many evidentiary presumptions, it is based on an assessment of probabilities.¹²⁵ A pirate apprehended by a nation might be thought to be likely to have committed offenses against the forum state vessel's, or to have been prepared to do so but for his apprehension. While this likelihood would not necessarily arise to a greater-than-not level, the difficulty in many cases of establishing jurisdiction through evidence could leave impunity as the only alternative to the presumption. In a somewhat weaker form, the presumption would be rebuttable. Rather, it would shift the burden to defendant to prove the *lack* of proper jurisdiction under the sovereignty-based models. Such burden shifting makes sense, and is quite common, when the relevant knowledge is in the particular possession of the defendant.¹²⁶ Before the rise of 20th century bureaucratic state, the defendant would best know his own nationality, and have

¹²⁵ See 2 MCCORMICK ON EVIDENCE § 343 (4th ed. 1992) (“Generally ... the most important consideration in the creation of presumptions is probability.”); *id.* § 337, (“Perhaps a more frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation.”); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12-13 (1959) (observing that presumptions are often determined by “a judicial, i.e., wholly nonstatistical, estimate of the probabilities of the situation”); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911 (1931).

¹²⁶ See Cleary, *supra* note 125, at 12 (suggesting that the burden of proof is often allocated to the party who controls the evidence relating to that element); Morgan, *supra* note 125, at 929-30.

access to the best proof of it (family witnesses and so forth). The pirates would often be the only ones who know the nationality of the ships they attacked.

D. Illustrations from leading cases.

Illustrations of both the problems of proof to which universal jurisdiction responded, and its actual use as an evidentiary rule, can be found in some of the leading American cases on universal jurisdiction over piracy. *United States v. Holmes*¹²⁷ was the last of a trilogy of important piracy cases decided during the Supreme Court's 1820 term; most of the Court's pronouncements about universal jurisdiction over the crime comes from these cases.¹²⁸ The multinational character of piracy is evident in *Holmes*. The ship captured by the defendants was "apparently Spanish," but there was neither documentary nor testimonial evidence establishing even this basic jurisdictional fact.¹²⁹ Nor was there any evidence of the flag which the capturing vessels flew: they carried no documents, and it was not clear who owned them. The ships had sailed out of Buenos Aires, where they had taken on a typically diverse crew of Frenchmen, Englishmen and Americans.¹³⁰ Thus while there were no facts on which to solidly establish jurisdiction, it did appear that the attacking vessels were essentially an American problem. One of the two captains was an American, and the ship had been built in

¹²⁷ 18 U.S. (5 Wheat.) 412, 418-19 (1820).

¹²⁸ The other cases were *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). *Cf.* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

¹²⁹ *Holmes*, 18 U.S. at 414 (reporting that the vessel's "national character . . . was not distinctly proved by any documentary evidence, or by the testimony of any person").

¹³⁰ *Id.*

Baltimore. But while there was no proof the attacking vessels were American, the Court also found that it “did not appear by any legal proof” that they were flagged by any *other* nation;¹³¹ their voyage to Buenos Aires appears to have been for piratical purposes and not to change nationality.

Thus the Court was faced with what appeared to be a piratical attack by a U.S. vessel and a U.S. defendant on a foreign ship, but the rootlessness and spotty record keeping of the pirates meant that U.S. jurisdiction could only be *inferred* from the *absence* of evidence to the contrary. The admissible evidence did not establish the ship to be within U.S. territorial jurisdiction, and yet the fact that the captains and the ship both came from America suggested that it was. The Court had to choose between crafting a jurisdictional fiction that would allow these “non-national” pirates to be punished, or to allow them to go free. It chose the former course and upheld the indictments. Drawing on *Palmer*, which had established a quasi-universal jurisdiction over “stateless” vessels, the Court held that lack of *proof of jurisdiction* would not bar a piracy prosecution.¹³² The Certificate of the Court looks like it affirms under a universal jurisdiction principle. But UJ only exists when there is no other ground for jurisdiction; the real problem in *Holmes* was not a lack of territorial jurisdiction but rather the inability to prove it. Indeed, the Court explicitly establishes a burden-shifting evidentiary presumption: “Under these circumstances, the Court is of opinion, that the burthen of proof of the national character of the vessel on board of which the

¹³¹ *Id.* at 418.

¹³² *Id.* at 420 (“That the said Circuit Court had jurisdiction of the offence charged in the indictment, although the vessel on board of which the offence was committed was not, at the time, owned by a citizen, or citizens of the United States, and was not lawfully sailing under its flag.”).

offence was committed, was on the prisoners.”¹³³ Presumably, if the ship-owners could prove that they *were* French or Spanish, the indictment would be dismissed.

Similarly, one of the 19th century cases most beloved by proponents of NUJ is in fact not about universal jurisdiction as such but rather about using universality as a legal fiction when American jurisdiction exists but cannot be easily proven. Justice Story’s dizzying opinion in *La Jeune Eugenie*¹³⁴ has been embraced by modern commentators as an endorsement of universal jurisdiction based on the heinousness of the offense,¹³⁵ and of the view that new offenses can become universally cognizable by analogy to piracy as the conscious of the civilized world develops. In fact it stands for none of these propositions, because it was not in substance a universal jurisdiction case. Rather, it stands for the proposition that when there an ample jurisdictional nexus between the United States and the offense, courts will ignore defects in the proof of jurisdiction.

The case stemmed from the seizure of a slave-trading ship off the coast of Africa by a U.S. warship, which had been sent there to enforce Congress’s ban on the slave trade. The ship was libeled in Boston, where its owners demanded its return. The captured vessel flew the French flag and carried proper French papers.

¹³³ *Id.* at 419.

¹³⁴ *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 840-42 (C.C. Mass. 1822) (No. 15,551).

¹³⁵ *See, e.g.*, Randall, *supra* note 10, at 791 & n.29 (citing *La Juene Eugenie* as establishing federal court jurisdiction under UJ principles over pirates with no connection to the United States). *See also* Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT’L L. 65, 75 & n. 49 (1995) (citing *La Jeune Eugenie* as evidence that federal courts can hold individuals accountable for violations of international law even absent congressional provision of a private right of action).

It sailed from Basseterre to Africa, crewed by Spaniards and Italians. The claimants and French diplomats also protested the assertion of U.S. jurisdiction.¹³⁶

This led Justice Story to his labyrinthine consideration of whether slave trading, being morally repugnant and having been condemned by many (but not all) nations had become universally cognizable along the lines of piracy.¹³⁷ But this famous portion of the opinion is purely dicta for two reasons. First, after arguing that he would have universal jurisdiction, Story ultimately refused to entertain the case, and instead ordered the vessel returned to the French to avoid aggravating America's foreign relations.

Second, and what is relevant for the present discussion, *La Jeune Eugenie* was not a true universal jurisdiction case. As in *Holmes*, the ship was an American one, but had resorted to a variety of subterfuges to hide from American jurisdiction. This was the primary argument of Blake and Webster in defending jurisdiction, and it is actually the *first* issue Story decided. The American character of the ship was clearly sufficient for jurisdiction,¹³⁸ and the subsequent discussion of universal jurisdiction turns on an admittedly counterfactual assumption about the vessel's nationality.¹³⁹

From the outset, Story suggests that the vessel's French character is a ruse:

¹³⁶ *Id.* at 840 (noting that “there is also a protest filed by the French consul against the jurisdiction of the court, upon the ground that this is a French vessel, owned by French subjects, and, as such, exclusively liable to the jurisdiction of the French tribunals.”).

¹³⁷ *Id.* at 846-50.

¹³⁸ *Id.* at 841 (holding that regardless of other jurisdictional “difficulties,” American ownership of a vessel is sufficient to defeat the claimant's request).

¹³⁹ *Id.* at 842 (beginning discussion of universal jurisdiction over slave trading with “*supposing* the vessel to be established to be French”) (emphasis added).

In respect to the ownership, it has been already stated, that the vessel was sailing under the customary documents of France, as a French vessel; and certainly in ordinary cases these would furnish prima facie a sufficient proof that the vessel was really owned by the persons, whose names appear upon the papers. In ordinary times, and under ordinary circumstances, *when disguises are not necessary or important to cloak an illegal enterprise, or conceal a real ownership, the ship's papers are admitted to import, if not an absolute verity, at least such proof, as throws it upon persons, asserting a right in contradiction to them, to make out a clear title establishing their falsity.* But if the trade is such, that disguises and frauds are common; if it can be carried on only under certain flags with safety or success; it is certainly true, that *the mere fact of regular ship's papers cannot be deemed entirely satisfactory to any court accustomed to know, how easily they are procured by fraud and imposition upon public officers and how eagerly they are sought by those, whose cupidity for wealth is stimulated and schooled by temptations of profit, to all manner of shifts and contrivances.*¹⁴⁰

Story found that there was ample evidence that the vessel was really an American one: “this schooner is American built, and was American owned, and that within about two years she was naturalized in the French marine in the port of her departure.”¹⁴¹ The French ownership was merely “nominal,” a “disguise” adopted by “American citizens” to “facilitate . . . their escape from punishment.”¹⁴² The ease of masking national identity in an enterprise that takes place across the seas, among foreigners and with foreign crews, requires courts to be particularly vigilant to the substance of jurisdiction rather than its form. Story announced that he will not “shut his eyes” to the real jurisdiction; he will penetrate beyond “the surface of causes” and deal with things as everyone knows them to be, rather than as they superficially appear. Despite his fondness for

¹⁴⁰ *Id.* at 840-41.

¹⁴¹ *Id.* at 841.

¹⁴² *Id.*

natural law and formalism, Story wrote that “I should manifest a false delicacy and unjustifiable tenderness for abstract maxims” if he ignored the substantial American connection to the vessel. Yet he could not establish the American involvement through proof either, and thus *reversed* the burden of proof, which normally lies on those wishing to invoke a federal court’s jurisdiction.¹⁴³

Universal jurisdiction is exercised when the forum state has no connection with the offense. Yet *La Jeune Eugenie* is about what will be required to *prove* such a connection, not about what could be done if it did not exist. Story announces what is in fact an evidentiary rule. The ship will be treated as an American one *unless* the “ostensible” foreign owners “should give affirmative evidence” that their title is not pretextual. Story suggests claimants must produce a bill of sale that establishes the transfer of title from the American owners was for “valuable consideration.” In other words, the case will be *presumed* to be within territorial U.S. jurisdiction *unless* those opposing jurisdiction prove that the case “has no admixture of American interests.”

Clearly such a jurisdictional presumption cannot be applied in all cases; Story is not suggesting that prosecutors will never need to establish jurisdiction. Rather, some of the very characteristics that would today be regarded as relevant to making an offense universally cognizable are the ones that a court would look to in deciding whether to switch the burden of proof on jurisdiction. First, the crime involves international shipping on the high seas, which has a particularly

¹⁴³ See *Hogan v. Foison*, 35 U.S. 160 (1836) (Story, J.) (holding that the plaintiff-in-error bears the burden of proof on facts necessary to establish the Court’s subject matter jurisdiction). Note that in *La Jeune Eugenie*, the government was the appellant, as the claimants had won a pro forma decree from the district court in an unreported decision. See *La Jeune Eugenie*, 13 F. Cas. 579 (No. 7301) (1821).

multinational dimension that makes it easy for perpetrators to use false flags and other ruses to immunize themselves from prosecution. But Story also suggests the burden-switching will not apply even to all such crimes. A second factor is relevant here. Burden-switching would not be inequitable as applied to slave traders because “a traffic of this nature [is] so little reconcilable with good faith or sound morals.” Thus the opprobrium that attaches to the crime, be it slavery or piracy, was in Story’s view relevant -- but not to establishing universal jurisdiction over it, but rather to reversing the burden of proof for *territorial and national* jurisdiction.

E. The significance of the evidentiary rule.

Universal jurisdiction as an evidentiary rule is not about expanding jurisdictional frontiers. Rather, it is used specifically in those cases where a jurisdictional nexus exists between the defendant and the forum state. The doctrine facilitated prosecutions under sovereignty-based categories of jurisdiction.¹⁴⁴ This explains how universal jurisdiction could be a useful principle despite the enforcement paradox described in Part II. As an evidentiary rule, UJ need not encourage additional enforcement by non-affected states to have value. Rather, it encourages enforcement by states that already have some incentive to do so. By reducing the cost of proving jurisdiction (by removing one of the elements the prosecution would normally have to establish), it lowers the costs of enforcement precisely in those cases where the benefits of enforcement to the

¹⁴⁴ The evidentiary rule does not explain all observed uses of UJ. Some may be products of altruism or hegemonic stability, as explained in Part II.D. But those reasons for UJ are not general enough to account for the broad and longstanding acceptance that piracy UJ enjoyed. U.S. courts endorsed the doctrine at a time when America was neither hegemonic nor altruistic. The doctrine must have had some other use to these nations, namely, its value as an evidentiary rule.

forum state are positive. Thus it would in fact result in increased enforcement of piracy laws. In particular, it would allow nations to prosecute those pirates whose nationality (or rather the proof of it), or the nationality of their victims, has been obscured by time, distance or deception.

This account also explains why there on rare occasion “true” UJ prosecutions of pirates. Universal jurisdiction as an evidentiary rule is essentially probabilistic jurisdiction. It is based on the *likelihood* that there is an actual basis for traditional jurisdiction, but not one that can be cheaply proved. Since it is a matter of likelihoods, some true UJ cases might get swept in along with those where jurisdiction is merely difficult to prove. Every presumption based on probabilities will be over-inclusive (and under-inclusive). But the few true UJ cases that might be swept in would not reflect the essence of the *hostis humani generis* concept, but rather be a byproduct of it.

IV. CONCLUSION

This Article has presented a positive account of universal jurisdiction that is consistent with the historical evidence and with rational choice models. It shows that UJ has substantial limitations and problems. Indeed, self-interested nations cannot be expected to exercise UJ with any regularity. But this Article has also shown that UJ has a previously unappreciated role – not as an independent basis of jurisdiction, but rather as an evidentiary rule that facilitates the proof of territorial or national jurisdiction.

This improved understanding of UJ's has cautionary implications for current efforts to expand it beyond piracy to a broad range of human rights offenses. The new universal jurisdiction ("NUJ) invokes piracy UJ to legitimize itself, but the positive understanding of piracy UJ developed in this Article suggests that it has little in common with NUJ. Part I discussed several characteristics of piracy that were either necessary or helpful to its universal status. Modern human rights offenses do not have many of these characteristics.

Piracy was not only committed exclusively by private actors, it was committed by private actors who had turned their backs on their home state and thus would not likely receive any protection from it. NUJ offenses on the other hand, are almost invariably committed by people acting under color of state law. From Sharon to Pinochet to Milosevic, the principal NUJ cases involve not just state actors, but the political or military leaders of nations. Quite unlike pirates, these are people that their home state would be expected to have great solicitude for, and thus resist assertions of UJ. Indeed, the home states of all those defendants did. Furthermore, pirates attacked ships of many nations, and by disrupting international commerce injured the economic interests of many more. Human rights offenses, on the other hand, are almost always committed against a single population, often within the offender's own states. The crimes do not directly injure many nations,¹⁴⁵ and it is thus unclear why the unaffected nations would have any interest in prosecution. Piracy was everywhere punished by death, and thus UJ did not create forum-shopping possibilities, double jeopardy

¹⁴⁵ See Part II.B.3, *infra*.

problems, or set up potential conflicts between the laws of prosecuting states. Yet punishment for NUJ varies greatly; some nations punish human rights offenses with death, while others do not even have the death penalty. These differences in punishment have already caused serious problems for tribunals exercising NUJ.¹⁴⁶ Finally, NUJ offenses appear to have much vaguer definitions than piracy.¹⁴⁷

To be sure, NUJ offenses may have some of the relevant characteristics of piracy. All nations regarded piracy to be a crime, and morally culpable; the same can surely be said about genocide, war crimes and so forth. Moreover, some commentators have argued that NUJ offenses, like piracy, take place in situations where municipal enforcement is unlikely. Piracy occurred on the high seas, which was difficult to police because of its size. NUJ offenses often take places in “failed states” where government has broken down, or are committed by the government itself against its own population; in either case, there is no “on the spot” enforcement mechanism.¹⁴⁸ But on the whole, while NUJ claims 18th and 19th century universal jurisdiction over piracy as a precedent and inspiration, it has chosen to disregard the safeguards and limitations that have traditionally kept UJ unproblematic and uncontroversial.

Part II has shown that rational, self-interested states would not exercise universal jurisdiction because of free rider and coordination problems. Enforcing universal norms amounts to providing a public good, and economically rational actors do not do this. Thus the few instances in which actual UJ can be observed

¹⁴⁶ See text accompanying notes 58-60 *infra*.

¹⁴⁷ See text accompanying notes 76-77, 79-81, *infra*.

¹⁴⁸ See Cowles, *supra* note 44, at 193-94.

may be explained either as nations acting on altruistic preferences, or as products of hegemonic stability.¹⁴⁹ If, as is likely, the latter is the primary explanation, this has rather grim implications for the success of NUJ. If there is a global hegemon today, it is the United States. Yet the U.S. is the nation most opposed to expanding UJ beyond piracy to the NUJ human rights offenses. The American reluctance suggests that the benefits of NUJ are diffuse enough, or the costs of production high enough, that the latter would exceed the former despite the broad scale and scope of U.S. global interests.

While the rational choice model suggests nations would rarely if ever exercise UJ, the universal principle was for centuries said to apply to piracy. This Article has shown how UJ over piracy was a useful concept, and thus a long-lived and widely accepted one, despite the enforcement paradox. The rational choice model can be reconciled with the longstanding acceptance of UJ over piracy once if such “universal jurisdiction” was not really used to expand jurisdiction to offenses with which the forum state had no connection, but rather as an evidentiary rule to facilitate the proof of territorial and national jurisdiction. Many classic U.S. piracy cases that are often thought to stand for UJ only used the universal principle as an evidentiary rule; territorial or national jurisdiction probably existed in those cases. Yet NUJ does not use the universal principle as merely an evidentiary rule; NUJ seeks to apply it specifically in those cases where there is no nexus between the forum state and the crime. This represents an entirely different phenomenon from piracy universal jurisdiction.

¹⁴⁹ *See* Part II.D.