

THE ARCHAEOLOGICAL DUTY OF CARE: THE LEGAL, PROFESSIONAL, AND CULTURAL STRUGGLE OVER SALVAGING HISTORIC SHIPWRECKS

*Christopher R. Bryant**

“The cultural heritage of the western world, the colonial appetite of the Spanish Empire, nearly three centuries of man’s timeless quest for wealth and adventure, and the distribution of authority in the American Federalist legal system are all substantially intertwined [in this Article].”¹

INTRODUCTION

The law of shipwrecks, treasure, and artifacts is an evolving area of the law² with significant social, scientific, cultural, and monetary

* Christopher R. Bryant is an associate of Fried, Frank, Harris, Shriver & Jacobson in New York.

¹ *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 544 (S.D. Fla. 1982). The court’s poetic statement concluded with “in this litigation.” *Id.*

² For example, the United Nations convened the Third Conference on the Law of the Sea (UNCLOS III) as recently as 1982, dividing national sovereignty over navigable waters into zones. See Third United Nations Conference on the *Law of the Sea*, United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter UNCLOS III].

A nation’s ability to assert jurisdiction over a shipwreck depends upon the location of the wreck. See *id. passim*; see also *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 964-65 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999); Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 *FORDHAM INT’L L.J.* 667, 668-72 (1994) (observing that shipwrecks found in international waters are subject to fewer restrictions than those found within a nation’s jurisdiction); David C. Frederick & Caroline M. Blanco, *A Look at . . . Sunken Treasure; Legally, the Waters Are Murky*, *WASH. POST*, Aug. 30, 1998, at C03, 1998 WL 16552808 (noting that “[t]he fate of wrecks now depends entirely on where the ship happened to sink”). Although UNCLOS III became effective on November 16, 1994, the United States has not ratified it. Brad L. Bacon, Note, *Enforcement Mechanisms in International Wildlife Agreement and the United States: Wading Through the Murk*, 12 *GEO. INT’L ENVTL. L. REV.* 331, 352 (1999). Even though it has not been ratified, UNCLOS III may still be binding on the United States. For example, at least one lower court recently held that the United States is bound by UNCLOS III pending ratification or rejection by the Senate. See *Mayaguezanos Por La Salud Y El Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (D.P.R.), *aff’d*, 198 F.3d 297 (1st Cir. 1999) (indicating that the United States must adhere to “the agreement to which the executive branch has tentatively made the United States a party”); see also Lawrence J. Kahn, Comment, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 *TUL. ENVTL. L.J.* 595, 641 (1994) (stating that

implications.³ Moreover, after centuries of international development and application,⁴ it remains an unsettled and disputed area of the law.⁵ There are countless historic shipwrecks containing valuable treasure and artifacts to which the law must be applied,⁶ especially in light of the sophisticated search and salvage technologies now available.⁷ In fact, technology is so advanced today that “it [is now] possible to find, visit and remove artifacts

UNCLOS III places obligations upon the United States to preserve archaeological finds). In addition, the United States enacted the Abandoned Shipwreck Act of 1987 (ASA), which seeks to protect certain shipwrecks resting in U.S. waters by vesting title in such wrecks with states. See Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-2106 (1994)); Brendan I. Koerner, *The Race for Riches: Under the Sea, Treasure Hunters and Scientists Battle for History's Bounty*, U.S. NEWS & WORLD REP., Oct. 4, 1999, at 44, 49 (stating the ASA “grant[s] states ownership of abandoned wrecks within 3 miles of their coasts”). UNCLOS III and the ASA are discussed in Part II herein. In addition, the laws of finds and salvage as applied to historic shipwrecks are still evolving. See *infra* Part II.

³ See *R.M.S. Titanic, Inc.*, 171 F.3d at 959-70 (considering such issues as whether salvors-in-possession have exclusive rights to photograph vessels and whether U.S. district courts have jurisdiction to decide salvage rights over foreign wrecks resting in international waters).

⁴ International admiralty law precedes the U.S. Constitution and has been applied for over 3,000 years. *Id.* at 960. It was codified as long ago as 900 B.C.E. in ancient Rhodes; 533 C.E. in Rome in Justinian's *Corpus Juris Civilis*; 1063 in the City of Trani, Italy; and 1189 in England in the form of the Law of Oleron. *Id.* International maritime laws “constitute a part of the continuing maritime tradition of the law of nations—the *jus gentium*.” *Id.*

⁵ See Koerner, *supra* note 2, at 49 (noting that laws governing the treatment of shipwrecks are “sketchy”). In addition to jurisdictional issues, controversy exists over whether courts should still apply the laws of finds and salvage to historic shipwrecks. See Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 199-203 (1999) (arguing that salvage law should not apply to historic shipwrecks); *infra* Part II.D.2 (discussing the United Nations Educational, Scientific and Cultural Organization's (UNESCO's) goal of effectively abolishing the laws of finds and salvage with respect to historic shipwrecks).

⁶ See *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the “Seabird,”* 941 F.2d 525, 529 (7th Cir. 1991) (noting that 50,000 abandoned shipwrecks are resting in U.S. navigable waters); Koerner, *supra* note 2, at 45-46 (remarking that “millions of ships, from prehistoric dugouts to rubber-clad German U-boats, still lie submerged”).

⁷ See Koerner, *supra* note 2, at 46 (describing how the “latest generation of survey equipment, diving gear, and aquatic robots puts even the deepest wrecks within reach”). Remotely operated vehicles (ROVs) are highly effective and represent the state-of-the-art in underwater search technology. *Id.* ROVs recently located a 2,500 year-old Phoenician trading ship under 3,000 feet of water in the Mediterranean and a steamer that sank off the coast of North Carolina in 1857 loaded with three tons of gold. *Id.* In addition, “there have been a plethora of legal battles since the technology for recovery has become so advanced.” Paul S. Edelman, *Who Gets Treasure Recovered from Sea?*, N.Y.L.J., Dec. 4, 1992, at 3. Current technology is so advanced that “[s]ubmarine robots are now picking up treasure,” thus making wrecks resting thousands of feet underwater salvageable. *Id.* (discussing the discovery of the *S.S. Central America* 160 miles off the coast of South Carolina at a depth of 8,000 feet); see also *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 455 (4th Cir. 1992) (addressing the ownership rights to the *S.S. Central America* and its gold treasure that was worth \$1.6 million in 1857). The gold was estimated to be worth \$1 billion in 1992. Edelman, *supra*, at 3.

from shipwrecks long beyond our power to reach.”⁸ For example, after resting 12,500 feet below the surface of the North Atlantic from the time of its sinking in 1912, the *Titanic* was discovered in 1985 nearly 400 miles off the coast of Newfoundland.⁹

With the advent and aggressive use of new technologies,¹⁰ the debate has intensified over whether commercial salvage should be permitted with respect to historic shipwrecks.¹¹ For instance, many archaeologists consider certain historic shipwrecks to be underwater “museums” containing cultural heritage,¹² while others consider certain shipwrecks, particularly naval wrecks, to be underwater cemeteries that should be protected from salvage or recovery.¹³ Salvors,¹⁴ however, dismiss such arguments and contend that archaeologists and other non-profit entities (generally referred to herein as “archaeologists”) simply want the opportunity to salvage, recover, or preserve historic shipwrecks themselves.¹⁵ Moreover,

⁸ *Full Fathom Deep*, Editorial, N.J.L.J., May 11, 1998, at 30; see *supra* note 7 and accompanying text. “Twenty years ago there was no such argument [over shipwrecks], because nobody—explorers or commercial salvagers—had the technological means to search for sunken vessels in waters more than a few hundred feet deep.” William Mullen, *Titanic Exhibition: History Or Grave Robbing? Technology Offers The Chance To Salvage Sunken Ships From Almost Any Depth. Many Want Them Left In Peace.*, CHI. TRIB., Dec. 12, 1999, at 1, 1999 WL 2940921 (discussing how new technology has dramatically altered the debate over shipwrecks).

⁹ *R.M.S. Titanic, Inc.*, 171 F.3d at 951. Salvaging the *Titanic* has been described as “time-consuming, dangerous, and expensive.” *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624, 627 (E.D. Va. 1998), *aff’d in part, rev’d in part*, 171 F.3d 943 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) [hereinafter *R.M.S. Titanic, Inc. II*]. For more information regarding underwater discovery technology, see James A.R. Nafziger, *The Titanic Revisited*, 30 J. MAR. L. & COM. 311, 312 (1999).

¹⁰ See Koerner, *supra* note 2, at 46 (noting the current “mad dash” and “craze” for the recovery of shipwrecks); see also *Ancient Flood Created Black Sea Abyss: Scientists Say Old Ships in Near-Mint Condition May Be Preserved on Floor*, ORLANDO SENTINEL, Oct. 10, 1999, at A18, 1999 WL 26014692 (observing that the use of new technology has “unlocked . . . a new age of discovery reminiscent of the early days of space travel”).

¹¹ See Koerner, *supra* note 2, at 47 (stating that archaeologists cringe at the thought of salvors raising historic shipwrecks or recovering artifacts from them); Mullen, *supra* note 8 (explaining that scholars do not want shipwrecks disturbed unless it is for archaeological research, while commercial salvors view shipwrecks as sources of wealth).

¹² See Koerner, *supra* note 2, at 47-49 (arguing that salvors are destroying history)

¹³ See *id.* at 50 (noting Spain’s view that sunken Spanish galleons are military graveyards). The archaeological director from the non-profit Institute of Nautical Archaeology at Texas A&M University-College Station has likened salvors to grave robbers and believes historic shipwrecks should be given the same protections as American Indian burial sites. See *id.* at 47.

¹⁴ “[A] salvor . . . is one 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 a duty of employing himself for the preservation of the vessel.” *Elrod v. Luckenbach S.S. Co.*, 62 F. Supp. 935, 936 (S.D.N.Y. 1945).

¹⁵ See Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 189-92 (1995).

salvors allege that if they are precluded from salvaging historic shipwrecks, such shipwrecks will be lost forever because archaeologists lack the requisite funding to perform salvage, recovery, or preservation operations in a meaningful quantity.¹⁶

In Part I, this Article considers (1) whether historic shipwrecks should be afforded absolute protection as underwater cemeteries,¹⁷ (2) the monetary value placed on historic shipwrecks by salvors,¹⁸ and (3) the struggle between salvors and archaeologists over the proper treatment of historic shipwrecks.¹⁹ Part II discusses the laws of finds and salvage as applied to historic shipwrecks, particularly in light of recent judicial trends, certain federal and state laws, and existing and proposed international treaties.²⁰ Part III proposes that admiralty courts expand upon the judicially created Archaeological Duty of Care (ADC) as an alternative to the approach now being considered by the United Nations for the management of historic shipwrecks.²¹ The ADC imposes certain requirements upon salvors with respect to salvaging historic shipwrecks so as to protect their historical, archaeological, and monetary value.²² In this last Part, it is also argued that the ADC will preserve the traditional laws of admiralty, the jurisdiction of admiralty courts, and the financial incentives that lead to the discovery of new historic shipwrecks by salvors—all of which the United Nations, among others, is now seeking to abrogate.

I. HIGH STAKES FOR CONTROL OF HISTORIC SHIPWRECKS AND TREASURE

A. *Shipwrecks as Protected Cemeteries*

Neither history nor the law treats shipwrecks, historic or otherwise, as protected underwater cemeteries.²³ It is argued,

¹⁶ See Koerner, *supra* note 2, at 49 (stating that salvors believe that historic shipwrecks are doomed if left only to archaeologists because of their long wait for funding). “We have the funding, which is the difficulty [non-profits] run into.” *Id.* (quoting Tom Gidus of Recovery Salvage, Inc., a Florida-based commercial salvage company) (emphasis added).

¹⁷ See *infra* Part I.A.

¹⁸ See *infra* Part I.B.

¹⁹ See *infra* Part I.C.

²⁰ See *infra* Part II.

²¹ See *infra* Part III.A.

²² See *infra* Part III.B.

²³ See *infra* notes 28-30 and accompanying text. In a technical sense, many shipwrecks are, in fact, gravesites. For example, over 1500 perished when the *Titanic* sank. David Glovin, *Titanic Lawsuit Says Investors in Salvage Effort Weren't Paid*, PLAIN DEALER

however, that salvaging shipwrecks “disturb[s] the final resting places of those who lost their lives in a shipwreck disaster.”²⁴ The historic, social, scientific, and monetary value of historic shipwrecks, however, dictates that they should not be treated as underwater cemeteries protected from salvage or recovery.²⁵ The decision to recover the *H.L. Hunley*, a Confederate submarine known to contain the remains of soldiers, underscores the notion that historic shipwrecks should be salvaged and recovered even when human remains are present.²⁶ Upon recovery, the remains of the *Hunley*’s crew will be studied by a forensic team and then reburied in a military ceremony.²⁷

Moreover, throughout history, shipwrecks have been treated as anything but underwater cemeteries.²⁸ The existence of the laws of finds and salvage illustrates that shipwrecks, historic and otherwise, are viewed under the law as property subject to salvage and recovery.²⁹ In fact, “the general presumption under the maritime law of salvage [is] that historic shipwrecks are in marine peril and need to be salvaged so that they can be returned to the stream of commerce.”³⁰ Moreover, it should be remembered that while cemeteries are the *intended* resting place for the dead, shipwrecks are not.

As noted, naval shipwrecks are regarded by some as underwater cemeteries that should be protected from salvage and recovery.³¹

(Cleveland), Jan. 1, 2000, at 2C, 2000 WL 5127001.

²⁴ Ole Varmer, *The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 293 (1999) (stating that many deem salvage operations to be disrespectful and akin to grave robbing); see Sean R. Nicholson, Comment, *Mutiny as to the Bounty: International Law’s Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters*, 66 UMKC L. REV. 135, 140 (1997) (noting that many relatives of those who perished in shipwrecks compare salvage efforts to “disturbing a cemetery”).

²⁵ See *Full Fathom Deep*, *supra* note 8, at 30 (noting that shipwrecks are “of great interest to the public and sometimes [are of] great commercial value”); see also Edelman, *supra* note 7 (“[S]eeking treasure is, in most cases, not a hobby. It is a business enterprise with some huge rewards.”).

²⁶ See Friends of the Hunley, *The Official Site of the Hunley*, at <http://www.hunley.org> (last revised Feb. 6, 2001) (on file with Albany Law Review).

²⁷ See *id.*

²⁸ Varmer, *supra* note 24, at 293 (observing that salvage laws do not address or consider shipwrecks as grave sites); see *infra* Parts II.A.-B (explaining the maritime laws of finds and salvage).

²⁹ See *Martha’s Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987) (addressing the “generic” question of which admiralty law doctrine, finds or salvage, applies to *property* recovered from the ocean floor).

³⁰ Varmer, *supra* note 24, at 281 (noting the contrast between federal historic preservation laws and the maritime law of salvage); see also *infra* Part II.B (discussing the law of salvage in depth).

³¹ See *supra* note 13 and accompanying text. The United States treats *some* naval wrecks

For example, in June 1993, a diver discovered a German World War II U-boat off of Cape Cod, Massachusetts.³² Germany, concerned with preserving the sanctity of the site, argued that the U-boat was a war cemetery and that the bodies contained within the wreckage should not be disturbed by salvors or divers.³³ Despite such protests, however, another U-boat discovered in the Potomac River may become an “underwater park” open to divers.³⁴ Of course, the U-boat would be of even more value and interest to the public and archaeologists if it were recovered, as was the *H.L. Hunley*.

Spain, like Germany, has also argued that historic Spanish shipwrecks resting in U.S. waters should be treated as underwater cemeteries. Spain recently challenged a U.S. commercial salvage firm, Sea Hunt, Inc., in U.S. district court over the rights to two Spanish galleons, *La Galga* and the *Juno*, which Sea Hunt discovered off the coast of Virginia.³⁵ It is unclear how many lives were lost on *La Galga*, but at least 413 lives were lost on the *Juno*.³⁶ Spain argued that the shipwrecks were “military gravesites, and anything that [was to be] done with them must respect those sensitivities.”³⁷ While the district court determined that Spain expressly abandoned *La Galga* under a 1763 treaty ending the Seven Years War,³⁸ the court of appeals reversed this finding on the grounds that the treaty did not act to expressly abandon *La Galga*.³⁹

as military gravesites. Varmer, *supra* note 24, at 293 (noting that the *Arizona*, a ship that sank during the attack on Pearl Harbor, is treated as such a site).

³² David Arnold, *Sunken Nazi Sub Reportedly Found Off Cape*, BOSTON GLOBE, June 11, 1993, at 1, 1993 WL 6596956. Other German U-boats have been located off the coasts of Rhode Island, North Carolina, and Delaware. Kahn, *supra* note 2, at 640.

³³ Kahn, *supra* note 2, at 640 n.278. Germany was particularly sensitive about this issue because the bones of crewmembers taken from a sunken U-boat off of the Rhode Island coast were sold as souvenirs. *Id.* at 640 n.280.

³⁴ *Id.* at 641. The U-boat, the *Black Panther* (U-1105), an extremely rare rubber-coated version designed to avoid detection by sonar, was discovered at the bottom of the Potomac River, only forty miles from Washington, D.C. *Id.* at 641.

³⁵ *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 680 (E.D. Va. 1999), *aff'd in part, rev'd in part*, 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001) (noting that the galleons sank in 1750 and 1802, respectively); *see also* Koerner, *supra* note 2, at 50 (reporting that Sea Hunt spent \$1 million in its search for the galleons).

³⁶ *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 639 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001).

³⁷ Koerner, *supra* note 2, at 50; *see Sea Hunt, Inc.*, 47 F. Supp. 2d at 692 (noting Spain's argument that the *Juno* should be designated as a grave site).

³⁸ *See Sea Hunt, Inc.*, 47 F. Supp. 2d at 688, 690-92 (“Article XX of the 1763 Treaty constitute[d] . . . an express abandonment by Spain of its title to LA GALGA. LA GALGA is consequently an abandoned shipwreck, and belongs to Virginia under the terms of the Abandoned Shipwreck Act.”).

³⁹ *See Sea Hunt, Inc.*, 221 F.3d at 646 (concluding that although the treaty expressly abandoned land and property, no mention of property in the sea was made in the applicable

Spain also retained ownership of the *Juno* because there was no evidence that Spain had lost title to the vessel (either by expressly abandoning it or because it fell under the actual control of the United States before its sinking).⁴⁰ Sea Hunt then sought a partial salvage award from Spain for locating the *Juno* and for services rendered.⁴¹ Spain argued that the *Juno* was a “maritime grave” and that it never intended for the *Juno* to be salvaged.⁴² In an unpublished opinion the court later held that Sea Hunt was not entitled to a salvage award from Spain.⁴³

A shipwreck that claimed at least 413 lives must be treated with dignity and respect. In light of the potential fortune that may be contained in the *Juno*,⁴⁴ however, some have speculated that Spain will salvage the wreck itself.⁴⁵ Regardless, the social, historical, scientific, and monetary value of the *Juno* as a salvaged vessel far exceeds its value as a so-called underwater cemetery (especially one that is not likely to contain any human remains after nearly 200 years at the bottom of the Atlantic Ocean) and dictates that it should be salvaged.⁴⁶

provision).

⁴⁰ See *Sea Hunt, Inc.*, 47 F. Supp. 2d at 691-92. The court noted that there is no such doctrine as “constructive capture.” *Id.* at 691. Thus, a “captor must have actual control over [an] enemy ship to establish capture before sinking.” *Id.* Because there was no evidence that the United States had actual control over the *Juno* before it sank, Spain retained title to the *Juno*. See *id.* at 691-92. It has been said, however, that when a vessel is destroyed and sinks, any jurisdiction its country of origin had over it ceases. See *United States v. Smiley*, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864) (No. 16,317); see also Mary S. Timpany, Note, *Ownership Rights in the Titanic*, 37 CASE W. RES. L. REV. 72, 96 (1986) (stating that the *Titanic*’s British registry did not give Great Britain exclusive jurisdiction over the *Titanic* or property recovered from it). In light of the preceding, Spain’s claim to title to the *Juno* is not so clear.

⁴¹ *Sea Hunt, Inc.*, 47 F. Supp. 2d at 692.

⁴² *Id.*

⁴³ See *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 191 F.R.D. 508, 510 (E.D. Va. 1999) (noting therein, without discussion of the merits of Spain’s claim that the *Juno* is a “maritime grave,” that the court had entered a decision on June 25, 1999 denying Sea Hunt a salvage award with respect to the *Juno*). In affirming the denial of a salvage award, the court of appeals noted that the district court stated:

“It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage Because Sea Hunt had prior knowledge of Spain’s ownership interests and had reason to expect Spain’s ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award.”

Sea Hunt, Inc., 221 F.3d at 647 n.2.

⁴⁴ See Koerner, *supra* note 2, at 50 (stating that the treasure recovered from another Spanish galleon, *El Salvador*, is now valued at approximately \$124 million).

⁴⁵ See *id.* (noting Sea Hunt’s suspicion that Spain will salvage the vessel itself despite the Spanish government’s claim to the contrary).

⁴⁶ See *infra* Part I.C.2 (discussing the deterioration of shipwrecks). But see DONALD

It is because historic shipwrecks have such diverse value that they should not glibly be labeled as cemeteries and kept off-limits to salvors and others.⁴⁷ This value was clearly acknowledged by Congress in enacting the Abandoned Shipwreck Act of 1987 (ASA).⁴⁸ For example, in the ASA's Congressional statement of findings⁴⁹ and the legislative record, abandoned shipwrecks are described as "resources" over which states have the responsibility of management.⁵⁰ Importantly, the ASA does not expressly make reference to human remains. Moreover, the word "resource," as it is commonly understood, is wholly inconsistent with traditional notions of cemeteries.⁵¹

The United Nations Convention on the Law of the Sea (UNCLOS III) also acknowledges the value of historic shipwrecks, and states that member nations have a "duty to protect objects of an archaeological and historical nature found at sea."⁵² UNCLOS III does not define archaeological and historical objects, nor, as with the ASA, does UNCLOS III expressly refer to human remains.⁵³

SHOMETTE, *THE HUNT FOR HMS DEBRAAK: LEGEND AND LEGACY* 221 (1993) (describing the loss of human remains aboard the *DeBraak* when it was salvaged).

⁴⁷ See Cottrell, *supra* note 2, at 667 (acknowledging the educational and cultural value of shipwrecks); see also *infra* Part I.B (analyzing the monetary value of shipwrecks). But see Nafziger, *supra* note 9, at 311 (describing a television broadcast of the first *Titanic* artifacts being brought to the surface as nothing more than a "ghoulish publicity stunt"); Timpany, *supra* note 40, at 99 n.204, 102 (stating that the main body of the *Titanic* should be left alone as a memorial to the dead because "[y]ou don't go poking around in someone's grave" (quoting a survivor of the *Titanic*)).

⁴⁸ Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-2106 (1994)). The ASA vests title to certain abandoned shipwrecks in the United States and then transfers it to the state where the wreck is located. See 43 U.S.C. § 2105(a), (c). Furthermore, the ASA makes inapplicable the laws of finds and salvage to such wrecks. See 43 U.S.C. § 2106.

⁴⁹ 43 U.S.C. § 2101.

The Congress finds that—(a) States have the responsibility for management of a broad range of living and nonliving *resources* in State waters and submerged lands; and (b) included in the range of *resources* are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

Id. (emphasis added).

⁵⁰ See H.R. Rep. No. 100-514(I), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (asserting that five to ten percent of an estimated 50,000 shipwrecks resting in state waters have "historical significance"); see also *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Seabird,"* 941 F.2d 525, 529 (7th Cir. 1991) (discussing the legislative history of the ASA—specifically, the concerns of its sponsor Senator Bill Bradley, regarding the "historical value of shipwrecks"). The ASA defines "shipwreck" as "a vessel or wreck, its cargo, and other contents." 43 U.S.C. § 2102(d).

⁵¹ See Cottrell, *supra* note 2, at 667 (referring to shipwrecks as resources that should not be jeopardized). Webster's defines "resources" as "available means (as of a country or business);[.] computable wealth (as in money, property, products);[.] or] immediate and possible sources of revenue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1934 (1993).

⁵² UNCLOS III, *supra* note 2, art. 303(1), 21 I.L.M. at 1326.

⁵³ See M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of*

Regardless, UNCLOS III states that no admiralty laws, including the law of salvage, are affected by this duty.⁵⁴ Therefore, because the laws of finds and salvage do not prohibit the salvaging of wrecks containing human remains, even if the definition under UNCLOS III of an archaeological or historical object did include human remains, nothing in UNCLOS III would prohibit salvaging vessels containing human remains.⁵⁵

Historic shipwrecks must be treated with respect, particularly if they contain, or contained, human remains. This respect, however, should not extend so far as to treat historic shipwrecks as underwater cemeteries that cannot be salvaged for various purposes.⁵⁶ Such treatment is an “extreme form of preservation”⁵⁷ that vitiates the historic laws of finds and salvage and dooms shipwrecks to complete loss with the passage of time. Consider that,

Within the anthropological and archeological fields, it is widely acknowledged that the quest for knowledge about the past and the preservation of that knowledge for future generations is an important endeavor; it is also widely acknowledged that to gain such knowledge requires examining ruins of earlier cultures—including human skeletal remains.⁵⁸

the Impact of Cultural Property on Finders and Salvage Laws, 14 ARIZ. J. INT'L & COMP. L. 223, 244 (1997) (stating that UNCLOS III uses “vague terms” and that it fails to either define the terms at issue or provide guidelines to interpret them).

⁵⁴ See UNCLOS III, *supra* note 2, art. 303(3), 21 I.L.M. at 1326.

⁵⁵ See Harris, *supra* note 53, at 244 (noting that some view UNCLOS III as granting broad “freedom of the high seas” where nations have “common ownership and [the] common ability to exploit”); see also UNCLOS III, *supra* note 2, art. 149, 21 I.L.M. at 1295 (emphasizing that the fate of archaeological and historic objects rests on their benefit to “mankind as a whole”); *id.* art. 303(1), 21 I.L.M. at 1326 (requiring states to cooperate in protecting archaeological and historic objects found at sea). Article 149 does, however, state that objects of an archaeological or historical nature should be “preserved or disposed of” with “particular regard being paid” to the wishes of the nation of origin. *Id.* art. 149, 21 I.L.M. at 1295.

⁵⁶ See Nafziger, *supra* note 9, at 327 (arguing that it is unacceptable to say that all commercial salvaging is grave-robbing). Underwater shipwrecks are “fundamentally unnatural. . . . [They] do not entirely ‘belong’ in situ on the sea bottom like a Mayan ruin belongs on a particular site of land; they also ‘belong’ at their home ports and intended destinations. . . . [R]ecovery [is acceptable] where circumstances permit.” *Id.* But see Nicholson, *supra* note 24, at 140 (noting that the founder of the Titanic Historical Society deems salvaging the vessel as “nothing more than grave robbing fueled by technology”).

⁵⁷ Nicholson, *supra* note 24, at 140.

⁵⁸ Diana Dee Thomas, *Indian Burial Rights Issues: Preservation or Desecration*, 59 UMKC L. REV. 737, 766 (1991).

B. Gold and Fame

The monetary value of many historic shipwrecks and the availability of new technology has drawn an increasing number of salvors into the salvage industry.⁵⁹ As a result, the debate over salvaging historic shipwrecks is now intense.⁶⁰ Two such salvors are Phil Masters and Barry Clifford, both of whom left behind more traditional lifestyles to undertake salvaging historic shipwrecks.⁶¹ Masters discovered the *Feversham*, a British frigate that sank in 1711; Blackbeard's flagship, the *Queen Anne's Revenge*;⁶² and *El Salvador*, a Spanish galleon that sank in 1750, carrying 240,000 gold and silver pesos.⁶³ Masters stated that he wants to make *El Salvador* a household name like *Titanic* by producing documentary videos and auctioning off recovered treasure and artifacts.⁶⁴ Clifford has been referred to as "ultra-famous" for discovering the pirate ship *Whydah* in 1984⁶⁵ and his fame may grow if his recent claim of

⁵⁹ See Mullen, *supra* note 8 (noting the recent fervor of treasure hunters who are aided by ever increasing technology); see also Wendy Williams, *Barry Clifford: The Treasure Hunter Who Discovered the Pirate Ship Whydah Says He Has Recovered a Piece of Wood from the Boston Tea Party*, OFFSHORE, Apr. 2000, at 15.

⁶⁰ See Mullen, *supra* note 8 (noting that the monetary value of historic shipwrecks has created international disputes and that state governments have joined the action by seeking a portion of the "booty" discovered in their waters). "We're about to go into an era when we're going to locate and recover hundreds, maybe thousands, of sunken vessels in deep water, especially ancient vessels . . ." *Id.* (quoting Robert D. Ballard, the oceanographer who discovered the *Titanic*).

⁶¹ See Alec Foege & Tom Duffy, *Sunken Dream: Barry Clifford Has Found Captain Kidd's Long-Lost Pirate Ship—Maybe*, PEOPLE MAGAZINE, May 22, 2000, at 169, 172 (noting that Clifford was a gym teacher, lifeguard, and construction worker before turning to commercial salvaging); Koerner, *supra* note 2, at 45 (stating that after enduring "years of long commutes and white-collar drudgery," Masters quit his job and relocated in order "to learn the secrets of hunting sunken treasure").

⁶² Paul Rodgers, *Hurricanes Threaten Feared Pirate Blackbeard's Sunken Flagship*, INDEP. (London), Mar. 19, 2000, at 7, 2000 WL 6466506 (ceding all rights to the ship, Masters relinquished the *Queen Anne's Revenge* to the state of North Carolina). It is likely he had no choice under the ASA. See Koerner, *supra* note 2, at 49 (explaining that the ASA "granted states ownership of abandoned wrecks within 3 miles of their coasts").

⁶³ Koerner, *supra* note 2, at 45.

⁶⁴ *Id.*

⁶⁵ Williams, *supra* note 59, at 15. The *Whydah*, captained by Black Sam Bellamy, sank nearly 300 hundred years ago off of Cape Cod. *Id.* Clifford discovered part of the vessel in the early 1980s, and has since recovered over 200,000 artifacts. *Id.* The hull was discovered in 1998 and Clifford soon after made preparations to recover it. *Id.* For a critical view of the salvage of the *Whydah*, see Kahn, *supra* note 2, at 619. Kahn refers to the *Whydah's* artifacts as being lost as a result of the salvage of the vessel. *Id.* Such artifacts, however, were *truly* lost for almost 300 years until Clifford discovered the vessel and salvaged it. With respect to another shipwreck, one court said, "[w]ithout plaintiff's efforts . . . wrecks might remain undiscovered." *Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 746 F. Supp. 1334, 1351 (N.D. Ill. 1990). Similarly, referring to the efforts of Mel Fisher in locating and salvaging the *San Christo del Valle*, also known as the *Nuestra*

finding an artifact from the Boston Tea Party is valid.⁶⁶

Fame aside, the potential for overwhelming financial reward is the true engine behind the salvaging of historic shipwrecks.⁶⁷ Not surprisingly, it is also what concerns and disturbs many archaeologists the most.⁶⁸ Salvaging historic shipwrecks is so prohibitively expensive, that outside investors are often sought to fund salvage operations.⁶⁹ Investors, however, are often left disappointed and disillusioned.⁷⁰ Returns have been astounding, however, with respect to *El Salvador*, discussed above,⁷¹ and the Spanish galleon the *Nuestra Senora de Atocha* (the “*Atocha*”), discovered by famed treasure hunter Mel Fisher.⁷² For example, the *Atocha* sank in 1622, forty nautical miles west of Key West, Florida, with a “cargo of New World treasure” bound for Spain.⁷³ Profits earned from, among other things, selling the *Atocha*’s treasure, valued at between \$250 and \$400 million, were largely returned to investors of the salvage operation.⁷⁴ Artifacts and treasure from the

Senora de la Concepcion, the district court stated that without plaintiff’s efforts, “artifacts which had been lost in the ocean depths for over two hundred and sixty-four years . . . would otherwise have remained unknown to the terrestrial world.” *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 554 (S.D. Fla. 1982).

⁶⁶ See Williams, *supra* note 59, at 15 (describing Clifford as “internationally famous”). Some dispute his claim because Boston Harbor has been dredged many times since the Boston Tea Party. *Id.* (noting that archaeologists have “responded with considerable skepticism”); see also Jules Crittenden, *Treasure Island; Explorers May Have Located Sunken Pirate Ships*, BOSTON HERALD, Jan. 19, 2001, at 003, 2001 WL 3791060 (noting Clifford’s recent possible discovery of two pirate ships off the coast of Madagascar: Captain Kidd’s *Adventure Galley* and Captain Billy One-Hand’s *Fiery Dragon*).

⁶⁷ See Mullen, *supra* note 8 (ascribing to commercial salvors the view that shipwrecks are “potential gold mines [and] mother lodes . . . worth millions of dollars”).

⁶⁸ See Koerner, *supra* note 2, at 47 (“Stories of wrecks mauled and artifacts destroyed [by salvors in their quest for riches] are legion in archaeological circles.”).

⁶⁹ See Nicholson, *supra* note 24, at 138 (identifying treasure hunters as the only people capable of finding private funding); Brendan I. Koerner, *Shipwrecked Savings: Better Stick with IPOs, Instead*, U.S. NEWS & WORLD REP., Oct. 4, 1999, at 50, 50 (outlining the risks some investors take in funding explorations for shipwrecks); see also *infra* Part I.C (discussing archaeologists’ lack of funding and resources).

⁷⁰ See Koerner, *supra* note 69, at 50 (identifying scam artists as a pitfall for investors of treasure hunts).

⁷¹ See *supra* notes 63-64 and accompanying text (noting Masters’s discovery of the Spanish galleon); Koerner, *supra* note 2, at 45 (describing *El Salvador* as the “Holy Grail” of shipwrecks due to the riches thought to be on board).

⁷² See Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 673 (1982) (detailing the court battle between Fisher and the State of Florida for ownership of the *Atocha*). For an interesting history of Mel Fisher, see *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 544-48 (S.D. Fla. 1982).

⁷³ *Treasure Salvors, Inc.*, 458 U.S. at 673. Five hundred fifty persons died aboard the *Atocha*. *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 333 (5th Cir. 1978).

⁷⁴ Mike Harden, *Lost—and Found—Treasures Off Key West*, CHI. SUN-TIMES, Jan. 30, 2000, at 2, 2000 WL 6666081.

Atocha can be purchased on the Internet and at Fisher's Key West museum and exhibition at prices reaching \$3,000.⁷⁵

Not unlike Mel Fisher's aggressive marketing of the *Atocha's* artifacts, the salvors of the *Titanic* entered into a licensing agreement with an event promotion firm to market and create exhibits with the *Titanic's* artifacts.⁷⁶ The deal was to pay the salvors a minimum of \$8.5 million per year.⁷⁷ Moreover, items recovered from the *Titanic* at the time of its sinking, such as a boarding pass and a desk chair, were sold for nearly \$100,000 and \$500,000, respectively.⁷⁸ A similar marketing strategy is being planned for Blackbeard's pirate ship, and will likely include a documentary and the sale of replicas of artifacts found within the vessel.⁷⁹

There are numerous other historic shipwrecks containing gold and valuable artifacts that have been the subject of salvage operations (and, of course, disputes over salvage and ownership rights).⁸⁰ For example, the *Brother Jonathan* sank in 1865 off the coast of California with gold bullion then valued at up to \$2 million;⁸¹ the *Islander* went down near Juneau, Alaska in 1901 with a sizable shipment of gold for the Canadian Bank of Commerce;⁸² the *Aquila* sank in 1863 off the coast of San Francisco with armaments and materials then worth \$400,000;⁸³ and the *I-52*, a Japanese WWII submarine, sank with nearly 4,500 pounds of gold bullion, currently valued at \$25 million.⁸⁴

⁷⁵ Koerner, *supra* note 2, at 48-49 (illustrating the demand fueling the treasure hunting industry).

⁷⁶ Mullen, *supra* note 8.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Koerner, *supra* note 2, at 49. (noting that one such replica is a syringe thought to have been used by pirates to inject mercury as a cure for syphilis).

⁸⁰ See Nancy Ann Jeffrey & Ken Bensinger, *After 143 Years, A Ship of Gold Finally Arrives*, WALL ST. J., Jan. 28, 2000, at B1, 2000 WL-WSJ 3015818 (discussing the end of twelve years of litigation over title to gold estimated to be worth over \$100,000,000 recovered from the *S.S. Central America*, which sank in 1857). A prominent California sports agent obtained a large portion of the gold and will commence a massive marketing and sales campaign. *Id.* Sotheby's Holdings is expected to auction off another mass of the gold. *Id.*

⁸¹ *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 495 (1998) (outlining the litigation surrounding the ownership of the *Brother Jonathan's* artifacts and their value).

⁸² *Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189, 1192 (9th Cir.), *cert. denied*, 531 U.S. 820 (2000).

⁸³ *The Camanche*, 75 U.S. 448, 449, 8 Wall. 29 (1869).

⁸⁴ See Harris, *supra* note 53, at 233 (stating that U.S. forces sank the submarine during World War II); Koerner, *supra* note 2, at 46 (noting that the submarine's treasure has yet to be retrieved).

C. Salvors Versus Archaeologists

1. Profits and Funding

Professional competition and jealousy fuel the debate between salvors and archaeologists over the management of historic shipwrecks. For example, salvors are generally better funded than archaeologists, yet they lack the professional legitimacy enjoyed by archaeologists.⁸⁵ The cornerstone of archaeologists' opposition to the commercial salvage of historic shipwrecks, however, is that salvors are profit driven and traditionally have not used archaeologically sensitive methods.⁸⁶ The potential for riches drives salvors to undertake expensive and risky salvage operations.⁸⁷ Archaeologists and museums, however, view profiting from salvaging historic shipwrecks as a taint on the profession of marine archaeology.⁸⁸ Many museums refuse to exhibit artifacts recovered by salvors because they "don't want to be partners in the marketing or trafficking of archaeological materials,"⁸⁹ nor do they want to give the artifacts a "pedigree," thus driving up their market value.⁹⁰ The importance of salvors partnering with museums, however, may be diminishing in light of the growing use of other marketing tools

⁸⁵ See Koerner, *supra* note 2, at 47-49 (chronicling the rift between commercial salvors and archaeologists).

⁸⁶ See Varmer, *supra* note 24, at 295 (discussing the cost-effective methods of commercial salvors that compromise the scientific, cultural, and historic value of shipwrecks); Cottrell, *supra* note 2, at 669 (stating that "unregulated salvage [operations] could threaten an increasing number of historic shipwrecks"); Jance R. Hawkins, Note, *Reconsidering the Maritime Laws of Finds and Salvage: A Free Market Alternative*, 30 GEO. WASH. J. INT'L L. & ECON. 75, 76 (1996) (discussing the conflict between salvors and archaeologists over salvors' primarily financial motivation and lack of archaeological care); Koerner, *supra* note 2, at 49 ("As soon as you start talking about selling objects, you enter the commercialization of the past . . . and that's something that won't be acceptable to archaeologists."); see also *Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801, 809 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (denying plaintiffs a salvage award because they failed to conserve recovered artifacts; in fact, plaintiffs stored various items in their backyards, exposing the irreplaceable artifacts to the elements).

⁸⁷ See Cottrell, *supra* note 2, at 668 n.3 (noting the profit-driven nature of commercial salvors); Koerner, *supra* note 2, at 46-49 (discussing the economic motivation of salvors); see also Jeffrey & Bensinger, *supra* note 80 (stating that the payoff to salvors and investors from the salvaging of the *S.S. Central America* is estimated to be between \$100 million and \$250 million).

⁸⁸ See Koerner, *supra* note 2, at 46 ("An archaeological project is intended to preserve and record as much scientific data as possible; a commercial salvage project is intended to make a profit.").

⁸⁹ See *id.* at 48 (quoting James Delgado, executive director of the Vancouver Maritime Museum).

⁹⁰ *Id.* Selling artifacts is generally the primary method of capitalizing on shipwrecks. *Id.* at 49.

such as the Internet and self-created exhibitions.⁹¹ Regardless, it is likely that most archaeologists will continue to oppose or contest most, if not all, commercial salvage operations involving historic shipwrecks.⁹²

The disparity in funding between salvors and archaeologists is often stark. The cost of locating and salvaging a vessel is so prohibitive that many archaeologists simply lack the resources to search for shipwrecks and salvage or recover them.⁹³ For example, it was initially estimated that the cost of salvaging the *Titanic* could exceed \$1 billion.⁹⁴ Moreover, one salvor spent \$1 million to locate two Spanish galleons;⁹⁵ salvaging *El Salvador* will likely cost an additional \$5 to \$10 million;⁹⁶ \$12.7 million has already been invested in salvaging the *Central America*;⁹⁷ it cost \$2 million (1971 value) just to locate the *Atocha*;⁹⁸ and in 1863, a failed attempt to salvage the *Camanche* cost \$38,000, followed by an attempt to recover the vessel at a cost of \$110,000.⁹⁹

Archaeologists, however, deny that they lack sufficient funding, or that it factors into their opposition to commercial salvaging of historic shipwrecks.¹⁰⁰ Instead, archaeologists argue that they are opposed to such salvage, in part, because salvors lack expertise and

⁹¹ See *id.* at 48-49 (noting that the Internet “has allowed salvors to move treasures without museum seals of approval”).

⁹² See Nafziger, *supra* note 9, at 327 (discussing “archaeological purists” and their opposition to the salvage of any and all “heritage”). But see Mullen, *supra* note 8 (stating that not all museums object to displaying artifacts recovered from wrecks, including the Museum of Science and Industry, which displayed *Titanic* artifacts).

⁹³ See Peter E. Hess, *The Trouble With Treasure: Ethical Dilemmas for the Salvage Attorney*, 30 J. MAR. L. & COM. 253, 258 (1999) (noting the enormous costs that can be incurred during a salvage expedition); Varmer, *supra* note 24, at 289 (discussing the high costs of excavation, recovery, and conservation of shipwrecks); Jeffrey T. Scrimo, Recent Development, *Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks*, 5 OCEAN & COASTAL L.J. 271, 279 (2000) (stating that “[d]ue to budgetary restrictions and a lack of economic incentive,” archaeologists may not be able to sufficiently preserve and excavate shipwrecks and their artifacts).

⁹⁴ Timpany, *supra* note 40, at 78.

⁹⁵ Koerner, *supra* note 2, at 50 (referring to the financial resources expended by Sea Hunt to locate *La Galga* and the *Juno*).

⁹⁶ *Id.*

⁹⁷ Koerner, *supra* note 69, at 50 (stating that investors have not yet seen a return on their investment despite the three tons of gold recovered from the *S.S. Central America*).

⁹⁸ *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 333 (5th Cir. 1978) (noting that the salvors’ costs included four deaths).

⁹⁹ *The Camanche*, 75 U.S. 448, 450-51, 467-68, 8 Wall. 29-30 (1869) (noting that although the initial effort failed after several weeks, subsequent efforts were successful at salvaging the cargo and raising the ship after several months).

¹⁰⁰ See Koerner, *supra* note 2, at 49 (noting that archaeologists consider the “financial argument” to be “the big lie”).

often damage or destroy historic shipwrecks and artifacts.¹⁰¹ While this argument has merit, barring salvors from salvaging historic shipwrecks will bring about an end to the discovery and salvage or recovery of such shipwrecks in any meaningful number.¹⁰² Many salvage operations cost more than \$30,000 per day.¹⁰³ Archaeologists generally will have difficulty affording such an expense over the course of a prolonged salvage operation, and will often argue that it is better to forestall salvaging until the requisite funding is available and a proper excavation can be undertaken.¹⁰⁴

2. Delay and Marine Peril

Archaeologists object to salvors profiting from the salvage of historic shipwrecks.¹⁰⁵ Archaeologists, however, usually are not interested in—or capable of—salvaging a significant number of vessels themselves.¹⁰⁶ Indeed, it has been said that “qualified marine archaeologists’ have yet to discover a single shipwreck site in North American waters.”¹⁰⁷ The passage of time coupled with the lack of funding and interest on the part of archaeologists is detrimental to historic shipwrecks because shipwrecks, subjected to the elements and other perils, simply deteriorate.¹⁰⁸ The Fourth

¹⁰¹ See Kahn, *supra* note 2, at 612-15 (detailing examples of the lack of archaeological care exhibited by salvors). The *DeBraak*, a Dutch cutter later captured by the British, sank in the Delaware River in 1798. *Id.* at 612. The wreck was virtually destroyed by salvors-in-possession when they raised the vessel, causing the loss of countless artifacts that fell from the wreck. *Id.* at 614. The salvors of the *DeBraak* severely damaged “one of the most important underwater archaeological sites in the United States.” *Id.*

¹⁰² See Koerner, *supra* note 2, at 49 (noting that salvors possess the financing that archaeologists lack, and that salvors, in any event, discover the majority of shipwrecks).

¹⁰³ See Koerner, *supra* note 69, at 50 (observing that funding salvage operations is a risky venture and that even successful operations can wind up in expensive legal disputes).

¹⁰⁴ See Scrimo, *supra* note 93, at 278-79 (noting archaeologists’ lack of funding).

¹⁰⁵ See Varmer, *supra* note 24, at 295 (stating that because financial ventures are intended to maximize the profits of their backers, salvors use methodologies that minimize costs to the detriment “of science, history, culture, and natural resources”); Scrimo, *supra* note 93, at 278 (“The archaeological and preservationist communities are largely steadfast in their adherence to a principle of strict exclusion of profit seekers from historic shipwrecks”); Koerner, *supra* note 2, at 47, 49 (illustrating cases where salvors mishandled shipwrecks because of their interest in salvaging only marketable artifacts and noting that archaeologists find the sale of artifacts unacceptable).

¹⁰⁶ See Koerner, *supra* note 2, at 49 (arguing that available funding allows salvors to discover a majority of the shipwrecks); Mullen, *supra* note 8 (noting that some seek to protect ancient wrecks as “underwater museums”); *infra* notes 118-25 and accompanying text (discussing in situ preservation, a treatment of historical shipwrecks favored by many archaeologists).

¹⁰⁷ McLaughlin, *supra* note 15, at 190 n.237.

¹⁰⁸ See *id.* at 182 (noting that after a vessel sinks, it suffers immediate and severe deterioration); Mullen, *supra* note 8 (“[T]he Titanic is deteriorating at a rate that will leave it a mere ‘dark spot on the floor of the sea 100 years from now.’” (quoting G. Michael Harris, a

Circuit has described the *Lusitania* as being in “marine peril,” a condition that is presumed of sunken shipwrecks, because of the obvious risk of loss to the wreck and its contents.¹⁰⁹ The risk of loss is caused by the actions of the elements,¹¹⁰ dredging and oil-drilling operations,¹¹¹ vandalism,¹¹² and artifact pirates.¹¹³

The risk of marine peril at the hands of pirates and recreational divers should not be underestimated.¹¹⁴ Many recreational divers pick apart both historic and non-historic shipwrecks over which they do not have title or salvage rights.¹¹⁵ Of course, many of the

salvor of the *Titanic*); see also Kahn, *supra* note 2, at 595 (stating that there are not many shipwrecks over 100 years old that have survived); Nicholson, *supra* note 24, at 162 (noting that most pre-twentieth century wrecks have decomposed because of their wood composition).

¹⁰⁹ See Bemis v. The R.M.S. Lusitania, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *3-4 (4th Cir. Sept. 17, 1996) (unpublished table decision) (discussing “marine peril” as an element of establishing a salvage claim).

¹¹⁰ See Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft, 54 F. Supp. 2d 1172, 1174-75 (S.D. Fla. 1999), *rev'd*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001) (remarking that a wrecked aircraft located in the Atlantic Ocean was subjected to “years of exposure to a saltwater (highly corrosive) environment” and that its condition visibly worsened over a five year period); Platoro Ltd. v. The Unidentified Remains of a Vessel, 518 F. Supp. 816, 821 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983) (finding that the annual threat of ferocious hurricanes is a danger to shipwrecks resting on the sea floor). In addition, the *Queen Anne's Revenge*, located by a salvor but now in the possession of the State of North Carolina, is in grave danger of being completely destroyed by the action of hurricanes. See Rodgers, *supra* note 62 (stating that protective in situ measures have been inadequate).

¹¹¹ See Platoro Ltd., 518 F. Supp. at 821 (stating that marine peril can be created by drilling operations and that the *Santa Maria* was destroyed by the Army Corp of Engineers when it dredged the Port Mansfield channel).

¹¹² See McLaughlin, *supra* note 15, at 182-83 (noting that vandalism is a real threat facing underwater wrecks despite various legislation that has attempted to protect them from such threats).

¹¹³ See Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 557 (S.D. Fla. 1982) (noting that the shipwreck was subject to marine peril for purposes of salvage because of dangers posed by pirates and the elements).

¹¹⁴ See McLaughlin, *supra* note 15, at 182 (observing that shipwrecks face physical damage from underwater vandalism); see also Nafziger, *supra* note 9, at 327 (stating that as long as divers are kept at a safe distance, they should not be excluded from wreck sites to view and photograph them).

¹¹⁵ See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 723 (E.D. Va. 1996) [hereinafter *R.M.S. Titanic, Inc. I*] (discussing the appointment of a salvor to prevent “free-for-all” looting); GARY GENTILE, SHIPWRECKS OF NEW YORK 191 (1996) (describing the wreck of the *Oregon* and “the ease with which divers used to stock their shelves with *Oregon* mementoes”). The *Oregon* has been virtually picked clean but remains a popular dive site where divers can still find gold rings, jewelry, and silver coins. *Id.* See generally DANIEL BERG, WRECK VALLEY VOL. II: A RECORD OF SHIPWRECKS OFF LONG ISLAND'S SOUTH SHORE AND NEW JERSEY (1990) (detailing wreck sites for divers and containing countless photographs of divers who took artifacts from shipwrecks).

In Bemis v. The R.M.S. Lusitania, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *4 (4th Cir. Sept. 17, 1996) (unpublished table decision), the court discussed the plaintiff salvor's fears about “rogue” divers stealing the *Lusitania's* “artifacts[,] to which they are not entitled.” In seeking an injunction preventing divers from taking artifacts from the wreck, plaintiff presented a letter to the court written by a dive company to its customers stating

vessels dived on by recreational divers are not yet of historic value or interest to salvors or archaeologists and remain unclaimed through the laws of finds or salvage. Regardless, there can be no doubt that recreational diving and the threat thereof places historic shipwrecks in extreme marine peril.¹¹⁶ Clearly, the longer a ship remains below the sea, the greater the risk of its deterioration and destruction, until the wreck is of little value even to recreational divers.¹¹⁷

that a planned dive to the *Lusitania* would have to be made surreptitiously because the divers did not have permission, but that divers could take whatever they wanted because the charter company would “turn a blind eye.” *Id.* The dive company stated, however, that the group’s “wreck robbing instincts might have to be a tiny bit restrained.” *Id.*

¹¹⁶ See *supra* notes 114-15 and accompanying text (discussing the looting of shipwrecks by divers).

¹¹⁷ See *supra* notes 110-13 and accompanying text (outlining various causes of deterioration to shipwrecks). Interestingly, some courts have said that salvage operations, especially those done poorly or without authorization, pose a greater marine peril than merely leaving the vessel alone. See *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985). The court stated with respect to an unauthorized salvage operation that “[p]laintiff’s salvage efforts were directed toward a vessel that was not lost or suffering any marine peril Furthermore, plaintiff’s salvage efforts were not successful. The articles removed from the shipwreck site were not marked or identified so as to preserve their archaeological provenience [sic].” *Id.* In addition, some shipwrecks can reach a state of equilibrium in which little, if any, deterioration occurs to the vessel over time. For example, in the Black Sea, shipwrecks may be resting on the bottom in near perfect condition because of the lack of oxygen, light, and maritime life that normally destroy wrecks. *Ancient Flood Created Black Sea Abyss*, *supra* note 10 (discussing the peculiar traits of the Black Sea that serve to preserve what could be numerous wrecked vessels); see also Kahn, *supra* note 2, at 612 (discussing how a shipwreck can enter a state of equilibrium and thus be subjected to greater damage by salvors who are not using proper preservation techniques to prevent deterioration).

Some courts have also held that ancient, abandoned shipwrecks are not in marine peril for purposes of establishing a maritime salvage claim. See *Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 611 (D. Md. 1983), *aff’d*, 765 F.2d 139 (4th Cir. 1985) (stating that the vessel in question, which had been resting on and under the ocean floor for hundreds of years, was not in peril of being lost to the elements because it was “impervious to weather conditions above the surface of the sea” and safe from deterioration in general because it was buried in sand). As such, the court held that the law of salvage was not implicated when objects to be recovered are “marine antiquities which have been undisturbed for centuries.” *Id.* The district court, however, failed to recognize that wrecks are in peril of being destroyed from more than just above surface weather and underwater deterioration. For example, marine peril includes the action of pirates, dredging, and oil drilling. See *supra* notes 110-13 and accompanying text (describing causes of marine peril). In addition, the historic application of the law of salvage to shipwrecks is so well established that “federal courts in admiralty jurisdiction accept without comment the propriety of [the law in] shipwreck actions.” McLaughlin, *supra* note 15, at 161. But see *Frederick & Blanco*, *supra* note 2 (“[T]here can be little doubt that the rules created for salvage in admiralty law are ill-suited to determining whether and how to recover artifacts from historic shipwrecks.”).

3. Eliminating Competition from Salvors

If archaeologists are successful in barring their more aggressive and successful competitors—salvors—from salvaging historic shipwrecks, it may result in numerous historic shipwrecks remaining undiscovered forever¹¹⁸ or being “preserved” in situ.¹¹⁹ These scenarios, however, are unacceptable. First, the view that historic shipwrecks are somehow sacred, whether as underwater cemeteries or as de facto underwater museums, and should therefore be left untouched, is an “extreme form of preservation.”¹²⁰ Historic shipwrecks possess too much social, historical, scientific, and monetary value to be treated as underwater tombs or in situ museums, accessible only by a few.¹²¹ This approach would limit access to historic shipwrecks to recreational divers,¹²² high-end

¹¹⁸ See Cottrell, *supra* note 2, at 713 (noting that historic preservationists have limited resources to search for and recover wrecks); Nicholson, *supra* note 24, at 138 (describing salvors as often being “the only individuals capable of raising the necessary (and usually outrageous) funds to locate and successfully salvage a wreck”).

¹¹⁹ See *R.M.S. Titanic, Inc. I*, 924 F. Supp. at 723 (stating that the salvors therein did “more than merely preserve the site and the artifacts; [they] made the artifacts available to the public through exhibitions, thereby benefiting the public *more than the requisite at-site archaeological preservation could do*”) (emphasis added); see also *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 970 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (noting that monetary incentives must be provided for salvage to encourage recoveries otherwise salvors will “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”). The Fourth Circuit noted that this development would run counter to policies behind salvage law. See *id.* Thus, at least two courts have recognized the benefit of responsible salvage over in situ preservation. The creation of underwater parks, however, where shipwrecks are preserved in situ, has been encouraged through federal funding. Kahn, *supra* note 2, at 602; see Varmer, *supra* note 24, at 291-92 (stating that the benefits of in situ preservation, such as the creation of “underwater laboratories,” are seen as varied).

¹²⁰ Nicholson, *supra* note 24, at 140.

¹²¹ See *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 560 n.20 (S.D. Fla. 1982) (describing shipwrecks as valuable for three conflicting purposes: (1) structure; (2) artifacts; and (3) data); Cottrell, *supra* note 2, at 667 (stating that “shipwrecks have educational, recreational, and cultural value and contribute to our understanding of history”); *supra* note 119 and accompanying text (noting the benefits of responsible salvage over in situ preservation).

¹²² See BERG, *supra* note 115, at 7-17 (detailing many diving sites for recreational divers). There is a trend to create “underwater museums” or “underwater parks” where visitors can visit shipwrecks under the control of government entities or museums. For an example of this approach, see Florida Dep’t of State, Underwater Archaeological Preserves, at <http://www.dos.state.fl.us/dhr/bar/uap/> (last visited Aug. 26, 2001). Also, a waterfront property owner in Cape Fear, North Carolina wants to exhume 100-year-old tugboats shipwrecked in the mud along his property. Brian Feagans, *Historic Wrecks Could Benefit from Convention Center Plan*, MORNING STAR (Wilmington, N.C.), Mar. 17, 2000, at 4A, 2000 WL 3967344. The property owner wants to excavate the partially submerged tugs for a museum to be built as part of a convention center. *Id.* State archaeologists, however, who have jurisdiction over the tugs, believe that there is “probably already . . . a museum under the ground there” and instead have proposed a walkway be built out over the mud for visitors

tourist ventures,¹²³ those capitalizing on wrecks via underwater movies and video feeds,¹²⁴ and, of course, archaeologists.¹²⁵ Second, this approach would, in effect, place historic shipwrecks within the sole province of archaeologists. This “[j]ealous safeguarding” of shipwrecks by archaeologists for their own purposes is known as “opportunity preservation,” and occurs when archaeologists “maneuver . . . to limit access to and competition over an item.”¹²⁶ If only archaeologists have the right to conduct salvage, recovery, and scientific expeditions, shipwrecks may be lost forever because archeologists traditionally lack both the funding and speed required to recover historic shipwrecks and artifacts.¹²⁷ Therefore, it seems clear that “without private treasure hunters the sea will retain its ill-gotten bounty and the secrets of ages past.”¹²⁸

to observe the tugs. *Id.* Such an in situ museum may not last long considering that the tugs are already “rotting.” *Id.* In situ preservation may be a valid approach for some shipwrecks where salvage is inappropriate for whatever reason, however, it limits access to divers who can reach the site and will lead to the eventual destruction of the wrecks over time due to the elements.

¹²³ See *R.M.S. Titanic, Inc. II*, 9 F. Supp. 2d 624, 628-29 (E.D. Va. 1998), *aff’d in part, rev’d in part*, 171 F.3d 943 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (discussing “OPERATION TITANIC,” a tourist venture that charged \$32,500 per person and utilized a civilian submarine to reach the site).

¹²⁴ See Mullen, *supra* note 8 (discussing the use of the Internet to view images of shipwrecks that have been classified as protected underwater museums).

¹²⁵ See Varmer, *supra* note 24, at 291 (noting that shipwrecks that are preserved in situ can be used as “underwater laboratories” for archaeological study).

¹²⁶ McLaughlin, *supra* note 15, at 189-92 (discussing the conflicting positions between salvors and academia, including both ethical and legal implications).

¹²⁷ See *supra* Part I.C.1 (discussing the difference in funding between salvors and archaeologists); see also Harris, *supra* note 53, at 252 n.221 (noting the vast disparity between the number of shipwrecks located by divers and salvors and the number located by federal and state archaeologists). Non-commercial salvage and preservation operations overseen by state agencies are “usually under-funded and thus unlikely or unable to . . . [conduct] successful salvage operation[s].” *Id.* at 252. *But see* John D. Broadwater, *Raiders of the Lost Artifacts*, 2 THE WEB OF TIME: PAGES FROM THE AMERICAN PAST 2, at <http://www.thewebsoftime.com/Issue-6/Broadwater.htm> (last visited Aug. 26, 2001) (on file with Albany Law Review) (“George Bass, often referred to as the ‘father of underwater archaeology’ . . . has been able to conduct a series of significant underwater archaeology projects around the world through support from donors, grants and other sources.”).

¹²⁸ Nicholson, *supra* note 24, at 138. One of the most stunning examples of the impact that limited funds have on archaeologists and government entities engaged in the research and recovery of historical wrecks is detailed in *International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1174, 1181 (S.D. Fla. 1999), *rev’d*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001), which involved not a ship, but an airplane. In 1990, a commercial salvage firm located the wreck of the *TBD-1 Bruno # 0353*, a World War II U.S. Navy aircraft. *Id.* at 1174. The plane crashed into the Atlantic Ocean in 1943, eight miles off the coast of Florida. *Id.* During the “Battle of the Coral Sea,” the plane operated from the U.S. aircraft carrier *Yorktown* and played an integral role in damaging and sinking Japanese aircraft carriers. *Id.* The plane later crashed into the sea during instruction maneuvers; the crew survived. *Id.* The Navy made no attempt to salvage the plane and it was “stricken” from their records. *Id.* Salvors soon

4. Responsible Salvage

Salvors have not always been careful to preserve the integrity and value of historic shipwrecks and artifacts,¹²⁹ even when acting under the laws of finds and salvage.¹³⁰ Irresponsible salvage is not consistent with the public's interests in historic shipwrecks,¹³¹ and

discovered the historical significance of the aircraft and offered to sell its location along with a video of the site to the National Museum of Naval Aviation (NMNA) in Florida. *Id.* at 1174-75. The offer was refused because the NMNA "had no budget for such acquisition." *Id.* at 1175. The salvors subsequently sold the location of the wreck to Douglas Champlin, a fighter plane collector and owner of the Fighter Aces Museum in Arizona. *Id.* Champlin unsuccessfully tried for several years to enter into a contract with NMNA, whereby he would recover the plane in exchange for one or more surplus fighter planes that the government possessed. *Id.* On his own and seemingly undaunted, Champlin recovered the plane's radio mast and part of the canopy. *Id.* Champlin later assigned his interest in the aircraft to plaintiff, which filed an in rem salvage claim in district court. *Id.* at 1175-76. In 1998, the United States made a unilateral "[a]ssignment" of title to the plane to NMNA "for salvage and eventual static display." *Id.* at 1175. The United States then intervened in the in rem action seeking to reclaim the salvaged parts of the airplane. *Id.* at 1176. At trial, however, the Director of the Naval Historical Center in Washington, D.C. and the Director and Assistant Director of NMNA "all testified that there [was] *no budget or any funding* for locating and recovering historic aircraft from a water environment." *Id.* at 1175 (emphasis added). Yet, "[t]hese experts are unanimous in their opinion that *TBD-1 Buno # 0353*, located in deep international waters east of Miami Beach, Florida is one of the rarest and most historic military aircraft still in existence." *Id.* The above-stated group also expressed the notion that the United States lacked the necessary funding to engage in a timely attempt at saving the plane, and further noted that NMNA had no ability to even "trade government owned surplus aircraft in return for salvage services." *Id.* at 1180. After finding that the plaintiff made out a valid salvage claim, the district court awarded it salvage rights. *See id.* at 1182. The Court of Appeals for the Eleventh Circuit reversed, however, finding that the United States had the right to refuse salvage operations commenced without its permission and remanding the case for the determination of a possible award, contingent upon whether the salvage operation was performed despite an objection by the United States. *See Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1263 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001).

This aircraft, described as one the most historic military planes in existence, would never have been located but for the efforts of salvors. Furthermore, the U.S. government stated flatly that it had no funding whatsoever to search for and recover such aircraft. *Int'l Aircraft Recovery, L.L.C.*, 54 F. Supp. 2d at 1175. This, however, did not prevent the United States from asserting a claim to the aircraft fully eight years after it was first located by salvors. *See id.* at 1176. The district court noted that the salvor had "ably engaged in successfully returning to the people of this country, a historic aircraft which otherwise would [have] remain[ed] lost beneath the sea." *Id.* at 1178.

¹²⁹ *See* Varmer, *supra* note 24, at 295 (noting the propensity of commercial salvors to disregard the historical significance of artifacts to maximize their profits); Kahn, *supra* note 2, at 614 (discussing the disastrous salvaging of the *DeBraak*).

¹³⁰ *See* David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 343 (noting that the International Law Association views salvors as "looters" and "destroyers of our past").

¹³¹ *See* *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (recognizing the public's interest in vessels being salvaged in an archaeologically sensitive manner); *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310 (S.D. Fla. 1986) (noting that the public has an interest in shipwrecks because they provide a glimpse into history); Cottrell, *supra* note 2, at 667.

hinders the pursuit of historic preservation and learning.¹³² Ironically, the more that historic shipwrecks and their artifacts are damaged during salvage, the less salvors are likely to recover by way of salvage awards or selling artifacts.¹³³ In addition, negative publicity resulting from salvage operations only makes it more difficult for salvors to exhibit recovered artifacts in already skeptical museums,¹³⁴ and, ultimately, to market artifacts from the wreck.

As a result, some salvors have attempted to adhere more strictly to generally accepted archaeological procedures when salvaging historic shipwrecks and have formed trade organizations that impose certain conditions and restrictions upon members with respect to treatment of historic shipwrecks, artifacts, and the environment.¹³⁵ Their success, however, may be limited because so many archaeologists still refuse to work with salvors.¹³⁶ Regardless of the obstacles, not only is this approach sensible with regard to maximizing profits from salvage operations, it may help salvors fend off professional and political attacks and gain respectability and legitimacy in the field of underwater archaeology and marine recovery.¹³⁷ Thus, while the work of salvors has led to the discovery

¹³² See Cottrell, *supra* note 2, at 667-68 (stating that the public has an interest in shipwrecks that should not be jeopardized by the application of traditional maritime law).

¹³³ See McLaughlin, *supra* note 15, at 190 n.240 (noting that the value of recovered artifacts increases when wreck sites are accorded archaeological care); Koerner, *supra* note 2, at 48 ("Some salvors have learned that a touch of archaeological sensitivity can fatten their bottom line.").

¹³⁴ The Council of American Maritime Museums prohibits the exhibition of artifacts removed from commercial salvage sites. McLaughlin, *supra* note 15, at 191. Additionally, the International Congress of Maritime Museums opposes the display of artifacts retrieved in contravention of archaeological standards. Nafziger, *supra* note 9, at 318.

¹³⁵ Salvors have formed trade associations to institute uniform salvage guidelines to protect the archaeological and historical value of shipwrecks and artifacts during salvage. Koerner, *supra* note 2, at 49. The Professional Shipwreck Explorers Association (ProSEA), for example, has enacted a mandatory Code of Ethics that requires members to conduct themselves according to certain criteria. See THE PROFESSIONAL SHIPWRECK EXPLORERS ASSOCIATION, CODE OF ETHICS (1999), at <http://www.prosea.org/about/codeethics.html> (last visited Aug. 26, 2001) (on file with Albany Law Review) [hereinafter CODE OF ETHICS]. Seahawk Deep Ocean Technology, Inc., a commercial salvage firm, notes in its mission statement that it explores and recovers wrecks "in an archaeologically sound manner." Seahawk Deep Ocean Technology, Inc., Mission Statement, at <http://www.seahawkdot.com/mission.htm> (last visited Sept. 6, 2001) (on file with Albany Law Review). In addition, courts have begun to require salvors to use generally accepted techniques designed to protect historic shipwrecks during salvage or recovery efforts. See *infra* Parts III.A.-B (discussing the creation and operation of the ADC).

¹³⁶ See McLaughlin, *supra* note 15, at 190 (stating that archaeologists blackball any colleagues who work with, or for, salvors); Koerner, *supra* note 2, at 49 (noting that archaeologists are reluctant to work with salvors because they view the sale of artifacts as unacceptable).

¹³⁷ See McLaughlin, *supra* note 15, at 189-90 (noting that even though many marine

of numerous historic shipwrecks and the preservation of their artifacts,¹³⁸ clearly, the profession can do better.¹³⁹

II. HEAVY SEAS FOR THE LAWS OF FINDS AND SALVAGE

The debate over whether it is appropriate for salvors to continue to salvage historic shipwrecks is largely centered around whether the laws of finds and salvage, after centuries of evolution and application, are still relevant to historic shipwrecks.¹⁴⁰ In light of growing public policy concerns and existing and proposed national and international measures, the laws of finds and salvage have been marginalized and are in danger of being displaced altogether.¹⁴¹

A. “Finders, Keepers”¹⁴²

The law of finds vests title to property that has been lost or abandoned in the first person that lawfully and fairly appropriates the property and reduces it to his or her possession with the intention to become its owner.¹⁴³ Mere discovery of lost or

archaeologists try to distance themselves from the work of salvors, the archaeological community has recognized the adeptness that salvors display in wreck recovery). Salvors have added much in the way of operational improvement to advance their image in the eyes of archaeologists. See Koerner, *supra* note 2, at 48 (expanding on the notion that modern day salvors respect the historical worth of wrecks, and that contemporary projects are geared to salvage site protection).

¹³⁸ Salvage firms continue to successfully locate new shipwrecks. See Paul Frustaglio, *Visa Gold Explorations, Inc.—Visa Gold Recovers New Artifacts*, CAN. STOCKWATCH, Mar. 14, 2000, 2000 WL 15268079 (reporting the recent identification of artifacts dating back to 1700); see also Kahn, *supra* note 2, at 639 (stating that a majority of the sunken vessel discoveries are made by salvors); *id.* at 614 (describing a situation where salvors worked with the government to discover an archaeological rich vessel and to preserve its artifacts).

¹³⁹ Interestingly, courts traditionally have not required salvors to do better. For example, in *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983), the court refused to hold salvors to the standard of expertise required of professional marine archaeologists. Many salvage cases do not even reach this issue. Along with the fact that salvors often are not held to the higher standard, it should be noted that some salvage efforts end in disaster. See Kahn, *supra* note 2, at 615 (stating that “[t]he search for sunken treasure [can] result[] in the deliberate disregard for objects of historical importance”).

¹⁴⁰ See *infra* Part II.D.2 (explaining how UNESCO proposes to virtually abrogate the laws of finds and salvage with respect to shipwrecks).

¹⁴¹ See *infra* Parts II.C.-D (discussing existing and proposed measures that severely limit traditional maritime laws).

¹⁴² *Martha’s Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987).

¹⁴³ See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 343 (5th Cir. 1978) (acknowledging that the American rule of lost property vests title in the finder); Sweeney, *supra* note 5, at 196-97 (“The first finder of property without an owner on the high seas who takes physical possession of it acquires title under the law of finds.”).

abandoned property is not sufficient for title to be granted to a finder; the property must be reduced to actual or constructive possession.¹⁴⁴ In *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*,¹⁴⁵ for example, the court stated that the law of finds applied to the *Atocha* because it was abandoned—as it had been “lost for centuries”—and because it was uncontested that plaintiffs “were in possession of the *Atocha*.”¹⁴⁶ In order to decide whether property is either lost or abandoned, courts consider several factors, including: (1) the condition of the property at the time it was abandoned; (2) the amount of time that has passed since the property was lost or abandoned; (3) any steps taken by the original owner to recover the property; and (4) whether the original owner has relinquished all hope of recovery.¹⁴⁷

The law of finds is now generally accepted as a maritime concept despite lacking an admiralty pedigree.¹⁴⁸ Some courts, though, have been reluctant to apply the law of finds to shipwrecks.¹⁴⁹ Previously, the law of finds was seen as more appropriate for property—such as whales and fish—that had never been owned by anyone.¹⁵⁰ The

¹⁴⁴ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999); *Bemis v. The R.M.S. Lusitania*, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *2 (4th Cir. Sept. 17, 1996) (unpublished table decision) (noting that mere discovery is insufficient to establish possession); *Timpany*, *supra* note 40, at 89-90.

¹⁴⁵ 569 F.2d 330 (5th Cir. 1978).

¹⁴⁶ *Id.* at 336-37.

¹⁴⁷ See *Timpany*, *supra* note 40, at 89-90 & n.138 (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960)).

¹⁴⁸ See *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 459-60 (4th Cir. 1992) (referring to the law of finds as a common law doctrine); *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the “Seabird,”* 941 F.2d 525, 532 & n.10 (7th Cir. 1991) (stating that the law of finds is now commonly considered a maritime concept despite its common law genesis).

¹⁴⁹ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (explaining that because the law of finds fully deprives a true owner of title, admiralty courts favor the law of salvage); *Dluhos v. The Floating and Abandoned Vessel, Known as “New York,”* 162 F.3d 63, 74 (2d Cir. 1998) (acknowledging that some courts prefer the law of salvage over finds because it is better suited to maritime activity and results in less competition and secrecy); *Columbus-Am. Discovery Group*, 974 F.2d at 460-61 (stating that the law of finds is disfavored because its rules encourage finders to conceal their recoveries and noting that “[t]here are only a handful of cases which have applied the law of finds”); *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) (describing the law of finds as “harsh, primitive, and inflexible” because it fully deprives an owner of title and the law of salvage as better able to meet the needs of “marine activity”); *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 820 (W.D. Tex. 1981), *aff’d in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983) (declining to apply the law of finds, regardless of its potential value, due to Fifth Circuit precedent). *But see Columbus-Am. Discovery Group*, 974 F.2d at 476-77 (Widener, J., dissenting) (dismissing the view that courts prefer salvage over finds as “erroneous” and stating that courts, in fact, favor applying the law of finds, especially with respect to ancient shipwrecks to avoid the application of several legal fictions).

¹⁵⁰ See *Columbus-Am. Discovery Group*, 974 F.2d at 459-60 (remarking that the rules of the

recent trend, however, as illustrated by *Chance v. Certain Artifacts Found and Salvaged from the Nashville*¹⁵¹ and *Treasure Salvors, Inc.*, is to apply the law of finds to historic shipwrecks because the passage of time creates an inference that the original owner has abandoned the vessel.¹⁵² Thus, with respect to “treasure salvage cases . . . involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property This calls for the application of the law of finds.”¹⁵³ Some courts, however, are unwilling to apply this recent trend or to dispense with the “nonabandonment fiction”—which holds that ships are never abandoned—unless more evidence exists than mere passage of time.¹⁵⁴

law of finds encourage would-be finders to engage in subterfuge “to hide their recoveries”).

¹⁵¹ 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985).

¹⁵² *See id.* at 804 (applying the law of finds to the vessel at issue, which sank in 1863, because the long lapse in time had created an inference of abandonment); *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (“Disposition 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.”); *see also Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189, 1194 n.2 (9th Cir.), *cert. denied*, 531 U.S. 820 (2000) (asserting that when a vessel is found to be abandoned, the law of finds applies, not the law of salvage); *R.M.S. Titanic, Inc.*, 171 F.3d at 962 (“[T]he law of finds is most often applied in the context of long-lost shipwrecks.”); *Dluhos*, 162 F.3d at 74 (recognizing the recent trend of questioning the law of salvage with regard to long abandoned shipwrecks); *Columbus-Am. Discovery Group*, 974 F.2d at 461 (noting that the law of finds is appropriately “applied to previously owned sunken property only when that property has been abandoned by its previous owners”); *Marex Int’l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) (applying the law of finds to a shipwreck that dated back to 1840 and asserting that “[t]he law of finds . . . applies when a shipwreck has been abandoned by its owner, either through formal renunciation of title or through inaction over time and the failure to assert any claim to the vessel in court”). *But see Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 556 (S.D. Fla. 1982) (illustrating an example of a court choosing to apply salvage over the law of finds “because the law of salvage provide[d] a complete and adequate basis for resolving the instant case”).

Abandonment can be determined either by an affirmative renouncement of ownership rights or by an inference drawn from the circumstances. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 499, 508 (1998) (explaining that in the absence of a statutory definition of “abandonment,” the maritime definition applies); Edelman, *supra* note 7 (stating that the law of finds applies where there has been either a clear or express abandonment); *see also Fairport Int’l Exploration, Inc. v. The Shipwrecked Vessel, Known as the Captain Lawrence*, 177 F.3d 491, 499 (6th Cir. 1999) (noting the Sixth Circuit’s adoption of the “inferential abandonment test,” which allows a finder or salvor to prove abandonment without proving that the original owner expressly renounced ownership).

¹⁵³ *Columbus-Am. Discovery Group*, 974 F.2d at 462. The court also stated that while the law of salvage is favored, the law of finds *should* be applied when it is shown through clear and convincing evidence that the prior owner abandoned the property, and that in the case of shipwrecks that have been lost for a long period of time, courts may infer abandonment if the prior owner does not appear to assert ownership. *Id.* at 464-65.

¹⁵⁴ *See Fairport Int’l Exploration, Inc.*, 177 F.3d at 499-500 (agreeing “that lapse of time, alone, does not necessarily establish abandonment” and stating that several factors must be considered to infer abandonment); *Dluhos*, 162 F.3d at 74 (discussing the nonabandonment

As a result of the ASA, however, the law of finds no longer applies to shipwrecks that are located in U.S. territorial waters and that are “embedded” or “on submerged lands,” as defined by the statute.¹⁵⁵ The effects of this abrogation of a long-standing law of admiralty are discussed below.¹⁵⁶ In addition, it is argued below that, despite the recent trend to the contrary, the law of salvage should be given preference over the law of finds with respect to historic shipwrecks because, once title vests in the finder, admiralty courts lack jurisdiction to ensure that the finder protects the archaeological integrity and value of the historic shipwreck and its contents.¹⁵⁷

B. The Law of Salvage

The law of salvage, unlike that of finds, does not divest title to a vessel from its owner.¹⁵⁸ In fact, the nonabandonment fiction states that “an owner . . . retains title to a ship no matter how long it has been abandoned.”¹⁵⁹ Instead, salvage rewards the salvor with a generous and liberal percentage of the value of the saved vessel and/or its cargo and contents.¹⁶⁰ In some cases, especially when no

fiction but not deciding its application because the vessel therein was clearly not abandoned); *see also* *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 641 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001) (stating that when a party appears in court to assert ownership over an ancient shipwreck, the finder must prove express abandonment and may not rely on the inference thereof). *But see* *Bemis v. The R.M.S. Lusitania*, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *3 (4th Cir. Sept. 17, 1996) (unpublished table decision) (presuming that the vessel’s contents were abandoned because no one appeared to assert ownership); *Columbus-Am. Discovery Group*, 974 F.2d at 474-75 & n.6 (Widener, J., dissenting) (suggesting that the mere passage of time, alone, is strong enough circumstantial evidence for a court to infer abandonment).

The Sixth Circuit requires that abandonment be proven with clear and convincing evidence. *See Fairport Int’l Exploration, Inc.*, 177 F.3d at 501. The Fourth Circuit also follows this approach. *See Columbus-Am. Discovery Group*, 974 F.2d at 467-68 (holding that because the law is reluctant to find an abandonment, it must be proved by clear and convincing evidence).

¹⁵⁵ *See* Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, §§ 6-7, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2105-2106 (1994)); *see also infra* note 176 and accompanying text.

¹⁵⁶ *See infra* Part II.C (discussing the abandonment of admiralty law under the ASA).

¹⁵⁷ *See infra* Part III.A (comparing and contrasting the law of finds and law of salvage with respect to the ADC).

¹⁵⁸ *See Columbus-Am. Discovery Group*, 974 F.2d at 459. Instead of being awarded title, salvors obtain from the admiralty court a maritime lien on the wreck for their service. *See Sweeney, supra* note 5, at 191 (noting that the maritime lien is afforded priority status if a judicial sale of the vessel occurs). This lien gives the salvor an exclusive possessory interest in the property to ensure payment for salvage services from the ship owner. *See R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999).

¹⁵⁹ *Dluhos*, 162 F.3d at 74. The law of salvage, in fact, assumes that property is owned by another and has not been abandoned. *See Columbus-Am. Discovery Group*, 974 F.2d at 460.

¹⁶⁰ *See R.M.S. Titanic, Inc.*, 171 F.3d at 962 (describing the purpose of the law of salvage as encouraging prompt and effective aid to vessels in marine peril by awarding compensation);

owner comes forth to claim the vessel or property recovered from it, the admiralty court will award the salvor the full value of the vessel and/or whatever was recovered therefrom.¹⁶¹

Salvage is intended to save and preserve property that is in marine peril from destruction, damage, or loss and to compensate the salvor with an award determined by an admiralty court.¹⁶² It is well established that to assert a successful salvage claim, it must be shown that: (1) the vessel or cargo was in marine peril;¹⁶³ (2) the salvor rendered service voluntarily;¹⁶⁴ (3) the salvor was successful either in whole or in part;¹⁶⁵ and (4) the salvor established "possession" over the shipwreck.¹⁶⁶

Once a salvor has successfully asserted a salvage claim, the court will determine the award by considering various factors, including:

- (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

Columbus-Am. Discovery Group, 974 F.2d at 459 (noting that salvors are entitled to very liberal awards).

¹⁶¹ See *Columbus-Am. Discovery Group*, 974 F.2d at 459 ("Such awards often exceed the value of the services rendered, and if no owner should come forward to claim the property, the salvor is normally awarded its total value.").

¹⁶² See *id.* at 460 (noting that salvage law enables courts to encourage orderly conduct with respect to saving property); see also Varmer, *supra* note 24, at 281 (stating that the policy behind salvaging wrecks is to return them and/or their contents to the stream of commerce).

¹⁶³ This element is without question the most hotly debated with respect to historic shipwrecks. See *supra* Part I.C.2 (discussing the risk of delay of recovering shipwrecks as a marine peril).

¹⁶⁴ See *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 820 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983).

¹⁶⁵ See *The "Sabine"*, 101 U.S. 384 (1879) (noting that proof of success is "essential"); *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 672 (5th Cir. 1974) (finding that uncontradicted proof of performance of acts that bear directly on the success of a salvage operation entitles the actor to an award).

¹⁶⁶ See *Bemis v. The R.M.S. Lusitania*, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *3 (4th Cir. Sept. 17, 1996) (unpublished table decision) (finding that the salvor must either have possession or "show that he has acted with due diligence and that his salvage operations are ongoing"); *Hener v. United States*, 525 F. Supp. 350, 357 (S.D.N.Y. 1981) (observing that, although possession is required, possession in the context of the law of salvage means something less than in the law of finds and is more easily established than under the law of finds). In *R.M.S. Titanic, Inc. I*, 924 F. Supp. 714, 722-24 (E.D. Va. 1996), the court held that in order for a salvor to be granted exclusive salvage rights to a shipwreck it must use due diligence in that (i) it is conducting salvage at a level of activity reasonable under the circumstances; (ii) its activities must be ongoing with respect to salvaging the wreck site; and (iii) its efforts must be clothed with the prospect of success.

value of the property saved. (6.) The degree of danger from which the property was rescued.¹⁶⁷

Archaeologists oppose the application of salvage law to historic shipwrecks, because they argue that its purpose, to return property in marine peril to the stream of commerce, is inapplicable to such shipwrecks.¹⁶⁸ Archaeologists contend that historic shipwrecks will not be returned to the stream of commerce in the traditional sense, but instead will be looted of valuables and artifacts that will in turn be sold as souvenirs.¹⁶⁹ This emotional response to salvage law (an ancient law that fully sanctions and encourages salvors to search for and salvage all shipwrecks) ignores the fact that, because salvage is incentive driven, salvors are responsible for locating the overwhelming majority of historic shipwrecks.¹⁷⁰

As proposed below in Part III.A, the solution to salvors' failure to preserve the historical and archaeological significance of historic shipwrecks during salvage operations is for admiralty courts to impose the ADC on them.¹⁷¹ This duty requires salvors to document to the court's satisfaction that the historical and archaeological integrity of historic shipwrecks is protected during salvage.¹⁷² Imposition of this duty is a very recent judicial trend, and one not

¹⁶⁷ *The Blackwall*, 77 U.S. (10 Wall.) 1, 13-14 (1869) (stating that compensation is not viewed by the admiralty courts as mere payment, but rather "as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property"); see *The Camanche*, 75 U.S. 448, 479, 8 Wall. 29 (1869) (listing factors to be considered in determining salvage awards, including the difficulties encountered, exposure to danger, expenses incurred, skill required, and time and labor spent in completing the enterprise); see also *Columbus-Am. Discovery Group*, 974 F.2d at 468 (adopting and applying the elements set forth in *The Blackwall*); *Platoro Ltd.*, 518 F. Supp. at 821-23 (applying elements substantially similar to those in *The Blackwall* and providing a brief examination of each).

¹⁶⁸ See Sweeney, *supra* note 5, at 189 (noting that salvage law seeks to return the vessel and its cargo back to "the stream of commerce"); Varmer, *supra* note 24, at 292-93 (equating salvage operations to the desecration of grave sites and arguing that there is no need to recover historic shipwrecks because public access to these shipwrecks preserved in situ may be accomplished through various sources of non-intrusive media such as radio, television, film, print, and the internet); Frederick & Blanco, *supra* note 2 (noting that a sixteenth century cannon salvaged from a wreck would have little practical value in "today's navy").

¹⁶⁹ See *supra* Part I.C (outlining archaeologists' objections to the commercial salvage of historic shipwrecks).

¹⁷⁰ See *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 556 (S.D. Fla. 1982) (explaining that maritime law allows salvors to search for and recover shipwrecks in return for salvage awards); *supra* note 102 and accompanying text (noting that salvors discover the most shipwrecks).

¹⁷¹ See *Marex Int'l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (finding that "[a]dmiralty courts have placed an additional requirement" on salvors seeking to establish a salvage claim, i.e., the "archaeological duty of care").

¹⁷² See *id.*

required under traditional salvage law.¹⁷³ This proposal: (i) protects the right of salvors to continue to search for and salvage historic shipwrecks; (ii) preserves the incentives behind salvage; and (iii) helps to ensure that the archaeological integrity and value of historic shipwrecks is protected.¹⁷⁴

C. Abandoning Admiralty Law Under the Abandoned Shipwreck Act of 1987

Congress, in enacting the ASA, minimized the overall importance of the laws of finds and salvage by removing the application of both laws from many abandoned shipwrecks resting within the state waters of the United States.¹⁷⁵ Pursuant to the ASA, the laws of finds and salvage do not apply to a shipwreck that is both abandoned and:

- (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].¹⁷⁶

The ASA vests title to these abandoned shipwrecks in the United States and then transfers title to the state in or on whose submerged lands the shipwreck is embedded or rests.¹⁷⁷

A salvor cannot assert title under the law of finds to an abandoned shipwreck that is subject to the ASA.¹⁷⁸ For example,

¹⁷³ See, e.g., *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983) (holding that salvors need not possess the skill of marine archaeologists). Under the law of finds, however, title passes to the finders, who can then do what they may with the property. See Kahn, *supra* note 2, at 619 (describing how, once title to a shipwreck is given to salvors by a court, they are "free to tear her apart in the search for coins, gold, silver, ivory, and other valuables" because, as owners, finders are under no legal duty to preserve historic artifacts). The ADC applies to salvors under the laws of both finds and salvage. See *Marex Int'l, Inc.*, 952 F. Supp. at 829. Once title vests in the finder, however, the court has no authority to continue to apply the ADC. See Kahn, *supra* note 2, at 619.

¹⁷⁴ See *infra* Parts III.A.-B (discussing and analyzing the ADC).

¹⁷⁵ See Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, § 7(a), 102 Stat. 432 (1988) (codified at 43 U.S.C. § 2106(a) (1994) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies."). Traditionally, Congress left to the admiralty courts the responsibility of fashioning the laws of admiralty. See *Cobb Coin Co.*, 549 F. Supp. at 548.

¹⁷⁶ 43 U.S.C. § 2105(a).

¹⁷⁷ See *id.* § 2105(a), (c).

¹⁷⁸ The law of finds, by definition, only applies to abandoned vessels. See *supra* Part II.A. Under the ASA, however, it no longer has application to abandoned vessels in state waters

when a finder asserts that a vessel is abandoned, which it must be to satisfy the elements of the law of finds, and the vessel is otherwise covered under the ASA, it becomes clear that the finder cannot succeed without admitting that the state has title to the vessel under the ASA. If a shipwreck located within state waters is not abandoned (in which case, the law of finds does not apply) a salvor may still seek salvage rights and/or a salvage award from its owner in federal court.¹⁷⁹ This, however, presents risks to salvors

that fit one of the three criteria listed in section 2105(a). *See supra* note 176 and accompanying text. Thus, the law of finds is effectively dead with respect to vessels covered under the ASA because a finder can no longer establish the key element of his claim, i.e., abandonment. Moreover, because admiralty courts have exclusive jurisdiction over admiralty cases, a finder cannot assert a claim for title to a shipwreck in state court, absent a state finds law. *See* U.S. CONST. art III, § 2, cl. 1 (“The [federal] judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .”); 28 U.S.C. § 1333 (1994) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction [and] . . . (2) Any prize brought into the United States . . .”); *see also* *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the “Seabird,”* 941 F.2d 525, 533 & n.13 (7th Cir. 1991) (concluding that the interaction between admiralty jurisdiction and the eleventh Amendment can deprive a salvor of a forum because any federal action brought in admiralty against a state will be barred by the eleventh Amendment, and absent a state law under which the salvor can proceed, will be beyond a state court’s jurisdiction as well). Thus, because the ASA renders the law of finds inapplicable in federal court to certain abandoned shipwrecks and because state courts lack jurisdiction, the finder is stripped of all ability to assert his claim under the law of finds. *See id.* This legal “box” does not affect a salvor asserting an in rem action for salvage because salvage law presumes the vessel is *not* abandoned. *See* *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 460-61 (4th Cir. 1992) (discussing the “sharp contrast” between the law of salvage and the law of finds).

The law of finds is effectively abrogated under the ASA, which is desirable from the standpoint that the law of finds places no ongoing restrictions upon salvors with respect to preserving the historical significance of shipwrecks. *See* Kahn, *supra* note 2, at 619 (emphasizing that a salvor acquiring title to a wreck under the law of finds is under no obligation to protect its artifacts). When a court grants a salvor exclusive salvage rights to a wreck, it is able to maintain a degree of control over the operation and can impose the ADC on salvors both at the time the salvor makes the claim and at the time the court grants the award. *See R.M.S. Titanic, Inc. I*, 924 F. Supp. 714, 719-21 (E.D. Va. 1996) (stating that “because salvage rights are not necessarily permanent,” courts have the power to require the salvor-in-possession to update the court with respect to its archaeological preservation efforts). With the law of finds, to which the ADC also applies, courts can only apply the ADC once, at the time the claim is made, because the law of finds vests title to the wreck in the finder. *See* *Marex Int’l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (discussing the ADC in the context of the laws of finds and salvage).

¹⁷⁹ *See* 43 U.S.C. § 2106(a) (stating that the law of salvage does not apply to abandoned shipwrecks that are embedded in state-submerged land). Shipwrecks that are not abandoned are thus still subject to traditional salvage laws. *See, e.g.,* *Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189, 1196 (9th Cir.), *cert. denied*, 531 U.S. 820 (2000) (discussing how the application of the ASA to vessels hinges on a determination of whether they are abandoned). Moreover, in *Sunken Treasure, Inc. v. The Unidentified, Wrecked, and Abandoned Vessel*, 857 F. Supp. 1129, 1133-37 (D.V.I. 1994), the court held that the ASA was constitutional because the law of salvage does not apply to abandoned shipwrecks due to salvage law’s presumption, under the nonabandonment fiction, that the vessel is not

who, after commencing salvage operations on a wreck thought not to be covered under the ASA, face the possibility of a court declaring that the vessel is in fact subject to the ASA.¹⁸⁰ This has the effect of deterring salvors from operating in state waters¹⁸¹ because they must either litigate the issue of whether a ship they discovered in state waters is abandoned and embedded or resting upon state submerged lands,¹⁸² or apply to the relevant state for a permit to

abandoned. Thus, once a finding of abandonment is made, a salvor's claim cannot proceed under the law of salvage. See John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. & COM. 205, 224 (1999) (concluding that "because the law of salvage does not apply to abandoned shipwrecks anyway, its displacement by the ASA is merely an illusion").

¹⁸⁰ See *Yukon Recovery, L.L.C.*, 205 F.3d at 1196.

The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is "abandoned" or "embedded" and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate, survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing

Id.

¹⁸¹ See Kahn, *supra* note 2, at 603 (remarking that the ASA will discourage salvors because of the elimination of profit motives); see also *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, known as the Captain Lawrence*, 177 F.3d 491, 498 (6th Cir. 1999) (noting that, in the ASA era, a finding of abandonment leaves divers who have discovered shipwrecks embedded in a state's submerged lands without title or a salvage award, absent a state law to the contrary).

¹⁸² If Congress believed that the ASA would reduce federal litigation over historic shipwrecks, it was wrong. See *Zych*, 941 F.2d at 533 (explaining that "the ASA purports to remove litigation involving the ownership of embedded shipwrecks from the purview of admiralty jurisdiction altogether"). Since its enactment, there have been numerous federal cases challenging the ASA's constitutionality and the definitions of "abandoned" and "embedded." See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 499-500 (1998) (outlining litigation involving a commercial salvor's rights in the historically significant wreck of the *Brother Jonathan* in which the salvor argued that the vessel was not abandoned, and therefore, not subject to California's title claim under the ASA); *Zych*, 941 F.2d at 529-31 (challenging the constitutionality of the ASA and litigating whether the vessel was embedded as defined under the ASA so as to vest title in the state).

In *Deep Sea Research, Inc.*, a salvage firm brought an action in federal district court to obtain either title or a salvage award to a shipwreck it discovered. 523 U.S. at 496. The State of California intervened claiming title to the wreck under the ASA. *Id.* Moreover, California argued that the salvor's suit was barred by the eleventh Amendment because any in rem action against the vessel was in effect an action against the state as owner of the vessel. *Id.* at 496-97. The Supreme Court held that the eleventh Amendment does not bar a salvor from bringing an in rem admiralty suit against a vessel for a determination of title or a salvage award because the ASA does not automatically vest title in a state, unless the state establishes ownership over the res by showing that the vessel satisfies the elements of the ASA. See *id.* at 507-08; see also Jones, *supra* note 179, at 206-12 (discussing the disposition of the *Brother Jonathan* in *Deep Sea Research, Inc.*). If a court finds that a state does not have title to a shipwreck under the ASA, the court is free to assign title to the salvor under the law of finds or grant it exclusive salvage rights and/or a salvage award. See *Fairport Int'l Exploration, Inc.*, 177 F.3d at 498-99, 501 (holding that in light of *Deep Sea Research, Inc.*, a state asserting title to a shipwreck under the ASA must first prove, by clear and convincing evidence, that the wreck is abandoned). If the state meets this threshold question and then also establishes that the wreck is embedded in, or rests upon, state submerged lands, the state will be found to hold title to the wreck under the ASA. See *id.* at 498.

perform salvage in accordance with the ASA.¹⁸³ The permit system is a valid approach to ensuring that historic shipwrecks covered by the ASA are salvaged in a manner that protects their historical integrity and value, while allowing salvors to continue to locate and salvage or recover historic vessels.¹⁸⁴ Unfortunately, however, because the permit system is neither uniform nor in place in all fifty states,¹⁸⁵ and because the ASA encourages “contract salvage,”¹⁸⁶ the

¹⁸³ See 43 U.S.C. § 2103(a). The ASA requires states to guarantee both recreational exploration of shipwrecks and private and public sector recovery of shipwrecks in accordance with protecting the historical value of the wreck and the surrounding environment. See *id.* Some states have responded to this requirement by creating a licensing system whereby salvors are able to perform salvage and recovery services under the purview of state control. See *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 640 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001) (noting that Virginia employs a permit system); *Zych*, 941 F.2d at 533 (describing an Illinois statute that grants permits for the excavation of shipwrecks covered by the ASA); Kahn, *supra* note 2, at 642 (stating that Florida enters into agreements with salvors and takes a percentage of the value of artifacts recovered).

¹⁸⁴ See Sweeney, *supra* note 5, at 198, 202 n.81 (stating that Congress passed the responsibility of historic shipwrecks to the states because “Congress obviously never intended to fund marine archaeological research”). Unfortunately, many states provide little or no funding for the discovery and/or salvage or recovery of shipwrecks. See McLaughlin, *supra* note 15, at 195-96 (describing various state preservation agencies as facing limited budgets and understaffing).

Allowing salvors to continue their efforts is important because by locating and salvaging or recovering historic wrecks, a wealth of knowledge about such wrecks, and about the lives and cultures of those who sailed such vessels, has been accumulated. For example, salvors located the *Henrietta Marie*, a slave ship that sank in 1700 off the coast of Key West. *Exhibit An Invaluable History Lesson: Riviera Beach Should Be Applauded for Support*, SUN-SENTINEL (Ft. Lauderdale), Dec. 21, 1999, at 26A, 1999 WL 29920300. Artifacts recovered from the wreck are housed in a Key West museum and make up the largest collection of such material from the U.S. slave trade. *Id.* It is said that the collection helps to overcome inadequate teaching of slavery in public schools because “[i]t brings us face to face with shackles that bound human beings for the hellish journey.” *Id.* Furthermore, salvors, not archaeologists or government agencies, are now trying to find the wreck of Amelia Earhart’s plane using an ocean-going tug and side-scan sonar. Doug Clark, *Spokane Man Dragging the Deeps for Amelia Earhart*, SPOKESMAN-REV. (Spokane), Dec. 2, 1999, at B1, 1999 WL 30166035. The salvors, anticipate that the documentary rights to their story will be very profitable if they are able to locate and salvage Earhart’s plane. *Id.* Without the efforts of salvors, the *Henrietta Marie*, among numerous other historic shipwrecks, would likely still be lost to the world and there would be little chance of finding Earhart’s historic airplane. Moreover, if Earhart’s aircraft is said to already be “preserved” in situ, as archaeologists would argue, to whose benefit is it preserved and to what end?

¹⁸⁵ See Sweeney, *supra* note 5, at 202 (“The 30 coastal states have responded to the treasure salvage problem in various non-uniform and haphazard ways, despite the expectation that the states would willingly adopt the solutions proposed in the National Park Service’s Abandoned Shipwreck Guidelines.”). For example, the State of Louisiana only issues permits for scientific ventures and allows solely *quantum meruit* compensation, whereas the State of Ohio does not allow salvors to conduct salvage operations at all. See McLaughlin, *supra* note 15, at 194-95.

¹⁸⁶ McLaughlin, *supra* note 15, at 169-70 (discussing how the ASA in effect fosters “contract salvage” because states cannot apply the law of finds or provide salvage-style awards under the statute). Contract salvage is disfavored by salvors because it binds salvors to act and sets the salvage award in advance. See *id.* Therefore, contract salvage may leave the salvor with a less than generous award, unlike the law of salvage. For a comprehensive review and

ASA has caused many historic shipwrecks in state waters to remain undiscovered or unsalvaged.¹⁸⁷

The ASA's policy of granting control over certain shipwrecks to states and not admiralty courts represents a dramatic break with traditional admiralty law.¹⁸⁸ Congress, however, apparently believed that states could police the management, preservation, and salvaging of historic shipwrecks better than the Federal Government¹⁸⁹ or even admiralty courts¹⁹⁰—a view surely supported by archaeologists.¹⁹¹ In some ways, salvors themselves are to blame for the enactment of the ASA because it was the insensitive actions of some salvors that brought it about.¹⁹²

Regardless of what led to the enactment of the ASA, and despite the fact that it forecloses the possibility that admiralty courts will

critique of the varying state approaches to the ASA, see *id.* at 192-97. For a critical analysis of contract salvage with respect to U.S. Naval vessels, see Lieutenant Junior Grade James Kraska, *The U.S. Navy and No-Cure, No-Pay Salvage Law*, 41 NAVAL L. REV. 135, 136-37, 146 (1993) (examining the shortfalls of naval salvage techniques).

¹⁸⁷ See Kahn, *supra* note 2, at 641 (reasoning that because incentives to invest time and money in locating shipwrecks have been removed by the ASA, salvors ignore wrecks that are located in state waters); see also Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116, 50,135 (Dec. 4, 1990) (discussing the need for states to discourage the recovery of shipwrecks); Harris, *supra* note 53, at 253 (“[O]verprotection . . . stifle[s] the desire to make these discoveries and . . . smother[s] the creative process required to locate the treasure.”); McLaughlin, *supra* note 15, at 150-51, 167 (noting that the ASA was enacted to protect shipwrecks and the marine environment from salvors recklessly searching for artifacts).

¹⁸⁸ See McLaughlin, *supra* note 15, at 167-68.

¹⁸⁹ The Federal Government's track record with respect to managing artifacts is uneven. For example, a recent audit by the U.S. Department of the Interior revealed that the U.S. Bureau of Land Management's oversight of artifacts in its possession has led to the loss of “millions of artifacts,” while others cannot be identified as coming from any specific site, or even as to who might own them. See Matt Kelley, *Agency Said To Do Poor Job of Keeping Track of Artifacts*, ASSOCIATED PRESS, Dec. 3, 1999, WL APWIRE 03:34:00. In addition, the audit found that the Bureau did not perform annual inventories or record the source of artifacts on loan from institutions. *Id.* Sounding a familiar theme, the Bureau admitted to a lack of funds and personnel. *Id.* Moreover, the National Parks Service has 24.6 million objects in its collection of artifacts, of which only 7.8 million have been catalogued. Pat Clyne, *Protection of Underwater Cultural Heritage: Role of the Commercial Salvor*, at <http://www.imacdigest.com/protect.html> (last visited Aug. 26, 2001) (on file with Albany Law Review).

¹⁹⁰ See *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the “Seabird,”* 941 F.2d 525, 529 (7th Cir. 1991) (quoting Senator Bill Bradley as saying that “Federal courts—sitting in admiralty—have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks”); Kahn, *supra* note 2, at 602 (noting that Congress enacted the ASA to give states the responsibility of managing abandoned wrecks in state waters).

¹⁹¹ See *supra* Part I.C (discussing the ongoing competition and rivalry between archaeologists and salvors concerning the management and salvage of a vessel).

¹⁹² See Jon Hall, *A Deeper Look at Piracy's Past*, BOSTON GLOBE, Apr. 3, 2000, at A3, 2000 WL 3320464 (discussing the work of historian and marine archaeologist Donald Shomette in recording the damage done to the *DeBraak* during salvage operations). Shomette's work ultimately helped to influence the passage of the ASA. *Id.*

extend the recent destructive trend of applying the law of finds to historic shipwrecks in international waters to those in state waters,¹⁹³ it is time for the ASA's repeal. In its place, admiralty courts, which historically have had the responsibility of fashioning admiralty law in significant part,¹⁹⁴ should uniformly apply the ADC to salvors seeking to establish claims for title or for salvage rights to historic shipwrecks.¹⁹⁵ Meanwhile, or at least in the alternative, Congress should provide states with funding to support historic shipwreck research and salvage efforts to ensure that such activities continue. The lack of funding at the state level cripples research and salvage and recovery efforts, as illustrated by the case of the *Queen Anne's Revenge*.¹⁹⁶ As noted, this wreck was discovered by a commercial salvor, yet North Carolina now holds title to the wreck.¹⁹⁷ As is typical with archaeologists and government entities, North Carolina appears to lack either the financial commitment or ability to fund its salvage operation adequately to ensure the swift salvage or recovery of the wreck.¹⁹⁸ Moreover, since the *Queen Anne's Revenge* has been under the control of the state's archaeologists, the vessel has been seriously threatened with total destruction from the elements.¹⁹⁹ This cannot be the result contemplated by Congress when it enacted the ASA.

¹⁹³ See *supra* Part II.C (explaining that the law of finds is inapplicable to shipwrecks that are subject to the ASA).

¹⁹⁴ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) ("[T]he Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction."); *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 548 (S.D. Fla. 1982) (stating that Congress left the burden of crafting the rules of admiralty to federal courts).

¹⁹⁵ See *Marex Int'l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (requiring salvors to record a ship's location and depth, and the proximity of the artifacts to each other); *Cobb Coin Co.*, 549 F. Supp. at 559 (finding the preservation of the archaeological provenance of the shipwreck to be an essential element of a salvage claim); *infra* Part III (comparing the incentives to salvors under the ADC with the disincentives under the ASA).

¹⁹⁶ See *Rodgers*, *supra* note 62 (stating that four million dollars is needed to raise and restore the famed ship).

¹⁹⁷ See *id.* (illustrating the state's lack of commitment to the ship); *supra* note 62 and accompanying text (noting that the salvor relinquished title to the state).

¹⁹⁸ See *Rodgers*, *supra* note 62 (remarking that North Carolina has scaled down its financial backing).

¹⁹⁹ See *id.* (noting that hurricanes, which are clearly a form of marine peril to historic shipwrecks, are sweeping sand away from the ship and exposing it to destruction).

D. The Laws of Finds and Salvage in International Waters

Traditional admiralty laws are still applicable on the high seas—at least for the time being.²⁰⁰ While U.S. admiralty courts have jurisdiction to adjudicate claims to shipwrecks resting in waters located within the district where the complaint is filed under traditional in rem jurisdiction,²⁰¹ these courts also have jurisdiction to adjudicate claims to shipwrecks resting in international waters on the basis of constructive (i.e., “‘imperfect’ or ‘inchoate’”) in rem jurisdiction over the vessel.²⁰² This jurisdictional basis, which was used by the court to adjudicate the salvage claims involving the *Titanic*,²⁰³ generally involves the salvor bringing a piece of the vessel, or one of its artifacts, into the court.²⁰⁴

The laws of finds and salvage, however, are in danger of being abrogated because of UNCLOS III²⁰⁵ and because of ongoing negotiations in connection with the United Nations Educational, Scientific and Cultural Organization’s Draft Convention on the Protection of the Underwater Cultural Heritage (UNESCO Draft).²⁰⁶ Naturally, this is of great concern to salvors as well as those holding a stake or interest in the artifacts and archaeological data salvors recover from historic shipwrecks.

²⁰⁰ See *Marex Int’l, Inc.*, 952 F. Supp. at 828 (concluding that U.S. federal courts have quasi in rem jurisdiction over salvage operations located in international waters). “The Admiralty is the only Court where such a question [of salvage] can be tried; for what other Court, but a Court of Admiralty, has jurisdiction to try a question of salvage?” *Houseman v. O’Hara*, 40 U.S. 40, 48, 15 Pet. 6 (1841).

²⁰¹ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 967 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (noting that the court’s jurisdiction is established “by the presence of the *res* within the jurisdiction of the court”).

²⁰² *R.M.S. Titanic, Inc.*, 171 F.3d at 967; see *Marex Int’l, Inc.*, 952 F. Supp. at 828 (stating that exercising “*quasi in rem*” jurisdiction over wrecks in international waters is an exception to the “traditional *res* requirement”). Both the in rem and constructive in rem jurisdictional bases recognize the impossibility of bringing a shipwreck and all of its contents into court. See *id.*

²⁰³ See *R.M.S. Titanic, Inc.*, 171 F.3d at 967-68 (concluding that the district court had constructive in rem jurisdiction over the *Titanic* and was correct in awarding plaintiff salvage rights, though finding the district court in error for awarding the plaintiff the exclusive right to visit and photograph the wreck).

²⁰⁴ See *Marex Int’l, Inc.*, 952 F. Supp. at 828 (explaining that the court could exercise quasi in rem jurisdiction because the salvor had demonstrated sufficient control over the ship).

²⁰⁵ See *supra* note 2; *infra* Part II.D.1 (discussing the contents and objectives of UNCLOS III in depth).

²⁰⁶ See *infra* Part II.D.2 (discussing the UNESCO Draft in detail).

1. UNCLOS III

As noted, UNCLOS III²⁰⁷ has not been ratified by the United States.²⁰⁸ Regardless, in contrast to the ASA, UNCLOS III

²⁰⁷ UNCLOS III created certain zones over which nations have varying degrees of sovereignty, including: (1) The territorial sea—the area that extends outward to a maximum of twelve nautical miles from a nation’s shoreline in which each nation has full sovereignty. See UNCLOS III, *supra* note 2, art. 3, 21 I.L.M. at 1272; see also *id.* art. 17, 21 I.L.M. at 1273 (noting the exception that foreign ships retain the right of innocent passage in the territorial sea). (2) The contiguous zone—the area contiguous to the territorial sea and that extends outward to a maximum of twenty-four nautical miles from a nation’s shoreline. See *id.* art. 33, 21 I.L.M. at 1276. Nations have the authority to prevent and punish violations of their fiscal, immigration, and sanitary laws in this zone. See *id.* (3) The exclusive economic zone—the area beyond and adjacent to the territorial sea in which coastal nations have the exclusive right to explore, consume, preserve, and manage all the natural resources, and which extends outward to a maximum of 200 nautical miles from the coastal nation’s shoreline. See *id.* arts. 55-57, 21 I.L.M. at 1280. (4) The continental shelf—the area that extends outward from a nation’s shoreline to the outer edge of the continental shelf from a minimum of 200 nautical miles to a maximum of 350 nautical miles “from the baselines from which the breadth of the territorial sea is measured.” *Id.* art. 76, 21 I.L.M. at 1285. Nations have the right to explore and exploit all natural resources therein, and no other nation may do the same without express consent. See *id.* art. 77, 21 I.L.M. at 1285. (5) The high seas—the area consisting of all seas beyond the reach of the above zones and which are free and open to all nations, regardless of their coastal or land-locked status, as governed by UNCLOS III and international law. See *id.* art. 87, 21 I.L.M. at 1286-87. No nation may extend its sovereignty over any part of the high seas. See *id.* art. 89, 21 I.L.M. at 1287. (6) The Area—the region beyond which any nation may assert sovereignty. See *id.* art. 137, 21 I.L.M. at 1293. The Area and its resources are to be used for the “common heritage of mankind.” *Id.* art. 136, 21 I.L.M. at 1293. Resources are defined as “all solid, liquid or gaseous mineral resources.” *Id.* art. 133, 21 I.L.M. at 1293.

²⁰⁸ *R.M.S. Titanic, Inc.*, 171 F.3d at 965 n.3; see also *Mayaguezanos Por La Salud Y El Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (D.P.R.), *aff’d*, 198 F.3d 297 (1st Cir. 1999) (stating that pending ratification, the United States is bound to the “purpose and principles” of UNCLOS III because the executive branch made the United States a party, at least tentatively, and further noting the consensus among commentators that UNCLOS III contains “customary international law” that the United States is bound to observe, regardless of whether it ratifies UNCLOS III). Some argue that the United States is bound by UNCLOS III because it incorporates generally accepted international principles of law that are already applicable to the United States. See *R.M.S. Titanic, Inc.*, 171 F.3d at 965 & n.3 (noting U.S. recognition of certain UNCLOS III provisions, and remarking that Congress has enacted legislation in accordance with the terms therein).

In 1988, the U.S. Territorial Sea was expanded by President Ronald Reagan from three nautical miles to twelve. Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989); Philip A. Berns, *A Sovereign’s Perspective on Treasure Salvage*, 30 J. MAR. L. & COM. 269, 274 (1999). This extension is consistent with provisions of UNCLOS III permitting such expansions. See UNCLOS III, *supra* note 2, art. 3, 21 I.L.M. at 1272. President William Clinton followed suit in 1999 by extending the contiguous zone of the United States to twenty-four nautical miles. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 8, 1999). Clinton made reference to UNCLOS III and general international law as the basis for this proclamation. See *id.* Clinton stated that the United States enacted the extension to help prevent the “removal of cultural heritage found within 24 nautical miles.” *Id.* UNCLOS III makes provisions for the President’s proclamation in article 33. See UNCLOS III, *supra* note 2, art. 33, 21 I.L.M. at 1276 (“In a zone contiguous to its territorial sea, . . . the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea . . .”). Also, article 303 states that a

expressly states that the laws of finds and salvage are not affected thereunder.²⁰⁹ This is important because UNCLOS III, like the ASA, does not provide money for locating, salvaging, or recovering historic shipwrecks.²¹⁰ Therefore, because financial incentives remain to salvage historic shipwrecks resting beyond the territorial waters of coastal nations, salvors continue to aggressively search for new wrecks in those waters.²¹¹ Since the ASA was enacted, the same can no longer be said for historic shipwrecks resting in state waters.²¹²

While articles 149²¹³ and 303²¹⁴ of UNCLOS III attempt to impose archaeological duties upon signatories, the provisions are weak, ambiguous, and largely without practical effect.²¹⁵ For example,

“coastal State may . . . presume that the[] removal [of archaeological and historical objects] from the sea-bed in the [contiguous] zone . . . without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in [article 33].” *Id.* art. 303(1)-(2), 21 I.L.M. at 1326. Therefore, while UNCLOS III expressly preserves the laws of finds and salvage, it most likely does so only beyond the twenty-four-mile contiguous zone of the United States and other nations. See Bernard H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM.-VLA J.L. & ARTS 353, 363-64 (1988) (noting that article 303 lets a coastal nation presume that removal of shipwrecks from the contiguous zone constitutes smuggling); see also Nicholson, *supra* note 24, at 144 (stating that although the right to exercise control over the contiguous zone gives a nation jurisdiction over activities in the zone, it does not provide the nation with title to artifacts found therein).

²⁰⁹ See UNCLOS III, *supra* note 2, art. 303, 21 I.L.M. at 1326 (“Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.”); see also Harris, *supra* note 53, at 245 (asserting that the amorphous nature of UNCLOS III necessarily neutralizes any threat that may have been posed to salvage and other maritime laws).

²¹⁰ See Harris, *supra* note 53, at 252 (warning that “cultural knowledge will stagnate” without funds to aid expeditions searching for shipwrecks).

²¹¹ See *id.* at 252-53 (noting that if the laws of finds and salvage were superseded, incentives to search for wrecks would disappear).

²¹² See *supra* Part II.C (discussing the relationship between the ASA and historic shipwrecks).

²¹³ See UNCLOS III, *supra* note 2, art. 149, 21 I.L.M. at 1295. Article 149, which applies only in the Area, states that:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the state of cultural origin, or the State of historical and archaeological origin.

Id.

²¹⁴ See *id.* art. 303, 21 I.L.M. at 1326. Article 303(1) is a general provision that imposes upon states the “duty to protect objects of an archaeological and historical nature found at sea and . . . co-operate for this purpose.” *Id.*

²¹⁵ See Harris, *supra* note 53, at 244-45 (discussing the vagueness of UNCLOS III and the lack of any standards or procedures for nations to apply with respect to shipwrecks); Nafziger, *supra* note 9, at 319 & n.43, 320 (characterizing articles 149 and 303 as “product[s] of political compromise and trade-offs involving more general concerns among the maritime powers about creeping coastal state jurisdiction”); Cottrell, *supra* note 2, at 701-02 (noting that commentators have found articles 149 and 303 to be vague); Nicholson, *supra* note 24, at 154 (arguing that an international watch-group mandated to enforce the provisions of article 149 would (1) eliminate confusion about what is considered an archaeological or historical artifact

while UNCLOS III imposes a duty of archaeological care upon signatories, it also states that the laws of finds and salvage are not affected by such duties.²¹⁶ It would take a tortured interpretation of UNCLOS III to conclude that it imposes real and enforceable duties upon salvors operating in international waters,²¹⁷ because, while UNCLOS III does create certain vague and ill-defined duties, they are without effect given that the laws of finds and salvage—which are expressly preserved—do not traditionally impose such duties.²¹⁸ As a result, the duties in UNCLOS III are not only weak and ambiguous, they are, by their own terms, not applicable when a salvor invokes the law of finds or the law of salvage with respect to a wreck laying in waters beyond the territorial reach of coastal nations.²¹⁹ Moreover, the Fourth Circuit in *R.M.S. Titanic, Inc. v. Haver*²²⁰ discussed UNCLOS III, but did so only with respect to U.S. sovereignty in national and international waters.²²¹ Tellingly, the court made no mention whatsoever of UNCLOS III's various archaeological preservation provisions.²²²

and (2) ensure that the recovery process meets the necessary standard set forth by UNCLOS III). Additionally, Nicholson remarks that articles 149 and 303 are ambiguous and questionable with respect to the effectiveness and applicability of UNCLOS III. *See id.* at 155. Some interpret article 149, which applies to the Area only, as forbidding individuals from taking shipwrecks for themselves, while others interpret article 149 as allowing free exploitation of shipwrecks in the Area. *See Harris, supra* note 53, at 244. The latter interpretation is bolstered by the fact that article 89 states that no nation may subject any part of the high seas to its sovereignty. *See UNCLOS III, supra* note 2, art. 89, 21 I.L.M. at 1287.

²¹⁶ *See UNCLOS III, supra* note 2, art. 149, 21 I.L.M. at 1295 (stating that nations should preserve “[a]ll objects of an archaeological and historical nature” located in the Area for mankind’s benefit); *id.* art. 303, 21 I.L.M. at 1326 (providing that although nations have a responsibility to protect artifacts, the rules of salvage and admiralty law remain free from interference).

²¹⁷ *See Nicholson, supra* note 24, at 137 (“[N]o nation holds the right to regulate the preservation of artifacts (including shipwrecks) found in the international waters known as the high seas.”).

²¹⁸ *See, e.g., Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981), *aff’d in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983) (refusing to impose upon salvors a duty of care consistent with archaeologists’ standards).

²¹⁹ *See UNCLOS III, supra* note 2, art. 303(3), 21 I.L.M. at 1326; *see also* Bederman, *supra* note 130, at 344 (stating that one of UNESCO’s goals is to amend UNCLOS III’s application of the law of salvage and other admiralty laws to historic shipwrecks); Cottrell, *supra* note 2, at 704-05 (remarking that the law of finds is most likely the governing law in the Area under article 149 because there is no other basis of ownership delineated therein).

²²⁰ 171 F.3d 943 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999).

²²¹ *See id.* at 965 & n.3 (noting that “the United States has long claimed the right to exercise jurisdiction over domestic and foreign vessels beyond the three-mile limit for purposes of customs control and for defense purposes and this practice is recognized by international law”).

²²² The only mention the Fourth Circuit made of such provisions was contained in a single quote of article 303(3), which provides for the preservation of salvage law and other admiralty rules. *See id.* at 962. The district court in this case stated with respect to UNCLOS III that

The references in UNCLOS III to nations' exclusive control over "natural resources"²²³ and "resources"²²⁴ in the various zones appear to apply only to minerals, and not to historic shipwrecks.²²⁵ In fact, article 133 specifically states that the term "resources" in the Area refers to minerals.²²⁶ A contrary interpretation, of course, would grant nations more extensive control over historic shipwrecks located within the various UNCLOS III zones.

UNCLOS III's primary objective is not the absolute preservation of historic shipwrecks in international waters to the exclusion of the interests of salvors. This is evidenced by the fact that the treaty, in Article 303, which is entitled, "Archaeological and historical objects found at sea," expressly states that salvage and other admiralty rules are *not* affected by the treaty.²²⁷ Thus, while UNCLOS III does not restrict the activities of salvors operating in international waters (at least, beyond the twenty-four-mile contiguous zone), as a string of U.S. cases illustrate,²²⁸ salvors, nonetheless, face the very

"[m]odern international law and salvage law . . . encourage the preservation of a shipwreck's archaeological and historical integrity." *R.M.S. Titanic, Inc. II*, 9 F. Supp. 2d 624, 639 (E.D. Va. 1998), *aff'd in part, rev'd in part*, 171 F.3d 943 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (emphasis added). The district court, however, referred to articles 149 and 303 as mere "policies" that lead the courts to reward salvors who adhere to them with greater salvage awards. *Id.* The district court continued by stating the plaintiff salvor was "salvaging and preserving the artifacts salvaged from the wreck for the benefit of all mankind." *Id.* The district court borrowed this language from article 149, which states that "objects of an archaeological and historical nature found in the Area shall be preserved . . . for the benefit of mankind as a whole." UNCLOS III, *supra* note 2, art. 149, 21 I.L.M. at 1295. It seems that the district court, in asserting jurisdiction over the *Titanic* in international waters, interpreted UNCLOS III as *encouraging* salvage and, thus, not binding on it. It is clear that the approach taken in the above case goes to great lengths to protect the rights of salvors. See John D. Kimball, Note, *Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters*. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 1999 AMC 1330 (4th Cir. 1999), 30 J. MAR. L. & COM. 691, 693 (1999) (observing that "[t]he exercise of constructive *in rem* jurisdiction over a shipwreck in international waters takes this principle a giant step further and provides salvors with greatly augmented legal protection").

²²³ UNCLOS III, *supra* note 2, arts. 56, 77, 21 I.L.M. at 1280, 1285.

²²⁴ *Id.* art. 133, 21 I.L.M. at 1293.

²²⁵ See Nicholson, *supra* note 24 at 145-46 (concluding that UNCLOS III adopted the language and interpretation of "natural resources" from the 1958 Continental Shelf Convention, and observing that neither document included shipwrecks in its definition of "natural resources").

²²⁶ UNCLOS III, *supra* note 2, art. 133, 21 I.L.M. at 1293.

²²⁷ *Id.* art. 303(3), 21 I.L.M. at 1326. While the law of finds is not mentioned expressly, it clearly falls within the language "or other rules of admiralty." *Id.*; see also *R.M.S. Titanic, Inc. II*, 9 F. Supp. 2d 624, 639 (E.D. Va. 1998), *aff'd in part, rev'd in part*, 171 F.3d 943 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (remarking that the only principles governing shipwrecks in international waters are those recognized by maritime and admiralty law); *supra* Part II.A (discussing the evolution of the applicability of the law of finds to shipwrecks).

²²⁸ See *supra* notes 200-204 (noting the jurisdiction of U.S. federal courts over salvage operations in international waters). In *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 966-68

real threat under the UNESCO Draft of losing all of their rights.²²⁹

2. UNESCO Draft

The UNESCO Draft proposes, for all practical purposes, to abolish the laws of finds and salvage with respect to historic shipwrecks,²³⁰ and instead suggests that such wrecks should be managed exclusively through in situ preservation.²³¹ The UNESCO Draft would remove the applicability of the laws of finds and salvage to historic shipwrecks with one prohibitively narrow exception.²³² Moreover, to ensure that commercial salvage is effectively abrogated under all legal regimes, even with respect to vessels recovered from the high seas, signatory nations cannot receive into

(4th Cir.), *cert. denied*, 528 U.S. 825 (1999), the court of appeals upheld the district court's extension of jurisdiction over the *Titanic*. The court took pains to state that jurisdiction was extended only in keeping with the traditions of the law of nations, or *jus gentium*. *See id.* Moreover, the court was careful to note that it only shared sovereignty over the *Titanic* with other admiralty jurisdictions but that it was sufficient to adjudicate the rights of those laying claim to the vessel because of the theory of constructive in rem jurisdiction. *See id.* at 966-69.

²²⁹ *Draft Convention on the Protection of the Underwater Cultural Heritage*, U.N. ESCO, U.N. Doc. 31 C/24 (2001), <http://unesdoc.unesco.org/images/0012/001232/123278e.pdf> [hereinafter UNESCO Draft 2001]; *see infra* Part II.D.2 (discussing the UNESCO Draft in depth); *see also* Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries*, 67 DEF. COUNS. J., at 92, 104 (2000) ("[T]he United Nations poses the greatest threat to the status of salvage law and the law of finds in the area of sunken shipwreck discovery."). For an earlier version of the draft, *see Draft Convention on the Protection of the Underwater Cultural Heritage*, U.N. ESCO, U.N. Doc. CLT-96/CONF.202/5 Rev.2 (1999), <http://www.imadigest.com/99draft.html>.

²³⁰ *See* UNESCO Draft 2001, *supra* note 229, art. 4 (stating that the laws of finds and salvage are inapplicable to shipwrecks resting in waters to which the Convention applies except in one prohibitively narrow exception).

²³¹ *See* UNESCO Draft 2001, *supra* note 229, Annex I, Rule 1 ("The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option."); Bederman, *supra* note 130, at 341-42 (concluding that historic shipwrecks will be managed in situ under the UNESCO Draft because UNESCO deems the financial incentives that are favored by salvors to be "evil"); *see also* Peter Hess, Report to the Maritime Law Association (MLA) on UNESCO's International Convention on Underwater Cultural Heritage held in Paris, France, April 19-24, 1999, at <http://www.imadigest.com/intervue.html> (last visited Aug. 26, 2001) (on file with Albany Law Review) (remarking that without the commercial salvor, shipwrecks will be left vulnerable to looting until such time as public funding is made available to conduct an expedition).

²³² *See* UNESCO Draft 2001, *supra* note 229, art. 4 (stating that underwater activity relating to shipwrecks shall not be subject to the law of finds or the law of salvage unless three conditions are met; that is, unless the activity: "(a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection"); *see also* Bederman, *supra* note 130, at 342 (arguing that the 1999 UNESCO Draft abolishes "in a devious and back-handed way" the commercial salvage of historic shipwrecks). The UNESCO Draft's jurisdictional application includes both the exclusive economic zone and the continental shelf. *See* UNESCO Draft 2001, *supra* note 229, arts. 9-10. The zones referred to in the UNESCO Draft are those set forth in UNCLOS III. *See supra* note 207 (outlining the ways in which national sovereignty varies within the different zones created by UNCLOS III).

their ports vessels carrying artifacts recovered from historic shipwrecks.²³³ The UNESCO Draft allows for only state-authorized salvaging of shipwrecks.²³⁴ In addition, nations are required to seize artifacts taken in contravention of the UNESCO Draft and to impose penalties upon those importing illegally recovered artifacts.²³⁵

In 1998, the United States participated in the UNESCO Draft negotiations merely as an observer and expressed its unwillingness to join the Convention unless the rights of salvors were preserved, including the right to sell recovered artifacts.²³⁶ During the 2001 Convention, the United States strongly opposed the Convention's extension of coastal state sovereignty into international waters.²³⁷ The position the United States has taken is important because, as noted, the UNESCO Draft favors in situ preservation as the best approach for managing historic shipwrecks.²³⁸ Imposing upon salvors the duty to protect the historical and archaeological value and integrity of historic shipwrecks is both necessary and reasonable. Unfortunately, the UNESCO Draft's approach will leave historic shipwrecks largely undiscovered and, if discovered, left to rot into nothingness. This approach is nothing but "an extreme measure."²³⁹

²³³ See UNESCO Draft 2001, *supra* note 229, art. 15 ("State Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention.").

²³⁴ See *id.* Annex II, Rules 9-13 (providing that activities affecting historic shipwrecks may be conducted provided that authorization is obtained and stringent guidelines are met, including submission of a detailed project design to the "competent authorities").

²³⁵ See *id.* arts. 17-18 (providing vaguely that sanctions should be severe enough to deter future violations).

²³⁶ Wilder, *supra* note 229, at 104 (noting that the United States was the only observer nation of fifty-three other nations at the Paris convention); see Hess, *supra* note 231 (stating that the "[1999] Convention is also a frontal assault on U.S. admiralty jurisdiction and the venerable law of salvage and finds, which will be abolished if the U.S. is to sign and ratify the Convention"). The United States advocated for consistency with UNCLOS III. *Id.* Additionally, though less enthusiastically, the United States advocated the recognition of "multiple uses" of the resource bases. *Id.* With such recognition, salvors, divers, fishermen, and cable layers' stakes in underwater cultural heritage would be recognized. *Id.* The United States's position was endorsed by several other nations, including the United Kingdom, Norway, and the Philippines. *Id.*

²³⁷ Peter E. Hess, *Divided UNESCO Experts Approve Sweeping International Restrictions on Underwater Exploration*, at <http://www.imacdigest.com/sweep.html> (July 9, 2001) (focusing largely on U.S. objection to diminishing state sovereignty over its own sunken military vessels and aircraft that are located in international waters).

²³⁸ See *supra* note 231 and accompanying text (explaining UNESCO's position that in situ preservation should be the "first option").

²³⁹ Wilder, *supra* note 229, at 105 (concluding that UNESCO's proposals will effectively

The laws of finds and salvage have been successfully applied to shipwrecks, historical and otherwise, for centuries.²⁴⁰ The applicability of both laws, which were narrowed as a result of the ASA and UNCLOS III,²⁴¹ now face virtual extinction if the UNESCO Draft is ratified. If the international community is successful in effectively banning the commercial salvage of historic shipwrecks, the result will be fewer discoveries of historic shipwrecks and fewer recoveries of historically significant artifacts. This would not serve the public interest.²⁴² Instead, only the interests of those archaeologists in the employ of, or acting under license from, a coastal nation will be served, because they will have control over historic shipwrecks to the exclusion of all others,²⁴³ except perhaps for divers.²⁴⁴ Moreover, because in situ “preservation” is the approach primarily favored by UNESCO,²⁴⁵ the UNESCO Draft has the effect of reducing historic shipwrecks to nothing more than far-flung, inaccessible archaeological sites, or, at best, underwater parks accessible to few. There is, however, a reasonable and viable alternative to this “extreme form of preservation” of historic shipwrecks.²⁴⁶

destroy the laws of finds and salvage in order to preserve the archaeological purity of shipwrecks in situ, and, in so doing, will leave most wrecks undiscovered and unpreserved).

²⁴⁰ See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 962 (4th Cir.), *cert. denied*, 528 U.S. 825 (1999) (recognizing that salvage law has been a crucial part of maritime law since the advent of navigation); *supra* notes 143-47 and accompanying text (discussing the applicability of the law of finds to lost and abandoned shipwrecks).

²⁴¹ See *supra* Parts II.C-D.1 (discussing the curtailment of the law of salvage and the law of finds by the ASA and UNCLOS III).

²⁴² See *Exhibit An Invaluable History Lesson: Riviera Beach Should Be Applauded for Support*, *supra* note 184 (illustrating the importance of historic artifacts); see also Kahn, *supra* note 2, at 639 (establishing that the majority of artifacts recovered are recovered by salvors). Because underwater artifacts have limited spans of existence, it does not serve the public interest when shipwrecks are ignored. See Hess, *supra* note 231 (explaining that shipwrecks, when submerged, are in marine peril, due not only to their physical environment, but also to their vulnerability to theft by looters).

²⁴³ It has been said that this is the goal of archaeologists in that they do not want to share historic shipwrecks with more successful and aggressive salvors. See *supra* Part I.C (explaining that elimination of effective competition may be the primary goal of archaeologists). This has been referred to as “opportunity preservation.” McLaughlin, *supra* note 15, at 189.

²⁴⁴ See UNESCO Draft 2001, *supra* note 229, Annex I, Rule 7 (stating that public access to sites should be encouraged, where practicable, but only for non-intrusive activities). Of course, few people will ever be able to visit many shipwreck sites due to deep waters, prohibitive costs, and/or lack of diving skills.

²⁴⁵ See UNESCO Draft 2001, *supra* note 229, Annex I, Rule 1 (prioritizing in situ preservation in order to halt unauthorized activities concerning underwater cultural heritage).

²⁴⁶ Nicholson, *supra* note 24, at 140 (referring to the abandonment of salvage efforts at sites containing human remains).

III. THE ARCHAEOLOGICAL DUTY OF CARE

A. *Establishing the Duty*

Traditionally, for a salvor to be granted exclusive salvage rights to a shipwreck, and ultimately a salvage award, the salvor must establish the following elements: (1) marine peril; (2) voluntary service; (3) success; and (4) dominion and control.²⁴⁷ The salvor's award is then based upon the court's consideration of a list of factors that the Supreme Court in 1869 set forth in *The Blackwall*.²⁴⁸ Although slight variations on this approach may exist, adherence to this traditional scheme is the norm.²⁴⁹

Nothing prevents modification of the above legal regime in the interests of protecting the archaeological and historic significance of shipwrecks during the salvage process.²⁵⁰ In fact, the Constitution implies that federal courts will continue to develop the law of admiralty as necessary.²⁵¹ In keeping with this flexible judicial approach, admiralty courts can and have applied the ADC, or certain elements thereof, upon salvors, requiring them to use archaeologically sensitive salvage methods in order to preserve and protect historic shipwrecks and artifacts.²⁵² Only one court has

²⁴⁷ See *supra* notes 163-66 and accompanying text (explaining the elements of a salvage claim).

²⁴⁸ 77 U.S. (10 Wall.) 1, 14 (1869). See *supra* note 167 and accompanying text (setting forth the relevant factors to be considered in determining a valid salvage award).

²⁴⁹ See, e.g., *Bemis v. The R.M.S. Lusitania*, 99 F.3d 1129, No. 95-2057, 1996 WL 525417, at *4 (4th Cir. Sept. 17, 1996) (unpublished table decision) (holding that the plaintiff was not entitled to a salvage award due to his limited success); *Clifford v. M/V Islander*, 751 F.2d 1, 5 (1st Cir. 1984) (finding that the plaintiff was not entitled to a salvage award due to the lack of marine peril).

²⁵⁰ See *infra* notes 251-64 (discussing the malleability of maritime law and the introduction of the ADC, or its equivalent, by the courts).

²⁵¹ See *supra* note 194 and accompanying text (explaining how admiralty courts fashion and develop maritime law). Senator Bill Bradley also acknowledged that federal admiralty courts have "substantial policymaking power." *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Seabird,"* 941 F.2d 525, 529 (7th Cir. 1991) (quoting 133 CONG. REC. 7,050 (1987)).

²⁵² See, e.g., *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (finding that the salvor's efforts to protect the shipwreck's historical and archaeological value is another factor to weigh in determining a salvage reward); *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) (denying a salvage award because the salvor made no effort to protect archaeological provenance and finding that the salvor's unscientific methods actually placed the shipwreck in greater marine peril than it would have been in had it been left untouched); *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248 (HB), 1998 WL 557591, at *3 (S.D.N.Y. Sept. 2, 1998) (noting the importance of preserving historic shipwrecks and finding that the photographs and films taken of the *Titanic* aided in its preservation by capturing the wreck in a permanent manner); *Cobb Coin Co. v. The Unidentified, Wrecked*

referred to this duty as the “Archaeological Duty of Care;”²⁵³ however, other courts have imposed similar requirements on salvors.²⁵⁴

In *Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*,²⁵⁵ the district court said that the ADC may be imposed on finders or salvors operating on “shipwrecks of historic or archaeological significance.”²⁵⁶ The court stated the ADC requires that finders and salvors must “document to the court’s satisfaction the shipwreck’s archaeological ‘provenance data’ . . . by mapping or recording the location, depth and proximity of each artifact recovered in relation to the other artifacts.”²⁵⁷ The court granted the plaintiff salvor in *Marex International, Inc.* exclusive salvage rights because it adhered to the ADC by: (1) compiling a historical record of the shipwreck; (2) using divers trained in archaeological methods of mapping; (3) employing careful excavating techniques; (4) conserving recovered artifacts in its laboratory; and (5) hiring experts to aid in evaluating and conserving the recovered artifacts.²⁵⁸

Similarly, the district court in *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*²⁵⁹ held that in order for salvors to establish salvage claims to historic shipwrecks and receive salvage awards, salvors must satisfy the “essential element” of documenting that they have preserved the wreck’s archaeological data.²⁶⁰ Importantly, the court held that this requirement is an element of establishing the salvage claim itself, and does not go to merely determining the award.²⁶¹ This is important because it

and Abandoned Sailing Vessel, 549 F. Supp. 540, 559 (S.D. Fla. 1982) (stating that a fundamental element for a salvage award is the salvor’s documentation of its protection and preservation efforts of the shipwreck).

Some commentators have said that the ADC is a perversion of salvage law. *See generally* Koerner, *supra* note 2, at 46. This is incorrect because adhering to the ADC merely goes to the traditional salvage claim elements of a salvor’s success in salvaging a historic shipwreck and a salvor’s skill displayed in rendering salvage services.

²⁵³ *Marex Int’l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (stating that courts can impose the ADC on salvors operating on wrecks of historic or archaeological value).

²⁵⁴ *See supra* note 252 and accompanying text (listing analogous cases).

²⁵⁵ 952 F. Supp. 825 (S.D. Ga. 1997).

²⁵⁶ *Id.* at 829.

²⁵⁷ *Id.*; *see also Cobb Coin Co.*, 549 F. Supp. at 558-59 (describing the importance of provenance data not only to historians and scientists, but to salvors as well, because good data will authenticate the find and thus increase the value of the artifacts).

²⁵⁸ *See Marex Int’l, Inc.*, 952 F. Supp. at 829 (noting how the plaintiff salvor demonstrated due diligence by applying archaeological preservation measures).

²⁵⁹ 549 F. Supp. 540 (S.D. Fla. 1982).

²⁶⁰ *Id.* at 559.

²⁶¹ *See id.* (commenting that the documentation of the preservation of the shipwreck not

ensures that salvors will adhere to the ADC from the outset and will not merely take their chances at the time they seek a salvage award.²⁶² Other courts, however, have applied the general principles of the ADC only with respect to determining the salvage award.²⁶³ Still other courts have confused the elements of establishing a salvage claim and the elements of determining the award, and have thrown the general principles of the ADC into the whole confused mix.²⁶⁴

It is more effective if the ADC is applied as an element of establishing a salvage claim, rather than as a consideration for assessing the salvage award after salvage is completed, because under the law of salvage a court can deny the claims of those salvors unable to establish that they possess the requisite skill and capability necessary to adhere to the ADC, and, when granting a salvage claim, courts can establish a monitoring system from the time the claim is granted. Under the law of salvage, courts have jurisdiction to monitor salvors' progress and revoke salvors' rights if they do not comply with the court's orders.²⁶⁵ As such, the law of salvage as it pertains to historic shipwrecks is superior to the law of finds because once a finder has been granted title to the historic

only ensures its genuineness, but also heightens the resale value of its artifacts).

²⁶² See *id.* (noting that adhering to the ADC will enhance a salvage award); see also *Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 54 F. Supp. 2d 1172, 1181-82 (S.D. Fla. 1999), *rev'd*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001) (establishing the ADC as an element of the salvage claim and further requiring that the salvor have the necessary funding to recover the wreck in accordance with the ADC and to make adequate provisions for the stabilization and preservation of the wreck).

²⁶³ See *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (adding the ADC as an element of determining the salvor's award). Also, the court in *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) denied plaintiff any salvage award for, among other things, not adhering to the ADC, in that the plaintiff failed to preserve the "archaeological provenience" [sic] of the wreck. In his dissent, Circuit Judge Kravitch, however, stated that failure to adhere to the ADC should only reduce the salvor's award, not deprive the salvor of an award altogether. See *id.* at 1516. The approach taken by Judge Kravitch, however, does not do enough to encourage salvors to adhere to the principles of the ADC throughout the salvage process.

²⁶⁴ See *R.M.S. Titanic, Inc. I*, 924 F. Supp. 714, 721 (E.D. Va. 1996) ("[C]ourts consider the time, effort, and money that parties have invested in the salvage operation [these are elements of the award] as well as their chances of success [an element of the claim], but, where the vessel is of historic importance, they also weigh the salvor's archaeological preservation efforts.").

²⁶⁵ See *Marex Int'l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 829-30 (S.D. Ga. 1997) (granting the salvor exclusive salvage rights for a limited period of time subject to further review by the court); see also *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 302 n.5 (4th Cir.), *cert. denied*, 531 U.S. 918 (2000) ("The district court can enforce and punish willful violations of its order with its contempt powers."). The court was referring to punishing third parties that interfere with a court's grant of exclusive salvage rights. See *id.* at 302. Such power, however, could be directed at the salvor-in-possession for not complying with the court's orders to adhere to the ADC.

shipwreck the finder is free to do with the wreck what he may.²⁶⁶ Under the law of salvage, a court can, among other things, require the salvor to submit periodic reports detailing its compliance with the ADC, and if it fails to comply in any material way, the court can rescind the salvor's rights.²⁶⁷ In this way, under the law of salvage, courts can stay involved in the process; while under the law of finds, once the finder is granted title, the court lacks authority to enforce the ADC.²⁶⁸

As the court stated in *Marex International, Inc.*, the ADC applies to salvors under the law of finds as well as the law of salvage.²⁶⁹ As such, even when a court applies the law of finds with respect to a historic shipwreck, the court can at least require the finder to comply with the ADC as an element of granting the finder title to the wreck.²⁷⁰ This does not guarantee the more expansive protection and oversight a court can provide under the law of salvage, but does still impose a duty of archaeological care upon finders making a claim for title to a historic shipwreck.²⁷¹

The ADC allows for the historic laws of finds and salvage to continue to apply to historic shipwrecks. This is important as it preserves incentives for salvors to search for and salvage or recover historic shipwrecks because, as noted, without financial incentives, shipwrecks generally remain undiscovered.²⁷²

Moreover, the ADC protects the historical and archaeological value and integrity of historic shipwrecks, and the provenance data coveted by archaeologists and others.²⁷³ Furthermore, unlike with

²⁶⁶ See *supra* Part II.A (discussing the law of finds as it applies to shipwrecks).

²⁶⁷ See *Marex Int'l, Inc.*, 952 F. Supp. at 830 (requiring the plaintiff salvor to submit regular written reports to the court outlining its actions). The court also gave plaintiff salvor exclusive salvage rights for a limited time, presumably so that it could review the salvor's efforts. See *id.* at 829-30.

²⁶⁸ See *supra* Parts II.A.-B (outlining the vast differences between the law of finds and the law of salvage).

²⁶⁹ See *Marex Int'l, Inc.*, 952 F. Supp. at 829.

²⁷⁰ See *id.* (observing that the ADC applies to shipwrecks under the law of finds).

²⁷¹ See *id.* (highlighting the requirement that the salvor document the wreck's "provenance data").

²⁷² See Clyne, *supra* note 189 (remarking that salvors are responsible for "locating, recovering, and successfully preserving" the cultural heritage of the United States). Clearly, the potential for financial reward is a strong incentive for salvors. See Nicholson, *supra* note 24, at 138 (concluding that treasure hunters will have no incentive to search for shipwrecks if government regulation prohibits the selling of their artifacts). The removal of the financial incentive would remove salvors from the business of locating shipwrecks and it is unlikely "governmental, educational, or charitable institutions" would fill the gap. Bederman, *supra* note 130, at 354. In addition, the same incentives that lead salvors to discover wrecks can be used to protect the archaeological value of those wrecks. See Cottrell, *supra* note 2, at 713 (explaining how incentives to salvage wrecks can also be used to locate and protect sites).

²⁷³ Admittedly, however, if courts continue to follow the recent trend of applying the law of

the UNESCO Draft, the application of the ADC as an element of establishing a claim for title or salvage requires no legislation, international treaties, or governing bodies, and preserves ancient and efficient admiralty laws.

B. Elements of the ADC

Courts that have applied the ADC have not done enough to enumerate what the duty requires of salvors. For example, the court in *Cobb Coin Co.* merely required a salvor to preserve the provenance data of shipwrecks to the “Admiralty Court’s satisfaction.”²⁷⁴ In *Marex International, Inc.*, the court adopted the same standard, but added examples of what satisfies the ADC.²⁷⁵ Moreover, the district court in *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*²⁷⁶ did little to clarify the elements of the ADC by finding that independent historical research regarding the shipwreck is helpful, and that “[a]rchaeological preservation, onsite photography, and the marking of sites are particularly important” to determining a salvor’s claim for exclusive salvage rights.²⁷⁷ Questions remain as to what extent salvors must adhere to these requirements and how comprehensive their efforts must be. Clearly, if the ADC is to be a viable alternative to the UNESCO Draft and similar approaches, the elements of the duty of care must be defined more clearly.²⁷⁸

Courts need to apply uniform standards under the ADC that include, for example, scientific methods of recording provenance data, reporting and publishing of data, access to artifacts recovered for scientific study, and monitoring by archaeologists.²⁷⁹ Moreover,

finds to historic shipwrecks instead of applying salvage law, the effectiveness of the ADC will be reduced because admiralty courts will not have continuing oversight over the salvage operation. See *supra* notes 265-67 and accompanying text.

²⁷⁴ *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 559 (S.D. Fla. 1982). As noted above, “provenance data” is information that is collected by professional archaeologists, including the “exact location, depth and proximity of each item found with respect to other items.” *Id.* at 558.

²⁷⁵ See *Marex Int’l, Inc.*, 952 F. Supp. at 829 (finding that the salvor satisfied the ADC by researching libraries for the wreck’s historical record, instructing its divers to use archaeological methods to map and excavate the wreck, performing conservation techniques on the recovered artifacts at its laboratory, and hiring experts to help with the assessment and preservation of the artifacts).

²⁷⁶ 631 F. Supp. 308 (S.D. Fla. 1986).

²⁷⁷ *Id.* at 310.

²⁷⁸ See Varmer, *supra* note 24, at 300 (remarking that when courts have demanded archaeological documentation, the information provided did not meet professional standards and was not subject to professional supervision).

²⁷⁹ See *id.* at 296 (arguing that salvors should have to survey, record, and research

in light of the increasing criticism of salvors, the ASA's enactment, and the even more restrictive UNESCO Draft now being considered, salvors must be willing to accept the reasonable measures comprising the ADC or face severe restrictions on their activities.²⁸⁰

The Professional Shipwreck Explorers Association (ProSEA), a professional organization of salvors, has enacted a Code of Ethics that requires its members to: (1) conduct themselves in a manner that respects all constituencies with an interest in shipwrecks, including archaeologists, divers, museums, and historians, among others; (2) establish and maintain professional standards while researching, excavating, or salvaging shipwrecks; (3) conduct operations in a way that recovers as much provenance data from the site as possible, and to provide public access to the data; (4) use the most current and accurate technology in salvaging shipwrecks; (5) employ a professional archaeologist on every historical site who will have reasonable control over excavation, documentation, and conservation of artifacts; (6) plan for the conservation and disposition of artifacts before they are recovered; (7) leave artifacts on site unless funds exist for their conservation, cataloging, and storage; (8) sell only those artifacts that have been made available to the scientific community for study; and (9) keep together in one collection all artifacts that are of irreplaceable archaeological value if they cannot be documented or replicated in a manner that allows for reasonable future study, or, in the alternative, disburse them only in a manner that allows them to be reconstituted for future study.²⁸¹

The ProSEA requirements provide both a comprehensive framework for preserving the historical and archaeological value of historic shipwrecks and a guidepost for admiralty courts to use to more fully define the elements of the ADC.²⁸² Archaeologists,

shipwrecks using archaeological methodology under the supervision of scientists); Bederman, *supra* note 130, at 345 (noting that salvors have not been held to the same standards as archaeologists when courts have imposed certain archaeological duties upon them).

²⁸⁰ See Clyne, *supra* note 189 (acknowledging the negative image of salvors that is harbored by government agencies and academics); *supra* Part II.C (discussing the ASA's effects on traditional admiralty laws); *supra* Part II.D.2 (explaining UNESCO's attack on the laws of finds and salvage).

²⁸¹ See CODE OF ETHICS, *supra* note 135 (stating further that the association's members should work in harmony with the archaeological community).

²⁸² ProSEA, in conjunction with David J. Bederman, has produced a comprehensive counter-proposal to the UNESCO Draft that allows for incentive-based commercial salvage to continue under a strict set of guidelines designed to protect the historic and scientific value of shipwrecks. Bederman, *supra* note 130, at 346-53. The proposal imposes a set of duties upon salvors that includes carefully planning for the investigation and recovery of wrecks, hiring professional archaeologists, deciding the appropriateness of in situ preservation, accurately

however, probably will not be satisfied by ProSEA's code or by the ADC because both permit the sale of recovered artifacts²⁸³—which is unacceptable in the view of archaeologists, regardless of how careful salvors are to preserve the provenance data of historic shipwrecks.²⁸⁴ Regardless of this inflexibility on the part of archaeologists, the laws of finds and salvage still apply in international waters; and it is within the authority of federal courts sitting in admiralty to apply the ADC in a comprehensive and systematic manner as part of the elements of establishing a claim for title or salvage to a shipwreck.²⁸⁵

CONCLUSION

Admiralty courts have crafted a uniform body of law, a custom among “seafaring men,”²⁸⁶ that is recognized worldwide and which continues to develop and evolve in order to serve the world's maritime interests.

Archaeologists, academics, historians, and government entities, however, have no faith in the laws of finds and salvage nor in the international admiralty courts to protect the historical value and integrity of historic shipwrecks during salvage operations. Instead,

recording provenance data in accordance with accepted archaeological standards, stabilizing and conserving all retrieved objects, publishing and reporting all aspects of the operation, disposing of artifacts only after scientifically important information has been obtained from them, ensuring ongoing access to artifacts, and giving states priority to buy all artifacts of “irreplaceable archaeological value.” *See id.* at 352-53.

²⁸³ *See* Koerner, *supra* note 2, at 46, 49 (reporting how archaeologists will not compromise with salvors because they are felt to commercialize the past by selling recovered artifacts).

²⁸⁴ *See id.* at 49 (recognizing ProSEA's commitment to ethical salvaging); *see also* UNESCO Draft 2001, *supra* note 229, Annex I, Rule 2 (“Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”); *id.* Annex I, Rule 1 (“[A]ctivities directed at underwater cultural heritage . . . may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.”).

²⁸⁵ *See* Hess, *supra* note 231 (“By mandating that archaeology be part and parcel of any salvage operations on a site of historic and scientific significance, admiralty law already protects the values that the bureaucratic model seeks to promote.”); *supra* Part III.A (explaining that the ADC is an ongoing element in salvage claims). As such, admiralty courts have at their disposal U.S. Marshals who can, pursuant to court order, take into actual or constructive possession all artifacts recovered from shipwrecks. *See* Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 551 n.7 (S.D. Fla. 1982). In this way, courts can ensure that salvors adhere to the ADC pursuant to the court's directions. For example, U.S. Marshals could take “constructive possession” of artifacts that salvors would maintain at their own facilities, but subject to inspection by Marshals. This would help to ensure that salvors are indeed abiding by the ADC.

²⁸⁶ *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 191 (1970) (stating that maritime law “provides an established network of rules and distinctions that are practically suited to the necessities of the sea”).

such constituencies supported the enactment of the ASA and UNCLOS III, and are now seeking what is essentially the outright abrogation of the laws of finds and salvage through the enactment of the UNESCO Draft.

Admiralty courts, however, should not be stripped of their control over historic shipwrecks in this manner. While admiralty courts traditionally may have ignored archaeological and historical considerations when granting finds or salvage claims to historic shipwrecks, these courts have begun to recognize the importance of addressing these considerations.²⁸⁷ As such, admiralty courts are beginning to incorporate the ADC or similar duties and obligations into the elements necessary to establish a finds or salvage claim to a historic shipwreck. The ADC requires clarification by the courts, but, as a more widely and uniformly applied element of the laws of finds and particularly salvage, the imposition of this duty represents a reasonable solution to the conflict over salvaging historic shipwrecks.

The “quest for knowledge about the past and the preservation of that knowledge for future generations” is only possible if the quest is undertaken.²⁸⁸ If archaeologists are successful in abrogating the laws of finds and salvage, salvors will have no incentive to locate and salvage or recover historic shipwrecks. In fact, because in situ preservation is a central theme of the UNESCO Draft, as is prohibiting the sale of artifacts recovered from historic shipwrecks, it appears that destroying the economic incentives underlying salvage is a primary goal of the UNESCO Draft. Unfortunately, this extreme approach will ensure that few, if any, historic shipwrecks will be located in international waters. And those that are will be left to rot into nothingness.

²⁸⁷ See *supra* Part III.A.

²⁸⁸ Thomas, *supra* note 58, at 766.