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AN ARCHAEOLOGICAL ARGUMENT FOR THE 
INAPPLICABILITY OF ADMIRALTY LAW IN THE 
DISPOSITION OF HISTORIC SHIPWRECKS

Terence P. McQuown†

I. INTRODUCTION

The ocean has played an important role in the history of humanity. The sea and its plethora of creatures have supplied not only a stable food supply, they also have been a source of inspiration, stimulating artistic motifs and epics. In addition, boats have been used for other than just functional purposes, and have been employed in both celebratory and funerary contexts. Currently,
the ocean is the last great bastion protecting submerged relics of the past from the ravages of time and vandals. Wherever found, archaeological resources are a part of our common cultural heritage. The sea has preserved much of our material past. However, carry a king who aspired to become part of the heavens.” Peter Miller, Riddle of the Pyramid Boats, 173 NAT'L GEOGRAPHIC 534, 550 (1988).

5. See generally William L. Rathje, Art Salvaged from the Sea, 1 ARCHAEOLOGY 179 (1948) (discussing some of the art recovered from ancient Mediterranean shipwrecks). It has been estimated that there are over 50,000 shipwrecks within the navigable waters of the United States. See H.R. REP. No. 100-514, pt. 1, at 1 (1988), reprinted in 1988 U.S.C.C.A.N. 365; H.R. REP. No. 100-514, pt. 2, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 370. The number of shipwrecks within the United States’ waters, and the number of archaeological artifacts therefore discoverable, are fewer than those in the waters of other parts of the world, where seafaring has been occurring for a longer period of time. For example, Arvid Pardo, permanent representative of Malta, stated at the United Nations General Assembly that “I have seen an apparently authoritative statement to the effect that there would appear to be more objects of archaeological interest lying on the bottom of the Mediterranean than exist in the museums of Greece, Italy, France and Spain combined.” U.N. GAOR, 22d Sess., 1515 mtg. at ¶ 20, U.N. Doc. A/C.1/PV.1515 (1967).

6. Archaeological resources are a subset of “cultural property.”

Cultural property encompasses a variety of objects in many different sizes, shapes, and forms. For example, it may be baskets, pottery, masks, tapestries, sculptures, or engravings. There is no universally accepted definition. ... Generally, it is anything exhibiting physical attributes assumed to be the result of human activity.

Antonia M. De Meo, More Effective Protection for Native American Cultural Property through Regulation of Export, 19 AM. INDIAN L. REV. 1, 2-3 (1994) (citations omitted). Cultural property may, for instance, encompass shipwrecks, ruins, historic structures, religious objects, and contemporary objects made by native peoples. See Stephanie O. Forbes, Comment, Securing the Future of Our Past: Current Efforts to Protect Cultural Property, 9 TRANSNAT'L L. 235, 239-40 (1996); see also Unidroit Convention on Stolen or Illegally Exported Cultural Objects (June 24, 1995), in LYNDEL V. PROTTO, COMMENTARY ON THE UNIDROIT CONVENTION, at 2 (1997) [hereinafter Unidroit Convention] (stating that cultural objects are those which are of importance for archaeology, prehistory, science, history, art, or literature, and which belong to one of the numerous categories listed in the annex to the Convention).

7. See Richard A. Gould, Getting off the Gold Standard, in UNDERWATER ARCHAEOLOGY: THE PROCEEDINGS OF THE FOURTEENTH CONFERENCE ON UNDERWATER ARCHAEOLOGY 1, 1 (Calvin R. Cummings ed., 1986). Therefore, “the same scientific, legal, and ethical standards that apply to archaeology on land should also apply to archaeology under water.” Statement by Seminar Participants on the Present Loot- ing of Shipwrecks in Florida and Texas, in SHIPWRECK ANTHROPOLOGY xiii, xiii (Richard A. Gould ed., 1983). Different nations view cultural property as belonging either to mankind as a whole, or as being only those nations’ national heritage. See generally John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 AM. J. INT’L L. 831, 831-32 (1986) (discussing the different ways nations think about cultural property); Anneliese Monden & Geert Wils, Art Objects as
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with the emergence of modern technology, submerged archaeological sites and the artifacts they contain are subject to potential looting and vandalism.

This article suggests that submerged archaeological resources, wherever found, should not be governed by admiralty law and subject to treasure salvage. Admiralty laws regarding the ownership and disposition of salvaged property developed in a context far removed from archaeological resource preservation. As will be shown, admiralty law sought to achieve a judicial balance between claims of owners of property lost at sea and the discoverers of such property. The solution was to allow the finders an award for their successful efforts in saving some of the lost property. In other instances, where no owner could be found, admiralty law afforded the finder title to the res. Thus, admiralty law was primarily con-


8. The development of diving technology is discussed in 50 Years of Scuba, SKIN DIVER, Feb. 1993, at 7. For a discussion of the tools archaeologists currently use to find shipwrecks, see generally Roderick Mather, Technology and the Search for Shipwrecks, 30 J. MAR. L. & COM. 175 (1999). There are numerous types of submerged archaeological sites including "refuse sites," which are merely the underwater accumulation of refuse, usually near a camp site or ceremonial center, and "sacred places," which include lakes or springs which local inhabitants believe have sacred properties and thus deposit offerings in them. See John M. Goggin, Underwater Archaeology: Its Nature and Limitations, 25 AM. ANTIQUITY 348, 351-52 (1960). In addition, there are sundry "drowned habitation sites" off the North American coast. See generally Melanie J. Stright, Archaeological Sites on the North American Continental Shelf, in ARCHAEOLOGICAL GEOLOGY OF NORTH AMERICA 439 (Norman P. Lasca & Jack Donahue eds., 1990) (discussing 35 sites located on the North American continental shelf). These are pre-historic sites that became submerged with the world-wide Post-Pleistocene rise in sea-level. See, e.g., Jon M. Erlandson & Madonna L. Moss, The Pleistocene-Holocene Transition Along the Pacific Coast of North America, in HUMANS AT THE END OF THE ICE AGE: THE ARCHAEOLOGY OF THE PLEISTOCENE-HOLOCENE TRANSITION 277, 279 (Lawrence Guy Straus et al. eds., 1996). It is, of course, shipwreck archaeological sites that have most often sparked the imagination of the public and which will be the focus of this article.


10. For a detailed discussion of admiralty law in the context of determining the ownership and disposition of historic shipwrecks, see infra Part II.

11. See infra notes 25-26 and accompanying text.

12. See infra note 56 and accompanying text.
cerned with the return of goods lost at sea to the stream of commerce. Antithetical to this purpose is that of archaeological resource preservation, which stresses the protection of historically and scientifically significant goods and their eventual scientific excavation. 13 Like all things, ships and their goods can eventually pass out of the stream of commerce and into the historical and archaeological realm. 14

This article concerns the inequity of treasure salvage, a topic that has consumed much of the field of cultural resource preservation for many decades. However, there is as yet no comprehensive domestic or international solution as to how to deal with artifacts, historic ships and other archaeological sites discovered beneath the waves. 15 Unfortunately, many proposed "solutions" have allowed treasure salvors to continue exploiting the past. 16 We can either protect submerged archaeological resources for all of humanity to learn from and enjoy or allow a small group of treasure hunters to exploit historically significant artifacts for their personal gain, destroying much important scientific data in their wake. It is the proposition of this article that treasure hunters be restrained in their activities, and thatjurists acknowledge the particular significance submerged archaeological resources play in an understanding of the past. In order to accomplish these goals, judges must abandon traditional admiralty law and treat submerged archaeological resources as a special category of property deserving of protection under new legal theories or, preferably, domestic and international law. In addition, people must be educated regarding the importance of cultural property. The basic reason underpinning why society must protect and scientifically study these resources is because they are fundamental to an adequate understanding of a common human culture and past. 17

13. See infra note 111 and accompanying text (discussing why professionally controlled excavations are necessary for the conservation of archaeological resources and the preservation of scientifically important data).
14. See infra note 131 (giving an example of how something moves out of the world of commerce and becomes an archaeological site or artifact).
15. See infra notes 63-68 (discussing the domestic Abandoned Shipwreck Act and noting that there is as yet no comprehensive international law covering underwater archaeological resources).
16. For example, see infra note 102 (discussing a bill that lost to the current Abandoned Shipwreck Act).
17. Lack of knowledge has led to many misunderstandings and gaps in our knowledge. For example, scholars know that the Mayans possessed many codices prior to the codices being destroyed by the Spanish. See generally MICHAEL D. COE,
Part II of this article will explore the traditional admiralty laws of salvage and finds, under which the ownership and disposition of historic shipwrecks has often been accomplished. As will be seen, traditional admiralty law is inept to protect historic shipwrecks. Part III will point out some of the problems encountered with using admiralty law to protect historic shipwrecks and make suggestions for change.

II. THE TRADITIONAL ANARCHY

In 1889, the court in Murphy v. Dunham\textsuperscript{18} declared that it was "[i]n a barbarous state of society [that] wrecks were treated as the lawful plunder of the first comer, or the lord of the soil . . . ."\textsuperscript{19} Over a century later, the majority of courts in the United States continue to apply salvage law, or the law of finds, to historic shipwrecks. Cases adjudicating the rights of salvors in historic vessels that they have salvaged, or found and reduced to possession, are typically brought in federal court.\textsuperscript{20}

In determining whether the law of salvage or finds applies, courts first determine whether a shipwreck is abandoned or merely
derelict. If the owner intended to divest himself of ownership of a vessel, and there is some act or omission tending to prove this intent, then the vessel is abandoned and the courts apply the law of finds.\(^\text{21}\) If the owner was merely divested of possession of a vessel, without any intention to divest himself of ownership, then the vessel is derelict and courts apply the law of salvage.\(^\text{22}\) A government vessel is not abandoned unless there is some affirmative act by the government to abandon the vessel.\(^\text{23}\)

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21. The test for abandonment in admiralty is the same as that under the common law; i.e., there must be an intent to abandon the property coupled with an act or omission effectuating that intent. See, e.g., Livermore v. White, 43 Am. Rep. 600, 601, 74 Me. 452, 455 (1883); Shepard v. Alden, 161 Minn. 135, 139, 201 N.W. 537, 539 (1924), aff'd on reh'g, 161 Minn. 135, 202 N.W. 71 (1925); Dober v. Ukase Inv. Co., 10 P.2d 356, 357 (Or. 1932). But note, in the more recent historic shipwreck cases, the courts have split as to whether abandonment can be inferred merely from the passage of time. See John Paul Jones, The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan, 30 J. MAR. L. & COM. 205, 214-15 n.2 (1999). See also Fairport Int'l Exploration v. Shipwrecked Vessel, 177 F. 3d 491 (6th Cir. 1999) (discussing abandonment in treasure salvage cases).

22. A derelict vessel is only factually, but not legally abandoned. See Alexander Korthals Altes, Submarine Antiquities: A Legal Labyrinth, 4 SYRACUSE J. INT'L L. & COM. 77, 85 n.34 (1976). That is, the ship owner is typically divested of possession of the ship, but does not have the intention to divest himself or herself of ownership. See id.; see also John W. Grigg, The Michigan Aboriginal Records and Antiquities Act: A Constitutional Question, 65 Mich. B.J. 432, 433 (1986). The law of salvage is premised upon the assumption that the owner of the vessel and/or cargo has not divested himself or herself of ownership. See, e.g., Jupiter Wreck, Inc. v. The Undentified, Wrecked & Abandoned Sailing Vessel, 691 F. Supp. 1377, 1388 (S.D. Fla. 1988); Chance v. Certain Artifacts Found & Salvaged from the Nashville, 606 F. Supp. 801, 804 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985).

23. There are approximately two thousand sunken ships worldwide over which the U.S. Navy acts as "custodian," as these ships have not been affirmatively abandoned. See David J. Cooper, In the Drink: Naval Aviation Resources and Archaeology, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 134, 134 (Robyn P. Woodward & Charles D. Moore eds., 1994). Only Congress has the power to dispose of, and promulgate rules and regulations relating to the disposal of, property belonging to the United States. See U.S. CONST. art IV, § 3, cl. 2; see also Philip A. Berns, A Sovereign's Perspective on Treasure Salvage, 30 J. MAR. L. & COM. 269, 269-70 n.2 (1999) (discussing federal ownership of shipwrecks). Therefore, with government vessels, Congress must make some affirmative act of abandonment, or the title to the vessel remains in the government. See, e.g., United States v. Steinmetz, 763 F. Supp. 1293, 1299 (D. N.J. 1991) (holding that a sunken Confederate warship is the property of the United States government), aff'd, 973 F.2d 212 (3rd Cir. 1992); Hatteras, Inc. v. The U.S.S. Hatteras, 1984 A.M.C. 1094, 1098 (S.D. Tex. 1981) (stating that a federal officer can only abandon United States' property if authorized by Congress to do so, and then only in the manner explicitly prescribed by Congress), vacated in part on other grounds, 1984 A.M.C. 1102 (5th Cir. 1982). For a further discussion of this topic, see generally Robert S. Neyland, Sovereign Immunity and the Management
A. *The Law of Salvage*

The law of salvage is of ancient origin and developed to promote commerce by encouraging people to save property from destruction at sea and discourage embezzlement of salvaged property. Salvage law, unlike the common law, grants an award to an individual who voluntarily saves another person's property. Any stranded, sunken, or otherwise imperiled vessel, cargo, or freight in navigable waters is held to be a proper object for salvage.

*of United States Naval Shipwrecks, in* UNDERWATER ARCHAEOLOGY 98 (Stephen R. James, Jr. & Camille Stanley eds., 1996) (discussing the law surrounding government shipwrecks).

24. The U.S. Supreme Court, in The "Sabine," 101 U.S. 384, 384 (1879), defined salvage as "the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture." In addition to being the name of the award one is entitled to for saving imperiled property, the term "salvage" is also used to describe the service of saving property. See Cope v. Vallette Dry Dock Co., 119 U.S. 625, 628 (1887) (discussing various definitions of salvage). All nations have recognized the principles of salvage law. "It has been declared that salvage is a question arising under the *jus gentium* [law of nations] and does not ordinarily depend upon the municipal laws of particular countries." 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY § 14 (1997) (citations omitted).


26. An individual who renders salvage service is known as a "salvor." "[A] salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel." The Clarita & The Clara, 90 U.S. (23 Wall.) 1, 16 (1874).

27. See Mason v. The Blaireau, 6 U.S. (2 Cranch) 240, 266 (1804) (noting the difference between the common law and maritime law rules). It should be noted that courts in the United States generally do not consider a salvor's motives when allotting a salvage award. See B.V. Bureau Wijsmuller, 702 F.2d at 339; Unnamed but Identifiable Master & Crew v. Certain Unnamed Motor Vessel, 592 F. Supp. 1191, 1194 (S.D. Fla. 1984).

28. The general rule is that so long as the property was engaged in some sort of commerce or transportation over navigable waters, a salvage award should be allowed. See 3A NORRIS, supra note 24, at § 34. Many items, such as logs, have been held to be proper objects for salvage awards. See, e.g., Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633 F.2d 1304, 1306 (9th Cir. 1980); Bywater v. A Raft of Piles, 42 F. 917, 918 (D. Wash. 1890); Fifty Thousand Feet of Timber, 9 F. Cas. 47, 48 (D.C. Mass. 1871) (No. 4783); Raft of Spars, 20 F. Cas. 173, 174 (S.D.N.Y. 1849) (No. 11,529). Even money found on a floating dead body has been held to be subject to a salvage award. See Broere v. Two Thousand One Hundred Thirty-Three Dollars, 72 F. Supp. 115, 118 (E.D.N.Y. 1947), aff'd, 78 F. Supp. 635, 637 (E.D.N.Y. 1947).
In order for a salvor to establish a valid salvage claim, three elements must be shown: (1) the services rendered must have been voluntary on the part of the salvor, (2) the salvor must have been successful in salvaging some of the property, and (3) the property must have been in marine peril. Each element deserves brief explanation.

First, to assert a valid salvage claim, the salvor must have acted voluntarily. The key to determining whether a salvor's action was voluntary is to see if that salvor was under any obligation to render assistance. Where one is under such an obligation, there cannot be a valid salvage claim. One eminent authority stated "voluntariness is the sine qua non of marine salvage. Without this element there can be no salvage award."

Second, a salvor must have been successful in saving some property before a salvage award will be granted. The Supreme Court, in The “Sabine,” stated that “[p]roof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes . . . no compensation will be allowed.” The court in B.V. Bureau Wijsmuller v. United States stated that the purpose of salvage is to confer a benefit upon the owner of the distressed or abandoned vessel; i.e., the saving of the owner's prop-

29. These three factors have long been utilized for determining whether one is entitled to a salvage award. See, e.g., “Sabine,” 101 U.S. at 384; Blackwall, 77 U.S. (10 Wall.) at 12; The M.B. Stetson, 16 F. Cas. 1272, 1273 (D. Mass. 1866) (No. 9363); Montgomery v. The T.P. Leathers, 17 F. Cas. 640, 643 (E.D. La. 1852) (No. 9736).
30. It is generally assumed that without some strong evidence of a binding contractual agreement, or legal obligation, to proffer salvage service, a salvor is entitled to a salvage award. See The Camanche, 75 U.S. (8 Wall.) 448, 477 (1869). Merely requesting help from a salvor is not sufficient, standing alone, to prove the existence of a contract. See Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968).
31. A traditional case was where firemen brought a salvage claim. If the firemen were determined to have been under an obligation to put out the fire, the firemen would not have a valid claim. See, e.g., Firemen's Charitable Ass'n v. Rose, 60 F. 456, 457-58 (5th Cir. 1893); Murphy v. Ship Suliote, 5 F. 99, 100 (C.C.D. La. 1880); Davey v. The Mary Frost, 7 F. Cas. 14, 15 (C.C.E.D. Tex. 1876) (No. 3592).
32. 3A NORTON, supra note 24, at § 12.
33. Success means that at least some of the imperiled property is returned to its owner. See id. § 96. It is necessary for at least some of the vessel and/or its cargo to have survived, as the salvage award is made out of the property saved. See 2 SCHOENBAUM, supra note 25, at § 14-1.
35. 702 F.2d 333, 339 (2d Cir. 1983).
If a salvor is not successful, he has not conferred any benefit on the property's owner, and he should not receive an award. If a salvor is not successful, he has not conferred any benefit on the property's owner, and he should not receive an award. Finally, maritime property must be in marine peril. This third element is indispensable to establish a valid salvage claim. Deciding whether sufficient peril exists is typically a factual question determined from the circumstances of each case. Some courts require that a vessel and/or its cargo be subjected to actual pecuniary loss, that a vessel and/or its cargo be in an unknown location, or that a vessel might have been injured by the elements but for its “rescue” by a salvor. Frequently, courts find marine peril when a vessel is merely stranded. It is important to note that a salvor cannot receive a salvage award if he was responsible for

36. See id.
37. See id. A salvor who attempts to save maritime property, but is unsuccessful, no matter how valiant the effort, will not be rewarded. See 3A NORRIS, supra note 24, at § 89.
38. To determine whether a vessel is in marine peril, courts inquire into whether the property was in a situation where it was exposed to a risk of loss. There only needs to be a reasonable apprehension of loss. See The Saragossa, 21 F. Cas. 425, 426 (S.D.N.Y. 1867) (No. 12,334). The peril does not need to be immediate or actual. See Cargill, Inc. v. M/T Pac. Dawn, 876 F. Supp. 508, 511 n.3 (S.D.N.Y. 1995); Reynolds Leasing Corp. v. Tug Patrice McAllister, 572 F. Supp. 1131, 1134 (S.D.N.Y. 1983); The Plymouth Rock, 9 F. 413, 416 (S.D.N.Y. 1881). However, if a vessel is under its own control, there is no peril. See 2 SCHOENBAUM, supra note 25, at § 14-1. The amount of peril is irrelevant to satisfy this element. It is only necessary that there is some peril. The degree of peril does become important, however, in determining the amount of the salvage award. See 3A NORRIS, supra note 24, at § 63.
40. See Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968); 3A NORRIS, supra note 24, at § 66.
42. See Thompson v. One Anchor & Two Anchor Chains, 221 F. 770, 773 (W.D. Wis. 1915) (finding marine peril where anchors and chains were lost).
44. See Markakis v. S/S Volendam, 486 F. Supp. 1103, 1107 (S.D.N.Y. 1980). Stranded vessels typically do not have to be in danger of destruction. Merely being stranded is often held to be sufficient. See Sobonis, 298 F. Supp. at 636; see also The Leonie O. Louise, 4 F.2d 699, 700 (5th Cir. 1925) (stating subjection to elements is sufficient); The St. Paul, 86 F. 340, 343 (2d Cir. 1898) (noting that not making money and eroding owners' good reputation while stranded is sufficient peril); The Sandringham, 10 F. 556, 574-75 (E.D. Va. 1882) (finding possible destruction due to elements to be sufficient).
causing a condition that put the vessel and its cargo into peril. If there is no peril, an individual is not a salvor, but an opportunist or officious intermeddler, and he is not entitled to a salvage award.

If the three above criteria are satisfied, a salvor is entitled to an award. An award is usually paid from the proceeds when the saved maritime property is sold. In order to determine the amount of a salvage award, courts have typically considered six factors:

1. The labor expended by the salvors in rendering the salvage service.
2. The promptitude, skill, and energy displayed in rendering the service and saving the property.
3. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.
4. The risk incurred by the salvors in securing the property from the impending peril.
5. The value of the property saved.
6. The degree of danger from which the property was rescued.


47. See Chance v. Certain Artifacts Found & Salvaged from the Nashville, 606 F. Supp. 801, 804 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985). In treasure salvage cases, courts have been known to deviate from the rule that salvors are only entitled to monetary awards, and have given awards in specie. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992). The reason put forth is that the artifacts are uniquely and intrinsically valuable. See id.; Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F. Supp. 1319, 1340 (S.D. Fla. 1983). But see 2 SCHOENBAUM, supra note 25, at § 14-7 n.58 (claiming that granting salvage awards in specie is "contrary to fundamental principles of salvage law").

48. These six factors originally came from Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869), and have been followed by most courts. See, e.g., B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 339 (2d Cir. 1983) (ranking factors by importance); W.E. Rippon & Son v. United States, 948 F.2d 627, 628-29 (2d Cir. 1965) (approving of factors enunciated in Blackwall). A few courts have followed the factors set forth in Blackwall, but stated that extra factors should also be taken into consideration when fixing a salvage award. See, e.g., Columbus-America Discovery Group, 974 F.2d at 468 (stating an additional factor is "the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items saved."); The Sandringham, 10 F. 556, 573 (E.D. Va. 1882) (stating another consideration should be "[t]he degree of success achieved, and the proportions of value lost and saved").
There is no fixed rate for a salvage award, although they have traditionally been given to successful salvors in generous amounts. However, the salvage award cannot exceed the value of the property salvaged.

B. The Law of Finds

The law of finds developed at common law, but has been adopted into United States admiralty law. As one commentator stated, "[a] 'find' in maritime law differs from salvage in that in the


50. See, e.g., The "Sabine," 101 U.S. 384, 384 (1879); Blackwall, 77 U.S. (10 Wall.) at 14; Rickard v. Pringle, 293 F. Supp. 981, 984 (E.D.N.Y. 1968); The Charles Henry, 5 F. Cas. 509, 510 (E.D.N.Y. 1865) (No. 2617). In a classic statement of public policy, the court in Warder v. La Belle Creole, 29 F. Cas. 215, 217 (D. Penn. 1792) (No. 17,165), announced that "[t]he general principle is not confined to mere quantum meruit, as to the person saving; but is expanded, so as to comprehend a reward for the risk of life and property, labour and danger, in the undertaking, as well as a premium operating as an inducement to similar exertions." When not much property is saved, the award will not be as great as if the entire vessel and/or its cargo had been saved. See The Isaac Allerton, 13 F. Cas. 131, 133 (S.D. Fla. 1856) (No. 7088). This is because when much is lost, courts do not want to aggravate the loss to the owner by charging a large salvage award. See id. Also, less property exists from which an award can be given. See id.


52. See Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 965 n.22 (M.D. Fla. 1993). The law of finds has not been adopted into general international admiralty law. See John P. Fry, The Treasure Below: jurisdiction Over Salving Operations in International Waters, 88 COLUM. L. REV. 863, 880 (1988). Many United States courts have applied the law of finds to abandoned maritime property. See Sub-Sal., Inc. v. The Debraak, No. CIV.A.84-296-CMW, 1992 WL 39050, at *2 (D. Del. Feb. 4, 1992) (shipwreck); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 457 (E.D. Va. 1960) (marble); Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 551-52 (Mass. 1988) (shipwreck); see also 3A NORRIS, supra note 24, at § 158 n.4 ("This author would limit the doctrine of 'find' relative to marine disasters to long-lost wrecks ... where the owners of maritime properties have publicly abandoned them."); Thomas E. Lochrey, Sunken Vessels, Their Cargoes, and the Casual Salvor, JAG J., July-Aug. 1965, at 25, 29 (advocating the use of the law of finds). Others have criticized the application of the law of finds when dealing with abandoned shipwrecks. See Fry, supra at 877 n.99 (citing critics and stating that the law of finds promotes "lawlessness and piracy"); id. at 878-81 (reciting some of the advantages of applying salvage law).
former instance the property found has never been owned by any person. It therefore belongs to the finder.\(^{53}\) This view has been broadened, and the law of finds is occasionally applied to historic shipwrecks.\(^{54}\)

Under the law of finds, title to abandoned property will vest in the first person to find it and reduce it to his possession.\(^{55}\) Such property is said to be *res nullius*.\(^{56}\) A finder acquires title to abandoned property by “occupancy,” i.e., by taking dominion and control over it.\(^{57}\) Once a finder has taken dominion and control over the abandoned property, he holds title to it, which is good against the whole world including the original owner.\(^{58}\)

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53. 3A Norris, *supra* note 24, at § 158. The court in *Columbus-America Discovery Group*, 974 F.2d at 459, stated that “[t]raditionally, the law of finds was applied only to maritime property which had never been owned by anybody, such as ambergris, whales, and fish.” Some courts have asserted that under the law of finds shipwrecks have reverted to a “state of nature,” and may therefore be appropriated by the first to reduce them to possession. See *Lathrop*, 817 F. Supp. at 965.

54. One early case stated that “[t]he wrecked vessel after abandonment has no owner.” *In re Highland Navigation Corp.*, 24 F.2d 582, 584 (S.D.N.Y. 1927), aff’d, 29 F.2d 37 (2d Cir. 1928). The court in *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1048-49 (E.D. Va. 1995), aff’d, 99 F.3d 1129 (4th Cir. 1996), cert. denied, 523 U.S. 1093 (1998), noting this trend to apply the law of finds to historic shipwrecks, stated: “[T]raditionally the law of finds was applied only to marine property which had never been owned by anybody. Yet recent trends suggest applying the law of finds when there has been a finding that the sunken property has been abandoned by its previous owners.” One explanation for expanding the law of finds to cover historic shipwrecks may be mere administrative convenience. See Marilyn L. Lytle, *Treasure Salvage*, 24 J. MAR. L. & COM. 403, 410 (1993). By awarding title of a *res* to the finder, the court does not have to have the property sold in order to pay the salvor’s lien. See *id.*

55. Property that is abandoned has “returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing . . . .” Ferguson v. Ray, 77 P. 600, 602 (Or. 1904). Title to abandoned property passes to its finder once he takes it into his possession. See *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Iowa 1991); *Foulke v. New York Consol. R.R. Co.*, 127 N.E. 237, 238 (N.Y. 1920).

56. *See The Tubantia* [1924] P. 78, 82.

57. *See Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1334 (S.D. Fla. 1983). Thus, one does not acquire title merely because he has found abandoned property. *See id.*; *see also Maritime Underwater Surveys*, 551 N.E.2d at 551. The occupancy requirement is satisfied when the finder takes actual or constructive possession of the find. *See Lathrop*, 817 F. Supp. at 965.

58. *See Bemis*, 884 F. Supp. at 1049; Herron v. Whiteside, 782 S.W.2d 414, 417 (Mo. Ct. App. 1989) (per curiam). The reason that the original owner of the property does not have a right to claim the property is because once one abandons property, it is as if that property had never been owned. See 2 *SCHONBAUM*, *supra* note 25, at § 14-7. However, a finder is not entitled to title if the original owner is able to prove that the property was not in fact abandoned. *See id.*
At common law, there are two recognized exceptions to the rule that a finder of abandoned property takes title to the property when he reduces it to his possession, even if it is discovered on another person's land. First, the title to abandoned property that is "embedded in the soil" does not vest in its finder. Rather, abandoned property that is embedded in the soil vests in the owner of the land where it is found. Second, where the owner of the locus where the property is found asserts "constructive possession" over the property, it is not considered abandoned, and title to it vests in the owner of the land. These two common law exceptions to the law of finds have generally been accepted as a part of United States admiralty law.

There are many who believe that the laws of salvage and finds do not recognize "the public interest in the nonmonetary value inherent in ancient shipwrecks and associated materials," and thus that these laws should not be applied to historic shipwrecks.


60. See Ritz, 467 N.W.2d at 269; Morgan v. Wiser, 711 S.W.2d 220, 222 (Tenn. Ct. App. 1985). For example, it has been held that metal tokens buried in a national park, United States v. Shivers, 96 F.3d 120, 124 (5th Cir. 1996); an aerolite embedded in the ground, Goodard v. Winchell, 52 N.W. 1124, 1125 (Iowa 1892); a prehistoric canoe found protruding from the banks of a river, Allred v. Biegel, 219 S.W.2d 665, 666 (Mo. Ct. App. 1949) (per curiam); buried earthenware, Burdick v. Chesebrough, 88 N.Y.S. 13, 16 (N.Y. App. Div. 1904); embedded pieces of gold-bearing quartz, Ferguson v. Ray, 77 P. 600, 603 (Or. 1904); and a two-thousand year old boat buried in the earth, Elwes v. Brigg Gas Co., 33 Ch. D. 562, 568-69 (1886), all belonged to the owner of the property in which they were found.

61. See Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985). Constructive possession "has been generally defined as knowingly having both the power and intention at a given time to exercise dominion or control over the property." United States v. Cousins, 427 F.2d 382, 384 (9th Cir. 1970); accord United States v. Holland, 445 F.2d 701, 703 (D.C. Cir. 1971) (defining constructive possession as "being in a position to exercise dominion or control over a thing") (citation omitted); Rodella v. United States, 286 F.2d 306, 311 (9th Cir. 1960) ("Constructive possession is that which exists without actual personal occupation of land or without actual personal present dominion over a chattel, but with an intent and capability to maintain control and dominion.").

62. At least one judge has doubted the applicability of these land-based exceptions to the law of finds when applied to abandoned historic shipwrecks. In Klein, 758 F.2d at 1515, Kravitch, C.J. (specially concurring and dissenting in part), stated that "the 'embedded in the soil' and 'constructive possession' exceptions to the common law of finds . . . are of dubious relevance in the context of a sunken ship . . . ." The majority of courts, however, have not rejected these two common law exceptions.

There are others, of course, who believe that treasure hunters have contributed greatly to our understanding of maritime history and should not be condemned or stopped from continuing their efforts. In the following section, it will be suggested that submerged archaeological resources, wherever found, should not be governed by admiralty law and subject to treasure salvage.

III. A MODEST PROPOSAL

The admiralty laws of salvage and finds should never apply to the recovery of artifacts from historically significant shipwrecks. Traditionally, admiralty law has not considered factors such as archaeological or historical significance. Over a decade ago, Congress passed the Abandoned Shipwreck Act of 1987 (ASA). The representative Vento are characteristic of this view. He stated:

There needs to be a very clear distinction made between the reasons for admiralty law and those for historic preservation and recreation. Admiralty law seeks to: First, regulate maritime commerce; second, to protect sailors, third, to adjudicate claims between shippers; and fourth, in the case of salvage, to save lives on ships in distress and to return goods to commerce. Admiralty law has no particular interest in these abandoned shipwrecks as defined in [the proposed Abandoned Shipwreck Act of 1987].

134 Cong. Rec. H1463-04 (Apr. 13, 1988); accord John M. Bondareff, Protection of Historic Shipwrecks in State Waters, 4 Coastal Zone 3514, 3521 (1989) ("[T]here is no compelling commercial reason to return shipwrecks and their artifacts to the flow of marine commerce . . . ."); Eleanor Sharpston, Underwater Archaeology and Wreck Sites: A Legal Perspective, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 62, 63 (John D. Broadwater ed., 1991) (arguing that salvage "law, with its focus on commercial worth and retrieval of wrecked material to minimize economic loss from shipwreck, is ill-designed to provide effective protection for archaeological wreck sites").

64. See Melvin A. Fisher, The Abandoned Shipwreck Act: The Role of Private Enterprise, 12 Colum.-VLA J.L. & Arts 373, 376 (1988) ("It is a simple fact that with bureaucratic archaeologists in control, the era of private enterprise recovery of ancient shipwrecks will be over.").

65. See Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the "Seabird," 941 F.2d 525, 529-30 (7th Cir. 1991).

ASA declares that the states have the responsibility for the management of many "living and nonliving resources" on state submerged lands. Of importance for this article, the ASA specifically removes the shipwrecks covered by its provisions from the laws of salvage and finds. Thus, many historic shipwrecks located

Eyes of its Drafter, 30 J. MAR. L. & COM. 167, 168-70 (1999) (discussing the background to the ASA as perceived by the statute's drafter).


68. See 43 U.S.C. § 2101(b) (emphasis added). Under the ASA, the United States asserts title to abandoned shipwrecks that are: (1) embedded in the submerged land within a state’s territorial waters, (2) embedded in coraline formations that are protected by a state and that are on submerged lands within a state’s territorial waters, and (3) located on submerged lands within a state’s territorial waters and are included or are determined to be eligible for inclusion in the National Register of Historic Places. See id. § 2105(a). Title to the shipwrecks that the United States asserts title to is then transferred to the state in which, or on whose lands, the shipwrecks are discovered. See id. § 2105(c). The ASA is not concerned with "recent shipwrecks." 134 CONG. REC. H1177-02 (daily ed. Mar. 28, 1988) (statement of Rep. Vento).

69. See 43 U.S.C. 2106(a) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies."). Congress made it clear that admiralty law is inappropriate for certain historic shipwrecks. See H.R. REP. NO. 100-514 (I), Pub. L. No. 199-298, at 2, reprinted in 1988 U.S.C.C.A.N. 365, 366. The ASA does not change admiralty laws in respect to those shipwrecks not covered by its provisions. See 43 U.S.C. § 2106(b). Although laudable in its attempt to remove certain shipwrecks from admiralty law, the ASA has one potential flaw: it is probably unconstitutional. Two courts have upheld the ASA’s constitutionality. See generally Zych 941 F.2d at 533-35 (7th Cir. 1991) (holding the ASA constitutional against attacks that it impermissibly excludes from the admiralty court’s jurisdiction something that falls clearly within it, that it violates the principle that admiralty law must be uniform, that it violates the Fifth Amendment Due Process Clause, and that it violates the Tenth Amendment), on remand, 811 F. Supp. 1300 (N.D. Ill. 1992), aff’d, 19 F.3d 1136 (7th Cir. 1994); Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel, 857 F. Supp. 1129, 1133, 1136 (D. V.I. 1994) (holding the ASA constitutional against attacks that it impermissibly excludes from the admiralty court’s jurisdiction something that falls clearly within it, that it violates the principle that admiralty law must be uniform, and that it violates the Fifth Amendment Due Process Clause). One district court intimated that the ASA might be unconstitutional. See Deep Sea
on state submerged lands will be governed by the states’ shipwreck preservation law. However, historic shipwrecks located beyond


70. Note, however, that the ASA only grants certain abandoned shipwrecks to the states. See 43 U.S.C. §§ 2101(b), 2102(d). Submerged archaeological resources other than shipwrecks are not covered. See id. States could attempt to claim that they hold title to such resources under the SLA. See 43 U.S.C. §§ 1301-1315; supra note 67 (discussing the SLA). Under this statute, the states hold title to the lands under navigable waters within their borders and also to the lands beneath the waters off their coasts, typically for three miles, and all “natural resources” found in and above them. See 43 U.S.C. §§ 1311(a) & 1312. Prior to the enactment of the ASA, the states attempted to assert title to abandoned historic shipwrecks under the SLA, claiming that the wrecks were included within the statutory definition of “natural resources.” See id. § 1301(e) (defining “natural resources”). Most courts stated that the SLA did not pass title to abandoned shipwrecks to the states. See Deep Sea Research, 883 F. Supp. at 1350; Sub-Sal., Inc. v. The Debraak, No. CIV.A.84-296-CMW, 1992 WL 39050, at *3 (D. Del. Feb. 4, 1992) (stating that the SLA did not pass title to shipwrecks and artifacts to the state); Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB “Lady Elgin,” 746 F. Supp. 1334, 1343 (N.D. Ill. 1990) (stating that “a shipwreck is not ‘natural’”), rev’d, 941 F.2d 525 (7th Cir. 1991); Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540, 549 (S.D. Fla. 1982); Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 214-16 (S.D. Fla. 1981); Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 553 (Mass. 1988) (stating that the passage of the ASA shows that SLA did not pass title of abandoned shipwrecks to the states). Even commentators noted that the SLA did not explicitly grant title to abandoned shipwrecks and other archaeological resources located on the states’ submerged lands to the states. See Thompson M. Mayes, Current Legal Issues in the Law of His-
the three mile limit of state jurisdiction are still subject to the laws of salvage and finds. 71 This Part will suggest that neither salvage

71. In the remaining nine miles of the territorial sea, federal law protects the majority of archaeological sites, although historic shipwrecks may be governed by traditional principles of admiralty law. The Antiquities Act applies on lands that the United States owns or controls. See 16 U.S.C. § 431 (1994). Courts have held that this act does not apply on the submerged lands that passed to the states under the SLA. See United States v. California, 436 U.S. 32, 41 (1978); Subaqueous Ex-
ploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597, 610 (D. Md. 1983), aff'd, 765 F.2d 139 (4th Cir. 1985). Moreover, the Antiquities Act does not apply on the continental shelf. See Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed to be the Nuestra Señora de Atocha, 408 F. Supp. 907, 910-11 (S.D. Fla. 1976) (granting title to an abandoned shipwreck located on the outer continental shelf to its finder, and holding that these lands are not owned or controlled by the United States government), aff'd as modified, 569 F.2d 330, 337-40 (5th Cir. 1978). Nevertheless, if the President declared that a nationally significant archaeological site located within the nine miles of territorial seabed under federal jurisdiction was to become a national monument under the Antiquities Act, see 16 U.S.C. § 431, a salvor would have to obtain a permit to excavate or be subject to minor penalties. See id. § 432 (potential excavator must obtain a permit), § 433 ($500 fine, or up to 90 days imprisonment, or both, for violating the Antiquities Act); see also Black Hills Inst. of Geological Research v. United States Dep't of Justice, 967 F.2d 1237, 1241 (8th Cir. 1992) (stating that prosecuting an individual under the Antiquities Act is little more than "a petty misdemeanor criminal prosecution"). One possible problem with this Act is that one court has held the penalty provision to be unconstitutionally vague. See United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974). But see United States v. Smyer, 596 F.2d 939, 940-41 (10th Cir. 1979) (refusing to follow Diaz and holding the Antiquities Act constitutional).

Under the Archaeological Resources Protection Act (ARPA), any "archaeological resource" located on public or Indian lands, not including the continental shelf, is protected from injury or excavation without a permit. See 16 U.S.C. § 470ee(a)(1994). Although not listed as an archaeological resource entitled to protection under ARPA, shipwrecks are listed as such a resource in the regulations. See 43 C.F.R. § 7.3(a)(3)(ix) (1998). It is unclear whether Congress intended ARPA to apply to historic shipwrecks in the navigable waters of the territorial sea that are under federal jurisdiction, or whether Congress intended for them to be governed by admiralty law.

Beyond the United States' territorial sea, there are primarily two statutes that can be used to protect submerged archaeological sites out to the International Seabed Area. One statute is the Marine Protection, Research, & Sanctuaries Act of 1972 (MPRSA), under which the area surrounding a nationally significant archaeological resource can be declared a national marine sanctuary. See 16 U.S.C. §§ 1431-1445 (1994 & Supp. II 1996). The first national marine sanctuary was designated on January 30, 1975, to protect the Civil War ironclad Monitor. See generally Gordon P. Watts, Jr., A Decade of Research: Investigation of the USS Monitor, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 128 (Alan B. Albright ed., 1987) (reporting archaeological investigations from the Monitor shipwreck site). Relatively few marine sanctuaries have been established and some commentators have noted that the MPRSA "may be insufficient to protect historic shipwrecks within and beyond the three-mile territorial sea because of the complexity of the designation process, [and] the desire to designate diverse ecological areas . . . ." Robert E. Moyer, The Law of Historic Shipwrecks: Conflict & Controversy, 2 PRESERVATION L. REP. 2072, 2082 n.65 (1983); accord Mayes, supra note 71, at 2037 n.56 (stating that the complex designation process prevents the MPRSA from effectively protecting many historic shipwrecks). Nevertheless, archaeological sites located within the few areas that have been declared national marine sanctuaries receive a fair amount of protection. Those who loot, vandalize, or excavate sites without a permit have been aggressively prosecuted and are potentially subject to substantial penalties. See, e.g.,
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16 U.S.C. §§ 1437(c)(1), (d)(1), (e)(2) (providing that any person who violates the MPRSA is liable for a civil penalty up to $100,000 for each violation; any vessel or other items used in violating the act, and any sanctuary resource appropriated, is subject to forfeiture; and that person shall be liable for the costs incurred by the Secretary in storing, caring for, and maintaining any property or sanctuary resource seized in connection with the violation); United States v. Fisher, 977 F. Supp. 1193, 1200-01 (S.D. Fla. 1997) (fining treasure salvors for damaging over an acre and a half of sea grass during treasure salvage operations within the Florida Keys National Marine Sanctuary); In re Craft, 6 Ocean Resources & Wildlife Rep. 150, 183 (NOAA 1990) (ordering six defendants to pay a fine of between $1,000 and $100,000 for looting shipwrecks and disturbing the seabed within the Channel Islands National Marine Sanctuary). The MPRSA is also attractive as its penalty provisions apply to United States citizens, nationals, and resident aliens as far out as the U.S. exclusive economic zone. See 15 C.F.R. § 922.4 (1998) (noting, however, that the designation of an area as a national marine sanctuary outside of the United States' territorial sea does not constitute any claim of sovereignty or jurisdiction over the area, unless otherwise permitted by generally recognized principles of international law and other such laws to which the United States is a party).

A second statute that can be used to protect submerged archaeological resources located beyond the limits of our territorial sea is the National Historic Preservation Act (NHPA). See 16 U.S.C. §§ 470 to 470w-6 (1994 & Supp. II 1996). Under the NHPA, before commencement of certain proposed federal or federally assisted “undertakings,” the head of the agency proposing the undertaking must take into account the effect of the undertaking on any property that is included in or eligible for inclusion in the National Register. See id. § 470f; see also 36 C.F.R. § 800.2(o) (1997) (defining “undertaking”). The NHPA is primarily a procedural statute. It does not mandate a particular outcome, but merely requires a federal agency to comply with certain procedural requirements before ultimately deciding whether to alter or destroy a historic property. See, e.g., Gettysburg Battlefield Preservation Ass’n v. Gettysburg College, 799 F. Supp. 1571, 1580 (M.D. Pa. 1992), aff’d, 989 F.2d 487 (3d Cir. 1993); Citizens for the Scenic Severn River Bridge, Inc. v. Skinner, 802 F. Supp. 1325, 1337-38 (D. Md. 1991), aff’d, 972 F.2d 338 (4th Cir. 1992). Importantly, the procedural requirements mandated by the NHPA apply all the way out to our continental shelf. See Clarification of Authorities and Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf, 87 Interior Dec. 593, 595-99 (DOI 1980). However, on the continental shelf these requirements only apply in connection with mineral activities. See Melanie J. Stright, The Mineral Management Service’s Archaeology Program, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 5 (J. Barto Arnold III ed., 1989). As long as those engaging in mineral activities on the continental shelf comply with the NHPA’s procedures, they may potentially alter or destroy any submerged archaeological sites they find. Moreover, “[t]he lessee, subcontractors of the lessee, or others gaining access to a shipwreck’s location are unrestricted in actions against the site as long as their actions are not related directly to [continental shelf] oil and gas operations.” James M. Parrent, Cultural Resource Management on the Outer Continental Shelf, in PROCEEDINGS OF THE SIXTEENTH CONFERENCE ON UNDERWATER ARCHAEOLOGY 82, 83 (Paul F. Johnston ed., 1985). Thus, this statute only requires federal agencies and those engaging in mineral activities to jump through proverbial “hoops,” and it does not generally prevent the alteration or destruction of submerged archaeological sites.

Unless one of the above statutes applies, traditional admiralty law proba-
nor finds law should ever apply to historic shipwrecks.

In order to make a salvage claim, a salvor must show that an historic shipwreck is in "marine peril." One commentator correctly stated that the concept of marine peril is stretched to its limits when applied to ancient shipwrecks. By its very definition, treasure salvage is the recovery of maritime property that has already experienced its peril and subsequent ruin; thus, the danger has passed. Yet, some courts have determined, as a matter of law, that marine peril exists with historic shipwrecks for the purposes of sat-


72. In order to make a salvage claim, a salvor must show that he acted voluntarily, that he was successful, and that the property was in peril. See supra note 29 and accompanying text. In treasure salvage cases, salvors can usually demonstrate that they were not under an obligation to perform salvage services. See supra notes 29-31 and accompanying text. Also, bringing artifacts into court demonstrates success. See supra notes 33-37 and accompanying text. Therefore, the only real issue is whether the shipwreck is in peril.

73. See 2 SCHOENBAUM, supra note 25, at § 14-1. But see Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) ("[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.").

isfying the three criteria necessary to establish a valid salvage claim. These courts justify their holding by asserting that the "elements" could destroy the remaining maritime property. Thus, these courts conclude that abandoned shipwrecks are still in "peril" of being destroyed or lost. Other courts have explicitly rejected this approach.

Whether historic vessels are in marine peril, and thus a proper subject of salvage law, has attracted international debate. In Simon v. Taylor, the High Court of Singapore addressed the issue of whether twelve tons of mercury, which had been recovered from the German submarine U 859 and had been lying in international waters for twenty-eight years, was the proper subject for a salvage

75. See Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893, 901 n.9 (5th Cir. 1983); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980); Treasure Salvors, 569 F.2d at 337 ("Marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation."); Bemis v. RMS Lusitania, 884 F. Supp. 1042, 1050 (E.D. Va. 1995) ("Courts will usually find that underwater shipwrecks are in marine peril, because sunken vessels and their cargoes are in danger of being lost forever."). aff'd, 99 F.3d 1129 (4th Cir. 1996), cert. denied, 523 U.S. 1093 (1998); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 962 (M.D. Fla. 1993); Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F. Supp. 1819, 1840 (S.D. Fla. 1983); Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982); see also Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1516 (11th Cir. 1985) (Kravitch, C.J., specially concurring and dissenting in part) (arguing that the Eleventh Circuit should adopt the Fifth Circuit's reasoning).

76. It should be emphasized that it is, in large part, the admiralty courts that are failing to protect submerged archaeological resources. Both the federal and states' governments have taken laudable first steps to end the destruction of such resources and their contextual data. See Ole Varmer, The Case Against the "Salvage" of the Cultural Heritage, 30 J. MAR. L. & COM. 279, 279 (1999) ("Although federal and state agencies generally have sided with archaeologists, treasure salvors have found refuge in the federal admiralty courts, which usually have held that salvage is necessary in order to protect the shipwreck from a marine peril.").

77. See, e.g., Klein, 758 F.2d at 1515; Lathrop, 817 F. Supp. at 962; Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597, 611 (D. Md. 1983), aff'd, 765 F.2d 139 (4th Cir. 1985). In the legislative history of the ASA, the Committee on Merchant Marine and Fisheries stated that it did not consider abandoned historic shipwrecks covered by the provisions of the ASA to be in marine peril. The committee stated that such wrecks were not in need of salvage services. See H.R. REP. No. 100-514, pt. 2, at 8 (1988), reprinted in 1988 U.S.C.C.A.N. 370, 377.


79. [1975] 2 Lloyd's Rep. 338 (Sing.).
The court stated that the “essence of a salvage service is that it is a service rendered to property or life in danger and the burden of proving the presence of danger rests upon those who claim as salvors.” The purported salvors failed to carry their burden, and the court held that the mercury was not subjected to an immediate or pending peril.

A contrary conclusion to that in Simon was reached in Robinson v. Western Australian Museum. The object of this case was a Dutch vessel named Gilt Dragon. This vessel was sailing from the East Indies to Holland, was blown off course, and crashed into an uncharted reef approximately forty miles from present day Perth. The plaintiff had discovered the remains of the vessel and appropriated numerous artifacts from its wreckage. Judges Stephen and Mason, relying on Morris v. Lyonesse Salvage Co. Ltd. and Tubantia, discussed the appropriateness of applying salvage law to historic vessels. Although neither of the cases relied on by the judges directly addressed this issue, they served as the foundation for their opinions. In sweeping language, Judge Mason stated:

It is sufficient to ground a claim for salvage that the salvor save the ship, its cargo or apparel from the perils of the sea or that he recover the ship, its cargo or a part thereof. Salvage is not limited to recovery of property in or from a ship which is actually in distress; it extends to the recovery of property in or from a ship which has lain at the bottom of the sea for a long time.

80. See id.
81. Id. at 344.
82. See id.
84. Robinson, 16 A.L.R. at 630 (Barwick, C.J.).
85. See id.
86. See id.
87. (1970) 2 Lloyd’s Rep. 59, 60 (Sing.) (recognizing that the raising of a derelict vessel is a form of salvage service).
88. The Tubantia, [1924] P. 78 (allowing an injunction against a second group of would-be salvors).
89. Robinson, 16 A.L.R. at 663 (Mason, J.).
Judge Stephen, referring to *Fisher v. The Ship "Ocean Gran-deur,"* went even further and asserted that one might be able to assert a valid salvage claim even in the absence of marine peril. In *Fisher,* Stephen stated that he would not confine salvage to cases where a vessel is in danger of threatened destruction or physical injury. To Stephen, the fact that a vessel was physically safe would not defeat a claim for salvage. Stephen also considered mere immobilization and loss of use of a vessel by its owners to be sufficient to state a valid salvage claim. Thus, the opinions of Judges Stephen and Mason in *Robinson* are a departure from the approach taken by the court in *Simon,* though they parallel the decisions of courts in the United States that have held "peril" exists with historic shipwrecks.

Whether an historic shipwreck is in marine peril has most recently been addressed by a Canadian court. At issue in the case was a ship named *Atlantic* that sank in Lake Erie in 1852 and is currently located three miles off the tip of Long Point, Ontario. The Crown argued that the Atlantic was not in danger at its present location. Moreover, the Crown argued that salvaging or raising the vessel posed more of a threat to the vessel than leaving it undisturbed. The court, diverging from most courts in the United

93. *See id.* at 953.
94. *See id.* at 954.
95. *See cases cited at supra note 75.* One interesting note about *Robinson* is that Mason was in agreement with the *Simon* court that if a salvor was motivated to save a vessel only for personal gain, and not for the benefit of the vessel's owner, there cannot be a valid salvage claim. *See Robinson,* 16 A.L.R. at 664 (Mason, J.); *Simon v. Taylor,* [1975] 2 Lloyd's Rep. 338, 345 (Sing.). *But see supra note 27* (noting that most courts in the United States do not consider a salvor's motives).
98. *See id.* at 591-92.
99. *See id.* at 592. The salvors argued that the vessel was in peril of being destroyed by zebra mussels. *See id.* However, the court was persuaded by the testimony of a marine archaeologist who stated that the exposed portion of the *Atlantic* was not large enough for a significant number of zebra mussels to attach themselves. *See id.* If a large number of mussels could not attach themselves to the ship, then the combined weight of the mussels would not pose a threat of causing the ship's structural collapse. *See id.*
States on the subject, as well as from the opinions of Judges Stephen and Mason in *Robinson*, held that the Atlantic was not in marine peril. The court stated that "salvage efforts can upset the equilibrium achieved over time in underwater historic sites and actually create peril by exposing the objects to new environmental stimuli which can accelerate deterioration." Thus, there is a checkered history of decisions, both in the United States and internationally, as to whether historic shipwrecks are in marine peril, and therefore a proper subject for salvage law. The majority of courts, however, hold that historic shipwrecks are in need of salvage services because the shipwrecks are in peril.

Commentators tend to agree with the courts that shipwrecks are in peril. One such commentator, Bruce E. Alexander, stated that "[i]f the elements or the natural processes of decay do not pose a marine peril to the property, then pirates, thieves, marauders, or intervening salvors invariably will pose a peril." Alexander asserted that marine peril should be presumed as a matter of law. In order to "protect" archaeological resources, while still keeping

100. See id. at 637-38.

101. Id. at 638. The court stated that the salvors had placed the wreck in peril due to their unskilled and unscientific recovery of artifacts. See id. Moreover, the court noted that "[u]nscientific removal of artifacts damages the value of the wreck." Id.; see also Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel, 568 F. Supp. 1562, 1568 (S.D. Fla. 1983) (noting that unskilled and unscientific removal of artifacts from shipwrecks actually creates marine peril), aff'd, 758 F.2d 1511, 1515 (11th Cir. 1985).

102. In a surprisingly brazen comment, without any scientific support, one commentator made a statement that epitomizes the misconception many in the public have about shipwreck archaeology: "Detractors of shipwreck salvage note that wrecks that have rested underwater for years, sometime centuries, hardly face the type of peril cognizable by salvage law. They are mistaken." Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 162 (1995). Those inside the archaeological community generally do not consider historic shipwrecks to be in peril. See infra notes 115-17 and accompanying text. It is only in commentary outside the archaeological community, especially in law review articles, that the notion of historic shipwrecks being in "marine peril" has unfortunately not been eliminated.

103. Alexander, supra note 74, at 16 (citation omitted). Amazingly, this same author admitted that "[t]reasure salvage ... applies to property that has already experienced a catastrophe. Stated another way, the peril appears to have passed." Id. at 14 (emphasis added). But see David R. Owen, *Some Legal Troubles with Treasure: Jurisdiction and Salvage*, 16 J. MAR. L. & COM. 139, 172-76 (1985) [hereinafter Owen, *Some Legal Troubles with Treasure*] (arguing that ancient shipwrecks are in marine peril).

104. See Alexander, supra note 74, at 16.
them subject to admiralty law, Alexander suggests that courts require salvors to preserve archaeological data when salvaging a shipwreck.\textsuperscript{105} Under this scheme, if a salvor cannot show that the salvor or the salvor’s crew possesses the necessary archaeological skills, the salvor could be enjoined from further salvage, and the amount of skill exhibited could be used in determining the size of the salvage award.\textsuperscript{106}

There are at least two important problems with the above scheme. First, to make a salvage claim, a salvor must already have salvaged something. Before a court could enjoin an unscrupulous or inexperienced treasure salvor, or deny a salvage claim, some irreversible damage to an archaeological site would have to occur. Second, in allowing a salvage claim, a court could permit recovery to salvors with some, but not much, archaeological skill who lost much archaeological information as they worked. Only when the amount of the salvage award is being determined would the court consider the inadequacies of the excavation. However, much irretrievable information would have been destroyed. From an archaeological standpoint, this proposed scheme is patently unacceptable.\textsuperscript{107}

\textsuperscript{105} See id. at 17. This is known as an “archaeological duty of care.” Alexander states that “[i]f archaeological, cultural, and historical data are perhaps the more important features of abandoned shipwrecks, any ‘rescue’ of an abandoned shipwreck ought to include a rescue of this data.” Id. at 17-18 (citation omitted). One of the bills proposed in opposition to the current ASA would have kept historic shipwrecks within the domain of admiralty law. See Abandoned Historic Shipwreck Protection Act of 1987, H.R. 2071, 100th Cong. (1987) (unenacted). This bill did not receive much support, though some in the legal community believed it to be more faithful to traditional admiralty law than the current ASA. See generally Nancy M. Hewitt, Note, The Proposed Abandoned Shipwreck Acts of 1987—Archaeological Preservation and Maritime Law, 12 SUFFOLK TRANSNAT’L L. REV. 381 (1989) (arguing for the adoption of H.R. 2071). Prior to the proposal of this alternative bill, admiralty attorney David P. Horan suggested that admiralty law merely be amended to impose a variation of the archaeological duty of care on treasure salvors. See Abandoned Shipwreck Act of 1987: Hearings on S. 858 Before the Subcomm. on Public Lands, National Parks and Forests of the Comm. on Energy and Natural Resources, 100th Cong. 85-86 (1987) (prepared statement of David P. Horan).

\textsuperscript{106} See Alexander, supra note 74, at 18. However, a nagging question remains: “How much does a court know about proper archaeological procedures?” Daniel P. Larsen, Ownership of Historic Shipwrecks in United States Law, 9 INT’L J. MARINE & COASTAL L. 31, 54 (1994). The answer is probably not enough to make the type of decisions Alexander proposes. Prott and O’Keefe suggest that judges generally demonstrate little understanding of archaeological considerations. See 1 PROTT & O’KEEEF, supra note 78, at 126.

\textsuperscript{107} One commentator stated that introduction of the archaeological duty of care has “actually muddled the maritime law of salvage because it is not based on
Nevertheless, a few courts have adopted variations of the approach proposed by commentators such as Alexander. In *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel* [hereinafter *Cobb Coin II*], the court held that to state a claim for a salvage award on a shipwreck, which is historically and/or archaeologically significant, the salvor must document to the admiralty court that he adequately preserved the shipwreck’s archaeological provenience. Also, the court in *Marex International, Inc. v. Unidentified, Wrecked & Abandoned Vessel* followed the court in *Cobb Coin II* and mandated that salvors demonstrate that they used an archaeological duty of care in salvaging historic shipwrecks before allowing them to recover under either the law of salvage or finds. The rationale for requiring an archaeological duty of care on salvors was given by the court in *MDM Salvage, Inc. v. Unidentified, Wrecked & the guiding premise behind the theory of salvage, which is to return goods to the stream of commerce.* Mayes, *supra* note 70, at 2039.

These few courts require that salvors record the provenience of the artifacts they recover. Although this sounds laudable, in practice, however, when courts speak of recording provenience, they require salvors "merely [to] note the coordinates of the blow holes they believe the artifacts came from. [But, t]his methodology does not meet the scientific standards necessary for preserving the time capsule information" of shipwrecks. Varner, *supra* note 77, at 297.


See *id.; see also* International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft, 54 F. Supp. 2d 1172, 1181-82 (S.D. Fla. 1999) (extending this rule to apply to submerged historic aircraft); *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 208 (S.D. Fla. 1981) ("There can be no suggestion that federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archaeological information associated with the artifacts salved."). Therefore, whether or not salvors use an archaeological duty of care is not left merely for consideration in determining the amount of a salvage award. But see *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (stating that "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salved" should be taken into account in determining the salvage award). Unfortunately, the court in *Cobb Coin II* stated that salvors need not employ professional archaeologists. See *Cobb Coin II* 549 F. Supp. at 559. While not requiring that salvors use professional archaeologists, the court in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 546 F. Supp. 919, 927-28 (S.D. Fla. 1981), noted favorably that Melvin Fisher had employed archaeologists and historians to record the provenience of artifacts recovered, preserve and catalogue them, and conserve them so they could be viewed by the public. For a definition and discussion of provenience, see *infra* note 115.


See *id. (requiring "provenience data" to be documented by recording and mapping the location and depth of the vessel and the artifacts in relation to each other and the vessel)".*
Abandoned Sailing Vessel. "Archaeological preservation, on-site photography, and the marking of sites are particularly important... as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era."

The relative confusion in the courts and in the legal literature over whether historic shipwrecks are in marine peril, and whether imposing an archaeological duty of care on salvors is sufficient to preserve archaeological data, is disheartening. This confusion only buttresses the notion that many in the archaeological community feel; namely, the public does not adequately understand what archaeology is, or the importance of preserving archaeological resources.

Underwater archaeologists have demonstrated time and

114. See id. at 312 (noting that the parties had not sought to preserve the archaeological integrity of the shipwreck site). This court did not indicate whether an archaeological duty of care was required of salvors in order to state a claim for salvage, but it did state that such would be "a significant element of entitlement to be considered when exclusive salvage rights are sought." Id. at 310.
115. See Karen D. Vitelli, To Remove the Double Standard: Historic Shipwreck Legislation, 10 J. FIELD ARCHAEOLOGY 105, 106 (1983) ("[P]eople still do not understand that archaeology is not just collecting objects."). In a recent law review article, a student author proposed a "free market" alternative to treasure salvage. See Jance R. Hawkins, Note, Reconsidering the Maritime Law of Finds and Salvage: A Free Market Alternative, 30 GEO. WASH. J. INT'L L. & ECON. 75, 92-95 (1996). The author suggested that salvors perform a title search to determine whether an historic shipwreck has an owner or is abandoned. See id. at 92. If the wreck is owned, then its owners should enter into a contract with the salvors to "save" it. See id. at 93. If it is not owned, then the salvors should go to court and obtain exclusive salvage rights, and title to the wreck once it is salvaged. See id. Among the problems with this proposal is its lack of concern for the historical and archaeological data shipwrecks contain. There was a time when free enterprise existed in the business of treasure hunting. Congress enacted the ASA to curtail that free enterprise. From an archaeological standpoint, this free market proposal harkens back to the pre-ASA days. That such an article was written relatively recently demonstrates that the legal community still does not understand the importance of archaeology. In an older but still often cited note, a student writer stated that laws should not discourage treasure salvors because they recover artifacts for the public to enjoy. See Howard H. Shore, Note, Marine Archaeology and International Law: Background and Some Suggestions, 9 SAN DIEGO L. REV. 668, 690-91 (1972). This suggestion demonstrates a common misunderstanding the public has about archaeology, i.e., that archaeologists are only concerned with artifacts. Archaeologists do not focus on the mere recovery of artifacts. Rather, they are concerned with observing and recording the temporal and spatial relationships of individual artifacts and features, and between artifacts and features, discovered at a site. When archaeologists carefully record the horizontal and vertical location of an artifact, they are giving it a "provenience." Provenience is the "[t]hree-dimensional location of an artifact or
time again that historic shipwrecks are not in marine peril. For example, James M. Parrent correctly stated:

Objects that come to rest on the sea floor initially start to deteriorate while at the same time becoming covered with concretions consisting of corrosion products and marine organisms. Eventually the concretion forms a protective barrier greatly reducing further deterioration. After the artifacts have acclimated to their underwater environment they are impervious to currents, tides and storms. Any wooden sailing vessel that has lain on the sea bed for a few hundred years has long since reached a stage of equilibrium with its environment and it has the potential to remain preserved for hundreds if not thousands of years . . . .

Therefore, courts should not hold submerged shipwrecks to be...
in marine peril. Rather, treasure salvors and looters put sites into peril when they disrupt the equilibrium that sites have reached with their environment. This type of "retrieval peril" is not the type of peril contemplated by traditional salvage law. Once historic shipwrecks have reached an equilibrium with their environments, they are not in peril and treasure salvors should not be allowed to salvage them for commercial gain.

Moreover, most archaeologists believe that allowing salvors to excavate sites, even with an "archaeological duty of care" imposed upon them, is not sufficient. One scholar wrote:

"It is not self-evident to the public, and clearly not to the state and federal legislative bodies, that only archaeologists are trained to carry out professional excavations; to keep documentation that can be examined and verified by others; to study the materials and the context so that we might all learn what they can tell us about earlier societies; to share that knowledge with other scholars and the public; and to preserve the relics of the past for intelligent...

118. Once a ship has sunk, it is quickly removed from any peril the environment could pose. "[T]he evolution of the boat towards its final form, before it is buried by currents and swells, marine life and sedimentation, is rather rapid, some ten years... depending on the type of wood it is built of and the marine conditions." Frédéric Dumas, Ancient Wrecks, in UNDERWATER ARCHAEOLOGY: A NASCENT DISCIPLINE 27, 30 (1972). Most scholars and a few legal commentators agree that historic shipwrecks are not in marine peril. See, e.g., J. Barto Arnold III, U.S. Federal Legal Historic Shipwreck Legislation: Development and Status, 16 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 3, 4 (1987); Sjur Brækhus, Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find, 20 SCANDINAVIAN STUD. L. 37, 57 (1976); Antony Firth, Archaeology Underwater in France, 7 INT'L J. ESTUARINE & COASTAL L. 57, 58 (1992); Larsen, supra note 106, at 37; L. Van Meurs, Legal Aspects of Marine Archaeological Research, [1986] ACTA JURIDICA 83, 102; Varmer, supra note 76, at 280-81.

119. See Parrent, supra note 117, at 35. While it is the duty of an attorney to zealously advocate the interests of his client, treasure salvage attorneys face several ethical dilemmas. One of these is candor to the tribunal. See Peter E. Hess, The Trouble with Treasure: Ethical Dilemmas for the Salvage Attorney, 30 J. Mar. L. & Com. 253, 254-56 (1999). With voluminous data that unprofessional retrieval of artifacts actually places the items in peril, it would seem unethical for attorneys to argue that anything less than proper, scientific, legal, and professional archaeological expeditions, with proper artifact conservation, can actually remove artifacts from any "peril" they may encounter as they rest safely on the ocean floor.

120. See Cynthia Furrer Newton, Note, Finders Keepers? The Titanic and the 1982 Law of the Sea Convention, 10 HASTINGS INT'L & COMP. L. REV. 159, 179 (1986) (coining the phrase "retrieval peril"). Retrieval peril is created when salvors remove submerged archaeological resources from their state of equilibrium in the sea, and do not adequately conserve them. See id.
presentation to the public. The archaeologist acts, as we must emphasize, for the public good; the salvor, for himself and his investors.\textsuperscript{121}

This same scholar went on to say that "treasure salvors, out for whatever profit they can glean from the skeleton of an ancient shipwreck, are no more the peers of archaeologists than tomb robbers...."\textsuperscript{122} Thus, most archaeologists think that historic shipwrecks are not in marine peril, and that merely imposing an archaeological duty on salvors is insufficient to protect the archaeological data that shipwrecks contain.

Even if courts hold fast to the position that historic shipwrecks are in marine peril, there are other methods within traditional admiralty law to deter treasure salvors.\textsuperscript{123} Archaeologists should first argue that any peril that exists with historic shipwrecks is \textit{de minimis}.
mus, and therefore a salvage award should either be reduced or denied altogether.\(^{124}\) Instead of rescuing shipwrecks from peril, salvors actually place shipwrecks in peril if the salvors are not properly trained or do not employ sound archaeological principles and techniques. However, at least one court was of the opinion that “salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.”\(^ {125}\)

Second, archaeologists should argue that treasure salvors do not possess, and have not exhibited, the necessary “skill” to receive a salvage award.\(^{126}\) By recovering artifacts without properly recording their provenience and context, treasure salvors have de facto looted the site. The traditional penalty for looting or plundering salvaged property has been to significantly diminish or deny a salvage award.\(^ {127}\) At least one judge has refused to accept the proposition of totally denying incompetent treasure salvors a salvage award, insisting that “[t]he fact that plaintiff failed to employ proper archeological techniques in removing artifacts from the shipwreck may reduce the amount of any salvage award, but should not altogether deprive plaintiff of such an award.”\(^ {128}\)

If a court determines to give a salvage award to treasure salvors, the court could still significantly reduce the award in another way. This can be effectuated by holding that artifacts recovered without adequate contextual information are less valuable than artifacts with such information, or an award could be denied altogether by holding that artifacts without such information are valueless.\(^ {129}\) As J. Barto Arnold III stated, “[w]hen the incalculable loss of historical, social, and anthropological data resulting from the removal of artifacts from a shipwreck site without proper archaeological controls is thrown into the balance the matter of value could . . . be interpreted in a negative sense in determining the sal-

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124. This suggestion is based on the sixth factor enumerated in Blackwall. See supra note 48 and accompanying text.


126. This suggestion is based on the second factor enumerated in Blackwall. See supra note 48 and accompanying text.


129. This suggestion is based on the fifth factor enumerated in Blackwall. See supra note 48 and accompanying text.
vage award."¹³⁰

If courts decide not to apply salvage law, they may still attempt to apply the law of finds. The law of finds is even more inappropriate for the preservation of historic shipwrecks than salvage law. With salvage law, there is at least the possibility for courts to command salvors to use an archaeological duty of care, and courts are able to diminish or deny salvage awards when salvors excavate shipwrecks in a nonprofessional manner. With the law of finds, however, once the court has awarded title of the res to the salvors, the property may be disposed of as the salvors see fit. There is absolutely no protection given to historic shipwrecks under the law of finds and it should not, from a policy perspective, ever play a part in the disposition of historic shipwrecks.¹³¹

As seen in the foregoing discussion, courts and commentators have struggled in an attempt to apply the laws of salvage and finds to historic shipwrecks. The courts and the majority of commentators are, however, starting from the wrong premise.¹³² In deciding

¹³⁰ Arnold, Some Thoughts on Salvage Law, supra note 123, at 176.
¹³¹ One commentator, who defended the right of treasure hunters to salvage historic shipwrecks, agrees that the law of finds should not govern the disposition of historic shipwrecks. He stated that the "endorsement and popular use of the principle of finds [by the courts] . . . threatens the delicate balance of public policy considerations that have been the historic justifications for salvage law." Robert A. Koenig, Property Rights in Recovered Sea Treasure: The Salvor's Perspective, 3 N.Y.L. SCH. J. INT'L & COMP. L. 271, 298 (1982).
¹³² A recent case exemplifies the current tension between attempts to encourage historical and archaeological data preservation and the constraints imposed by traditional admiralty law. See R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 9 F. Supp. 2d 624 (E.D. Va. 1998), aff'd and rev'd in part sub nom. R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999). This case concerns the efforts of the salvor in possession (RMST) of the R.M.S. Titanic to prohibit another organization, Deep Ocean Expeditions, from providing the public with "tours" of the site for a fee. See id. at 628-29. The district court stated that RMST conducted meticulous salvage operations and tours could potentially injure the wreck and/or interfere with the salvage. See id. at 635-37. Noting RMST's scientific operation, careful conservation of recovered artifacts, and the fact that RMST did not plan to sell any artifacts other than coal, see id. at 628, the court attempted to protect the R.M.S. Titanic wreck site and its artifacts, in addition to R.M.S. Titanic's economic interests, under the guise of traditional admiralty law. See id. at 635-37. All the artifacts recovered from the R.M.S. Titanic will eventually be permanently housed in a museum in the United States and RMST only makes money from museum ticket sales, and licenses to third parties of Titanic photographs, videos, artifacts replicas, apparel, etc. See id. at 628. Normally, salvors sell what they recover to pay for their treasure salvage operations. See Anne Giesecke, The Abandoned Shipwreck Bill: Protecting Our Threatened Cultural Heritage, ARCHAEOLOGY, July-Aug. 1987, at 50; see also Sue Williams, Marx is the Name, Treasure's the Game, UNESCO Sources, Feb. 1997, at 9 (statement of
Robert Marx, noting that it can cost over $30,000 per day to salvage an historic shipwreck). The district court understood that keeping artifacts together in a museum is in accordance with the international trend to protect cultural property, see R.M.S. Titanic, Inc., 9 F. Supp. 2d at 639-40, and determined that traditional salvage rights needed to be expanded to protect RMST and other salvors who scientifically conserve and preserve the historic data they recover from shipwrecks. See id. at 636. This court concluded that since photographs could be marketed like artifacts recovered from a site, the rights to photograph and videotape the R.M.S. Titanic belonged to the salver in possession, RMST. See id. at 640. Moreover, the court enjoined Deep Ocean Expeditions from entering the wreck site for the purpose of conducting any search, survey, salvage or recovering photographs, videos or images of the wreck. See id. Unfortunately for RMST, salvage law has yet to recognize such a novel right. The court of appeals, 171 F.3d 943, 969-71 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999), applied traditional salvage law correctly and effectively took away whatever protection for the site and its artifacts the district court may have created.

In its opinion, the Fourth Circuit Court of Appeals noted that to receive a salvage award salvors must provide a useful service and be successful. See id. at 969-70; see also supra notes 29-46 and accompanying text (detailing the requirements necessary to prove before a court will grant a salvage award). Stating that no other court has expanded salver's rights to include an exclusive right to photograph and videotape a wreck site, see R.M.S. Titanic, Inc., 171 F.3d at 969, the court proclaimed that “[t]he law does not include the notion that the salver can use the property being salvaged for a commercial use [i.e., licensing photographs and videos] to compensate the salver when the property saved might have inadequate value.” Id. at 970. Moreover, the court said that if salvors did receive an exclusive right to videotape and photograph a wreck site they “would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.” Id.

The court of appeals is undoubtedly correct in its determination that under salvage law salvors do not have an interest in objects until they actually have been salvaged. As mentioned above, see supra notes 33-37 and accompanying text, one must prove success before a salvage award is granted. Merely taking pictures or videotaping artifacts lying on the sea floor does not bring the goods before the court or return them to the stream of commerce. Thus, under a strict admiralty approach, nothing has been “saved.” Since an award comes from selling the artifacts saved, or from the artifacts themselves in some instances, see supra note 47, there is nothing from which to base a salvage award if the only thing accomplished is the taking of pictures or videos.

However, from a preservation standpoint, this case and the rule of law it provides is unfortunate and was avoidable. Shortly after the discovery of the R.M.S. Titanic, Congress enacted the R.M.S Titanic Maritime Memorial Act of 1986. See 16 U.S.C. §§ 450rr to 450rr-6 (1994). This Act declared the R.M.S. Titanic to be a memorial in honor of those who perished when it sank and sought to encourage the creation of an international treaty respecting the wreck. See id. § 450rr(b). Such a treaty could have prevented all but the most scientific and unintrusive exploration of the site and disallowed meddling commercial tours. Sadly, no such treaty has come into fruition.

that either the law of salvage or finds applies, one must first accept the faulty premise that historic shipwrecks are still maritime property within the meaning of admiralty law. This is absurd. At some point a shipwreck stops being the remains of a commercial vessel, and becomes an archaeological site. The starting question should not be whether the law of salvage or the law of finds applies to an historic shipwreck, but whether the shipwreck is still to be considered a ship, or whether it is more properly classified as an archaeological site. A few courts in other countries have ac-

beyond the jurisdiction of any coastal nation. Resources found in the Area are declared to be the “common heritage of mankind.” Id. at 1293. In addition, all objects of an archaeological or historical nature that are found in the Area are to be “preserved or disposed of for the benefit of mankind as a whole . . . .” Id. at 1295. The question naturally arises under UNCLOS as to what nation is responsible for the preservation and disposition of archaeological objects found in the Area, such as those from R.M.S. Titanic. It is possible that each state would have the responsibility to preserve the objects. “But even assuming that were the case, it is still not clear how objects should be preserved. Would housing finds in public museums be sufficient, or would such artifacts need to be sent on loan to other States?” Ar- end, supra note 70, at 798. It appears that the UNCLOS does not prohibit salvage of historically significant shipwrecks so long as the above ambiguous language currently is satisfied.

There is no international law adequately protecting important shipwrecks such as the R.M.S. Titanic, and our domestic courts struggle to solve the problem by forcing such archaeological sites into the constraints of admiralty law. What is desperately needed is an international treaty that will take important archaeological and historic sites out of admiralty law and place them under a sui generis law designed for their protection. See supra note 72 (discussing UNESCO’s Draft Con- vention). However, it may be decades before such a treaty comes into existence. Even if a treaty is promulgated, it is doubtful whether the Senate will give the advice and consent necessary for its ratification. The Senate still has not done so for the UNCLOS.

133. One example is sufficient to demonstrate that all things, including shipwrecks, at some time become archaeological sites. Two thousand years ago, Romans conducted business and lived in Pompeii. See OXFORD COMPANION TO CLASSICAL LITERATURE 454 (M.C. Howatson ed., 1989). This city was abandoned when Vesuvius erupted and the city was covered with volcanic ash. See id. Over the centuries, the city was forgotten, and it was transformed into an archaeological site. See id. When the city was excavated, the houses were not cleared out and put up for sale. The markets were not reopened for business. The reason is that, over the centuries, a once vibrant town passed from the world of commerce and living into an archaeological site. In the same way, shipwrecks may, by the passage of time, cease to be commercial vessels, and become archaeological sites. See S. REP. NO. 100-241, at 6 (1987) (stating that shipwrecks are no longer viewed only as lost commercial resources, but as archaeological and recreational resources as well).

134. Stated slightly differently, the question is: “When does a shipwreck become an archaeological site?” Any date after which one says that a shipwreck has become an archaeological site is inherently arbitrary. During the 1970s, many archaeologists rejected the premise that archaeological data must be “ancient.” See

http://open.mitchellhamline.edu/wmlr/vol26/iss2/6
cepted the premise that shipwrecks can be archaeological sites, not subject to traditional admiralty principles. By excluding ship-
wrecks of a certain age, such as those over one hundred years old, from admiralty law, ordinary commercial salvors should not be significantly restrained.\textsuperscript{136}

It is time for the legal community to realize that historic shipwrecks should not be disposed of under traditional admiralty principles, which were established for purposes other than the protection of archaeological information.\textsuperscript{137} As the Indiana Supreme Court stated, although in a different context, "[t]he information in these sites expands our knowledge of human history . . . and thus enriches us as a state, nation and as human beings. The general welfare of the public is greatly enhanced by such knowledge."\textsuperscript{138} We should not allow treasure salvors to destroy the information that historic shipwrecks hold for us while they search for commercial gain. The time has come to realize that historic shipwrecks are archaeological sites. Information recovered from these sites will enrich us all, as we learn about our common cultural heritage.

\textbf{IV. CONCLUSION}

"[A]ny deliberate destruction of the historical value of an antiquity is . . . a crime against humanity."\textsuperscript{139} This article has pro-

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\textsuperscript{137.} One commentator even suggested that "[e]ntrepreneurial motives for recovery and sale of artifacts from shipwrecks can reasonably be regarded as contrary to the fundamental objectives of salvage." McWilliams, supra note 122, at 19-20. Unfortunately, many courts in the United States have stated that one's motives for engaging in salvage are irrelevant. See supra note 27. Nevertheless, the entrepreneurial motives of treasure salvors, that is, to maximize profits and keep their discoveries, is not supported by traditional admiralty law and "does not further the notion of preservation of historical or archaeological value. For this reason, the law of shipwrecks is no longer applicable to historic wrecks." Larsen, supra note 106, at 55.
\textsuperscript{138.} Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1005 (Ind. 1989).
\textsuperscript{139.} Patrick J. O'Keefe, TRADE IN ANTIQUITIES: REDUCING DESTRUCTION & THEFT 101 (1997).
\end{flushright}
pounded arguments to disallow treasure salvors from salvaging submerged archaeological resources. However, merely enacting new domestic and international laws to take such resources out of admiralty law may not be sufficient. As one scholar has correctly noted, "legal solutions are costly, slow, and ineffective. . . . [A] change in people's attitudes is essential." People must understand that treasure salvors are not heroes for having discovered long lost artifacts. They should not be admired for their apparent wealth. Treasure salvors rip archaeological resources from their context, thereby making them relatively useless for scientific study. Moreover, after professional archaeological excavations, collections of artifacts are typically not sold. By not selling arti-


Thus, merely enacting legislation to protect archaeological resources, even those providing harsh penalties, may not be sufficient. A change in people's attitudes concerning the importance of archaeological resources is also needed.

141. This comment is furthered by a recent statement by David C. Frederick, Book Review, 30 J. MAR. L. & COM. 355, 359 (1999) (reviewing GARY KINDER, SHIP OF GOLD IN THE DEEP BLUE SEA: THE HISTORY AND DISCOVERY OF AMERICA'S RICHEST SHIPWRECK (1998)): "[T]here is . . . something perverse about deifying treasure salvors whose overriding purpose is not the advancement of human knowledge but the pursuit of private riches."

142. See, e.g., Peter Throckmorton, The World's Worst Investment: The Economics of Treasure Hunting with Real Life Comparisons, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 6, 8 (Toni L. Carrell ed., 1990) ("Today's salvors are no more aware of the cultural material they destroy than the peasant farmers who rob tombs for a living in Sicily or Columbia.").

143. One of the basic tenets of archaeological ethics is that "artifacts recovered from archaeological sites should remain in the public domain rather than be sold.
facts, but by keeping them together as a discrete collection, scientists are able to glean further information from the artifacts as new technologies become available.\textsuperscript{144} By taking submerged archaeological resources out of admiralty law, enacting new, comprehensive, domestic and international laws, and by educating the public of the important nature these resources play in our interpretation of the past, we may be able to save the past for our future.\textsuperscript{145} "Let us not underestimate the importance of the past in our present or in the future. In carelessly destroying the past we destroy part of our present and part of the future."\textsuperscript{146}


144. See George F. Bass, After the Diving is Over, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 10, 10-11 (Toni L. Carrell ed., 1990). No one interpretation of a site is necessarily correct. Scientists need the opportunity to check and recheck the data and conclusions produced by other scholars. By selling the artifacts discovered at a site, scholars are precluded from later studying the artifacts as new technologies become available. Moreover, sites cannot be studied in isolation. Artifacts and data recovered at one site must be compared with information retrieved at other sites. It is only through this type of comparative study that an accurate picture of the past can be obtained. By selling artifacts, instead of keeping them together in a museum, such study is impossible. See ARCHAEOLOGY UNDERWATER: THE NAS GUIDE TO PRINCIPLES & PRACTICE 22 (Martin Dean et al. eds., 1992). Additionally, "[f]uture generations are likely to have a better understanding and superior equipment to uncover the stories of history and culture which may be hidden from even the trained eye of present-day archaeologists," and by allowing the commercial salvage of shipwrecks, we take the opportunity away from future scientists to uncover more information than can be discovered at the present time. See Varmer, supra note 77, at 287.

145. Some may claim that by totally proscribing treasure salvage a black market in looted and/or counterfeit artifacts will emerge. See, e.g., Paul J. Tzimoulis, Shipwrecks Lost, SKIN DIVER, Jan. 1988, at 8 (asserting that “unjust” laws such as the Abandoned Shipwreck Act will lead divers to secretly loot shipwrecks). See generally Thomáš Kulka, The Artistic & Aesthetic Status of Forgeries, LEONARDO, Spring 1982, at 115 (discussing why counterfeiters are not as important as authentic relics); Thomáš Kulka, The Artistic & Aesthetic Value of Art, 21 BRIT. J. AESTHETICS 336 (1981) (same). However, this assertion is belied by the fact that there already exists a black market in the United States for looted and counterfeit antiquities, although it is generally legal to excavate on one’s private property and sell the discoveries. See generally O’KEEFE, supra note 139, at 467-68 (discussing the black market in Native American artifacts); Bruce Frankel & Tim Roche, Good as Gold?, PEOPLE, June 15, 1998, at 89 (asserting that treasure salvor Melvin Fisher may have been selling counterfeit gold coins).

146. Giesecke, Historic Shipwreck Resources, supra note 9, at 130.