Open Season on Ancient Shipwrecks: Implications of the Treasur Salvors Decisions in the Fields of Archaeology, History, and Property Law
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Abstract

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KEYWORDS: shipwrecks, season, archaeology
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Does a recent federal district court decision license a new open season on ancient shipwrecks off the Florida coast? Did the court in its zeal to uphold the American traditions of free enterprise and rugged individualism bargain away an irreplaceable cultural heritage? Are these traditions still viable, or more myth than reality in the functioning of the United States social and economic system? If not viable, is the judicial system justified in perpetuating these myths in the public consciousness? Or, has the United States judicial system again demonstrated its ability to act as a bulwark in defense of individual liberties? All of these questions, and more, are raised by the most recent decision\(^2\) in a series of Florida cases\(^3\) that revolve around the discovery and salvage

1. The rise of the welfare state and the concomitant emergence of the military-industrial complex has wrought vast changes in the social and economic life of the nation. In reviewing two recent analyses of this phenomenon, A.S. Miller, Modern Corporate State; Private Governments and the American Constitution (1976) and J.M. Buchanan, Limits of Liberty (1976), W.J. Samuels made the following observation:

   The study of American constitutionalism requires scrutiny of the total flow of relevant decisions whenever made, including private decision making having constitutional consequences, for example as made by political parties, large corporations, and unions. Received theory justaposes natural persons and the state, whereas in reality group action has grown in significance, and the individual increasingly is important only as a member of a group(s) The system has been transformed into one of nonindividual, nonstatist, nonpossessary economic and social power.

Samuels, Myths of Liberty and the Realities of the Corporate State: A Review Article, 10 Econ. Issues 923,924 (1976).


of an ancient Spanish shipwreck believed to be the *Nuestra Señora de Atocha*, sunk in 1622 in a storm off the Florida coast.

Treasure Salvors, Inc., under a contract with the Florida Division of Archives and History and Records Management (DAHRM), explored a site thought to be in state waters. It was believed to be the location of the *Neustra Señora de Atocha* and artifacts were recovered beginning in 1971.

In May, 1976 the validity of the contractual relationship between Treasure Salvors, Inc. and Florida became questionable as a result of *United States v. Florida* wherein the Supreme Court delineated the territorial waters of the State of Florida. The Court's holding precipitated much litigation as the site of the salvage operation of Treasure Salvors, Inc., a shoal near the Marquesas Keys, was in an area designated as international waters. On the basis of this declaration, Treasure Salvors, Inc. instigated what was to be the first of several suits to obtain title to all artifacts salvaged under its contract with the State Division of Archives and History. Eventually, the contract between the state and Treasure Salvors, Inc. was declared void for mutual mistake.

Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F. 2d 330 (5th Cir. 1978) [hereinafter Treasure Salvors, No. 2]; Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 459 F. Supp. 507 (S.D. Fla. 1978) [hereinafter Treasure Salvors, No. 3].

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5. This decision followed a Special Masters Report designating the territorial waters of the State of Florida as opposed to claims of the United States in a suit filed to determine ownership of oil leasing rights on the outer continental shelf. Florida had claimed all of Florida Bay as an inland sea and therefore part of Florida territorial waters. The decree, however, designated Florida Bay as part of the Gulf of Mexico, and rather than using a straight line, drew three-mile closing circles around the lower Florida Keys, the Marquesas Keys, and the Dry Tortugas, and designated these areas as territorial waters of the State of Florida.


7. 408 F. Supp. 907.

8. 459 F. Supp. 507. Was rescission an equitable remedy? Since the law of finds rather than the law of salvage was applied, the contract with the state effectively shielded the site from all other possible finders for many years. In effect, Treasure Salvors, Inc. was declared finder before the search ever began. Also, employees of the State Division of Archives and History cleaned and treated the artifacts in their possession for preservation and the state provided storage for a period of years. Since public funds were expended for this purpose, should not the state have been reimbursed for
The obvious struggle in these Florida treasure ship cases is between the archaeologists and the treasure hunters. The implications of the Treasure Salvors decisions, however, reach far beyond the question of who owns the particular antiquities from this particular wreck site. The decisions touch upon legal and policy issues in the areas of balancing individual and group rights, the right to property, forms of ownership, and the role of the United States and its citizens in the legal and illicit antiquities market. Property rights, as allocated between society as a whole and individual citizens, are involved in all of these issues. A look at what "property" is may help illustrate why the intense struggle has ensued.

PROPERTY RIGHTS IN SHIPWRECK LAW

The concept of property is a social construct—a description of relationships between people and things, both corporal and incorporeal. Involved are not only rights, but obligations, individual and collective. "Property can be, and routinely is, created from whole cloth, since its existence resides in the realm of social facts and not empirical reality."9

The two essential criteria for objects of property are value and transferability.10 Individuals within a society create the value component; transferability is that which makes the property capable of independent existence, separate from any one individual. Within any given society "[t]here is reasonable agreement that definitions of property cover appropriate objects, include appropriate rights and sanctions and that ownership is vested in the entity appropriate to the case in question."11 The allocation of objects to individual or collective ownership and the rights and responsibilities attached to this ownership is a societal decision, defined by its political and legal institutions.
The modern history of Florida shipwreck law presents an interesting illustration of the political and legal institutions in Florida attempting to define, or re-define, these property rights and allocations. The people of Florida have decided, through their elected representatives and the Archives and History Act, that the State of Florida is the appropriate entity in which to entrust protection and ownership of objects of cultural and historical importance, including sunken and abandoned ships. This allocation of ownership has been challenged by the treasure hunters who believe these objects are more legitimately subject to private ownership.

There seems to be no societal consensus at the present time to answer the question of who owns a sunken derelict ship and its cargo. The allocation of this property right has varied from society to society over time. Even within the common law system there is no unanimity. Under the admiralty laws of salvage, there are two rules, diametrically opposed: the English rule and the American rule. The English rule declares the rights of the sovereign in all derelict property found at sea, whether flotsam (goods from shipwreck but still floating), wreck (goods from shipwreck washed ashore), jetsam (goods cast overboard and sunk), or langan (ligan) (goods cast off and sunk but marked by a buoy). This rule is derived from the concept that all property rights reside in the sovereign and all other owners “hold of the king,” an indirect acknowledgement of the social consensus which creates “property” in the first place. Practically, the rule was used to produce more revenue for the Crown. Over time the harshness of the rule was tempered by allowing the owner a year and a day to claim the abandoned property before it reverted to the sovereign. The American rule generally awards ownership of a sunken derelict ship and/or its cargo to whomever first reduces it to possession. Rights vary according to the

14. Altes, Submarine Antiquities: A Legal Labyrinth, 4 SYR. J. INT. LAW & COM. 77 (1976). This is an excellent survey of the state of the law regarding ancient sunken abandoned ships, covering public international law, existing bilateral agreements between nations, and specific national laws.
category: flotsam, wreck, jetsam, or languan, and a salvage award is usually made from the proceeds of public sale of the property. 16

Prior cases which have established precedent for the American rule all have decided ownership of ships and cargos which had a purely commercial value. 17 Ownership of the disputed cargos presented no conflict with a demonstrated public interest and would have benefited the sovereign only as a source of revenue. United States courts have for the most part followed the American rule. Recent cases in Florida, 18 Texas, 19 and North Carolina, 20 however, have upheld sovereign ownership of abandoned shipwrecks in state territorial waters. In all three instances sovereign ownership has been asserted in an effort to protect the interest of the public in the sunken vessel.

The Florida case, State ex rel. Ervin v. Massachusetts Co., 21 resolved a dispute over ownership of a United States battleship purposely sunk and abandoned in Escambia Bay in 1922. Over the years the derelict functioned as an artificial reef and became a favored fishing and diving spot for the public, and the superstructure which protruded above the water, served as a navigational aid. In 1956 the Massachusetts Co. set out buoys in accordance with salvage law and announced its intention to salvage the ship. Spurred by conservation and recreation groups, the state filed suit to enjoin salvage operations. The Florida Supreme Court, sitting en banc, declared ownership in the sover-
eign (the State of Florida) of the wrecked vessel based upon the English statutory and common law of 1775 as adopted by Florida when it joined the Union.

The Texas case, *Platoro, Ltd. v. Unidentified Remains of a Vessel*,22 involved a Spanish galleon sunk in 1555 off Padre Island. A salvage company, operating under contract with the State of Texas, claimed ownership of recovered artifacts as first finder and shipped the artifacts out of state. Suit was filed in federal court and the court upheld the Texas claim based upon sovereign ownership by the Spanish Crown after a year and a day from the date of abandonment, in accord with the Spanish law of that time. Ownership was traced through a succession of governments to the State of Texas. The decision was overturned by the appellate court on other grounds.

The ships in dispute in the North Carolina case, *Bruton v. Flying "W" Enterprises, Inc.*,23 were an ancient Spanish ship and several ships that dated from the time of the Civil War. The North Carolina courts awarded ownership to the sovereign (the State of North Carolina) based upon a state antiquities statute24 similar to that enacted in Florida and upon the precedent of the Florida decision in *Ervin*.25

*Treasure Salvors No. 1*,26 and *Treasure Salvors No. 2*,27 in which the United States was an intervenor, specifically reject United States claims of sovereign rights traced to the English Crown. The Fifth Circuit noted, however, that these rights could be declared by legislative action: "While it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale) legislation to that effect has never been enacted."28

The State of Florida has made this type of legislative declaration through the Florida Archives and History Act.29 Theoretically, owner-

23. 273 N.C. 399.
25. 95 So. 2d 902.
27. 569 F. 2d 330.
28. Id. at 341.
(a) It is hereby declared to be the public policy of the state to protect and
ship of all sunken derelict ships on state owned submerged territorial waters (within three miles) resides in the State of Florida because control of the seabed within the three mile territorial limit was relinquished by the federal government to the states under terms of the Submerged Lands Act in 1953. As the Florida Archives and History Act was the first modern state antiquities law in the United States, subsequent antiquities laws passed by sister states have been patterned after it.

The Florida statute declares the public policy of the state with regard to antiquities to be the protection and preservation of historic sites and properties and objects of antiquity which have "scientific or historical value or are of interest to the public." A detailed list of covered items is in the statute along with the statement that the policy of protection and preservation is not limited to this list. Sunken or abandoned ships are specifically included. In addition, the Act declares ownership in the sovereign (the state) of all "treasure trove, artifacts and objects of historical or archaeological value" which have been

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32. Fla. Stat. § 267.061
abandoned on state owned land and state owned submerged lands.\textsuperscript{33} Title is vested in the Division of Archives and History, which is given the responsibility to “locate, acquire, protect, preserve, and promote the location, acquisition, and preservation” of the articles listed.\textsuperscript{34}

There now appears to be, however, some question as to the constitutionality of the Florida Archives and History Act as reference to it was made in \textit{Treasure Salvors No. 3},\textsuperscript{35} along with the Ninth Circuit case of \textit{United States v. Diaz},\textsuperscript{36} wherein the federal antiquities statute\textsuperscript{37} was declared vague and the conviction under it an unconstitutional violation of due process for lack of notice. The Ninth Circuit objected to the lack of definitions in the federal statute of the terms “ruin,” “monument” and “object of antiquity,” and noted that the Indian masks appropriated from a cave on Indian lands, although used in a ceremony of great antiquity, were only three or four years old.\textsuperscript{38} The court found additional lack of notice in the fact that there had been no prior prosecutions under the federal statute although the Act was passed in 1906. Despite the fact that the Florida district court found some similarities in the Florida statute, the comparison is strained. The federal law\textsuperscript{39} is encompassed in one paragraph, with two additional paragraphs covering the procedure for declaring national monuments. The Florida law\textsuperscript{40} is highly detailed with lists and definitions and contains sixteen separate sections and numerous subsections, paragraphs, and subparagraphs.

The detailed list which the district court in \textit{Treasure Salvors No. 3}
found objectionable included, but was not limited to "monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, historical sites and properties and buildings or objects, or any part thereof relating to the history, government and culture of the state." Under most circumstances this would seem to be sufficient and far from vague. The definition section of the Act further defines "historical sites and properties" as "real or personal property of historical value." The statute could be made more explicit, however, by adding a term of years, for example, "50 years or older," or "100 years or older." In addition, there has been no lack of notice in the State of Florida; the Florida Archives and History Act is a revision of the Florida Antiquities Act of 1965 and has been aggressively enforced since its inception.

The court also objected to the definition of "treasure trove" as "gold, silver bullion, jewelry, pottery, ceramics, antique tools and fittings, ancient weapons, etc.," because this definition is at variance with the traditional common law definition of "treasure trove" as "any gold or silver, plate or bullion, found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown." This definition of treasure trove is not in the Act itself. It exists by administrative regulation but

41. 459 F. Supp. at 525.
42. FLA. STAT. § 267.021 (6).
43. FLA. STAT. §§ 267.01-267.08 (1965). The original statement of policy appeared in § 267.01:

It is hereby declared to be the public policy of the State of Florida to protect and preserve historic sites, buildings, treasure trove, objects of antiquity which have scientific or historic value or are of interest to the public, including but not limited to fossil deposits, Indian habitations or ceremonial sites, coral formations, sunken, abandoned ships or any part thereof, maps, records, documents, and books relating to the history, government, culture of the State of Florida.

For the revised statement see note 29, supra. Two significant changes were made: the establishment of the Division of Archives, History and Records Management, with title to materials vested in the division; and the deletion of § 267.07, which authorized the awarding of salvage contracts based upon a 75%-25% split with the salvager of the value of objects recovered. The awarding of contracts has continued by custom, however, and is covered by administrative regulations.

44. 459 F. Supp. at 525. The court appears confused at this point in its opinion as it is objecting to a definition that is not in the Act.

45. Id.
is compatible with the overall intent of the legislation. Since the definition sections of any piece of legislation are designed to clarify the intent of the framers, the definitions in their present form are a legitimate use of words to establish meaning and reflect the changing value of items through time. Some of the artifacts of the type listed are not only "worth their weight in gold," but indeed, worth far more. It should be a simple matter, however, to legislatively change the appellation to a less controversial term, one devoid of the romantic and swashbuckling connotations surrounding the word "treasure."

The argument, sustained by the court, that the association of the *Nuestra Senora de Atocha* with Florida is "tangential at best and certainly is not integral to the heritage and development of the State," is controverted by the language of the Act which declares public policy to be "to protect and preserve historic sites and properties . . . relating to the history, government and culture of the state." With over 2000 miles of coast line, Florida and its entire history is intimately connected with its surrounding waters. Florida was Spanish territory at the time of the *Atocha* shipwreck. Spanish salvage operations were conducted from a Florida land base. Wrecking and salvage, and tales of shipwreck and survivors have been a part of Florida history from the beginning.

46. The Euphronios Krater was purchased by the Metropolitan Museum of Art for a reported one million dollars. K.E. Meye, *The Plundered Past; The Story of the Illegal International Traffic in Works of Art* (1973). This volume presents an extensive and well documented survey of the problem from all points of view.

47. 459 F. Supp. at 512.


49. The first descriptive account of Florida and its people was written by a survivor of a Spanish shipwreck who lived with the Florida Indians for seventeen years before being rescued near Tampa Bay by either Ribault or Menendez. Memoir of Do. d'Escarlante Fontaneda Respecting Florida 12-13 (Miami 1944) (1st ed. B. Smith trans. 1854). Fontaneda reported in 1575 that the riches of the Floridians came not from the land but from the sea:

[I] desire to speak of the riches found by the Indians of Ais, which perhaps were as much as a million dollars, or over, in bars of silver, in gold, and in articles of jewelry made by the hands of Mexican Indians, which the passengers were bringing with them. These things Carlos divided with the caciques [chiefs] of Ais, Jeaga, Guacata, Mayajuaco, and Mayacca, and he took what pleased him, or the best part. These vessels, and the wreck of the others mentioned, and of caravels . . . were taken by Carlos. . . .
One of the first acts of the federal government after Florida became a United States possession in 1821 was the establishment of a naval base in Key West to deter the wrecker-pirates operating in the Florida Straits. Rum runners, cocaine cowboys, submarines that stalked the shipping lanes offshore during World War II, oceanographers and treasure hunters are all a part of an historical heritage decreed by the configuration of reefs, islands, and peninsula that is known as the State of Florida.

Although the opinion in Treasure Salvors No. 3 notes with some asperity that state employees “reacted as though Treasure Salvors were attempting to steal the old Capital Building as well as the great Seal of the State,” the difference is only in degree. The Division of Archives and History, charged with the responsibility of preserving and protecting the cultural heritage of the state and specifically given ownership of sunken and abandoned ships on state owned submerged lands, arguably was acting under a legislative mandate, and not as an officious intermeddler.

CORPORATE OWNERSHIP OF SALVAGE

The image invoked by the courts in handing down the Treasure Salvors decisions, an image of hardy modern day pioneers comparable to those who opened the American West, is seductive, but incongruous upon close examination. Treasure Salvors is a corporation engaged in a multi-million dollar operation, acquiring capital by the sale of stock to shareholders. Although the Fifth Circuit noted that the justices “can find no authority in law or in reason to countenance interference with plaintiffs’ activities simply because they are American citizens . . .”, the court did not address the problems that are presented by corporate ownership.

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Id. at 34-35. Since Carlos was cacique of the large community of Calusa Indians which dominated South Florida at this period, it would appear that the right of the sovereign in wrecks of the sea was established very early in Florida history as a principle of customary law.

50. Smiley, Pirates and Wreckers, Born of the Sun, 158-59 (Gill and Read ed. 1975).
51. 459 F. Supp. at 512.
52. 408 F. Supp. 907.
53. 569 F. 2d at 343.
The corporation as it has evolved\(^4\) into its modern form in the United States has been regulated in its activities. The degree of regulation has varied over the years, usually in direct proportion to the economic strength of the industries being regulated.\(^5\) Indeed, a traditional mistrust of corporations is as integral a part of American history as the traditions of free enterprise, rugged individualism, and the right to private property.\(^6\)

One of the reasons for regulation is that ownership of property under the corporate structure has become a very “different sort of animal” from private ownership of property, and the responsibility side of the ownership coin tends to be lost. This is of special concern when the responsibility aspect of ownership is placed at the forefront, as it inevitably is when public rights and interests are inextricably entwined with the object that is “owned.” Objects of scientific or historical value obviously fall into this category.

The atom of corporate ownership has been split between stockholders, managers, employees, and the collectivity which appears in the courtroom as a fictional person.\(^7\) Split ownership presents complica-

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\(^4\) The corporation with an unlimited life, almost unlimited powers, and a legal entity as an artificial person emerged in England in the sixteenth century through the peace guilds when local governments were authorized to operate as corporations under Royal Charter. As the British empire expanded, the merchantile companies utilized the same device to acquire rights over foreign territories and resources. These merchantile companies, “absentee owners” with most stockholders domiciled in England, fostered and perpetuated a subservient economic and political status in the colonies, in North America as well as throughout the world, and effectively regulated international trade. The economic and political reality of this subservient status provided impetus to the American Revolution. In the colonies, distrust of the corporate form was legion and led some states to ratify the Constitution under protest because it did not prohibit the formation of “companies.” The Corporation as Legal Entity, 55 Canadian Forum 16 (1975); W. Fletcher, Cyclopaedia of the Law of Private Corporations, (rev. perm. ed. 1975).

\(^5\) The removal by the leading industrial states of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them . . . .” Louis K. Liggett Co. v. Lee, 288 U.S. 517,557 (1933) (Brandeis J., dissenting).


\(^7\) See note 10 supra. This article presents an overview of the social base for the
tions when the law of finds is applied as it was in the *Treasure Salvors* cases. Who, in this instance, is the true finder? The stockholders, to whom the property would be distributed if the corporation were dissolved? The management, which has actual possession? The individual diver employed by the corporation, who actually picked the artifact from the sand and carried it to the surface? Or the fictional person recognized by the court? Whichever choice is made as to the true finder leaves unanswered the problem of responsibility for safeguarding the interests of society as a whole, in this instance, the protection of the cultural heritage. Which person or group holding a fragment of the fissioned atom of ownership is charged with the "obligation" that has always been an element of ownership? 58

Numerous authorities 59 have commented upon the blurring of ownership rights and obligations that have occurred with the evolution of the corporate structure in the United States. The result is a separation of ownership and control and a narrowing of the options for action by "owners."

To speak of the corporation as owner... is merely to make a metaphysical separation of the corporation from the men whose decisions and deeds constitute the corporate activity. It merely conceals the fact that we are in the presence of something which has little in common with the traditional concept of ownership. 60

Via the corporate structure private ownership has been injected with a large dose of a public element through investment by institutions and through its major role in the production of wealth. 61 Some legal authorities 62 see the law of res in this instance "slipping altogether out of..." 63

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58. "[A] pragmatist might conclude... there are improper owners of property whenever (1) the owner has no specific obligations to specific groups, (2) the owner does not labor, or (3) the owner owns only persons." Schneider, *supra* note 9 at 9.


61. *Id.* at 89.
the *ius privatum* into the *ius publicam.*"\(^{62}\)

The omnipresence of the public element is as true of a corporation engaged in treasure hunting as of any modern corporation. Most treasure hunters have an ongoing *indirect* source of public funding; most use methods and tools developed by publicly funded national and international underwater research and exploration projects and frequently use surplus government equipment and government trained employees.

**SOCIAL POLICY IMPLICATIONS OF TREASURE HUNTING**

The obligations and responsibilities inherent in ownership of antiquities is underscored by new recognition of the fact that archaeological activity in and of itself is destructive. That which the excavators are not equipped to discover or learn from the site is effectively destroyed at the time of excavation. It is now widely recognized that as much or more can be learned from the context within which an artifact is found as from the artifact itself, and most famous archaeologists of the past century would be looked upon today as mere "pot hunters." Modern archaeologists have developed sophisticated methods of dating materials, complicated record keeping to facilitate computer analysis of provenence and proportional occurrence,\(^{63}\) pollen sampling which

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62. *Id.* at 93.


In the case of commercial salvage on the one hand, there is usually little or no effort made to collect and record archaeological information systematically. On the other hand, an archaeological excavation is a scientific operation which demands a fully developed theoretical basis upon which a research design is formulated for the cultural explication of the site. Resources for conducting archaeological research from within the salvage company had to be balanced against the priorities and expectations of the commercial operation. *Under such a situation, it was impossible to develop a proper excavation program.* . . . Excavation of burial mounds has demonstrated that associations and sequences of associations are ultimately of more value than the artifacts, structures, or burials themselves. Underwater sites are no different. Archaeological explanation of a wreck site is just as dependent upon spatial interpretation of artifact clusters as it is in any
reveals plants that grew in that location and in what proportion, fecal studies which reveal eating patterns, etc. In light of present technology, it is possible that clues which might have revealed the secret of how the Great Pyramids of Egypt were constructed may have been destroyed by those who first entered the sealed tombs. For this reason, the whole thrust of modern archaeology is away from excavation of sites and recovery of artifacts toward preservation; the discovery and identification of such can then be preserved for future generations of scientific technology.4

This emphasis on preservation is spurred by the increasingly rapid destruction of sites.5 Clemency Coggins, prominent Precolumbian terrestrial site.

. . . Field procedures had to be developed so that the answers to the archaeological questions would not be destroyed by the commercial operations.
Id. at 32-33 (emphasis added).

. . .

During exploratory phases of archaeological research on historic wreck sites, goals often overlap and coincide with those of a profit-motivated commercial operation. When this occurs some success can be achieved by working with commercial salvors in solving archaeological problems[,] . . . dependent upon the ability of the researcher to personally motivate and guide individual members of the company through mutual trust and respect.
Id. at 107.

Beyond the exploratory phases (involving wreck site identification and description) it becomes increasingly difficult to maintain the progressive build-up on contextual data. . . . Once archaeological investigations go beyond the descriptive stage and turn toward processual analysis of trying to answer questions dealing with patterns of human behavior, the trend of the research no longer provides immediate tangible feedback to assist the salvage company in achieving its operational goals. When this happens, the company soon loses its interest in supporting such research. At this point archaeological research of acceptable standards is only possible if it is independently supported and administered through a sponsoring educational or scientific institution.
Id. at 108.

65. Of forty-five major archaeological occupation sites known to have existed on the Oregon coast between 1900 and 1950, today only one remains intact and only twenty percent of the others survive in part. Of the forty sites known in the Portland area in 1971, ten have been vandalized or entirely destroyed, four have been covered by industrial developments, three have been flooded or badly eroded, twelve others have been ruined
scholar associated with the Peabody Museum, Harvard University, has commented: “[T]he over-riding and unalterable fact is that evidence of ancient civilization on this planet is nearly lost just as we have become most sophisticated in its interpretation. Future generations will look back with horror on the profligacy with which their past has been squandered.”

Most underwater archaeological sites remained undisturbed until recently. Difficulty of access to these sites was a major factor. An auxiliary factor is the difficulty of preservation once objects of bone, wood, and metal are exposed to the air. The beautifully carved and painted wooden masks and animal forms recovered from the mud of Key Marco off the southwest Florida coast in 1896 are today deteriorated to the point of being almost unrecognizable because of careless storage in someone’s attic. Their original beauty of form and color, fortunately, has been preserved in a series of paintings made for the Smithsonian Institution at the time of discovery. Artifacts which have been immersed in salt water for a period of time are best preserved underwater because of salt penetration. On land or in the air, deterioration is rapid unless all salt is removed, a time consuming, expensive, and not always successful process, usually only justified for small objects. Artifacts left in the salt water and especially if protected by an overburden of sand will probably remain “as is” for hundreds of years. The old Spanish cannons coveted by many amateur divers and a common sight in front of homes and commercial establishments throughout Florida have a very brief life span.

The need for preservation of the remaining underwater archaeological sites is underscored by the fact that all of the ancient shipwreck sites in the Mediterranean Sea have been destroyed within the past fifteen years. The impetus for such senseless destruction can be attrib-


by the work of inexpert amateurs, six have been paved over or built upon in a similar fashion, and two are presently scheduled for excavation by amateur groups; this leaves, on balance, only three sites undisturbed. In Arkansas (the statistics are less grim, but similar), twenty-five percent of that state’s known sites have been destroyed in the past ten years. I am sure that analogous figures would also apply to other parts of the country.


ut to the high demand and high prices in the current antiquities market, lax import/export laws, advances in diving technology and underwater surveying methods, the expansion of sport diving and the blue water (clear) diving conditions in the Mediterranean. As the same conditions exist in Florida waters off the Florida coast, and throughout the Caribbean, a concerted and mutual effort is required so that this cultural heritage will not be despoiled within a few years. This is a very real threat as the treasure hunters have already moved to the Silver Shoals off the Dominican Republic, to the Turks and Caicos Islands, and elsewhere. Artifacts from an ancient Spanish ship wrecked on Silver Shoals were recently imported into the United States by salvors working under contract (50-50 split) with the Dominican Republic. A Dominican Republic patrol boat was stationed at the salvage site throughout the salvage operation to protect the site from claim jumpers.67

In an effort to preserve part of the underwater archaeological heritage for future generations, the Florida Division of Archives and History in mid-1979 made plans to move most of a 1715 wreck from waters near St. Lucie County to the protected waters of John Pennekamp State Park. Treasure Salvors, Inc., on the basis of the decision in Treasure Salvors No. 3,68 proceeded to salvage a cannon as first finder, despite the fact that the wreck was located only a few hundred feet from shore and well within the three mile limit of state territorial waters.69 The principals were arrested by state agents pursuant to the provisions of the Archives and History Act, but the grand jury refused to return an indictment.

The methods used by modern treasure hunters also are of concern in coastal zone management and conservation. The large blowers used to remove the sand overburden on a suspected wreck site are a potential hazard to surrounding sea life. As a result, environmental damage from unlicensed and unmonitored treasure hunting activity in Florida waters is as much of a threat to commercial and recreational fishing and diving70 as it is to the preservation of antiquities. Dredging of sand

68. 459 F. Supp. 507.
70. Sport diving on the wrecks accounts for an important segment of the Florida tourist industry. During the summer of 1979, for example, amateur divers paid $975 a
in other activities is now closely monitored by the State Internal Improvement Fund Trustees and the Army Corps of Engineers in order to limit silt damage to coral and other sea life in and about the reefs.

In 1978 a treasure hunter was convicted of damaging a reef and fined $2000 by the United States Department of the Interior which is charged with responsibility for monitoring activities on the outer continental shelf under terms of the Outer Continental Shelf Lands Act. The conviction was recently overturned on appeal by the Fifth Circuit, ruling that the salvors can be regulated only by admiralty law. This decision, coupled with the Treasure Salvors decisions, appears to have created a class of people engaged in an activity which is effectively beyond the reach of any law, especially if operations are conducted beyond the three mile territorial limit. If so, another era of wrecker-buccaneers operating in the Straits of Florida is a real possibility.

A spur to treasure hunters off Florida shores is the result of the recent high value placed upon objects of antiquity and their investment potential in an inflationary economy. As might be expected under these conditions, the illicit market in antiquities has reached the proportions of international scandal; a pollution of international commerce fueled by money, principally from United States museums and private collectors. Private collectors have found antiquities a lucrative investment as a hedge against inflation and tax shelter, so much so that within the past year investment vehicles specializing in collectibles have been made available to investors on Wall Street. Most private collections are, in time, donated to a museum or other tax exempt group and the cost of acquisition taken by the collector/donor as a tax writeoff or deduction. This puts the American taxpayer in the incongruous position of subsidising the illicit trade in antiquities while at the same time buying back his cultural heritage, or someone else's cultural heritage perhaps illegally transported to this country, at grossly inflated prices.

The majority of United States museums are privately funded, un-

piece for the privilege of participating for two weeks in a professional archaeological expedition to document an underwater shipwreck site at Looe Key, off the lower Florida Keys. Historic Shipwrecks at Looe Key, EARTHWATCH RESEARCH EXPEDITIONS, 27 (Summer & Fall 1979).

72. United States v. Alexander, 602 F. 2d 1228 (5th Cir. 1979).
73. See note 3 supra.
74. See note 46 supra.
like museums in other countries, and therefore, are not subject even to
the loose control of public scrutiny. In 1972, a controversy that still
rages was sparked by the Metropolitan Museum of Art when it ac-
quired the Greek vase known as the Euphronios Krater. Numismatists
were understandably outraged when the outstanding Metropolitan col-
lection of ancient coins was sold, and dispersed, in the search for funds
to acquire the Krater, illegally exported from Italy.

Publicity, and the cloud on the legal title to the Euphronios
Krater, caused the Metropolitan Museum to back off when the Lysip-
pus bronze statue appeared on the international art market, also ille-
gally spirited out of Italy. Dating from the fourth century B.C., the
statue was purchased in 1977 for $3.9 million by the Getty Museum in
Los Angeles where it is currently on display. Meanwhile, Italy is nego-
tiating with the United States government for the return of the statue.

NATIONAL AND INTERNATIONAL ANTIQUITIES
LEGISLATION & POLICY

The role of the United States in the illicit market for antiquities is
decisive for the most restrictive legislation has been passed in those
nations least able to enforce it. A comparative look at national legisla-
tion in the field of antiquities reveals the isolated stance of the United
States, especially in this hemisphere, but also worldwide.

In the Western Hemisphere five countries have national laws
which declare that all cultural properties are ultimately the property of
the state: Bolivia, Brazil, British Honduras, El Salvador, and Mexico. Six
countries have laws protecting all cultural property: Canada, Co-
lumbia, Equador, Guatemala, Honduras, and Peru. Worldwide, ten
countries have placed ownership of cultural properties in the state: Na-
tionalist China, Peoples Republic of China, Greece, Iraq, Jordan, Leb-
anon, Nigeria, Turkey, USSR, and Yogoslavia. Nine countries protect
all cultural properties: India, Indonesia, Iran, Italy, Japan, Pakistan,
Philippines, Spain and Syria. Most of the other countries allow export

75. Id.
76. Id.
77. Roston, Smuggled, SAT. REV., Mar. 31, 1979, at 25; Edwards, The World's
Richest Museum Stands Aloof on Its Olympus, The Miami Herald, Aug. 12, 1979, at
1 L, col. 3.
78. See note 14 and note 46 at Appendix B, supra.
of cultural materials only by permit. In contrast, the United States protects only those antiquities which are located on public lands.

Australia passed an Historic Shipwreck Act in 1976 which protects all shipwrecks on the Australian continental shelf and it has a bilateral agreement with the Netherlands to negotiate ownership of wrecks which belonged to the Dutch East India Company.\textsuperscript{79} Wrecks of archaeological interest in French waters belong to the state.\textsuperscript{80} In Spain, the state now acquires ownership after three years.\textsuperscript{81} Great Britain, Norway and Denmark have wreck protection statutes.\textsuperscript{82}

The "treasures" involved in the \textit{Treasure Salvors} controversy have been declared by the court to be in international waters and effectively beyond the control of either the United States or the State of Florida. Even if these decisions are upheld on appeal, the questions are not stilled. Should some protection be afforded the shipwrecks which remain? If so, in what way and by whom? If, according to the reasoning of the court, the only sovereign with a legitimate interest in the artifacts is Spain, should Spanish regulations apply? The logistics of distance and control would preclude this solution, but do emphasize the problem of attempting to make antiquities protection and concern only a parochial problem. This is a stance which becomes increasingly untenable as the interdependance and mobility of world populations continues unabated.

The policy of extending the protection of the sovereign to those objects and sites deemed important to the national heritage is one that is now seemingly embraced in the United States by a concensus of the whole society, a justified assumption based upon passage of the Federal Antiquities Act of 1906,\textsuperscript{83} the Historic Sites Act of 1935,\textsuperscript{84} the Reservoir Salvage Act of 1960,\textsuperscript{85} the Historic Preservation Act of 1966.\textsuperscript{86} However, since both the national and the Florida antiquities laws are under attack in the courts, new legislation would seem to be essential. This could be accomplished on the national level by legislation declar-

\begin{tabular}{l}
81. \textit{Id.} at 87.
82. \textit{Id.} at 89,91.
\end{tabular}
ing the rights of the sovereign in those items important to the national heritage. A revision of the 1906 Antiquities Act has just been passed by Congress,\textsuperscript{87} and separate legislation that would control underwater sites is pending.\textsuperscript{88}

A measure of control could be placed in the United States government if the protection and control over the continental shelf were, by legislative declaration, extended to “cultural resources” as well as “natural resources.”\textsuperscript{89} Anything lying beyond the continental shelf probably would be unsalvageable today, but that undoubtedly would not be true in the future as underwater engineering techniques are further developed.

Precedent for an extension of United States jurisdiction in a maritime context was established by a recent decision involving the boarding of a vessel in international waters that was suspected of carrying illegal drugs. In \textit{United States v. Cadena},\textsuperscript{90} the Fifth Circuit stated:

\begin{quote}
That the vessel was outside the territorial waters [of the United States] does not, of course mean that it was beyond United States jurisdictional limits or the operation of domestic law. Jurisdictional and territorial limits are not co-terminous. . . . [The jurisdiction of the United States] extends to persons whose acts have an effect within the sovereign territory even though the acts themselves occur outside it.\textsuperscript{91}
\end{quote}

The opinion in one of the \textit{Treasure Salvors} cases noted that an extension of sovereignty over the outer continental shelf might provoke an international controversy,\textsuperscript{92} but such a controversy already exists regarding the acquisition policies of United States museums and the import-export policies of the United States government with regard to antiquities.\textsuperscript{93} That the role of the United States is pivotal is under-

\textsuperscript{87}. Archaeological Resources Protection Act of 1979, 16 U.S.C. 471 (1979). This act restricts coverage to cultural resources found on public lands.
\textsuperscript{88}. H. R. 1195. This bill declares ownership in the United States of any abandoned historic shipwreck located on the outer continental shelf.
\textsuperscript{89}. 569 F. 2d at 339.
\textsuperscript{90}. 585 F. 2d 1252 (5th cir. 1978).
\textsuperscript{91}. \textit{Id.} at 1257.
\textsuperscript{92}. 408 F. Supp. at 911.
\textsuperscript{93}. \textit{See} note 46 and note 77 \textit{supra}. The United States places few restrictions on the importation of cultural objects and there is no import duty on items that are more than one hundred years old. Some attempts have been made to curb the illicit trade in
scored by the fact that the signing of a treaty with Mexico⁹⁴ and the passage of a law affecting twelve other Latin American countries in 1971⁹⁵ prohibiting the import of Precolumbian murals and monumental sculpture has been a major factor in stemming the illicit trade in those items.⁹⁸

The only international convention that might apply, the Geneva Convention on the Continental Shelf,⁹⁷ by interpretation through International Law Commission commentary, excludes shipwrecks. Bilateral treaties covering situations similar to that which exists in the United States with regard to ancient shipwrecks have been negotiated between England and Spain and between several countries and the Netherlands.⁹⁸

A UNESCO resolution in this area recommends allowing member states to regulate property rights on its territory, but suggests:

Finds should be used, in the first place, for building up, in the museums of the country in which excavations are carried out, complete collections fully representative of that country's civilization, history, art, and architecture... [T]he conceding authority, after scientific publication, might consider allocating to the excavator a number of finds from his excavation...⁹⁹


⁹⁸. Supra note 14.
⁹⁹. 9 UNESCO, U.N. Doc. 9C/PRG/7, paras. 23(b) and (c) (1956).
however, would appear to be in substantial compliance.

CONCLUSION

In the early 1970s awarding property rights to the excavators even in coastal waters was thought to be the best way "to encourage and stimulate the legitimate exploration for and excavation of evidence of past civilizations contained in the sea." From the vantage point of 1980, and with a new awareness of the need for preservation, the facts would seem to controvert this viewpoint. As amateur and professional organizations, museums, and scholars have become increasingly alarmed by the loss of sites, they have passed policy resolutions relating to collecting and collections. Perhaps the treasure hunters can be

100. SAN DIEGO L. REV. 668 (1972). An extensive discussion of the field of marine archaeology noted:

Wherever coastal state jurisdiction over marine archaeology ends, it seems clear that the property rights to archaeological material found beyond that jurisdiction would currently vest in the marine archaeologist reducing it to possession, based on a characterization of the finds as abandoned property. While such rights are warranted in view of the investment of time and money by the finders, there is also a definite interest in protecting such property and the information about past civilizations it represents from eluding public and scientific interest.

Id. at 689.

101. The gravity of the situation has prompted a number of museums associated with educational institutions to issue policy statements on acquisition and collecting. For example, the following statement was issued by the University of California, Berkeley, in 1973:

Preamble: For the past several years, reputable museums throughout the world have been concerned with the scientific, legal, ethical, and diplomatic problems involved in the acquisition of art, antiquities, and archaeological materials. Large quantities of primitive and ancient artifacts, as well as occasional old-master paintings and prints, are being stolen, illegally excavated, or smuggled out of their countries of origin and illegally imported into the United States. This is particularly shocking in the area of archaeological materials, which are being clandestinely excavated in direct contravention of the laws of the countries of their origin, to such an extent that resentment against this illicit trade is running high in many countries, threatening to disrupt the legitimate and highly desirable research of American archaeologists abroad. If this market were to continue at its present systematic rate, it could obliterate large segments of the cultural heritage and national treasures of many countries.

Hence, we believe that the museums of the University of California, Berkeley, must join other museums throughout the world in formulating a policy...
persuaded to change the form of the souveniers that they carry home from the hunt, just as the African big game hunters switched from stuffed heads to photographs. Even Mel Fisher, president of Treasure Salvors, Inc., has admitted, "The search, the hunt is the real reward."  

The decision in Ervin, and the Florida Archives and History Act, rather than being aberrations, appear to be at the forefront of progressive antiquities law in the United States. It is unconscionable to allow the protective cloak of a free enterprise ideology to shelter or obscure the systematic destruction of an irreplaceable cultural heritage. It is staggering to learn that all known underwater sites in the Florida Keys formerly protected by state law were totally or partially destroyed within two years of the United States v. Florida decision. New law, both judicial and legislative, is imperative, on all levels: local, national, and international.

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which will regulate, reduce, and control the illicit traffic in art and antiquities.  

Policy: Therefore, on behalf of the Lowie Museum of Anthropology and the University Art Museum, the University of California, Berkeley, will use its best efforts to ensure that any object to be accessioned to their respective collections has not been (1) excavated without permit, where such permits are required, whether in the United States or abroad; (2) stolen from a private collection, a dealer in art and/or antiquities, a museum, or a nationally designated monument; or (3) exported from its country of origin in violation of the laws of that country and/or the country where it was last legally owned.

Moreover, should either of these museums of the University of California, Berkeley, come into possession of any object in violation of these principles, the University will, if practicable, return it to the rightful owner.  


IMS TO DIVEST ITSELF OF COLLECTIONS:

At a special meeting of the IMS Board of Directors, held on July 12, 1979, it was resolved that the IMS will in the future decline donations of all artifacts from private or individual sources, unless they are on loan with express permission of the country of origin. It was further resolved that a Committee be appointed to study ways and means of divestiture and make its recommendations known to the Board within six months.

Newsletter, Institute of Maya Studies, Inc., August 15, 1979 at 1. See also note 46 supra at Appendix D.

102. Nova Law Center, Perspective, Fall, 1979 at 3.
103. 95 So. 2d 902.
104. 425 U.S. 791.