

**Science or Profit: Searching for a Balance in Maritime Salvage Rights of Historic
Shipwrecks under American Law**

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Introduction

This paper surveys the competing interests that fight for the rights to sunken treasures, and analyzes the legal doctrines in place for determining who possesses the rights to ships and cargos resting below the surface of the world's oceans, seas, rivers and lakes. The *dramatis personae* includes commercial salvage operations on the one hand, and archaeologists, historians, and cultural institutions (preservationists) on the other. The primary dispute is over the nature of the value of sunken wrecks: commercial salvors contend that the value is primarily, if not solely economic in nature, while preservationists argue that the principal value is in the cultural and educational realms.

Part I of this paper looks generally at the nature of the dispute between the various parties. Part II analyzes the common law and statutory protocols used by courts in deciding disputes concerning sunken wrecks. It looks at the laws of finds and salvage, as well as the Abandoned Shipwrecks Act, and explains why all three approaches, individually and comprehensively, fall well short of the ideal situation. The advent of an archaeological duty of care for salvors will also be covered in this part. Part III offers a modest proposal that courts should adopt for classifying wrecks and balancing the interests of concerned parties, in order to determine the best way to proceed when faced with a dispute over sunken vessels and cargo.

I. Who Owns History?

The primary opposing interests of note can be classified as commercial interests on the one hand, and preservation interests on the other hand. Each side can point to compelling arguments on its behalf, why the courts should enforce one set of interests at the expense of the other. This section of the paper illustrates the nature of the conflict by examining exactly what can and should be protected, and how the competing forces characterize their interests.

At its most basic level, this is a dispute over the nature of cultural property and cultural heritage. Sparing the reader a philosophical treatise on the nature of culture and property,¹ this paper will work from the assumption that any human-created object now or previously residing underwater is (at least potentially) cultural property. The UNESCO Convention on the Protection of Underwater Cultural Heritage² defines “Underwater Cultural Heritage” as:

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (iii) objects of prehistoric character.³

This fairly comprehensive definition is mostly adequate, though the 100 year requirement is unnecessarily arbitrary. It is certainly possible for items less than 100 years old to have

¹ See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 561-73 (1995).

² I generally avoid using the term Underwater Cultural Heritage because it seems to be a politically loaded term – it clearly presupposes the prominence of the non-economic values. Also, this paper focuses on American legal regimes and does not discuss international treaties or agreements in protection of cultural artifacts; however, UNESCO provides the most satisfactory working definition of what should be preserved, so it is employed here.

³ http://www.unesco.org/culture/laws/underwater/html_eng/conven2.shtml (last visited November 20, 2005).

historical significance – particularly given the two major world wars fought in the last century and the large number of vessels that were wrecked during those conflicts. Conversely, not every ship or object more than 100 years old will require scientific study and protection; many things may be old yet irrelevant.

Before the advent of underwater archaeology as a scientific discipline, the primary purpose for recovering underwater cultural property was to re-introduce the objects into the stream of commerce.⁴ This could consist of either salvaging usable items so that they could be used for their original purpose, or the collection of items that could be sold for profit. The second category of items, those that were retrieved specifically for profit-making purposes, are of primary concern for this study. With the advent of a scientific methodology that could be applied to the removal of underwater artifacts, a conflict began brewing between those whose motives were primarily commercial in nature, and those whose concerns were preservative and academic in nature. “The generalized view is that ‘archaeologists value shipwrecks as a means to study past cultures . . . and treasure salvors value shipwrecks for economic profit.’”⁵

Treasure salvors are commercial operations, operating with their own capital – often millions of dollars – in order to discover and recover artifacts from wrecks.⁶ They operate equipped with state-of-the-art technology that allows them to find long-lost wrecks submerged

⁴ Craig Forrest, *A New International Regime for the Protection of Underwater Cultural Heritage*, 51 INT’L & COMP. L.Q. 511, 533 (2002).

⁵ *Id.* at 534 (quoting AG Giesecke, “Historic Shipwreck Resources and State Law: A Development Perspective” unpublished PhD Thesis) (1992).

⁶ See, E.g., Howard M. McCormack, *Finders Keepers – Losers Weepers: Underwriters’ Problems with Deep Sea and Other Salvage Operations*, 49 FED’N OF INS. & CORP. COUNS. Q. 87, 93 (1998).

thousands of feet under the surface.⁷ Without the work of these private treasure salvors, many famous wrecks would never have been discovered.⁸ It is apparent, then, that if governments prohibit all work by treasure salvors (either outright or de facto by eliminating any remuneration for their efforts), few, if any, new wrecks, at least in the deep oceans, will be discovered.⁹ Private salvors would be forced to conduct their work outside the legal guidelines covering historic wrecks if they wanted to continue with their discovery missions and profit financially from their operations.¹⁰ That would be a terrible result, as it would ensure that wrecks with economically valuable artifacts would be looted without the benefit of scientific study.

While it is clear that commercial salvage operations play a key role in discovering important wrecks, they are not the only party that has important interests at stake. In the last half of the 20th Century, both in the marine and terrestrial contexts, great attention has been given to the value of historic preservation and the study of the past.¹¹ “Historic shipwrecks provide key insight to our cultural history because a facet of life from a former time period has been

⁷ See Russell G. Murphy, *The Abandoned Shipwreck Act of 1987 in the New Millennium: Incentives to High Tech Piracy?*, 8 OCEAN & COASTAL L.J. 167, 195-200 (2003).

⁸ See, E.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999) (RMS Titanic found by private discovery crew after years of effort and considerable expense).

⁹ See Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Law*, 14 Ariz. J. Int'l & Comp. Law 223, 251-52 (“One representative in Congress noted that ‘more items are on public display as a result of artifacts they [sport divers] have donated to museums and galleries than from any other source, including archaeologists.’”).

¹⁰ See Murphy, *supra* note 7, at 198-201.

¹¹ Mary Ann Becker, *Regulating the Business of Culture: The Abandoned Shipwreck Act – Can Preservationists, Salvors, and Divers Sail in Calmer Waters?*, 51 DEPAUL L. REV. 569, 582 (noting that in the last half century, all 50 states and over 500 municipalities have enacted legislation concerning historic preservation).

completely preserved while submerged below the sea. These perfectly preserved artifacts, discovered on historic shipwrecks, are essential to understanding the life and history of the United States.”¹² Archaeologists work by “construct[ing] pictures of past cultures and societies and their ways of life through interpretation of scientifically gathered evidence”¹³ in the form of these preserved artifacts. While terrestrial archaeologists have been operating freely and with a general respect for their work for more than one hundred years, underwater archaeology has only recently emerged as a legitimate scientific discipline. In 1960, George Bass became the first trained archeologist to excavate a ship from below the surface of the sea.¹⁴ Since then, the field has progressed, but “still strugg[les] to determine its own techniques and theories.”¹⁵

Generally speaking, when archaeologists work, their primary goal is acquisition of knowledge. Even archaeologists who work in commercial enterprises (as opposed to working for a museum or university) generally do so on a contract basis; they excavate and document sites but do not keep the artifacts that they recover.¹⁶ The monetary value of individual artifacts is not considered a factor when an archaeological survey is commenced; the same level of detail

¹² *Id.* at 583.

¹³ Forrest, *supra* note 4, at 313.

¹⁴ *Id.* at 312 (excavation was of a 31 centuries old vessel in the Turkish Mediterranean).

¹⁵ *Id.* at 314.

¹⁶ See, E.g., <http://www.desert.com/>, the website for Desert Archaeology, Inc., a Tucson, Arizona contract archaeology firm. Their work focuses on both public and private sector clients, primarily in the field of compliance – “The need for cultural resources compliance services can be triggered by regulations at the local, state, or federal level. Desert Archaeology can help you through the steps of determining whether cultural resources will be affected by your particular project and, if they are, what to do about it. Compliance starts with a simple assessment of what is on the ground. If archaeological sites or historic-period buildings are present and the planned project will affect them, further treatment is likely to be needed.” <http://www.desert.com/compliance/> (last visited Nov. 21, 2005).

and attention is given to every artifact that is recovered from a site.¹⁷ Excavation is done in an orderly fashion, and proceeds based on the accessibility of areas of the site.¹⁸ This methodology clearly contrasts with the interests of a salvage diver, whose primary concern is recovering objects that can be sold at a profit¹⁹, such as precious metals²⁰ or recognizable items from famous wrecks.²¹ As such, some commentators have declared that “archaeological and economic values [are] incompatible.”²² One major reason why the interests are so fundamentally opposed is that “[e]ffective archaeological resource protection requires the recognition that archaeological resources are finite, depletable, and nonrenewable. Although such resource protection may seem

¹⁷ See, *E.g.*, WILLIAM L. RATHJE AND MICHAEL B. SCHIFFER, *ARCHAEOLOGY* 189 (Harcourt Brace Jovanovich 1982) (“Artifacts from the same bulk provenience are grouped and placed in bags by type of material – lithic, ceramic, animal bone” in order to facilitate proper analysis in the laboratory, which can involve sifting all soil removed from the site through screens no larger than ¼ inch in order to preserve even the smallest of artifacts.)

¹⁸ See *Id.* at 174-96 for a general discussion of excavation techniques in terrestrial archaeology.

¹⁹ Forrest, *supra* note 3, at 328-320 (“The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.”)

²⁰ *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 547 (S.D. Fl. 1982) (“In 1980, the plaintiff recovered 734 individual silver coins, two gold discs, 10 clumps of inseparable silver coins, and 300 pieces of ‘encrusted objects.’ In 1981, it recovered 25 or 30 ‘encrusted objects,’ 300 silver coins, and 12 Royal Eight Escudo gold coins. . . . Many of the silver coins are pieces of eight, minted in 1713; the value of one is now estimated at \$500.00 to \$600.00. The value of a Royal Eight Escudo is estimated to range between \$5,000.00 and \$12,000.00, depending on the quality of the coin.”) (Internal citations omitted).

²¹ Objects from the Titanic have fetched considerable sums at auctions. An original dinner menu shown recently on PBS’s *Antiques Roadshow* program was valued at \$75,000 to \$100,000.

<http://www.pbs.org/wgbh/pages/roadshow/series/highlights/2004/favorites/> (last visited 5 December 2005).

²² Forrest, *supra* note 3, at 317.

initially intended to protect primarily the objects themselves, a second and even more significant goal is the preservation of the archaeological and historical context in which an object is found.”²³ In a commercial venture, where economic considerations are primary, “[d]espite the presence of an archaeologist on the site, or the recovery of any archaeological data, the long-term potential of a site to yield meaningful data is compromised when the collection of artifacts – the primary data of an archaeological site – has been dispersed.”²⁴ For the most accurate scientific analysis possible, artifacts from a single site must be kept together until all study is complete.²⁵

It should now be apparent that there are serious, fundamental conflicts between those who see shipwrecks as underwater vessels in the salvage context - ready to share their riches with the world – and between those who see the same wrecks as archaeological sites – ready to share their histories and cultures with the world. The following section of this paper will detail the traditional common law approaches to dealing with wrecked vessels, and look at the statutory approach taken by the Abandoned Shipwrecks Act of 1987. Once this legal background is understood, only then can we begin to fashion a better solution.

²³ Gerstenblith, *supra* note 1, at 564.

²⁴ Forrest, *supra* note 4, at 318.

²⁵ *See Id.*

II. Legal Background

A. Traditional Maritime Law

In a typical maritime case, the person or company that has discovered a shipwreck will go to the federal courts and plead two distinct concepts: first, that the wreck in question has been abandoned and that the finder should receive title valid against the world, and alternatively, that the petitioner is a salvor who should receive a portion of the value of the recovered goods as a reward for their successful recovery efforts.²⁶ The legal principle of finds has long been recognized in Anglo-American common law.²⁷ This doctrine is also recognized in admiralty; “[t]raditionally, the law of finds was applied only to maritime 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.”²⁸ In other words, in order to succeed in a claim under the doctrine of *finds*, in the maritime context, the finder must show that the sunken property has been abandoned²⁹ by its owner and all successors in interest.

²⁶ See, E.g., *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 19 F.3d 1136, 1138 (7th Cir. 1994) (“Harry Zych filed this in rem action to obtain title to an abandoned shipwreck, the *Seabird*, or, alternatively, a salvage award.”).

²⁷ See generally *Armory v. Delamirie*, 1 Strange 05 (King’s Bench 1722) (awarding a jewel to the finder, a chimney sweeper’s boy, “he has such a property as will enable him to keep it against all but the rightful owner.”)

²⁸ *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1048-49 (E.D. Va. 1995).

²⁹ There are two exceptions to abandonment in the common law that have been adopted in the admiralty realm: items embedded in the soil are property of the owner of that parcel of land, and, if the owner of the land asserts constructive possession. In these cases, the property will not be considered abandoned. Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 WM. MITCHELL L. REV. 289, 295 (2000).

Additionally, the finder must have reduced the property (or some portion of it) to his possession or control in order for the court to obtain *in rem* jurisdiction over the wreck.³⁰

The weaknesses of the doctrine of finds in the context of historical preservation should be well apparent. Initially, the requirement that the property be abandoned raises significant obstacles to proper administration. “A court will consider a shipwreck abandoned if the original owner ‘intended’ to abandon it. To prove the intent, there must be evidence of some act or omission on the part of the owner to deliberately abandon the shipwreck.”³¹ Given that many historically significant wrecks are more than 100 years old, proving the intent of the owner to abandon the property can be difficult. An insurer who long ago paid claims for losses on a sea voyage can receive a windfall by claiming to have retained title when the ship is later discovered by an expeditionary crew.³² It is certainly conceivable as well that wrecks from prior centuries will have no known modern successor to the original owners. In such cases, it would seem likely that courts would declare the vessels to be abandoned, vesting title of the ship and its artifacts in the recognized finder.

Once a vessel has been declared abandoned, and title given to the first finder who is able to secure possession of the wreck, the courts will have no ability to control the removal of artifacts from the sea. The finder will have sole dominion over the ship and its artifacts, and can extract them in any way he sees fit, irrespective of the cultural and historical values that may be

³⁰ Bemis, 844 F. Supp. at 1049.

³¹ Sherri J. Braunstein, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks*, 8 WIDENER L. SYMP. J. 301, 303 (2002)

³² See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 295 (4th Cir. 2000) (underwriters succeeded in claim to obtain title to ship and cargo of gold based on payments made in 1857; discovering crew received salvage award, not title).

lost by improper removal techniques or the lack of proper documentation of the recovery context. In this situation, it is almost certain that economic considerations will be given precedence, much to the chagrin of the preservation community. “There is absolutely no protection given to historic shipwreck under the law of finds and it should not, from a policy perspective, ever play a part in the disposition of historic shipwrecks.”³³

If a ship is not declared abandoned, then the finder cannot be given title, as the valid title will remain vested in the original owner. In these cases, the law of *salvage* will be the alternative legal theory under which the finder of the wreck attempts to profit financially from his discovery and recovery work. Salvage law, unlike finds, is a concept that only exists in the maritime context. “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.”³⁴ In a salvage claim, the salvor is not seeking actual ownership of the recovered goods, but rather is asking for the court to impose a lien on the property that entitles the salvor to a court-determined fee for their recovery efforts.³⁵ One advantage of salvage, as opposed to finds, is that the courts will retain some jurisdiction over the artifacts in question³⁶ – salvage awards are only determined after goods have been retrieved, so “[i]f a salvor is not successful, he has not conferred any benefit on the property’s owner, and he should not receive an award.”³⁷

³³ McQuown, *supra* note 29 at 320.

³⁴ McQuown, *supra* note 29, at 301.

³⁵ *See Id* at 295.

³⁶ There are other advantages inherent as well, such as the ability for a court to require a higher duty of care in recovery efforts, but these will be discussed in Part III.

³⁷ McQuown, *supra* note 29, at 297.

Establishing a salvage claim requires showing three elements: “(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.”³⁸ The most contentious of these criteria (and the only point relevant here) is how the courts have interpreted “marine peril.” The dispute boils down to the question of whether a ship that has been located at the bottom of the ocean for (potentially) hundreds of years should be considered in “marine peril” in the same sense as a vessel that is being overtaken by a strong storm and threatening to founder. “By its very definition, treasure salvage is the recovery of maritime property that has already experience its peril and subsequent ruin; thus, the danger has passed [Yet some] courts conclude that abandoned shipwrecks are still in ‘peril’ of being destroyed or lost.”³⁹ In the end, courts are likely to interpret “marine peril” in the way that gives them the desired result in a particular case.⁴⁰ If the court wants to deny an award for salvage, it will declare that the ship was not in marine peril; conversely, if the court wants to give the expedition crew a salvage award, then it will find that the ship was in marine peril at the time it was discovered.⁴¹ This argument can even be taken further, pointing to the fact that “underwater cultural heritage may be in greater danger from salvage operations than from being allowed

³⁸ *Id.* at 296.

³⁹ *Id.* at 308-09.

⁴⁰ Craig J. S. Forest, *Has the Applications of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 330 (2003). (“While judicial interpretations on this point are inconsistent, they are evidence that, in order to apply salvage law to the recovery of UCH [Underwater Cultural Heritage], some courts will manipulate the meaning of the prerequisite marine peril, in effect making of it a legal fiction. Thus, a marine peril appears to be discerned judicially solely in order that salvage law may be applied to UCH.”).

⁴¹ *Id.*

to remain where it is.”⁴² That is, “[i]nstead of rescuing shipwrecks from peril, salvors actually place shipwrecks in peril if the salvors are not properly trained”⁴³ which could be used as further grounds for denying a salvage award.

This lack of standardization in salvage cases poses a major problem, as it makes salvors unsure whether their efforts will be rewarded, and can lead to perverse incentives – it may make more sense for salvors to loot economically valuable artifacts from newly discovered wrecks without making claims to a court, because they would at least be assured of the profits from the sales of looted items on the black market.⁴⁴ Of course, such behavior is conducted at the salvor’s peril, as “[c]riminal behavior by salvors such as looting the salvaged vessel or violence in preventing assistance by other salvors are classic situations for denial of a salvage award.”⁴⁵

For those salvors who follow the necessary protocols to earn a salvage award, there are six basic criteria that admiralty courts use to determine the amount of the salvage award:

(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; and (6) the degree of danger from which the property was rescued.⁴⁶

⁴² *Id.* at 328.

⁴³ McQuown, *supra* note 29, at 319.

⁴⁴ See Murphy, *supra* note 7, at 179 (“A salvor may conclude that good-faith efforts to follow federal and/or state law cannot promise a fair reward with sufficient certainty and timeliness. In that case, the salvor may choose to work outside the law by taking the treasures of lost shipwrecks secretly and without legal authority.”).

⁴⁵ Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 193 (1999).

⁴⁶ *The Blackwall*, 77 U.S. 1, 14 (1869) (cited in *Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 207 n.15 (S.D. Fl. 1981)).

These criteria are both longstanding and straightforward to apply, so they require little additional explanation, beyond pointing out that the “promptitude, skill and energy” requirement provides a solid foundation for requiring the use of an archaeological duty of care in recovery efforts.⁴⁷ It is important, finally, to note that in order to receive a salvage award (or an injunction to have exclusive salvage rights), at least some of the items must be removed from the wreck and brought into the district where the court hearing the case resides.⁴⁸ This necessarily means that the wreck site must be disturbed to some degree in order for the admiralty courts to have jurisdiction to hear the case, which is problematic if serious preservation efforts are going to be mandated.

⁴⁷ *See infra*, subsection C in this part.

⁴⁸ *See supra*, note 12, and accompanying text; it is also worth noting that in cases where the actual ship lies outside the territorial boundary of the United States, courts must assert “constructive in rem” jurisdiction, a legal fiction adopted by the court in *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 967-68 (4th Cir. 1999).

B. The Abandoned Shipwrecks Act of 1987

The traditional admiralty topics discussed above currently have limited applicability. In 1987, Congress set out to balance the demands of commercial salvors and preservationists,⁴⁹ by creating a new statutory regime to govern wrecks, which takes qualifying wrecks out of the traditional finds and salvage rules. In the Abandoned Shipwrecks Act (ASA) of 1987, the United States asserts title to any

abandoned shipwreck that is – (1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register [of Historic Places].⁵⁰

Once the federal government asserts title, it then transfers said title to the State “in or on whose submerged lands the shipwreck is located.”⁵¹ This means that individual States affected by the ASA will need to develop their own legal rules for settling competing claims; the ASA does not provide substantive, governing law on its own – it merely punts all responsibility for balancing the competing interests to the States, while maintaining only minimal oversight at the federal level.⁵²

⁴⁹ In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwreck, the Secretary of the Interior . . . shall . . . prepare and publish guidelines in the Federal Register which shall seek to: . . . (2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States; (3) facilitate access and utilization by recreational interests; (4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

43 U.S.C. § 2104(a)(2)-(4) (2005).

⁵⁰ 43 U.S.C. § 2105(a) (2005).

⁵¹ 43 U.S.C. § 2105(c) (2005).

⁵² See Braunstein, *supra* note 31, at 303.

Before looking at how States are to implement the ASA, it is important to understand exactly what is covered and what has been left out by the terms of the Act. The first thing that merits attention is the scope of the ASA's coverage, which is limited to waterways within three miles of the coastal lines – “any shipwreck that is not found within three miles of a state's coastal line is still governed by admiralty law.”⁵³ This is clearly problematic, as it creates distinct legal regimes based on nothing more than geographic proximity to a State coastline. What would be the result, for example, if a wreck site were spread over a large area, partly within and partly outside the 3 mile line of demarcation? Would the finder be required to treat the discovery as two separate wrecks, one governed by the ASA and one covered by traditional admiralty law?

Beyond such academic questions, the terms in the act are not necessarily clear in their meaning. The term “abandoned” as used in Section 2105(a) is the most obviously problematic. Unfortunately, Congress did not provide a definition for “abandoned” or guidelines for its application. In the advisory guidelines later promulgated by the Secretary of the Interior⁵⁴, the following definition is offered:

An "Abandoned," shipwreck means any shipwreck to which title has been given up by the owner with the intent of never claiming a right or interest in the future. Sometimes an owner takes steps to affirmatively abandon a shipwreck such as by collecting insurance or by paying a salvage award to persons that salvage the vessel's cargo. By not taking any action after the wreck incident to recover or remove the vessel and its cargo, an owner shows intent to give up title.⁵⁵

It appears that we are left, once again, with essentially the traditional admiralty rules, from the law of finds, for determining whether a wreck has been abandoned. This contention is

⁵³ *Id.* at 302.

⁵⁴ *See supra*, note 49.

⁵⁵ 54 Fed.Reg. 13642 (April 4, 1989)

backed by the Supreme Court, which stated “that the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law.”⁵⁶ The logical conclusion is that if a ship is “abandoned” (or historic) it falls under the ASA, but if it is not, then traditional salvage law would apply; in other words, the ASA completely eliminates the law of finds within its area of jurisdiction, but not the law of salvage.⁵⁷ The end result is likely to be more litigation – whether a ship has been abandoned is the threshold question that must be answered in any new discovery within the ASA’s geographic reach, and any party that may possibly have an interest will be certain to try to intervene, leading to long court battles just to determine whether the ASA applies.⁵⁸

The guidelines also provide sovereign immunity for ships that flew under flags of other nations, meaning that a country such as Spain could still assert title to 16th Century colonial ships should they be made aware of one’s current location, regardless of whether or not the original country had previously made any effort to locate the wreck.⁵⁹ While this would perhaps make sense if the federal courts maintained jurisdiction for hearing cases under the ASA, “in essence, once it is determined that a shipwreck is covered by the ASA, all rights and claims to it are

⁵⁶ California v. Deep Sea Research, 523 U.S. 491, 508 (1998).

⁵⁷ If a wreck is not judged abandoned, then it would not be subject to traditional finds rules, nor subject to the ASA, but to traditional salvage law; if, on the other hand, the wreck is considered abandoned, then the ASA applies. Therefore, finds has been completely eliminated within the 3 mile jurisdiction of the ASA.

⁵⁸ See E.g., Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 454 (4th Cir. 1992) (which had “legal brawls involving self-styled ‘finders’ from Ohio, British and American insurance underwriters, an heir to the Miller Brewing fortune, a Texas oil millionaire, an Ivy League university, and an Order of Catholic monks.” Litigation over the wreck in question lasted more than a decade.).

⁵⁹ See *Id.*

dependent on state law, must be asserted in state court, and will be evaluated without reference to the traditional body of admiralty law.’⁶⁰

Once it is determined that a particular wreck is covered by the ASA, the various interested parties will be subject to the laws of the State that has been given title to the wreck. Under the ASA, there is no requirement that States follow the federal guidelines for settling disputes, so there is the very real possibility of being faced with entirely different legal schemes in different States. Further, there is no guarantee that States will enact laws to protect historic wrecks – the provisions of the ASA leave open the possibility of States auctioning off historic wrecks to the highest bidder, should one so desire.⁶¹ Given these factors, it is hard to see how the ASA in practice lives up to its stated purpose: “Congress enacted the ASA to ensure the preservation of shipwrecks of historical and archaeological value and to eliminate the inconsistencies of traditional salvage law with those goals in the abandoned shipwreck context. The ASA is also intended to . . . facilitate cooperation among a variety of parties for purposes of recreation, cultural resource management, sport, and salvage efforts.’⁶²

It cannot possibly be an acceptable solution to have wrecks governed differently merely depending upon the geographic fortuity of where the ship originally sank or ran aground. This scheme serves neither constituency – the preservation nor commercial salvage communities – adequately. In this commentator’s opinion, the ASA leads to too much uncertainty and too much litigation to remain valid in its current form. The interests of the involved parties cannot be met

⁶⁰ Murphy, *supra* note 7, at 170.

⁶¹ See Braunstein, *supra* note 31, at 313 (“Congress has granted title to abandoned shipwrecks to the states in order to protect the historic value, without any guarantee that the states will protect and preserve the wrecks, raising the question of the overall effectiveness of the ASA’s provisions.”).

⁶² Gerstenblith, *supra* note 1, at 612.

by a law that requires litigation of threshold issues such as where it was “abandoned” or “embedded” in every case that comes before the courts. Instead, there must be some degree of standardization so that everyone involved can have some idea of what the end result will be from the time a new wreck is discovered.

C. The Archaeological Duty of Care

The first case to recognize that a specific duty of care was owed by potential salvors was *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*.⁶³ There, Cobb Coin, a treasure salvage outfit, was working on what was believed to be the remains of Spanish ships that sunk off the East Coast of Florida in 1715 on their way back from the New World.⁶⁴ Noting the impressive skill of the Cobb Coin team, the court held that

in order to *state a claim* for salvage award on an ancient vessel of historical and archeological significance, it is an essential element that the salvors document to the Admiralty Court's satisfaction that it has preserved the archeological provenance of a shipwreck. To leave this element merely for consideration of a salvage award would not provide, perforce, sufficient incentive to salvors to ensure that the information is obtained.⁶⁵

⁶³ 549 F. Supp. 540 (S.D. Fl. 1982); it is relevant to note that this case predates the ASA – if it were after the passage of the ASA, this ship would qualify and would be the property of the State of Florida. In fact, Florida already had its own permitting requirements for those who desired to explore wrecks in its territorial waters. The court’s extensive discussion of the inconsistency between Florida’s requirements and traditional maritime law – and the implications of the 11th Amendment – were, of course, rendered moot by the ASA, as Florida’s scheme would unequivocally be valid under the ASA.

⁶⁴ *Id.* at 545.

⁶⁵ *Id.* at 559 (archaeological provenance meant the “information concerning the exact location, depth and proximity of each item found with respect to other items”) (emphasis in original).

This decision was groundbreaking, for it expressly rejected the findings of another district court that had “declined to hold salvors to the standard of expertise required of marine archeologists in evaluating the skill, promptitude and energy component of the salvage award.”⁶⁶

In the end, the *Cobb* court awarded all of the recovered goods (which were valued at roughly a half a million dollars⁶⁷) to the Cobb Coin Company. While it may seem counterintuitive that a court would expound on the importance of using archaeologically sound methodology to recover historic artifacts, only to then award the treasure *in specie* to the salvors, this was done solely because the State of Florida had obtained “a representative cross-section of recovered 1715 artifacts [that] makes it inappropriate to award further artifacts to the State at this time.”⁶⁸ If, however, future artifacts were to be uncovered that the State did not have a sample of in its possession, then it would be possible for the State to “assert an interest on behalf of its citizenry to particular artifacts recovered which are not represented in its present inventory and which it feels are essential to the preservation of the people's heritage.”⁶⁹

Cobb was not, however, the only decision that has required the use of an archaeological duty care. The court in *MAREX Int'l v. Unidentified, Wrecked & Abandoned Vessel*⁷⁰ required a similar level of care. In this case, which was not subject to the ASA because the wreck was beyond the territorial limits of the statute's jurisdiction, the court applied the law of finds and

⁶⁶ *Id.* (citing *Platoro Ltd. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D.Tex.1981).

⁶⁷ *Id.* at 561.

⁶⁸ *Id.* at 562.

⁶⁹ *Id.*

⁷⁰ 952 F. Supp. 825 (S.D. Ga. 1997).

granted an injunction for MAREX to have “exclusive dominion and control”⁷¹ over the wreck site, which was located “somewhere off the coast of South Carolina.”⁷² The court here defined, at least in part, what constitutes an “historic shipwreck” that would require the use of an archaeological duty of care: this wreck “meets at least two of the criteria set forth in the regulations for the National Register of Historic Places. The ship's copper boilers and steam engines represent a rare example of an emerging technology. In addition, when the ship went down many prominent people of the day were onboard, including eight members of Congress.”⁷³

The court held that MAREX

has met its duty to document the archaeological and historical significance of the S.S. NORTH CAROLINA [the wreck in question]. Plaintiff compiled an historical record of the wreck from several libraries and archives along the East Coast, plaintiff trained its divers in the archaeological methods of mapping the artifacts and carefully used those methods when excavating the shipwreck, plaintiff subjected each recovered artifact to conservation treatment at its Brunswick laboratory, and plaintiff retained the appropriate experts to aid it in its evaluation and conservation of the various artifacts recovered.

As a result, the court awarded all artifacts previously recovered from the wreck, as well as a preliminary injunction to MAREX allowing them exclusive rights to salvage the wreck during the 1997 season.⁷⁴ As a condition of the award, MAREX was required to “submit a written report to this Court summarizing its salvage operations at the end of each salvage season.”⁷⁵

The approach used in Cobb, revealed a major point of tension between the two sides in the debate over underwater artifacts – the degree to which collections need to be kept together

⁷¹ *Id.* at 829.

⁷² *Id.* at 827.

⁷³ *Id.* at 829 (internal citations omitted).

⁷⁴ *Id.* at 830.

⁷⁵ *Id.*

for scientific study. “According to salvors, a representative sample of these trade goods could be preserved for whatever contribution they might make to cultural heritage, while the remainder could be separated for sale. It is argued that the collection of redundant artifacts and data is ‘neither good science nor a cost effective use of funds and resources.’”⁷⁶ However, archaeologists counter that only “by keeping [artifacts] together as a discrete collection, scientists are able to glean further information from the artifacts as new technologies becomes available.”⁷⁷ Courts should err on the side of caution, and keep collections together whenever feasible, for once an artifact has been sold, it cannot easily be reclaimed for the purpose of scientific study. On the other hand, once the team of archaeologists has definitively concluded their work on a given wreck, it is not terribly difficult to hold an auction for items that do not need to be preserved for the benefit of the public.

⁷⁶ Forrest, *supra* note 4, at 322 (internal citation omitted).

⁷⁷ McQuown, *supra* note 29, at 325-26.

III. A Modest Proposal

It should be clear to the reader that the current legal regimes covering historically significant shipwrecks are inadequate and need to be updated in order to take into account all relevant factors. This section of the paper will present a new set of tests and factors to be used by courts for determining competing claims to wrecks, and to determine how to fix awards for expeditionary crews that discover new, historically significant wrecks. These tests will take into account the interests of all concerned parties and the individual characteristics of the wreck in question, resulting in a balancing by the courts of multiple factors in order to determine results on a case-by-case basis. Unfortunately, the amounts of money and the cultural interests at stake are too great to be governed by blanket rules that do not account for the multiple levels of incentives inherent in treasure salvage and archaeological preservation.

A. Tier 1 – Tests by Age and Origin

Wrecks older than 500 years must be placed automatically into the most protected category. One of the most important characteristics of this category is a determination that no commercial sale of recovered items shall ever be allowed.⁷⁸ Excavating crews must be held to the most meticulous excavation procedures possible, and required to exercise the most stringent archaeological duty of care. Upon the finding of a wreck of this age, it should be documented (video, photographs, GPS location) but not disturbed. Removal of any artifacts prior to court approval should be subject to criminal sanctions. These severe restrictions are necessary to ensure that the recovery efforts that eventually take place preserve all of the scientifically

⁷⁸ At least, until the scientists and cultural institutions have exhausted all possible foreseeable avenues of study and have retained a representative sample for curatorial purposes.

relevant data. Additionally, title to any wreck of this age is automatically forfeited by the original country that launched the vessel and transferred to a cultural institution in the United States⁷⁹ that has the resources and ability to preserve the artifacts from the wreck.

Wrecks 100-500 years old would have a presumption of historical significance, but there would first be a need to determine the particular historical importance, as well as the origin of a given vessel. No commercial sale of items recovered should be allowed, unless it is determined that the wreck presents no potentially useful scientific information. Significant wrecks should be treated the same as in the category above. Wrecks presumed to be historically significant should not be disturbed, and removal of artifacts without court approval should be subject to criminal sanctions.

For modern wrecks, those less than 100 years old, it becomes necessary to determine and distinguish the original use of the crafts. Commercial and personal vessels will have presumption of non-significant, that can be rebutted by evidence, documentary or from recovered artifacts. Military craft will have presumption of historical significance that can be rebutted by overwhelming evidence (e.g., American training vessel in American waters may not be historic; German U-boat in American waters presumed historic). Historically significant wrecks will be treated the same as older wrecks of similar significance and provenance.

Not all modern ships will be easy to categorize. The origin and other circumstances will need to be weighed in order to determine whether a ship is considered historically important. For example, military vessels lost during battles are likely to have more historical value than

⁷⁹ If this proposal were to be adopted by other countries, then foreign courts could award title to institutions in their home country; since this paper deals with American courts, then title should vest in American institutions where our courts have some ability to monitor and redress future violations.

personal, pleasure crafts; alternatively, a craft owned by a famous individual, or that contained emerging technologies may be more historically important than an ordinary commercial craft (tug or barge). Nationality of origin is a difficult factor because of Sovereignty issues.

American courts may have difficulty issuing rulings affecting ships claimed by other nations – and discussion of these issues is beyond the scope of this paper.⁸⁰

B. Tier 2 – Accessibility

If a wreck is accessible to skin or SCUBA divers,⁸¹ then it must necessarily be located in an area that is physically hard to control or secure. Wrecks discovered in such shallow waters are likely to be vandalized, and require fast action by courts to protect the rights of excavation crews. Detailed archaeological study will be easy to conduct, but may not yield much in terms of results if the site has been heavily trafficked and vandalized prior to scientific excavation and analysis.

Wrecks that are accessible to manned submarine require significant expenses on the part of the search crews. As a result, this is not the type of expedition that is likely to be undertaken by State actors, but by privately funded ventures.⁸² Commercial salvors should be granted

⁸⁰ See Harris, *supra* note 9, at 235-40 for discussion of competing approaches (“Cultural Internationalism” and “Cultural Nationalism”) in International Law as to which countries would maintain ownership of cultural property.

⁸¹ The generally accepted depth limit for recreational SCUBA diving is 130 feet below sea level, due to the rapidly increasing atmospheric pressure underwater (increase of 1 atmosphere of pressure every 33 feet descended). PADI Adventures in Diving: Advanced Training for Open Water Divers 55 (PADI 1991).

⁸² There are some exceptions, such as the search for the Titanic, which was a joint venture between private American and public French actors. *See R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 952 (4th Cir. 1999).

access, and monetary reward for their efforts,⁸³ any relevant licensing deals, and other awards as courts determine are proper. Salvors should be required to employ archaeologists and follow archaeological duties of care. Wrecks at these depths are likely to be environmentally stable,⁸⁴ and safe from other treasure hunters, so there is no hurry to commence work when it may damage artifacts.

The deepest wrecks, those accessible only to unmanned submersibles, require extraordinary effort and expense to discover and recover. Courts should fashion remedies that fairly compensate crews for scientifically sensitive recovery efforts, in order to encourage further such efforts by those who have the necessary capital to engage in deep water exploration. Since the wrecks are likely to be environmentally stable, there should be no hurry to commence work, allowing for the most careful possible excavations.

C. Balancing the Parties' Interests

Non-historic wrecks – For wrecks which are deemed not historically significant, and from which scientific study will not yield useful information, the courts should be allowed to

⁸³ Courts can determine a fair award that allows salvors to work at a reasonable profit for their successful preservation and recovery of historic artifacts

⁸⁴ McQuown, *supra* note 29, at 316 (“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. An wooden sailing vessel that has lain on the sea bed for a few hundred years has long since reached a state of equilibrium with its environment and it has the potential to remain preserved for hundreds if not thousands of years.”) (quoting James M. Parrent, *Treasure Hunters in the Caribbean: The Current Crisis*, in *Underwater Archaeology Proceedings from the Society for Historical Archaeology Conference 32, 35* (James P. Delgado ed., 1988)).

maintain the ordinary maritime common law regimes.⁸⁵ There is no need for a higher duty of care or for preservation of the artifacts. If an expeditionary crew seeks title under the law of finds, there is no reason why, if the ship is determined to be abandoned, that they should not be allowed sole dominion over their find. Similarly, if there is a known owner or successor in interest, then the law of salvage should still be applicable. Though it relies on the legal fiction of continued marine peril,⁸⁶ it is not an altogether unreasonable doctrine. It allows a rightful owner to retain their property while rewarding the crew whose efforts returned it to the terrestrial earth. Though payment amounts and possible *in specie* awards will still need to be litigated, that is no different than the current situation, and there is certainly ample case law to guide the courts in this area.

Historic wrecks – The cases of historically significant wrecks are much more complicated, for the reasons discussed in Part I of this paper. Courts need to factor in the issues presented by Tiers 1 and 2, *supra*, as well as myriad other concerns unique to each wreck. The primary problem can be articulated as “who pays for the recovery?” If a historically significant wreck is discovered by a private expedition, and they are not allowed to sell items from the wrecks – at least until after years of study are completed – how can the expedition be fairly compensated for their contribution to history and society?

One approach courts can use is a modified *Titanic* model, where the party that finds a wreck is granted exclusive rights to proceed with recovery efforts, subject to archaeological duty of care and employment of sufficiently trained staff (specifics will need to be at discretion of

⁸⁵ See Murphy, *supra* note 7, at 167. (There are an estimated 50,000 wrecks in US territorial waters, 90% or more are not believed to be historically significant.).

⁸⁶ See *supra*, notes 37-39, and accompanying text.

court). In the *Titanic* case,⁸⁷ the salvor agreed not to sell any artifacts recovered⁸⁸ from the ship, but sought revenue from alternative methods, including “exhibitions for which they had contracts, a projected two hour documentary, receiving finances through the sale of videos . . . [and] organizing cruises to the wreck site.”⁸⁹ Following this model, once artifacts are retrieved, catalogued and studied, finders will be allowed to exhibit artifacts, market videos, sell replicas of artifacts, and engage in other forms of commerce that do not affect the original artifacts’ scientific value. Title to the original artifacts will be given to State or other cultural institutions (research museums, universities, Smithsonian, etc.), subject to a prohibition on sale/transfer. In the case of precious metals or other highly valuable objects, if not needed for scientific study, or at a time after such study is completed, then the finders can be awarded a significant or complete share (e.g., if a treasure trove of gold bullion is discovered on a wreck, the State should not receive a windfall profit for the work of the commercial salvage outfit that discovered and recovered the gold).

In cases where the above model may not be appropriate, such as when there is no ready market for replicas or videos, court can fashion an alternative set of remedies for the salvor. Recovery rights can be awarded on a contract basis – allowing commercial enterprises a fair profit for their efforts, commensurate with the amount of skill and expertise needed to find and recover artifacts from wreck. Allowances can be made for extraordinary efforts or expenditures on the part of the searching expeditions. Title to objects should vest in State or other cultural

⁸⁷ *RMS Titanic, Inc., v. The Wrecked and Abandoned Vessel*, 924 F.Supp 714 (E.D. Va. 1996)

⁸⁸ They did, however, sell coal recovered from the *Titanic*; as coal is not man-made, it was not considered an artifact. *Id.* at 718.

⁸⁹ Howard M. McCormack, *The Titanic Venture: Who Owns the Ocean Deep?* 13, (Sep. 1999) (delivered at Houston Marine Ins. Seminar).

institutions in most cases. If a time comes when scientific study of all or part of the artifact collections has finished, then title can be transferred to finders in cases where extraordinary skill or expertise were needed to find and recover the artifacts. This approach ensures that salvors are provided adequate compensation for their efforts, removing any incentives to work outside of the legal channels.

These two methods provide the best balancing of interests, at the discretion of the courts in any individual case. The scientific value of the artifacts is preserved first and foremost, but the profit-making incentives are not reduced to such a great degree that piracy becomes an attractive option. It also provides an allowance for artifacts to be sold once all scientific study is complete, allowing items to enter the stream of commerce instead of being allowed to deteriorate on the shelves of museum storerooms.⁹⁰

State versus Federal law, and the ASA – In the opinion of this commentator, the ASA is not a workable statute in its current form. The first revision should be the removal of the 3 mile territorial limit; if the ASA is to govern historic shipwrecks, then it needs to have the broadest possible range so that the greatest number of wrecks can be included in its jurisdiction. Second, the ASA should not automatically divest the federal government of title, because the states are not in a better position to ensure historic preservation. “When states do implement the necessary programs to protect historic shipwrecks, for the most part these programs are under-funded.”⁹¹ This is clearly problematic, given that ASA was “premised on the view that historic shipwreck

⁹⁰ Anyone who has seen the movie *Indiana Jones and the Raiders of the Lost Ark* is familiar with this fate: at the end of the movie, the Ark of the Covenant is “placed in an undisclosed government storage facility. It is crate number 9906753, one of thousands, gathering dust in a top secret warehouse.”

<http://www.indianajones.com/marshall/artifact/arkofthecovenant/index.html> (last visited December 9, 2005).

⁹¹ Braunstein, *supra* note 31, at 313.

exploration and recovery should be carried out by state governments using tax revenue rather than private salvors using private risk capital.”⁹² A better solution would be to encourage private exploration, with public reimbursement for missions that succeed. Under this approach, the risk is carried by the private actors, and not by the public; but, when an exploration returns historically significant wrecks and artifacts, the public pays a fair price to the expedition’s crew and financiers to reward them for their contributions to humanity.⁹³

By following the simple guidelines presented in this paper, Congress and the courts can better align the interests and incentives of the preservation and commercial exploration communities. As the laws currently stand, there is too much confusion as to substantive law and jurisdiction, leading to perverse incentives that can place salvors outside the law and historic artifacts in jeopardy. With a little effort, the confusion can be reduced enough to ensure that working within the law remains profitable, and at the same help protect humanity’s heritage to allow for proper scientific study.

⁹² Murphy, *supra* note 7, at 170.

⁹³ Premised, of course, of the following of an archaeological duty of care in recovery and preservation efforts.