

Perfectly Permissible Plundering

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Imagine being on a ship, sailing in an Ocean, filled with cargo, sometime in the 16th through the mid-19th Centuries. Another ship pulls alongside. You don't recognize it. It might even be a Naval Vessel. The ship's captain hails you to drop sails. You comply. His crew boards your ship, disables your defenses, binds you and your crew, and takes your cargo. This smells of piracy, don't you think? Your ship has been plundered. Plundering ships is the business of pirates. If these marauders had been pirates and had been caught, they could have been hanged summarily without a trial. Well, as we will learn, maybe they were not pirates. They might have fallen into another category of marauder, seemingly the same as pirates, but ones who can get away with this type of activity even if caught. No arrest. No hanging. Not even a reprimand. For them, it is legal. They can loot your ship, be praised by their Queen, grow rich, become national heroes, achieve a high office in government, and, if lucky, attain legendary status.

It was a friend who started my interest in the subject of permissible plundering. Recently, he told a story about Sir Francis Drake, who while exploring the Western Coasts of the Americas, filled his ship with silver and treasures from Spanish ships and all without harming a Spaniard. Francis Drake filling his ship with the goods of others without harming a Spaniard; that caught my attention. This couldn't have been a friendly trading transaction, not if harming a Spaniard had been an option. It sure sounded like stealing, and if he was doing so at Sea, wasn't this piracy? Wasn't he violating the ages old laws of nations against piracy?

Despite his being a legend, I knew little about Sir Francis Drake except that he was famous. I knew that he was a British explorer of the Northern California Coast who, they thought, had left a brass plate plaque, discovered in the 1930s, commemorating his Queen, and that whatever he had done had impressed the locals, judging by what they named for him. Features such as Drakes Bay and Drakes Landing along the Pacific Coast, as well as Sir Francis Drake Boulevard, a bi-way which crosses the entirety of Marin County from San Quentin to the Pacific Ocean, and Drake High School in San Anselmo, and the Sir Francis Drake Hotel near Union Square in San Francisco. The plaque they found was purchased by the California Historical Society and displayed for 40 years, but then was proved to be a fake, a practical joke made in the 1930s by students of the University of California's Berkeley chapter of the Ancient and Honorable Order of E Clampus Vitas, a National honor society which devotes itself to the preservation of history of the Western United States.

Coincidentally, just weeks before hearing that Drake might have been a plunderer, I visited his home in South West England. The house is in the County of Devon, on the border with Cornwall. The property, known as Buckland Abbey, had been a medieval monastery, which a prior owner had converted into a manor house. The thick walls were covered with paintings of Drake and his ships and maps of his voyages. Captions hailed Drake's actions as an explorer as well as his involvement in protecting Britain from the Spanish Armada, and detailed his considerable skills as a sailor, ship captain and warrior. There were pictures of both of his wives, one, Mary Newman, quite pretty, and the other, Elizabeth Sydenham,

not as pretty, but very rich. Someone that day, perhaps in the gift shop, mentioned that Buckland Abbey was only one of more than forty homes owned by Drake. I could only imagine how very grateful Queen Elizabeth must have been for Drake's help in the Spanish Armada business or how generous his not as pretty, but very rich, wife had been. There was no way that an honest sea captain could have put together so vast a real estate portfolio on ordinary sea captain wages. Plundering sure paid well.

I visited a library for answers. Books on Drake were silent on the topic of piracy. Books on piracy mentioned Drake but explained why he was not a pirate. Rather, they said he was a privateer and that must have been OK. I had never heard of a privateer, but obviously he was someone who could plunder other ships, and do so legally. So, what was a privateer?

A "privateer", I learned, was an individual who had written permission from the government in either of two forms (1) in times of peace, to take retaliatory actions at sea for harm done to one of its citizens, or (2) during times of war, to carry on all forms of hostility which were permissible to naval vessels by the usages of war.

The license given to a sea captain granting him privateer status was in the form of a letter. The license was either a Letter of Reprisal, granted in times of peace, or a Letter of Marque, granted in times of war. Each Letter gave its holder permission to engage in certain forms of action, as spelled out in the authorizing license. Letters of Reprisal were granted, or not, after a hearing, usually, in Britain's case, in Admiralty.

For example, an English merchant whose cargo had been seized by a Spanish ship could apply to Admiralty for Letters of Reprisal, authorizing him or his agent to recover by force goods or money up to a specified value from any Spanish ship, not necessarily from the offending Spanish ship. Letters of Reprisal sanctioned plundering as recompense for actual losses plus an additional amount as a reward or compensation for the risks taken and services rendered in seeking reprisals for the injured parties. That was Admiralty's intent. In practice, frequently more was taken than was authorized; profits could abound. Once away from the eyes of Admiralty, the precise monetary limits in the Letters of Reprisal could be ignored, and frequently were exceeded.

Letters of Marque were granted only during times of war and permitted the holder to engage in the same types of activities as those of naval vessels according to the rules of warfare. I was to learn that plundering with impunity was an acceptable usage in the waging of war at sea; it was an activity which, being permissible to naval ships, was also allowable to privateers.

In Drake's time, during the latter stages of the 16th Century, Britain needed privateers. With limited resources, Queen Elizabeth needed help to protect Britain from hostile activities of Catholic countries, such as Spain, Portugal and France. These countries viewed Britain as a heretic nation peopled by Lutherans. They wanted to reestablish Catholicism in the realm and remove Elizabeth from the throne. Elizabeth's military and navy were limited.

The Queen also turned to privateers to help in invigorating Britain's economy. Britain was a seafaring exporting nation, but it was suffering economically. It relied on the export of its products, mainly wools and cloths, mostly through the port of Antwerp, but that trade had dwindled when Antwerp became oversupplied with products from other countries.

One solution was to expand the geographic area of British trading by gaining access to other ports, but these efforts were being discouraged by Spain and Portugal. These countries had become world powers, extending their territories into Africa and the Americas, as well as islands in the Atlantic, the Caribbean and the Pacific. Their colonies were rich in natural resources. The Spanish and Portuguese controlled the ports of most of the Countries fronting the Atlantic, going all the way down to the hump of West Africa. Pope Pius V, a Spaniard by birth, had given exclusive licenses to Catholic countries to trade in Western Africa and Eastern South America. The Pope declared that all areas East of a longitudinal line in the middle of the Atlantic Ocean belonged to Portugal, which included Brazil because its hump jutted to the East of this line, and all areas West of the line belonged to Spain. Spain and Portugal used their greater navies to keep the British and others away from these areas. Spanish ships blocked ports and engaged and plundered British merchant ships. Something had to be done. Yet, Elizabeth was reluctant to go to war. The cost would be prohibitive, and the other countries had bigger better navies. As Spanish and Portuguese ships continued to interfere with the trading activities of the British ships, the Queen turned to privateers, some with Letters of Reprisal and many without, relying instead on the proverbial wink or nod from a counselor of the Queen. This is where Francis Drake and John Hawkins and Richard Grenville and others like them came in.

Early in his career, Drake captained one of the vessels in the fleet of John Hawkins, another privateer. Sometime in 1568, Hawkins was commissioned to negotiate a trade deal, involving slaves, with the Viceroy of New Spain at the castle city of San Juan de Ulua near Vera Cruz, Mexico. The Spanish representative assured Hawkins and his men safe passage into the town to conduct the negotiations. Once Hawkins and his men were in the town and away from their ships, the Spanish set upon them, slaughtering as many as possible. Drake escaped. One year later, Drake, possibly with Letters of Reprisal, maybe not, returned to the area, this time to the town of Nombre de Dios, a Spanish settlement in the Isthmus of Panama. Drake and his men plundered storage areas and looted large amounts of silver and other treasures which had been mined by the Spanish or stolen by the Spanish from the locals and was awaiting portage to the Pacific coast of Panama for shipment to the Philippines in one of the Manilla galleons. Elizabeth reaped the benefit of Drake's considerable haul. She and John Hawkins were avenged. She shared enough of these riches with Drake for him to add to his collection of houses.

In the late-1570s, counselors of the Queen asked Drake to sail into the Pacific Ocean along the Western shores of the Americas to establish trading posts for Britain. Drake set sail from England in 1577 with five ships, including his main vessel, Pelican. Pelican later was renamed The Golden Hind. Drake's venture took three years to complete, and resulted in his circumnavigating the globe, the first Englishman to do so. He made the crossing from the Atlantic to the Pacific near the Southern tip of South America through the Straits of Magellan, only the fifth sailor to accomplish that difficult feat.

Drake's ship Pelican was the only one of the five to complete the passage through the Straits of Magellan. Alone, Drake sailed Pelican up the West Coast of the Americas, stopping at Spanish ports in Chile and Peru, and filling his ship with silver and treasures always, they say, without harming a Spaniard. Drake's biggest catch on this voyage was a Spanish galleon about to depart for Manilla with silver for the Chinese to make into coin. The bulk of his plunder went to the Queen, but enough was shared with him to increase the size of his real estate portfolio.

I asked a friend to read this essay. When finished, she said that she was not surprised at all by the plundering activities. She had always believed that explorers were up to no good.

As I pursued my subject, it still seemed like stealing, permissible or not. I found that I was not the only one who was bothered. There were others. The University of Exeter, in England, conducted a symposium in 1985 commemorating the 400th anniversary of Sir Walter Raleigh's fated attempt at a settlement in Roanoke, Virginia in 1585. The first in a selection of essays published from this symposium discussed privateering in Elizabeth's reign. The author scholar, Professor Kenneth Andrews, commented that the hunt for prize ships and cargos was a major attraction for sea captains, as it was the plundered prize that made the voyage financially viable. He continued, and I quote, "Drake was of course a pirate long before the Queen engaged his services ... Every single one of his ventures was devoted to plunder. He couldn't even refrain from going after a prize in the middle of the Armada action of 1588."

There is much we will never know about the legality or illegality of Drake's plundering. His diary and papers of his round the world voyage were lost, possibly in the fire that consumed much of London in the 1660s, including Whitehall where they were housed.

Drake was not alone. Many of his contemporaries were doing the same, helping the Queen and helping themselves, sometimes as privateers and sometimes as pirates. One was Richard Grenville. Grenville rose from being a pirate to being a privateer to being a Captain in the Queen's Navy. Another was Henry Morgan. Morgan was a member of a respectable Welsh family. I visited Morgan House, a manor just outside Cardiff. There is a painting of Henry in the main gallery next to pictures of relatives, presumably more reputable relatives, nothing said on his name plate about his avocation.

Charles Kingsley, the mid-19th Century novelist, in his book "Westward Ho!", had nothing but praise for Drake and Grenville and their likes. He never called them pirates, or even privateers. In the first chapter, Kingsley wrote "It was the men of Devon, the Drakes and Hawkins, Gilberts and Raleighs, Grenvilles and Oxenhams, and a host more of forgotten worthies, whom we shall learn one day to honor as they deserve, to whom [Britain] owes her commerce, her colonies, her very existence. For if they had not first crippled, by their West Indian raids, the ill-gotten resources of the Spaniard, and then crushed its last huge effort in Britain's Salamis, the glorious (Armada) fight of 1588, what [would we have been] but a popish appanage of a world-tyranny as cruel as heathen Rome itself, and far more devilish."

Nevertheless, Kingsley noted that during the protracted battles of the Spanish Armada Drake's ship set upon as many grounded Spanish ships as it could, plundering their cargoes, before proceeding to the next engagement.

The existence or non-existence of Letters of Reprisal as justification, or not, for these actions seemed to me to be a distinction without a real difference. I recalled how, in Tom Sawyer, Huck and Tom dealt with a hair-line distinction of legality. I quote: "There was no getting around the stubborn fact that taking sweetmeats was 'hooking' while taking bacon and ham and such valuables was plain stealing, and there was a commandment against [stealing] in the Bible. So, they inwardly resolved that so long as they remained in the sweetmeats business their piracies should not be sullied with the crime of stealing."

I now turn back to permissible plundering during wartime. Privateers with Letters of Marque, those granted in times of war, were even less restricted than those with Letters of Reprisal. There had to be a war, of course, but with Letters of Marque, you could perform all usages of war. Plundering, without limit, was, I was soon to learn, an acceptable usage of war. In times of war, there was no dollar limit on the cargoes which could be plundered from any ship flying an enemy flag, not just an enemy naval vessel, but private and public commercial ships as well. Plunder, the noun, was called the prize. The

prize belonged to the government that had granted the Letter of Marque to a privateer or that had commissioned the naval vessel. As an incentive and reward, the Crown passed on part of the prize to the captain of the capturing vessel to divide amongst himself and his crew. The practice was later formalized in the Cruisers and Convoy Act of 1708. An Admiralty Prize Court was created to evaluate claims of prizes and the division of the prizes.

During my travels in England, I also visited Hardwicke House in Derbyshire. Hardwicke House was the stately home of the Earls of Hardwicke and Litchfield. There was a painting on the wall of a Captain George Anson. It caught my attention only because there had been a teacher at my high school whose first name was Anson. George Anson had been the husband of Lady Elizabeth Yorke, the daughter of the 1st Earl of Hardwicke. The penultimate 5th Earl of Litchfield, Patrick Anson, had been a friend of Prince Charles and Lady Diana, and served as the official photographer at their wedding in the 1980s. My visit to Hardwicke House was in the month of May. At Christmas time that year, UK friends who had accompanied us to Hardwick House, sent me a used paperback condensed version of Richard Walter's 1748 multi-volume book. The book was titled: "Voyage Round the World in the Years 1740-1744 by George Anson, Esq; Commander in Chief of a Squadron of His Majesty's Ships." Richard Walter, the author, had been the navy's historian aboard Captain Anson's ship on this voyage.

In his introduction, Richard Walter explained the reason for Anson's voyage as follows, "When, in the latter of the summer of the year 1739, it was foreseen that a war with Spain was inevitable, it was the opinion of some considerable persons then trusted with the administration of affairs, that the most prudent step the nation could take, on the breaking of the war, was attacking that crown in her distant settlements; for by this means it was supposed that we should cut off the principal resources of the enemy, and should reduce them to the necessity of sincerely desiring a peace, and they would hereby be deprived of the returns of that treasure by which alone they could be enabled to carry a war."

Anson's mission, simply put, to plunder. It began in 1740 at the outset of the War of Jenkin's Ear. There had to be a war to justify plundering by naval vessels. The same being true of privateers with Letters of Marque. The War of Jenkin's Ear was but one of a succession of wars between Britain and Spain. There had been a respite after the War of Spanish Succession, when in 1713 the Treaty of Utrecht gave Britain a 30 year right to supply an unlimited number of slaves to the Spanish colonies, plus 500 tons of goods each year. The Spanish suspected that Britain was exceeding its quotas and began boarding British ships and confiscating cargoes. The incident which was to give its name to the next war occurred nine years earlier, in 1731 off the Florida coast. The British ship Rebecca was boarded by a Spanish patrol boat, La Isabella. The commander of the Spanish patrol boat cut off an ear of the captain of the British ship. The name of the captain of the British ship was Robert Jenkins. Jenkins testified in Parliament. Demands were made on Spain. Envoys were sent back and forth. Nine years later, war was declared. More than 110 years later, Thomas Carlisle gave the conflict its name, the "War of Jenkin's Ear," in his 1858 History of Frederick II.

After two years of searching, Anson's efforts were rewarded by the capture of one of the Manilla galleons, a Spanish ship, called the Nuestra Senora de Covadonga, sailing West from South America to the Philippines filled with silver from South America. Anson's ship plundered the Spanish galleon taking a prize which included 1,313,843 pieces of eight. All Anson needed was a war; there was one, that of Jenkins' Ear and to find a treasure ship flying the Spanish flag. Nothing really to do with a naval battle; just the looting of a private ship.

King George II shared the prize with Anson, enough to make him a rich man, and bring him considerable political influence. He was elected a Member of Parliament in 1744. He became Lord Commissioner of the Admiralty in the same year. He was promoted to rear admiral in April 1745 and to vice admiral in July of the same year. After his fleet defeated the French fleet in 1747 during the War of Austrian Succession, and took a prize worth 300,000 pounds, he was elevated to peerage as Lord Anson, Baron of Soberton. And, he became First Lord of the Admiralty in 1751.

Plundering during wartime had been common practice throughout history. I knew that soldiers plunder, and that more recently they lost their plunder after lawsuits to heirs of the plunderer. But, I must have assumed that naval ships just fired their cannons at the enemy until one of them sank. I was to learn that Naval and army commanders both viewed plundering as a means of supplementing the meagre salaries of their men. Nation's leaders used plundering as a way to finance the war and operations of government and, while at it, to obtain national treasures, such as art objects and obelisks and friezes for less than market value. Looting helped put the enemy at an economic disadvantage. And, there was an element of vengeance. In Genesis 15:14 despoliation was hailed as an act of justifiable vengeance upon the oppressors of Israel.

Still, in my way of thinking, all this plundering was just plain stealing, even if sanctioned by Letters of Reprisal or Letters of Marque or usages of war or a passage in the Old Testament. Laws were developing in civilized lands which recognized the rights to own, keep and enjoy the use of one's property and required strict procedures and due process in its taking by others. Laws also developed to abolish Bills of Attainder, by which a legislature could single out an individual or a group of individuals for punishment without a trial. Section 9, paragraph 3 of Article I of the U. S. Constitution says that "No Bill of Attainder shall be passed."

Yet, why had I not known about permissible plundering at Sea? I was a history major in college, and still consider myself as somewhat of a history-buff. Yet, I had never heard of privateering or of permissible plundering by the navy. I consulted my brother and a friend about. My brother had served as a naval officer for three years aboard a carrier, after six months of Officer Candidate Schooling in Newport, Rhode Island. I asked him whether there had been any discussion of plundering in his schooling or while on active duty. Not only had there been none, but it took him some time to understand what I was talking about. I mentioned this topic to a friend who had served for two years as a junior officer on a destroyer in the South China Sea. He had heard of Letters of Marque, but only vaguely, and dismissed the notion of plundering by naval ships with a smile.

Undoubtedly, something had happened to eliminate perfectly permissible plundering well before my time.

By the end of the 18th Century, the legality of privateering was being called into question. Britain's greatest naval hero Admiral Horatio Lord Nelson declared: "The conduct of privateering is, as far as I have seen, so near piracy that I only wonder any civilization can allow them."

In the 1850s, actually just one year after the publication of *Westward Ho!*, European powers decided that the host of ills caused by licensed plundering far outweighed any benefits they could provide. Not surprisingly, insurance companies were leaders in the protest. In 1856, privateering became a topic of the conference in Paris to settle the Crimean War. The participants included Russia, the Ottoman Empire, France, Prussia, Great Britain and Sardinia Piedmont. Topics on the agenda included resolving

the competing claims to various territories by the participating nations, demilitarizing the Black Sea, and freeing navigation on the Danube River. In its final version, the Treaty also declared privateering to be illegal, and stated that neutral goods, except contraband, were no longer liable to capture by an enemy flag.

The United States condemned the ban, and continued to treat privateering as legal. Privateering had been countenanced by the United States as far back as colonial times. Privateering is permitted in our Constitution. Article I, section 8 of the U.S. Constitution gives Congress the power not only to declare war, but also to grant letters of Marque and Reprisal and make rules concerning capture on Land and Water.

During the American Civil War, the United States government (the North) had second thoughts, and called on Britain and France to treat the Confederate privateers as no more than pirates. The Constitution of the Confederate States, which in large part mirrored the U.S. Constitution, gave the Confederate Congress the power to grant Letters of Marque and Reprisal.

In 1897, Francis R. Stark, an American jurist, writing on the history of privateers, commented "the right to capture private property on the high seas in time of war was one [which was] universally recognized." But, he continued, "at some time in the future it will not be recognized at all."

One year later, in 1898, President William McKinley issued a presidential proclamation that henceforth the U.S would abide by the stipulation in the Paris Treaty of 1856 that outlawed privateers. No succeeding President has reversed McKinley's proclamation, at least none by the time of this essay.

That left legal plundering only in the hands of naval warships, but not for long. The Institute of International Law, at its Oxford session in August 1913, upheld its former resolutions on the abolition of capture and of confiscation of enemy private property in naval warfare. It was aware that its principle had already been accepted, but believed that regulations were indispensable. Two Regulations which it adopted were pertinent to our topic. Article 12 confirmed that "Privateering is forbidden". Article 39, applicable to Naval vessels, states that "enemy cargo found on board ships detained under Articles 37 and 38 may likewise be held, but It must be restored after the termination of the war...."

Finally, the Fourth Geneva Convention, in 1949, explicitly prohibited looting of civilian property during wartime.

I now know that my ignorance was justified. The perfidious practice of perfectly permissible plundering had slipped into history. Sadly, pirates still plunder, but possibly, hopefully probably, perfectly permissible plundering, being placed in the past, persists only in print.

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