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The Protection Of Sunken Warships As Gravesites At Sea

Jason R. Harris

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THE PROTECTION OF SUNKEN WARSHIPS AS GRAVESITES AT SEA*

Jason R. Harris**

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I. INTRODUCTION

On January 19, 2001, in the closing hours of his presidency, William J. Clinton issued the following statement entitled "United States Policy for the Protection of Sunken Warships:"

Thousands of United States government vessels, aircraft and spacecraft ("State craft"), as well as similar State craft of foreign nations, lie within, and in waters beyond, the territorial sea and contiguous zone. Because of recent advances in science and technology, many of these sunken Government vessels, aircraft, and spacecraft have become accessible to salvors, treasure hunters, and others. The unauthorized disturbance or recovery of these sunken State craft and any remains of their crews and passengers is a growing concern both within the United States and internationally. In addition to deserving treatment as gravesites, these sunken State craft may contain objects of a sensitive national security, archaeological or historical nature. They often also contain unexploded ordnance that could pose a danger to human health and the marine environment if disturbed, or other substances, including fuel oil and other hazardous liquids, that likewise pose a serious threat to human health and the marine environment if released.

I believe that the United States policy should be clearly stated to meet this growing concern. Pursuant to the property clause of Article IV of the Constitution, the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed. The United States recognizes the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State.

Further, the United States recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea. International law encourages nations to preserve objects of maritime heritage wherever located for the benefit of the public.

Those who would engage in unauthorized activities directed at sunken State craft are advised that disturbance or recovery of such craft should not occur without the express permission of the sovereign, and should only be conducted in accordance with professional scientific standards and with the utmost respect for any human remains.

The United States will use its authority to protect and preserve sunken State craft of the United States and other nations, whether located in the waters of the United States, a foreign nation, or in international waters.¹

The Statement appears to affirm the opinion in the case of *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*.² The court in *Sea Hunt* held that Spain did not abandon (either expressly or by implication) title to two warships, the *La Galga* and the *Juno*, which sank in U.S. waters in 1750 and 1802, respectively.³ Since the Judicial Branch tends to defer to the Executive Branch on international policy issues,⁴ it was not surprising that certiorari was denied.

The Statement seeks to protect state craft only, thereby inherently making a distinction between state and non-state craft.⁵ Although there are particular reasons to protect warships, some of which are addressed by the Statement,⁶ not all of the rationales offered in the Statement justify the distinction between State and non-State vessels. The Statement attempts to protect sunken warships by stating they should be given "deserving treatment as gravesites," as objects of "archaeological or historical nature" and to encourage the protection of "maritime heritage." These explanations alone are not unique to warships. This paper will discuss reasons to treat the gravesites of military personnel aboard warships differently than civilian, non-warship gravesites.⁷

Until recently, the United States has occasionally allowed implied abandonment to be a sufficient justification to permit salvors to exploit and

1. Statement on United States Policy for the Protection of Sunken Warships, 37 WEEKLY COMP. PRES. DOC. 195196 (Jan. 22, 2001) [hereinafter Statement].

2. 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 531 U.S. 1184 (2001).

3. *Id.* at 638.

4. See *Weilemann v. Chase Manhattan Bank*, 192 N.Y.S. 2d 469, 471 (1959).

5. Although the difference between state vessels, non-state vessels and the mixed use of State vessels is a challenging issue, it is beyond the scope of this paper. Instead, this paper will assume that "State vessels" include warships. Whether or not a sunken warship is in fact a "warship" is discussed in this article *infra* Part II.A.6.

6. Such as unexploded ordnance and technology secrets, arguments that likely diminish in strength over time as technologies and secrets become outdated and less valuable. Statement, *supra* note 1.

7. Wherever possible, this paper will distinguish between the need or justification for protecting the sunken warship as opposed to the separate but related concept of protecting the remains of the soldiers aboard. The position asserted in Part III of this paper is that the presence of the deceased soldiers is independently a sufficient rationale to require unique protection to sunken warships.

deface military gravesites. Yet with the advent of *Sea Hunt*⁸ and the Statement, both of which attempt to prevent such salvage attempts, the need arises for a more well-grounded explanation as to why there is a unique interest in protecting warships absent express abandonment by the nation of origin.

While the Statement appears to be backed by a military-based policy decision, it should be questioned whether the United States has “shot itself in the foot” by making the Statement. Since it is generally a leader in developing the most extensive technological research capabilities in deep sea research, the United States must certainly have considered that the Statement could be read so as to prevent the United States from benefitting from salvaging other nations’ warship wrecks as well. Nonetheless, it may be assumed that the United States’ interest in protecting its warfare technology outweighs its interest in discovering the technology of other nations.

The primary purpose of this paper is to provide a sufficient legal and historical basis upon which the United States may base its decision to protect sunken warships containing the remains of deceased soldiers as military gravesites at sea. Section II describes the legal context and climate regulating activities relating to sunken warships. Section III of this paper will first focus on the unique position that soldiers and sailors aboard warships hold in states’ interests, thus rationalizing the need for State protection. Criminal, tort, and property law arguments will be cited as potential devices by which the United States may protect and enforce its interests in the sunken warship and its contents, including deceased soldiers. Such legal devices become critical when considering the cultural necessity and symbolism related to the sinking of warships and the death of the soldiers aboard. Next, to further understand and justify the unique status of “warriors,” the historical and modern culture of soldiers will be examined. Finally, the international practices recognizing an obligation to attach preferential protection to state vessels based on the concept of sovereign immunity, while a significant issue, is reserved for alternative forums.

8. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000).

II. BACKGROUND

A. *International Law of the Sea*⁹

The 1982 United Nations Convention on the Law of the Sea¹⁰ (UNCLOS) generally addresses international rights and duties related to the unique situations created by the oceans, seas, and waterways. UNCLOS, however, does not specifically address the issue of protecting sunken warships containing the remains of deceased soldiers, but insight as to the beliefs held in the international legal community can be derived from the UNCLOS provisions related to warships.¹¹

1. High Seas

Article 87 does not explicitly contain specific rules governing the recovery of sunken warships on the high seas.¹² Therefore, the general rule of freedom on the high seas applies which would allow salvage operations and other activities that may disturb the final resting place of a soldier aboard a warship. The Presidential Statement indicates that the U.S. will protect sunken warships "whether located in the waters of the United States, a foreign nation, or in international waters."¹³ The Statement effectively creates an exception to the general freedoms accorded on the high seas by granting flag states certain privileges while restricting the freedom of other vessels on the high seas with regard to protecting sunken warships.

2. Territorial Waters

Territorial waters are generally governed exclusively by the coastal state.¹⁴ Warships are given a right of innocent passage,¹⁵ which may be suspended for security reasons.¹⁶ If a warship fails to comply with the

9. Articles 149 and 303 will be addressed *infra* Part II.B and are related to protecting warships as objects of archaeological or historical significance.

10. U.N. Convention on Law of the Sea, 3rd Con., at 1261, U.N. Doc. A/Conf.62/122 (1982) [hereinafter UNCLOS].

11. See Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809 (1984).

12. UNCLOS, *supra* note 10, at art. 87.

13. Statement, *supra* note 1.

14. UNCLOS, *supra* note 10, at art. 2.

15. *Id.* at art. 17.

16. *Id.* at art. 25(3).

coastal state laws, it may be required to leave.¹⁷ The President's Statement indicates that the United States will protect sunken warships "whether located in the waters of the United States, a foreign nation, or in international waters."¹⁸ Since protection must presumably be executed somehow (i.e., retrieval, landmark, etc.), the Statement may be ignoring the rules of innocent passage¹⁹ by seemingly creating an implied right of passage for recovery purposes by implication. The nature and extent of this exception is not discussed in the Statement, yet due to the innocent passage requirement, it is likely to be riddled with limitations (express or implied) such as provisions for peaceful entrance using the least intrusive means necessary.

3. Contiguous Zone

In the contiguous zone, the coastal state has certain enforcement privileges. Article 33 allows a "coastal State to exercise the control necessary to (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."²⁰ Article 303(2) permits the coastal state to presume that removal of objects in the seabed in the contiguous zone are in violation of the laws of the coastal state. When reading the Statement in light of the provisions related to the contiguous zone, it seems likely that the recovery of warships would be, in some fashion, subject to restrictions by the coastal state. Yet the extent of these restrictions are not discussed in the Statement, leaving the opportunity for uncertainty and potential chaos when the situation actually arises.

4. Exclusive Economic Zone

The Exclusive Economic Zone (EEZ) is the water column above the Continental Shelf that extends up to 200 nautical miles from the coastal state's baseline.²¹ Article 58 allows many of the freedoms granted upon the high seas in Article 87 to be applicable in the EEZ.²² These rights explicitly include navigation, overflight, laying submarine cables and

17. *Id.* at art. 30.

18. Statement, *supra* note 1.

19. UNCLOS, *supra* note 10, at art. 19(2)(l) related to "any other activity not having a direct bearing on passage."

20. *Id.* at art. 33.

21. *Id.* at art. 57.

22. *Id.* at art. 58.

pipelines, and other internationally lawful uses of the sea such as those associated with the operation of ships and aircraft.

Article 59 requires resolution of conflicts concerning the attribution of rights and jurisdiction in the EEZ to be resolved on the basis of equity, taking into account the respective importance of the interests of the parties.²³ The interests of the flag state are entitled to receive more consideration than the interests of the coastal state.²⁴ Therefore, it is likely that recovery of sunken warships in the EEZ will be permissible under the current UNCLOS. However, sunken warships are generally on the ocean floor, not on the water column, so it is debatable as to whether the vessels are subject to the provisions of the EEZ or the Continental Shelf.

5. The Continental Shelf

The continental shelf provisions in Part IV indicate that coastal states have sovereign rights to explore and exploit natural resources on the continental shelf. Such natural resources "consist of the mineral and other non-living resources of the seabed and subsoil."²⁵ These provisions likely exclude sunken military vessels since scientific research should be considered limited to natural resources on the continental shelf.²⁶

The question arose in the Geneva Conference of 1958 as to whether sunken wrecks and cargoes would be covered by "non-living resources." Mr. Jhirad of India indicated that sunken wrecks did not constitute "resources."²⁷

Nonetheless, Australia²⁸ and Ireland²⁹ have attempted control over the exploitation of antiquities on the continental shelf. Therefore, it is safe to assume that the high seas regime applies to the recovery of warships in the continental shelf area.³⁰

23. *Id.* at art. 59.

24. Luigi Migliorino, *The Recovery of Sunken Warships In International Law*, in *ESSAYS ON THE NEW LAW OF THE SEA*, 244, 257 (Budislav Vukas, ed. 1985).

25. UNCLOS, *supra* note 10, at art. 77(4).

26. Commentators have stated that it is "clearly understood" that the rights over the continental shelf do not cover wrecked ships. Lucius Caflisch, *Submarine Antiquities and the International Law of the Sea*, 13 NETH. Y.B. INT'L L. 3, 1, 14-15 (1977); *see also* H. Peter Del Bianco, *Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure*, 5 B.U. INT'L L.J. 153, 169 (1987).

27. A/CONF.13/C. 4/L. 36 of March 24, 1958, 136.

28. Commonwealth Historic Shipwrecks Act, 1976, No. 190, Dec. 15, 1976, Neth.-Fr.

29. National Monuments (Amendment) Act, 1987, No. 17, July 22, 1987.

30. Migliorino, *supra* note 24, at 255.

6. UNCLOS Proposals Relating to the Appropriate Treatment of Sunken Warships

Several relevant proposals shed light on international views concerning the treatment of sunken warships and why UNCLOS fails to directly address the sunken warship issue. In 1978, the Soviet Union presented an informal proposal to the 2nd Committee of the 3rd United Nations Conference on the Law of the Sea (LOS) concerning salvaging sunken ships and aircraft.³¹ The Soviets proposed a new article or a new paragraph in Article 98 to be applicable on the high seas. The proposal was that “sunk ships and aircraft as well as their equipment and cargo on board, may be salvaged only by the flag State or with the flag State’s consent.”³² An explanatory note attached to the revised informal suggestion states that it is international custom that a flag state has an absolute right to its ships and aircraft and does not forfeit ownership rights to the vessel sunk at sea for any length of time. The protection extends to equipment and property on board.³³

This proposal was prompted by the Glomar incident which, due to their inferior technological capabilities, gave the Soviets increased reason to demand protection for their warships.³⁴ The Soviet proposal is not as broad as the current U.S. Statement because the Soviet proposal merely applied to warships sunk in international waters.

The proposal was not entered into the Draft Convention, but was supplemented by informal proposals by eight Eastern European States. In 1979, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary, Poland, the Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics (USSR) made a proposal concerning the salvaging of sunken ships and aircraft.³⁵ In 1980, the same group made a more limited proposal that stated, “sunken warships, as well as sunken vessels, which are only on government non-commercial service continue to enjoy complete immunity from the jurisdiction of any State other than the flag State” and “can be removed only by the flag State or with its consent.”³⁶ Removal efforts by

31. C.2/Informal Meeting/39–16 May 1978, c.2/Informal Meeting/39/Rev. 1–Sept. 1, 1978.

32. *Id.*

33. Cafisch, *supra* note 26, at 21–22 n.71, speculating that it is doubtful that the note accurately reflects customary international law.

34. Migliorino, *supra* note 24, at 247.

35. C.2 Informal Meeting/44–16 Aug 1979.

36. *Id.*

a flag state would require notice as to the nature and time limits of such activities that occurred in the EEZ of a coastal state.³⁷

In the Eighth session in the Spring of 1979, Greece suggested that a new paragraph should be added to Article 56 and 77 granting coastal states' sovereign rights to the discovery and salvage of any "object of purely archaeological or historical nature on the seabed and subsoil of its exclusive economic zone on or under its continental shelf."³⁸ Yet if the item originated from a state other than the coastal state, the state of "primary origin" should have "preferential rights . . . in case of disposal."³⁹ The suggestion was sponsored by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia, and Yugoslavia.⁴⁰ The final proposal replaced the term "sovereign rights" with "jurisdiction" and allowed further protections to identifiable owners.⁴¹ Nonetheless, the draft was opposed by the United States, United Kingdom, and the Netherlands, because there were potential conflicts between multiple states claiming preferential rights, there was no mention of state salvage laws, and more importantly, coastal states were given rights over its Continental Shelf that were unrelated to natural resources.⁴²

Next, Vietnam elaborated on the proposal by adding a proposal that would allow a coastal state priority should the flag state require the service of another state.⁴³ Yemen then proposed that articles 95 and 96 should apply to sunken warships owned or operated by a state used in non-commercial service.⁴⁴

The proposals by the USSR, Vietnam, and Yemen were raised in the Second Committee and were discussed in the Ninth Session in 1980.⁴⁵ Although the proposals did not receive widespread support, some support

37. C.2/Informal Meeting/50-14 Mar. 1980.

38. Caflisch, *supra* note 26, at 16.

39. *Id.*

40. *Id.*

41. *Id.* at 17.

42. *Id.*

43. C.2/Informal Meeting/52-19 Mar. 1980 and C.2/Informal Meeting/53, Mar. 19, 1980.

44. C.2/Informal Meeting/57, Mar. 20, 1980.

45. *Report of the Chairman of the Second Comm.*, THIRD U.N. CONF. ON LAW OF SEA, 9th Sess., ¶ 12, A/CONF.62/L.51 (1980).

was demonstrated.⁴⁶ Nonetheless, the proposals never made it into the official records of the Conference.

Despite the proposals by states discussed above,⁴⁷ a clear gap exists in international law relating to sunken warships containing the remains of soldiers. In the absence of clear codification, other sources should be examined to determine if another mechanism addresses the proper way to protect sunken warships and their contents.⁴⁸

B. International Law of the Sea—Cultural Property

In the Statement, several justifications are asserted by the President to protect warships, many of which, however, are not unique to warships. Among these are historical, archaeological, and environmental explanations. Nonetheless, a third way to protect sunken warships is through the increasingly recognized importance of protecting cultural property.⁴⁹

Hugo Grotius considered attacks on “things of artistic value [and] things which have been devoted to sacred uses” including “structures erected in honour of the dead” to be expressly forbidden.⁵⁰ Lieber’s Code discusses the protection of person, religion, arts and sciences, libraries,

46. *Official Records of Plenary Meetings*, THIRD U.N. CONF. ON LAW OF SEA, 9th Sess., 11–50, A/CONF.62/L.51 (1980). At the 126th plenary meeting (1980) by USSR (¶ 108), Sri Lanka (¶ 170, *ibid.* 22), at the 127th plenary meeting (1980) by Poland (¶ 69) and Ukrainian SSR (¶ 83); and at the 128th plenary meeting (1980) by Hungary (¶ 6, *ibid.* 32) and Angola (¶ 10).

47. Including ongoing efforts advanced by UNESCO in their drafts to create a Convention on the Protection of Underwater Cultural Heritage, discussed *infra* Part II.B. Additionally, the “gap” mentioned *supra* is partially, though not comprehensively addressed by UNCLOS Articles 149 and 303 which are also discussed *infra* Part II.B.

48. The question as to how to practically regulate activities on sunken vessels has been uncertain. In hearings debating the Abandoned Shipwreck Act, the U.S. Department of State objected to asserting federal title to shipwrecks on the outer continental shelf. Sarah Dromgoole & Nicholas Gaskell, *Who Has a Right to Historic Wrecks and Wreckage?* 2 INT’L J. CULTURAL PROP. 217, 220–221 (1993). Nonetheless, states feel that they may create safety zones around recovery operations conducted on the continental shelf and may restrict the actions of its own nationals. *Id.* at 221.

49. The remains of deceased soldiers as well as the warship itself should together be considered cultural property. Human remains can be found several hundred years after a vessel sinks. Dromgoole, *supra* note 48, at 230 n.113 (noting that human remains were discovered on a 17th century warship sunken off of Scotland).

50. HUGO GROTIIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch XIX, pt. I, 32 (1646) translated in *THE CLASSICS OF INTERNATIONAL LAW*, (Carengie ed., 1925). See SYDNEY D. BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 32 (Oxford Univ. Press 1972). A ship sunk in war time is a war grave. See BARRIE PENROSE, *STALIN’S GOLD* 86 (1982) (concerning the HMS Edinburgh); see also MARTIN MIDDLEBROOK & PATRICK MAHONEY, *BATTLESHIP 326* (Penguin Books 1977) (concerning the Prince of Wales and the Repulse).

telescopes, and hospitals which "must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."⁵¹ There is a standard in the law of war to spare places of worship, civilians, disabled, children, and the elderly. There is great moral significance attached to such people and places and respect must be paid to them by belligerents.

The U.S. policy is that special care must be taken to respect human remains in submerged heritage resources.⁵² An ongoing concern of the National Oceanic and Atmospheric Administration (NOAA) has been the fear of disturbance and respect for the crew members who died aboard sunken vessels and aircraft. They recommend ensuring sensitive treatment of human remains and protecting the sovereign immunity of vessels and aircraft that have not been expressly abandoned.⁵³ Thus an assumption must be acknowledged that war graves and sunken warships are symbols of nationalism.⁵⁴

Article 303(1) of UNCLOS places a duty on states to protect objects of an archaeological and historical nature found at sea. Yet, 303(3) states that nothing shall affect the law of salvage or other rules of admiralty. Although this article is found in the General Provisions section, it defines jurisdiction of the coastal state over the contiguous zone. Article 303 uses the term "archaeological objects and object of historical origin."

The phrase "objects of historical origin" was added at the insistence of Tunisia who sought to ensure coverage of Byzantine relics.⁵⁵ Thus, historical objects, as a "rule of thumb," cover at least those before 1453, the date of the collapse of the Byzantine Empire; 1521, the fall of Tenochtitlan; or 1533, the fall of Cuzco.⁵⁶ The scope of the historical and archaeological coverage is far from certain and no precise time-limits have been established. Yet critics are doubtful that Article 303 can be limited to objects

51. See RICHARD SHELLEY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 16 (1983).

52. NOAA, *Turning to the Sea: America's Ocean Future* 36, available at <http://www.publicaffairs.noaa.gov> (last visited Apr. 18, 2001).

53. *Id.* at 37.

54. One example where the U.S. has demonstrated its intent that sunken warships are symbols of nationalism worth protecting is that the first site declared a National Marine Sanctuary under the National Marine Sanctuary Act was the Monitor, the first iron-clad, steam powered vessel used in the Civil War.

55. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 9th Session* (1980), 75 AM. J. INT'L L. 211, 241 n.152 (1981).

56. *Id.*

that are hundreds of years old, thus the Articles should also apply to objects of relatively recent origin.⁵⁷

The effect of Article 303 when read in conjunction with Article 33 is that there can be no removal of antiquities within the contiguous zone without coastal state approval. Some have noted that this creates an "archaeological zone."⁵⁸ In conclusion, the protection duties assigned by 303 are general and vague, and, as a result, the reference to the rules of admiralty creates a paradox and confusion.

Meanwhile, Article 149 of UNCLOS requires that States of origin be given preferential rights to objects of an historical and archaeological nature found in the area. Article 149 uses the term "objects of an archaeological and historical nature." The regime has been said to be unsatisfactory and ineffective due to its vagueness and ambiguities.⁵⁹

Domestic laws such as the Abandoned Shipwrecks Act (ASA),⁶⁰ the National American Graves Protection and Repatriation Act (NAGPRA),⁶¹ and the Archeological Resources Protection Act (ARPA),⁶² all replace the traditional law of finds and salvage with a new law recognizing cultural property as having a valid significance worth protecting. A criticism of such statutes has been that they tend to serve as economic disincentives for salvors to continue their efforts.⁶³ Salvage activities, however, are often performed below the standard necessary for the proper care of historical and archaeological sites.⁶⁴

One alternative is for states to regulate the market for archaeological goods. One way to do this is through co-operative archaeology where public funding is given to archaeologists to excavate for some share of the profit.⁶⁵ Another alternative is to regulate salvage operations through

57. Caffisch, *supra* note 26, at 10.

58. *Id.* at 20.

59. *Id.* at 30. For a detailed discussion as to Article 149 versus Article 303, concluding that there is no clear meaning as to the terms nor the extent of coverage that these two sections provide, *see id.* at 28–31.

60. Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101–2106 (1994); *see infra* note 77–79 and accompanying text.

61. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1994).

62. Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm (1994).

63. M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow?* 14 ARIZ. J. INT'L & COMP. L. 225, 252 (1997).

64. *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 966, (M.D. Fla. 1993) (citing affidavit of Larry Murphy, an archeologist with Submerged Cultural Resources Unit, a division of the U.S. Dept of Interior).

65. Jeffrey T. Scrimo, *Raising the Dead: Improving the Recovery and Management of*

internal rules of professional conduct.⁶⁶ Without some permissive salvage, the long term effect could be to have fewer and fewer discoveries since the historical reality has been that the private sector, not the government, is the more likely party to make contributions to the historical preservation movement.⁶⁷

There remains a need to balance incentives to discover wrecks while simultaneously preserving their contents. Meanwhile, there is a general tension between private versus historical or preservationist interests. The effects of these divisions are to complicate the rights and interests in state vessels and sever the uniform efforts necessary to pass international legislation.

Finally, the most promising developments in the area of cultural preservation are the current efforts by the United Nations Educational, Scientific and Cultural Organization (UNESCO), which may serve to close the gaps left open in UNCLOS and supplant domestic laws regarding sunken warships. UNESCO is currently in the drafting process of an international Convention on the Protection of Underwater Cultural Heritage.⁶⁸ The essence is to grant a new basis of jurisdiction over sunken items of archaeological importance.

C. Domestic Law

1. Law of Finds Versus Salvage

The first step in analyzing the rights to a sunken vessel in U.S. waters is to determine whether the common law or admiralty law should be applied to determine the rights to the vessel. The *common law of finds* is based in property law and it entitles the claimant to an ownership interest in the vessel, while the concept of salvage in admiralty law entitles the claimant to a lien against the vessel.⁶⁹ The law of finds applies only to vessels that have been "abandoned."⁷⁰ Determining abandonment, either

Historic Shipwrecks, 5 OCEAN & COASTAL L. J. 271, 281 (2000).

66. *Id.* at 280–81.

67. *Id.* at 281. Government agencies are generally unable and/or unwilling to invest the time and resources required to protect and excavate underwater sites due to budgetary restrictions and lack of economic incentives. *Id.* at 280.

68. *Draft Convention on the Protection of the Underwater Cultural Heritage*, U.N. Doc CLT-96/CONF.202/5 Rev.2 (1999), available at http://www.prosea.org/articles-news/unesco/july99_draft_unesco_conv.htm (last visited Apr. 18, 2001).

69. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460–61 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

70. *Id.*

express or implied, is a difficult chore both factually and in application.⁷¹ The effect of applying the law of finds is to give the finder title to the vessel.⁷² The admiralty laws regarding *salvage* apply when a vessel has *not* been abandoned.⁷³ The salvor does not receive title to the vessel, but is entitled to a preferred maritime *in rem* lien against the vessel.

2. State Versus Federal Law

Next, it must be determined which court system will have jurisdiction over the sunken vessel. Before 1947, states exercised an ownership interest in the submerged lands up to the three-mile limit of the territorial sea. The court in *United States v. California*⁷⁴ however, held that the federal government had “paramount rights” in the submerged lands for national security and international relations reasons. Subsequently, Congress passed the Submerged Lands Act⁷⁵ (SLA) relinquishing title to the submerged lands to the states up to three-miles.⁷⁶ This advancement is important because sunken vessels often rest on, or are imbedded in, the submerged lands.

The jurisprudence regarding the law of finds and salvage was altered by the Abandoned Shipwrecks Act (ASA).⁷⁷ The ASA rejects the law of finds and salvage and grants the United States title to abandoned and embedded shipwrecks. Yet because Congress felt the states were better equipped to handle preservation, the ASA then transferred title to vessels found in state waters to the states.⁷⁸ The ASA arguably disrupts and confuses U.S. admiralty law, which may easily result in international implications.⁷⁹ Critics believe there should be a single legal scheme for the

71. Specific inquiries are beyond the scope of this paper but remain essential to determining interests in sunken vessels, particularly older vessels. This includes the amorphous “near-past” and “distant-past” approach.

72. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d at 460–61. There is traditionally an exception for embedded vessels to which a state may claim title.

73. *Id.* at 450.

74. 332 U.S. 19, 39–40 (1947).

75. 43 U.S.C. §§ 1301–1311 (West 2000).

76. *See United States v. Florida*, 363 U.S. 121 (1960).

77. Abandoned Shipwrecks Act of 1987, 43 U.S.C. §§ 2101–2106 (1994).

78. *Id.* § 2105(c).

79. The ASA has been subject to various domestic challenges based on its alleged effects and anomalies, including 11th Amendment challenges; it is notable that generally, federal courts have original jurisdiction for admiralty and maritime cases. U.S. CONST. art. III, § 2, cl. 1 (“[T]he judicial Power shall extend... to all Cases of admiralty and maritime Jurisdiction.”); *see also* 28 U.S.C. § 1333(1) (1988). Yet the numerous challenges remain better left for other occasions. Sunken vessels up to three miles beyond the baseline are

recovery of historic shipwrecks because most historical wrecks have a national, not a state quality associated with them, and because the laws of admiralty generally adhere to the quality of uniformity.⁸⁰

Committee notes indicate that the "United States only abandons its sovereignty over, and title to, sunken warships by affirmative act. Passage of time or lack of positive assertions of right are insufficient to establish such abandonment."⁸¹ The ASA does not address the treatment of foreign warships, but the Department of the State indicates that United States vessels can only be abandoned by affirmative act.⁸² Therefore, the ASA, when combined with the effect of the Statement, creates a presumption against abandonment of United States warships.

The National Park Service Guidelines deal with wrecks on state submerged lands.⁸³ These guidelines, though not mandatory, do address the treatment of warships.⁸⁴ The NPS Guidelines read:⁸⁵

Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation unless the cargo had earlier been unlawfully captured by that nation. In such a situation, title to the cargo remains in the nation from which it had been captured. Shipwrecks entitled to sovereign immunity are wrecks of warships and other vessels (such as privately owned vessels chartered or otherwise appropriated by a sovereign nation for military purposes) used only on government non-commercial

titled in the states. Sunken vessels found between three and twelve miles are titled in the United States. (43 U.S.C. § 2105(e)(1953)).

80. Scrimo, *supra* note 65, at 306.

81. H.R. REP. No. 100-514(I), at 3-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365.

82. *Supra* section II.C.2. See Clarissa A. Kang, *Chartering Through Protection for Historic Shipwrecks Found in U.S. Territorial Waters: Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 19 VA. ENVTL. L.J. 87, 103 (2000).

83. H.R. REP. No. 100-514 (II), at 2 (1988), *reprinted in* U.S.C.C.A.N. 365.

84. The NPS has successfully obtained ownership to the British warship, the H.M.S. *Fowley*, see *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), and other Spanish vessels off the Cape Canaveral National Seashore, see *Lathrop v. Abandoned, Wrecked and Unidentified Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).

85. National Park Service Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50,116, 50,121 (Dec. 4, 1990).

service at the time of sinking. Examples of vessels entitled to sovereign immunity would include, but not limited to, U.S. battleships and German U-boats from World War II, Confederate gunboats and Union ironclads from the Civil War, and British frigates and Colonial privateers from the Revolutionary War.

In conclusion, it is clear that UNCLOS has left a gap in the law as to how to treat sunken warships. Although UNESCO is currently debating whether or not to include warships in its Draft on the Protection of Underwater Cultural Heritage, a final draft has yet to be issued. Current domestic legislation and case law has at times been inconsistent regarding treatment of sunken warships. Therefore, the Presidential Statement cannot be solidly based on current codified international or domestic law. Thus, it is necessary to uncover other sources of authority in order to legitimately assert protection over sunken warships and, in particular, the bodies of the soldiers who gave their life while in the service of the military.

III. PROTECTING MILITARY BURIALS AT SEA— DEATH OF A WARRIOR

The following section details the importance of protecting sunken warships as a tomb for deceased soldiers. It examines methods of legal protection available to ensure the vessel is protected as the last resting place of the soldiers and sailors aboard.⁸⁶

A. Burial

1. Law of the Dead⁸⁷

In nearly every state, property and criminal laws recognize that the proper treatment of a buried corpse is to let it lie. "The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."⁸⁸ "In our society, we treat the dead with dignity

86. It is a basic assumption of this paper that the terms "soldiers" and "sailors" will be used synonymously since any differences that may exist should be discarded for burial purposes as related to this paper.

87. This section is not offered as a comprehensive review of the substantive law related to death and disposal, but is offered to introduce the reader to different ways in which the mistreatment of dead bodies may be regulated.

88. *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. Ct. App. 1926) (Opinion by Cardozo, J.).

and respect;" any violation "goes against the basic mores of society [and] cause(s) great suffering to the surviving families of the deceased."⁸⁹

Most societies have customs related to the respectful treatment of corpses.⁹⁰ These customs reflect the basic values of bodies as symbols in our culture.⁹¹ In essence, the treatment of the dead body goes far beyond the mere disposal of bones.⁹² These concepts, along with the inescapable theme of religion in death and war, will be developed throughout this paper.

a. Criminalizing Offensive Actions Related to Dead Bodies

One way for society to show its displeasure with disturbing those at terminable rest is to invoke criminal statutes. Criminalizing the desecration and disturbance of cemeteries, burial grounds, and human remains is a recognition of respect for the dead that has traversed time and is uniform among nearly all societies.⁹³ Almost every state has a criminal statute to protect cemeteries from desecration and the disinterment of the persons buried therein.⁹⁴

The activities related to the treatment of dead bodies that are frequently criminalized by state and federal statutes relate to the body and the items within the burial site itself. These include grave robbing, abandoning bodies, necrophilia, trafficking human remains and the cultural items contained within the burial site, and disturbing, molesting, and removing grave markers. Federal criminal laws have developed to afford special protection for sites of national significance.⁹⁵

89. *State v. Ryan*, 899 P.2d 825, 828 (Wash. App. 1995).

90. THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 105 (Alfred A Knopf, Inc.) (1983).

91. The duty to "refrain from deliberate mutilation of the dead has been a legal constant. The duty to protect the dead from pillage has been a constant too." Lt. Col. H. Wayne Elliot, *The Third Priority: The Battlefield Dead*, ARMY LAW 3, 13 (July 1996) (citing military prosecutions).

92. Health and safety codes are another way to regulate the treatment of bodies, but the underlying purpose for such codes are fundamentally different than criminal statutes. Yet the issue cannot be disregarded, particularly when inquiring about the disposal of bodies during the exigencies of war.

93. Virginia H. Murray, *A "Right" of the Dead and a Charge on the Quick: Criminal Laws Relating to Cemeteries, Burial Grounds and Human Remains*, 56 J. MO. B. 115, 116 (2000).

94. *Id.* at 115.

95. See Antiquities Act, 16 U.S.C. § 431 (1906); National Historic Preservation Act, 16 U.S.C. § 470 (1994); and Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1994). Additionally, the United States military has denoted the "maltreatment of dead bodies" as an act "representative of violations of the law of war (war crimes)." Dept. of the Army, *Field Manual 27-10, The Law of Land Warfare*, ¶ 504(c) (Jul.

The states, however, neither regulate nor punish activities related to dead bodies uniformly. Instead, there is piecemeal regulation with notable gaps and inconsistencies. One reason for this may be society's general displeasure with talking about death, which is considered taboo.⁹⁶ The Model Penal Code has attempted to eliminate piecemeal criminalization with a provision making treating a corpse in a "way that he knows would outrage ordinary family sensibilities" a misdemeanor.⁹⁷ To understand why criminal laws have developed as they exist today, it is necessary to look at the historical development of the law of the dead.

Criminalizing offensive activities related to dead bodies presents a difficult problem for legal theorists. A well-known crime throughout history has been "body snatching" and grave robbing.⁹⁸ The question becomes, who was harmed by this action? The body itself could not object and scholars have rejected the idea that the act should be a crime because the act would have been unwanted, harmful, and offensive to the person were he still alive.⁹⁹ Instead, the action is punishable probably because it is offensive to the public in general and the survivors in particular. Body snatching and comparable crimes often fell through the gaps of common law criminal elements. For instance, the common law crime of larceny required there to be a property interest in the item taken.¹⁰⁰ Therefore, while taking the clothes from the corpse or taking a corpse with clothes would be a common law crime, stealing the corpse alone was not. Blackstone's view (although he cites no authority) was that stealing a corpse did not amount to a crime absent the additional taking of clothing or articles since there was no owner. French law, however, made both crimes equally punishable.¹⁰¹

Nonetheless, "[t]hings buried with the deceased are said to remain the property of the owner."¹⁰² "[T]hough the heir has a property interest in the

1956). Of course, as with the Geneva Convention, the application may be limited to the handling of bodies on land. See UNIFORM CODE OF MILITARY JUSTICE, art. 103 (preventing looting and pillaging) and 134 (preventing conduct to the prejudice of good order and discipline) (1950). See also Elliott, *supra* note 92, at 13–20.

96. See generally JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW, VOL 1: HARM TO OTHERS* (1984).

97. MODEL PENAL CODE § 250.10 (Proposed Official Draft 1962).

98. One reason for the crime may relate to the demand for bodies for scientific research. See Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261 (1998). Also, some comparable issues arise today in the form of unsolicited autopsies and issues surrounding anatomical gifts. *Id.*

99. Feinberg, *supra* note 96, at 90–92.

100. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *236 (3rd ed. Rev. 1884).

101. *Id.*

102. Haynes' Case, 12 CoRep. 113 (1613).

monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes.”¹⁰³ While offensive acts related to the mishandling of dead bodies were eventually criminalized, such activity did not fit neatly into the legal paradigm. Thus, rationales from other areas of law were employed to explain society’s interest in protecting dead bodies.

b. Tort Law as a Mechanism to Punish Offensive Behavior Related to Dead Bodies

Another method to punish activity offensive to society related to the treatment of dead bodies is through tort law. There are two separate categories of torts under which disturbance of a dead body falls. First is the tort of intentional infliction of emotional harm, and second is the separate but related tort involving interference with dead bodies.¹⁰⁴

Initially, American tort law did not allow damages for stand-alone emotional harm.¹⁰⁵ Jurisprudence has developed inroads to the general rule against recovery for emotional harm absent physical injuries.¹⁰⁶ Courts created exceptions for plaintiffs who had implied contracts for particularly courteous treatment.¹⁰⁷ These early exceptions allowed recovery for the intentional infliction of emotional harm against carriers and innkeepers who were deemed to owe a duty of unique treatment to their guests.¹⁰⁸

The tort was expanded to include others who should have foreseen the emotional distress likely, such as those delivering death notices. In *Stuart v. Western Union Tel. Co.*,¹⁰⁹ when Stuart received a belated telegram concerning his brother’s ill health, by the time he was able to reach his brother, he had already died. Had the telegram arrived as contracted, Stuart would have been able to see his brother before he passed.¹¹⁰ The rationale in allowing emotional distress absent any adjoining physical injury was that the “wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness, as well as by a wound to the person.”¹¹¹

103. 2 WILLIAM BLACKSTONE, COMMENTARIES *429.

104. The standing requirement for the two are notably different but better left for another occasion.

105. *Id.*

106. DON B. DOBBS, THE LAW OF TORTS § 303 (2000).

107. *Chamberlain v. Chandler*, 5 Fed. Cas. 413, 3 Mason. 242 (Cir. Ct. D. Mass. 1823) (J. Story).

108. *Id.* See also DOBBS, *supra* note 106, at 824.

109. 18 S.W. 351 (Tex. 1885).

110. *Id.* at 352.

111. *Id.* at 353.

Although often based on a property or quasi-property right, interference with dead body claims have *in essence* been based on emotional distress.¹¹² Still, the recognition of quasi-property rights in a dead body is a minority viewpoint and most states analyzing the facts in a negligence context have declined to follow it.¹¹³ Why have courts created such legal fictions and expanded tort law to recognize claims related to the mishandling of dead bodies? The language used in the cases suggests there is an innate obligation to protect dead bodies due to the feelings possessed by survivors.¹¹⁴

It is a matter of common knowledge in civilized society that close relatives and friends possess deep-seated feelings and emotions regarding the remains of their dead. The person(s) with the duty of burying a loved one¹¹⁵ has the right to see that the body is preserved. That right is based on an obligation to account for sentiments related to the dead body.¹¹⁶ In *Louisville & Nashville R.R. Co. v. Wilson*,¹¹⁷ a similar concept was recognized:

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind can not be precisely brought within the

112. RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1965) suggests, however, that there is no true property right. Instead, the claim is merely a “peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress.”

113. *Culpepper v. Pearl Street Bldg., Inc.*, 877 P.2d 877, 881 (Colo. 1994) (citations omitted).

114. In addition to the emotional and psychological reasons to protect the remains of loved ones, the physical aspects of protecting bodies has been addressed as well. There is a “right to have the body in the condition in which it was left by death, without mutilation.” *Infield v. Cope*, 270 P.2d 716, 719 (N.M. 1954).

115. This raises the question of standing—see *Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986) (holding that brothers and sisters lacked standing since only their mother was the proper survivor to assert claim).

116. *Rollins v. Phillips*, 554 So. 2d 1006, 1008 (Ala. 1989) (involving unauthorized autopsy).

117. 51 S.E. 24 (Ga. 1905).

letter of all the rules regarding corn, lumber, and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment, or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead, and rights surrounding their bodies. In doing this, the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead, and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.¹¹⁸

It is clear from the peculiar, often unorthodox inroads to traditional notions of law that courts are influenced by the innate desire to protect the remains of the deceased. The interest expressed in protecting dead bodies has been a significant contributing factor in the recognition by United States courts of intentional infliction of emotional distress claims.

c. The Development of Property Law to Recognize Interests in Dead Bodies

This section describes how notions of property law made it possible to protect dead bodies buried on consecrated grounds.¹¹⁹ These religious concepts, while fundamental in England, did not translate well into the American culture which embraces the separation of church and state doctrine. Additionally, this section addresses an alternative as to how the United States may assert property rights over sunken warships and the contents therein.

Alternative methods of punishing offensive activity related to bodies developed from other areas of law. For instance, the property owner of a burial site could bring a trespass action for the removal or disturbance of a buried body.¹²⁰ Under English law, "parsons" had the power and duty to maintain the sanctity of ecclesiastical burial sites; thus body snatching from

118. *Id.* at 25.

119. While generally not thought of as the most effective way to govern the conduct of others, the concepts of property law are inescapable when exploring why others should be punished for offensive actions related to dead bodies.

120. Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 Tex. F. on C. L. & C. R. 3, at 9 (1998) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *428 (3rd ed. rev. 1884)). While a trespass is a tort also subject to criminal sanctions, it is nonetheless based on the concept of ownership of real property (for the purposes here, real property with religious significance).

property with religious significance was subject to the ecclesiastical courts' remedies concerning disturbing the dead.¹²¹

During the nineteenth century, fewer corpses were buried in consecrated grounds, thus they were not afforded the protections of ecclesiastical law, which was of "steadily decreasing importance."¹²² Nonetheless, religious orientation and cultural norms remain key concepts to understanding the need to protect the remains of the deceased.

While an heir retains property interests in the monuments and escutcheons of their ancestors, the common law recognizes no property rights in a dead body (a.k.a. the "no property" rule).¹²³ The "no property" rule can be traced to the Third Part of Coke's *Institutes* (1644):¹²⁴

It is to be observed, that in every Sepulcher, that hath a monument, two things are to be considered, viz. the monument, and the sepulture or buriall of the dead. The buriall of the *Cadaver* (that is, *caro data vermibus*) is *nullius in bonis*, and belongs to Ecclesiastical cognizance, but as to the monument, action is given (as hath been said) at the Common Law for defacing thereof.¹²⁵

"The carcase that is buried belongeth to no one; but is subject to ecclesiastical cognizance; if abused or removed."¹²⁶ At one time, corpses were typically buried in consecrated grounds and were thus protected by ecclesiastical law, while unburied corpses and those buried in unconsecrated grounds did not receive the protections of ecclesiastical law.¹²⁷

121. H. MARCUS PRICE III, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* 21 (1991).

122. P.D.G. Skegg, *Human Corpses, Medical Specimens and the Law of Property*, 4 *ANGLO-AM. L. REV.* 412, 414 (1975).

123. 10 R. PETER MOORE ESQ., LL.B., *HALSBURY'S LAWS OF ENGLAND* ¶ 1019 (4th ed. 1975). However, this position has been criticized. See Dromgoole, *supra* note 48, at 230; see also Skegg, *supra* note 122, at 417 (tracing the origin of the rule and noting "[i]t is remarkable how slight is the authority in favour of the no property rule.").

124. Skegg, *supra* note 122, at 412. The first case involving the "no property" rule occurred in the eighteenth century, but it remained unreported until the early nineteenth century when it was noticed by East. He could not have had personal knowledge of the case since he was not born until after the death of Lord C.J. Willes, the author of the opinion. The facts of the case are not entirely clear, yet Dr. Handyside was found not liable for his unknown involvement with the body of a pair of 'Siamese twins.' See *id.* at 413 (citing E.H. EAST, *PLEAS OF THE CROWN* II, 652 (1803)).

125. Skegg, *supra* note 122, at 412 (citing 3 *COKE'S INSTITUTES* 203).

126. Skegg, *supra* note 122, at 421 n.3 (citing RICHARD BURN, *ECCLESIASTICAL LAW* I, 250 (3rd ed. 1775)).

127. Skegg, *supra* note 122, at 412.

Hence there is a foundation for protection afforded to bodies based on religious affiliation.

Over time, there have occasionally been hints that courts may recognize property interests in *unburied* corpses or parts of corpses.¹²⁸ In *Doodeward v. Spence*,¹²⁹ the High Court of Australia examined a case involving a doctor who kept the corpse of a two-headed child in a bottle of spirits "as a curiosity" until it was later sold at auction.¹³⁰ Since the doctor had exercised a particular amount of skill in dealing with the corpse, he had "acquired some attributes differentiating it from a mere corpse awaiting burial,"¹³¹ therefore allowing some right of possession.¹³²

Despite the in-roads to the no-property rule based on religious ideas and property laws, the religious connotations could not survive under American jurisprudence. In the United States, there is a fundamental recognition of the separation of church and state. Despite an inexorable tie to religious and metaphysical concepts, the United States has vested such duties related to dead bodies in the next of kin resulting in a bundle of rights comparable to those in traditional property law.¹³³

Due to the criminal and tort-based rationale that bodies are protected in the interest of the next of kin, it is likely that although the United States has an interest in the warship, any right it asserts in the bodies of the soldiers aboard may be trumped by rights asserted by the next of kin. As discussed above, the general rule allows the family to claim property rights in the items buried with the body. Although there is an argument that since the sunken warship is a tomb, the family members may claim a property interest in the items aboard the warship, certainly this is subject to the greater proprietary interests of government-owned items.

Similarly, the government may attempt to assert a proprietary interest in the bodies. Yet due to the "no property" rule and the rationale behind criminal and tort law that the body is protected out of respect for the next

128. Also, an analysis similar to the Public Trust Doctrine has been used in an attempt to justify affording protection to dead bodies. *Foster v. Dodd*, 1 L.R. - Q.B. 475 (1866), 3 L.R. - Q.B. 67, 77 (1867); *see also* Skegg, *supra* note 122, at 415, 418 (noting that since a dead body belongs to no individual, it should be subject to protection by the public). Scottish case law allows a corpse to be subject to property laws until it is buried. This, however, may have developed from the misunderstanding of an earlier case. Skegg, *supra* note 122, at 420.

129. (1908) 6 C.L.R. 406 (Austl.).

130. Skegg, *supra* note 122, at 418.

131. *Doodeward*, 6 C.L.R. at 406.

132. The rule from this case could be applied to mummies and shrunken heads. *See* Skegg, *supra* note 122, at 419.

133. Russell, *supra* note 120, at 11.

of kin, it is unlikely that the government interest would supersede the interest of the next of kin.¹³⁴ Were the government to assert such proprietary rights as against a foreign state it is likely that family members, due to practical considerations, would allow the government to assert a protective interest in the bodies since it has the means to more efficiently assert such rights internationally. Nonetheless, it remains far simpler for the government to enforce its interests in sunken warships and the bodies that went down with the vessel through an international criminal or tort law enforcement mechanism.

*d. Protection of Native American Artifacts and Burial Sites –An Example of U.S. Enforcement*¹³⁵

The treatment of Native American artifacts and burial sites is an example of how the remains of a particular culture are treated differently than that of the general population. It combines the various legal tools discussed above into one legislative act. The Native American Graves Protection and Repatriation Act (“NAGPRA”) recognizes the Native Americans “as living cultures, both worthy of respect for their past contribution to North American society and worthy of protection for their continuing vitality.”¹³⁶ Similar recognition and protections should be recognized in the form of grave protection for the contributions by the military culture.

NAGPRA allows ownership and control of human remains and cultural objects to vest in the tribe. One of the purposes of NAGPRA is to protect Native American burial sites by regulating the removal of human remains, funerary, sacred, and cultural artifacts.¹³⁷ Secondly, the statute provides a method for museums containing cultural and human remains of Native Americans to provide restitution to the descendants.¹³⁸ The statute reg-

134. *See Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986) (allowing the state the right to conduct an autopsy, suggesting the government may assert a superior proprietary interest when its interests outweigh the family’s wishes).

135. This section is not meant to be a comprehensive analysis of the laws used to protect Native American Artifacts and Burial Sites. Instead, the purpose of this section is to illustrate an effort by the United States to combine the notions of criminal, tort, and property law into one legislative act to protect burial sites. For a thorough analysis of NAGPRA, *see generally* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in The United States*, 75 B.U.L.Rev. 559 (1995); James A. R. Nafzinger, *The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage*, 30 WILLAMETTE L. REV. 581 (1994).

136. Gerstenblith, *supra* note 135, at, 627 (1995).

137. *Id.*

138. 25 U.S.C. § 3003(a).

ulates excavations and violators are subject to criminal sanctions.¹³⁹ Museums and agencies are required to give lists of their possessions to tribes and have been ordered to repay the tribe.¹⁴⁰ Newly discovered grave-sites may effectively put a halt to excavating activities which may result in costly delays to a builder.¹⁴¹ Comparable legislation could be enacted both domestically and internationally to prohibit disturbing sunken warships and the remains of soldiers aboard.

According to Grotius, disposal of the dead is part of the law of nature.¹⁴² In every society, accounting for and disposing of the dead is a significant event.¹⁴³ There is an "almost universal belief in immortality. Even if the body perishes, the idea goes, some component of the self lives on."¹⁴⁴ It is with these aspects in mind that we explore the concepts of how the dead maintain a non-physical presence by being revered in the living culture.

2. The Symbolic Nature of Death and Burial¹⁴⁵

*And what the dead had speech for, when living/They can tell you,
being dead: the communication/Of the dead is tongued with fire
beyond the language of the living.*¹⁴⁶

The goal of this section is to demonstrate that dead bodies and the places in which they rest (or symbolically rest in the instance the body cannot be located or retrieved) have meanings and sentiments attached to them that go beyond simple reminders of a past life. Instead, the bodies and the shrines that contain them may symbolize the beliefs for which a state exists. Tombs, like bodies, express a tangible symbolic connection between society and its predecessors. The burial site itself has received revered status through time and efforts to preserve its sanctity and the ceremonies performed upon it have often been religiously motivated.¹⁴⁷

139 *Id.* at § 3013.

140. *Id.* at § 3003(a).

141. See Gerstenblith, *supra* note 135, at 633.

142. 2 H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, 450-52 (Carnegie ed., F. Kelsey trans. 1925) (1646).

143. *Supra* note 91, at 5.

144. CONSTANCE JONES, R.I.P., THE COMPLETE BOOK OF DEATH AND DYING vii (Harper Collins Publishers, Inc. 1997).

145. Much of this should be accepted as a prerequisite to cultural heritage legislation by recognizing the symbolic importance of dead bodies and grave markers.

146. T.S. ELIOT, LITTLE GIDDING 8 (1942).

147. The Saxons referred to burial grounds as "God's acre." Murray, *supra* note 93, at 116 (citing Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection*

The grounds are considered "consecrated" or "venerated" grounds.¹⁴⁸ Thus burial sites, like the bodies preserved therein¹⁴⁹ are symbols of the beliefs and conditions under or for which the individual died. Therefore, such sites become worthy of international respect and should be dealt with accordingly.

a. Symbolism Associated with Death and Burial

A human community consists of its living, unborn, and deceased members. Ancestors are given proper burials so that they may be revered as cultural treasures.¹⁵⁰ "Ancestors are made from remembering them. Remembering creates a difference between the deadliness of corpses and the fruitfulness of ancestors. The ancestors respond by blessing their descendants with fertility and prosperity."¹⁵¹

Initially, funerary significance was proportional to status in society. Today, this notion has evolved to giving special treatment when the body represents political or historical significance.¹⁵² Human values generally account or reflect recognition concerning authority such as a monarch's divinity or the orderly bureaucratic procedure and democratic participation.¹⁵³ A consistent theme throughout history is that different classes of people are buried differently. While class status may be determined differently among various cultures, the soldier fighting for his nation has generally been given a relatively high priority in the class system. Thus, soldiers have generally received increased funerary significance. "If the

and Repatriation Act: Background and Legislative History, 24 ARIZ. ST. L.J. 35, 38 n.2 (1992)).

148. The word "cemetery" is derived from the Greek term "koimeterion" meaning "place of repose" or "sleeping place." GARY WILLS, *LINCOLN AT GETTYSBURG, THE WORDS THAT REMADE AMERICA* 64 (1992).

149. Or of which they are meant to represent in the event no body is available.

150. KATHERINE VERDERY, *THE POLITICAL LIVES OF DEAD BODIES* 41 (Columbia Univ. Press 1999).

151. *Id.* at 42 (quoting Gillian Feelye-Harnik writing on ancestor practices in Madagascar). Transylvanian and Hungarian villagers believe that the soul of a dead person watches the funeral, and if it is dissatisfied, it will return to punish the living. *Id.* at 43. Some cultures believe that the dead be buried properly and that the living should continue to offer food to the dead to ensure their ancestors' blessings and continued good-will. *Id.* at 43. Russians, for instance, believe that bad things will happen if someone is not buried or is buried improperly, or if abnormal people are given a normal burial. *Id.* at 45. Some Latin American cultures conduct activities in cemeteries that are comparable to the ways in which United States citizens utilize recreational parks.

152. MIKE PARKER PEARSON, *THE ARCHAEOLOGY OF DEATH AND BURIAL* 94 (Texas A&M Univ. Press, 1999).

153. VERDERY, *supra* note 150, at 37.

funeral ranks among the most highly ritualized moments in a person's life, then the funerals of political rulers, military personnel and other major figures take death ritual to an even higher plane of ceremony."¹⁵⁴

"In ancient times a military death was seen as a good death."¹⁵⁵ As among the ancient Norse, death of a warrior was the noblest death since warriors went to a "different, and far more festive, afterlife than other dead people—Valhalla, an enormous dining hall."¹⁵⁶ Ancient Greek philosophers saw a military death as a way to gain immortality since a fallen warrior would become a hero, and would be remembered after his death. The Greek philosophers simultaneously saw the down-side of war as well, as reflected by the fact that Ares, the god of war, is generally portrayed in an unpleasant light while Athena, also associated with war, is the goddess of wisdom.¹⁵⁷

"[O]ne common rule about proper burial still in force is that *our 'sons' must be buried on 'our' soil*" and the "notion of repossession 'our' dead is common worldwide, as is evident from customs of warfare that return dead soldiers to their home countries."¹⁵⁸ The contemporary view is that returning cultural property or heritage is increasingly important to building the national identity of a nation.¹⁵⁹

According to one author, "not all bodies are equally worth retrieving."¹⁶⁰ The ones that are, however, are usually the bodies of persons thought to have contributed something special to their national history or culture."¹⁶¹ Soldiers are responsible for unique contributions to the foundation and development to their nations. Therefore, their sacrifices made in the line of duty should be recognized in a special or unique way, as their death represents a particularly deep and meaningful loss to the culture.

154. JONES, *supra* note 144, at 25.

155. *Id.* at 143.

156. *Id.*

157. *Id.*

158. VERDERY, *supra* note 150, at 47.

159. *Id.* at 48. Also, there was a saying during Vietnam concerning the dead (and often the living) to "bring em home." See Elliott, *supra* note 91, at 6.

160. VERDERY, *supra* note 150, at 48–9. This brazen statement is not the view represented by this paper. Instead, one goal in the paper is to show why there may be a difference in the level of treatment accorded to burial ceremonies involving different members of society. The issue of retrieval is wholly distinct.

161. *Id.*

*b. Sunken Warships are Tombs with Symbolic Significance
when Applying U.S. Case Law*¹⁶²

The treatment of dead bodies offers a perspective on culture and politics beyond a technical process. It offers insight into meanings, feelings, and ideas of morality and legitimacy. The politics of dead bodies may be seen as a strategic activity within a cultural system.¹⁶³ "A body's materiality can be critical to its symbolic efficacy: unlike notions such as 'patriotism' or 'civil society', for instance, a corpse can be moved around, displayed, and strategically located in specific places."¹⁶⁴ "The dead body is meaningful not in itself but through culturally established relations to death and through the way a specific dead person's importance is (variously) construed."¹⁶⁵

Thus, dead bodies may be thought of as symbolic and representative of an era and culture. Bodies have been seen as symbols of political order.¹⁶⁶ Part of the symbolism comes with "the feelings of awe aroused by contact with death."¹⁶⁷ Additionally, unlike inanimate objects such as flags or songs, symbols that were once human beings are valued by the observer in a different fashion because they are looking at as a being or symbol that was once a living person.¹⁶⁸

While symbols play an important role in our culture, some symbols of our cultural heritage cannot be prevented from being destroyed because to do so would undermine the very essence of our nation's beliefs. In a 5-4 decision, the U.S. Supreme Court held that Texas could not prohibit burning the United States flag on the basis of it being a national symbol.¹⁶⁹ Nonetheless, the Court recognized the importance of preserving national symbols within the bounds of the Constitution.¹⁷⁰

Millions of Americans regard the flag with "an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have."¹⁷¹ The flag "is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who

162. Although the warship itself attains symbolic significance on its own, it attains unique status when it sinks and is the last resting place for soldiers.

163. VERDERY, *supra* note 150, at 25.

164. *Id.* at 27.

165. *Id.* at 28.

166. *Id.*

167. *Id.* at 32.

168. *Id.*

169. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

170. *Id.*

171. *Id.* at 2552 (Rehnquist, C.J., dissenting).

share our aspirations.”¹⁷² “The value of the flag as a symbol cannot be measured.”¹⁷³ The message of some symbols “may survive long after [they have] outlived [their] usefulness as a symbol of regimented unity in a particular nation.”¹⁷⁴ They are symbolic of a way of thinking and the way a society functions, thus they are a snapshot of an era. With it are associated concepts of democracy, freedom, etc. The rationale applies to the bodies of soldiers who fall while in service for their nation, as well as the vessels upon which they serve.

The Texas statute was defended because it sought to preserve the integrity of the flag as a symbol of national unity.¹⁷⁵ Writing for the majority, Justice Brennan stated that the government has a legitimate interest in protecting the flag as a symbol of our nation.¹⁷⁶ However, the government’s interest in protecting the flag was constrained by the First Amendment’s right to free speech and certain types of expressive conduct.¹⁷⁷

Sovereign vessels, however, are more easily protected than the flag. In contrast with the flag issue, desecrating or salvaging a sunken warship does not enter the realm of free speech or expressive conduct that the First Amendment was designed to protect. The act of salvaging a warship is rarely, if ever, a political statement. Instead, most salvage operations are done for commercial purposes, which are likely to receive lower levels of

172. *Id.* at 2557 (Stevens, J., dissenting).

173. *Id.*

174. *Id.* at 2556 (Stevens, J., dissenting).

175. *Id.* at 2537. The majority agrees that there is symbolic importance associated with the flag, noting that the flag is “the one visible manifestation of two hundred years of nationhood.” *Id.* at 2540 (Rehnquist, C.J., dissenting) (quoting *Smith v. Goguen*, 415 U.S. 566, 603 (1974)). The majority then added, “[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Id.* (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943)). Notably, “when a word [or symbol] acquires value ‘as the result of organization and the expenditure of labor, skill, and money’ by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol].” *Texas v. Johnson*, 109 S.Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 532 (1987)) (allowing Congress to grant exclusive use of the word “Olympic” to USOC) (quoting *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918)). Therefore, it is at least arguable that the U.S. has a proprietary interest in the sunken warship and the remains of the soldiers who went down with the vessel.

176. *Texas v. Johnson*, 109 S. Ct. at 2547.

177. *Id.*

scrutiny by the court. The prohibition against the desecration of a gravesite remains content neutral, thus constitutional.¹⁷⁸

B. Soldiers

This section will attempt to analyze the observation made by some scholars that it is difficult to fathom why military remains of servicemen are accorded higher respect than the remains of civilians.¹⁷⁹ Part of the answer may lie in the notion that the government feels a sense of guilt or responsibility for sending its troops off to die.¹⁸⁰

Although soldiers have generally held upper-class privileges in caste systems, it has also been said that they traditionally “appeared to be a category of the poor much neglected and often disregarded by their employers.”¹⁸¹ This inability by the government to adequately remunerate soldiers for their efforts may be the very purpose of glorifying their exploits through heightened social status. A comparable attempt at a reward system is seen in the modern U.S. military in which soldiers are given ribbons and certificates for good deeds, but generally not pay raises (absent promotions which are generally time-based, not achievement-based). Nations throughout the globe have set up organizations to assist soldiers with religious, educational, and welfare interests; soldiers have been considered “regular objects of philanthropic concern.”¹⁸² Such unique treatment of soldiers helps to explain why soldiers are buried in a fashion different than the general population.

The propositions discussed below center around the concept that dying for a good cause is considered an honorable, more noble death that will be reveled in, not shunned. The death may even serve to legitimize the nation’s goals and become an inspiration to motivate a society to stand

178. “[E]ven if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried.” *Id.* at 2558, n.* (Stevens, J., dissenting).

179. E.g., Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations*, 12 U.S.F.Mar.L.J. 311, 353 (2000); Dromgoole, *supra* note 48, at 230–32.

180. “It is a melancholy judgement upon human nature that governments usually show greater alacrity in calling men up for military service than in caring for them once the war has ended.” JOHN KEEGAN & RICHARD HOLMES, *SOLDIERS* 161 (Viking Penguin, Inc., 1986).

181. GEOFFREY BEST, *HUMANITY IN WARFARE* 148 (Columbia Univ. Press 1980).

182. *Id.* These concepts appear to assign soldiers a comparable status to that of seamen as wards of the court in American maritime jurisprudence, but for the more limited purposes of financial hardship and the inability of the employer to adequately compensate soldiers for their efforts. *Harden v. Gordon*, 11 F. Cas. 480, 485 (Me. 1823) (No. 6047).

faithfully behind its soldiers, and fight for the nation's collective beliefs. When reviewing these materials, it is important to keep in mind the effect of technological developments in the context of the life and death of a soldier.

1. Ancient Warrior Status

a. *The Religious Concept of Just War*

The pure, original Christian view is that killing another is sinful.¹⁸³ While most Eastern religions are not in favor of war, there are many exceptions, such as a defensive war being permissible under Chinese Confucianism and Taoism.¹⁸⁴

Once Christianity was embraced, the soldier was in the paradoxical situation where he would either have to "immediately leave military service (as many have done); or we must resort to all kinds of excuses in order to avoid any action which is . . . forbidden."¹⁸⁵ During the fifth century and while the Roman Empire flourished, St. Augustine stated in his work, *City of God*, that a Christian could engage in a "just war" without sin and that killing was permitted at God's express command.¹⁸⁶ The overall intent of a just war is to win over the offender in order for him to repent, rather than to overrun him by force.¹⁸⁷

The concept of a just war is based on the notion that true dedication to God is noble and that the more dedicated one is to God, the more one is willing to fight for that noble cause. Therefore, should one choose to fight for beliefs about God, he should be rewarded with a more divine, revered status in heaven and on earth. Therefore, although killing is generally considered an un-Christian act, a soldier is nonetheless "innocent" when he kills under the auspices of fighting for one's country.¹⁸⁸ This, simply

183. *Exodus* 20:13 (describing the ten commandments). This view is likely common among most religions. Some relatively small Christian sects believe that death is particularly terrifying because replacing the dead is a more difficult chore for these communities. DAVID E. STANNARD, *DEATH IN AMERICA* xii (Univ. of Pa. Press, 1975).

184. JONES, *supra* note 144, at 143.

185. Tertullian, *De Corona Militis* (211), ch 11, par 4 (ET in FC xl p 257) (1959).

186. BAILEY, *supra* note 50 at 7 (citing Letter 47 to Publicola (398)(ET in FC, xii.230); *De libero arbitrio* (388), i.5, ¶ 11 (ET M.Pontifex, entitled The Problem of Free Choice (London, 1955), pp.44-7); c. Faust. Man., xxii, ¶¶ 74-5, 79 (ET pp. 463-5); Letter 87, to Emeritus (c.405) (ET in FC, xviii (1953), pp. 19-20; *De civitate Dei*, i (413), chs 16, 20, 25 (ET J. Healey, ed. R.V.G. Tasker, London, 1945); *Quaestiones in Heptateuchem* (419), vi.10 (ET in J. Eppstein, *Catholic Tradition of the Law of Nations* (London, 1935) p. 74)).

187. BAILEY, *supra* note 150, at 9.

188. *Id.*

stated, is the concept that dying for one's country is the equivalent of dying for God. The two ideas are intertwined and concepts of religion are inexorably intertwined with a soldier's death.¹⁸⁹

St. Thomas Aquinas, who was generally opposed to war, stated that a war may be just, hence justified, if the sovereign is the authorizing force (as opposed to the individual), there is a just cause, and there is an intent to advance good or to avoid evil.¹⁹⁰ Today, the concept of national sanction can be seen in the importance attached to publicly declaring war.¹⁹¹ Such an act shows the sanction by the nation and justifies, for many soldiers, the killing of another human being. Similarly, it is important to publicly assert an intention to guard the nation's sunken warships and the soldiers who went down with the vessel. This demonstrates that these soldiers died for a legitimate cause that was sanctioned by the government.¹⁹²

The relationship between the concept of a just war and the sanctioning by the sovereign¹⁹³ is that a soldier fighting for a national purpose, in many cultures, may be elevated in status and thus revered and respected differently than non-soldiers.

b. Ethical Codes

The ethical code systems among warriors established rules of combat and defined a "system of moral etiquette by which warriors judged themselves to be worthy of mutual respect."¹⁹⁴ These codes of ethics and responsibilities acknowledged a "moral paradox of combat: those who fight each other bravely will be bound together in mutual respect; and that if they perish at each other's hand, they will be brothers in death."¹⁹⁵

"[W]arriors distinguished between combatants and noncombatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and of the wounded.

189. See generally BAILEY, *supra* note 150. Luther stated that the profession of the soldier is "right and godly." *Id.* at 18 (citing LUTHER, TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED xlv.125 at 95 (1523)).

190. BAILEY, *supra* note 150, at 9 (citing St. Augustine, *City of God*, Letter 138 (ET pp. 44, 46)).

191. There are significant economic, political, judicial, and social differences attached to the effect of a public declaration of "war" as opposed to engaging in skirmishes, conflicts, peace-keeping missions, and the like.

192. BAILEY, *supra* note 188, at 29–30.

193. Some consider God to be at all times sovereign. *Id.* at 7.

194. MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR, ETHNIC WAR AND THE MODERN CONSCIENCE* 117 (Henry Holt and Co., 1997).

195. *Id.*

[Without such codes, war would have been reduced to] slaughter.”¹⁹⁶ The Geneva Conventions later codified the warrior’s honor and attempted to make the ethical codes universal.¹⁹⁷ Among the more well-defined ethical codes are the Christian Code of Chivalry, Japanese Bushido,¹⁹⁸ the Indian Caste system,¹⁹⁹ and the combat tactics of the Native American “dog fighter.”²⁰⁰

2. Characteristics or the Regiment of Soldiers

The days of intimate combat such as hand-to-hand combat and ships tying up to do battle are diminished while long-range missiles and bombing from the skies has become more prevalent and has resulted in swift losses. The intimate forms of combat often resulted in death, but survival with various levels of injuries was possible.²⁰¹ Today, however, the likelihood of death is very high if a weapon of mass destruction is used. Thus the international codification in the past dealing with treatment of the wounded and sick, while still relevant, is likely to shift or be extended to those who die on the battlefield due to the nature of modern warfare. The resulting issues will likely involve burial aspects and the marking of gravesites. When a vessel sinks the threat of death at sea remains significant, even in spite of today’s modern technology, due to the incompatible nature of humans with an aquatic environment.

196. *Id.*

197. *Id.* at 118.

198. Japanese Samurai knights held an elite status in the Japanese stratification system. EIKO IKEGAMI, *TAMING OF THE SAMURAI: HONORIFIC INDIVIDUALISM AND THE MAKING OF MODERN JAPAN*, 112 (Cambridge, MA, 1995). They practiced ritual suicides called “harakiri” or “seppuku” as honorable death sentences. JONES, *supra* note 144, at 29; *see generally*, JACK SEWARD, *HARA-KIRI: JAPANESE RITUAL SUICIDE* (Charles E. Tuttle Co. Publishers, 1968).

199. The “Mahabharata” is an epic Sanskrit poem based on Hindu ideals written between 200 B.C. and 200 A.D. L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 21 (Manchester Univ. Press, 1993). The term “Mahabharata” means “the death of many warriors in battle” and the term necessarily encompasses their mass disposal. JAGDISH NARAIN TIWARI, *DISPOSAL OF THE DEAD IN THE MAHABHARATA* 48 (1979).

200. Native American warriors held a high status despite being termed “dog soldiers” by U.S. soldiers. The “dog soldiers” would tie themselves to a lance driven into the ground and would fight to the death to defend the perimeter. JONES, *supra* note 144, at 29–30.

201. The lack of medical capabilities, thus resulting in death, is set aside for the purposes here.

a. Discipline in the Military

“When a Commander has, by tact, patience, justice, and firmness, each exercised in its proper turn, produced such an impression upon those under his orders in a ship of war, he has only to await the appearance of his enemy’s top-sails upon the horizon. He can never tell when that moment may come. But when it does come, he may be sure of victory over an equal or somewhat superior force, or honourable defeat by one greatly superior . . . No such achievements are possible to an unhappy ship with a sullen crew.”²⁰²

Military commanders, from at least the time of the Pharaohs, had rules in place to discipline troops.²⁰³ The goal was “to create an efficient fighting force.”²⁰⁴ Initially, discipline was necessary at sea to ensure adequate movement of the warship. Ancient warships were propelled by hundreds of rowers. Effective rowing could only be accomplished in unison; therefore, a high state of physical and mental discipline would be necessary to stay in time to avoid bumping oars.²⁰⁵

The goals sought from instilling discipline in soldiers tend to parallel humanitarian efforts.²⁰⁶ A knight’s fear of dishonor and public disapproval served as an effective sanction to ensure compliance with the chivalrous laws of arms.²⁰⁷ Yet discipline and a strict adherence to a set of rules, ironically, may result in actions quite contrary to humanitarian efforts.²⁰⁸ When fighting relates to religious disputes, one has the opportunity to demonstrate dedication to religion by fighting for it at any cost. Thus, dedication to fight was equated with a dedication to the national religion. In the United States, there is a fundamental belief in maintaining the separation of church and state. Therefore, among the reasons to fight in the United States include freedom from a government-mandated religion. However, many Middle-Eastern groups still base their system of government on fundamentalist religious beliefs. Soldiers in those nations tend to

202. See Augustus C. Buell, *Paul Jones, Founder of the American Navy*, reprinted in VICE ADMIRAL LELAND PEARSON LOVETTE (RET.), *NAVAL CUSTOMS, TRADITIONS, & USAGE* 323 (4th ed. 1959).

203. RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 3 (1983).

204. *Id.*

205. WILLARD BASCOM, *DEEP WATER AND ANCIENT SHIPS* 44 (1976).

206. THEODOR MERON, *HENRY’S WARS AND SHAKESPEARE’S LAWS* 142–3 (1993).

207. *Id.* at 7.

208. Pro-choice believers would liken this to the alleged logic behind bombing abortion clinics.

exemplify their intense discipline by their willingness to die for their nation.

Methods of discipline also provide psychological feelings of belonging, which in turn provide motivation to continue to fight for a cause. One rationale for drill is to weld "men together under circumstances of shared adversity," and to ensure a "habit of obedience."²⁰⁹ There are many disciplinary methods used in the modern military including rigid work schedules, physical training, and the repetitive practicing of drill and ceremonies. Other more subtle methods include taking an oath to join, having a short haircut, and wearing a uniform.²¹⁰ Even when these practices have different primary purposes,²¹¹ the secondary effects inescapably related to discipline are often displeasing and uncomfortable to the new recruit. Nonetheless, a rigid disciplinary regiment can create an esprit de corps and a braggadocios psychological mindset that prepares a soldier for the battlefield and the rigorous expectations demanded from them by their commanders. In essence, the soldier feels that since his training and preparation for battle was superior to others, he will be better equipped to fight and win.

b. Responsibility of Leaders

Grotius distinguished between "those who are responsible for a war and those who followed the leadership of others" saying that, those that follow should be pardoned since they were essentially an "innocent populace."²¹² St. Augustine "attaches great importance to the duty of obedience to the lawful authorities and considers that soldier 'innocent' if he obeys an unrighteous command on the part of the ruler."²¹³ He adds that "I do not approve of killing [in self-defense] unless one happens to be a soldier or public functionary . . . [acting] according to the commission lawfully given him, and in the manner becoming to his office."²¹⁴ These notions parallel the ideas of religious justification for war and the subsequent innocence of

209. KEEGAN, *supra* note 180, at 44.

210. Most military uniforms, including the Battle Dress Uniform, are worn with the name-tape over the right breast and the U.S. branch of service over the left-breast, or heart-side of the chest.

211. For instance, a haircut may be necessary for hygiene purposes.

212. GROTIUS, *supra* note 50 at bk III, ch. xi, pt v; see MERON, *supra* note 206, at 72-3.

213. BAILEY, *supra* note 50, at 7 (citing St. Augustine, *City of God*, Letter 47 to Publicola (398) (ET in FC, xii. 230); *De Libero Arbitrio* (388), i.5, ¶¶ 11-12; c. Faust. Man., xxii., ¶ 75 (ET p. 465)).

214. BAILEY, *supra* note 50, at 6-7 (citing *De Libero Arbitrio* (388), i.5, ¶ 11; c. Faust. Man., xxii, ¶¶ 74-5, 79 (ET p. 463-5)).

a soldier who kills for those reasons.²¹⁵ Christian chivalry encompassed the idea that persons dying without having the chance to repent are doomed to eternal damnation. Thus, King Henry in Shakespeare's play, *Henry V*,²¹⁶ contemplates his responsibility for the death of soldiers killed during war.²¹⁷

The following conversation between King Henry and a soldier, Williams, involves the spiritual responsibility of princes for the death of soldiers in a just or unjust war. The King is contemplating his responsibility for the death of his soldiers. He recognizes responsibility for authorized acts committed by soldiers while in their official capacity, but discharges any responsibility for private acts committed beyond the scope of his authority (namely pillage and murder). Remnants of these notions are paralleled in today's agency law where a principal remains liable for the acts of his agents.²¹⁸ These notions are evidenced as follows:

King (in disguise): Me thinks I could not die anywhere so contented as in the King's company, his cause being just and his quarrel honourable.

Williams: That's more than we know.

...

Williams: But if the cause be not good, the King himself hath a heavy reckoning to make, when all those legs and arms and heads chopped off in battle shall join together in the latter day . . . Now, if these men do not die well, it will be a black matter for the King that led them to it . . .

King: So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father, that sent him. Or if a servant, under his master's command transporting a sum of money, be assailed by robbers, and die in many irreconciled iniquities, you may call the business of the master the author of the servant's damnation. But this is not so. The King is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant, for they purpose not their deaths when they propose their services. Besides, there is no king, be his cause never so spotless, if it come to the arbitrament of swords, can try it out with all unspotted soldiers. Some peradventure, have on

215. See discussion *infra* Part III.B.1.a.

216. WILLIAM SHAKESPEARE, *HENRY V* iv. I. 125–6 (Oxford Univ. Press, 1982) (1600).

217. MERON, *supra* note 206, at 65.

218. *Id.*

them the guilt of premeditated and contrived murder; some, of beguiling virgins with the broken seals of perjury; some, making the wars their bulwark, that have before gored the gentle bosom of peace with pillage and robbery. Now, if these men have defeated the law and outrun native punishment, though they can outstrip men, they have no wings to fly from God . . . Then if they die unprovided, no more is the King guilty of their damnation than he was before guilty of those impieties for which the are now visited. Every subject's duty is the King's, but every subject's soul is his own . . .

Williams: 'Tis certain, every man that dies ill, the ill upon his own head. The King is not to answer it.²¹⁹

Leaders have learned that if they treat them well, soldiers are less likely to defy the rules of war and chivalry. For instance, it has been an important practice to pay soldiers regularly. Otherwise, there is increased incentive to pillage.²²⁰

Dead bodies may be politicized "in compensation for wrongs acknowledged" and in an effort to "establish accountability."²²¹ Thus a nation's guilt for sending its troops to death may be accounted for by the promise of a decent burial. This sense of compensation may justify a nation's special interest in the remains of its soldiers.

c. Culture of the Modern U.S. Soldier

Various cultures have their own set of values and norms that aid in dictating each group's burial practices.²²² Cultures can be organized by religion, region, specific institutions, and specific interest groups, among others.²²³ The way of life for a soldier includes rules of conduct, language,²²⁴ and specific symbols that qualify the group as a unique culture. The United States military has developed "proud traditions that transcend ethnic, religious, and traditional cultural boundaries."²²⁵ "The close-knit

219. SHAKESPEARE, *supra* note 216.

220. MERON, *supra* note 206, at 150.

221. VERDERY, *supra* note 1502, at 38.

222. See discussion *infra* Part III.A.

223. KATHRYN L. BRAUN, ET AL., CULTURAL ISSUES IN END-OF-LIFE DECISION MAKING 2 (2000).

224. Such as the extensive use of acronyms like M.O.S., P.M.C.S., P.T., D.&C., and E.T.S.

225. BRAUN, *supra* note 223, at 249.

nature of the extended family that exists in the military creates grieving issues" generally not seen in the civilian sector.²²⁶

Efforts taken to prepare and avoid death are unique to the military culture.²²⁷ By its very nature, death is "omnipresent in the minds of those in the military and is ingrained in every facet of daily life."²²⁸ Therefore, the military has served as a template for organizations to coordinate dealing with death.²²⁹ Even in peacetime, the loss of life remains a possibility because of the inherently risky operations and training which are conducted.

The military must maintain procedures on how to remove and bury the dead, including disease-ridden remains, and how to transport the remains to their homes. Procedures are in place to order body bags, register graves, evacuate bodies, and notify families of death.²³⁰ Proper maintenance of wills and powers of attorney are also important because of the inherent risk associated with military life. Although many of these procedures relate to health care and avoiding disease and contamination, various other procedures relate to helping fellow soldiers and their families cope with loss.²³¹

"The traditions of the military are so ingrained and so much a part of military life that they have changed very little over the past 200 years."²³² The endurance of these rituals provides strength and stability to the culture along with the ability to handle difficulties and uncertainties associated with the occupational risks.²³³ One fear involved with downsizing the military and the resulting effect of increased use of reserve component forces is that

226. *Id.* at 259.

227. The ancient Samurai warrior regarded the question of their death to be central to their existence. IKEGAMI, *supra* note 198, at 117.

228. BRAUN, *supra* note 223, at 249.

229. *Id.*

230. *Id.* at 253.

231. The Army Mutual Aid Association (now the Army/Air Force Mutual Aid Association) helps family members cope with the loss of a service member. *Id.* The military has established a "casualty branch" to organize notification to families, handle insurance benefits, and recover and transport the human remains and personal effects. Paul T. Bartone & Morten G. Ender, *Organizational Responses to Death in the Military*, 18 DEATH STUDIES 25, 26 (1994). These services serve an essential social and psychological function by maintaining individual mental health for those grieving as well as recovering unit morale so that the mission can continue. *Id.* The family notification process includes a respectful letter or telegram, a personal visit from a military representative, and presentment with an American flag. The procedure is rather strict and the representative must be of the correct rank, wear a specific uniform, visit between specified hours and generally states a rehearsed message.

232. BRAUN, *supra* note 223, at 261.

233. *Id.*

the deep nature of the practices will be forgotten or will become less ingrained, resulting in greater difficulty dealing with the death of a soldier.²³⁴

"Every individual in a society possesses not only a biological being, but also a 'social being' that is 'grafted onto him' by other members of the society."²³⁵ Therefore, the loss of an important individual in a society may be internalized in various ways. Among them are the notion that (especially in a smaller society), the person is difficult to replace and the society may not be able to function without the person. This is paralleled by the ritualistic burial of soldiers because the honored burial is necessary to maintain the morale of the unit to keep the system functioning. In a small or closed society, an individual is more difficult to "replace" in the utilitarian sense. Large societies, however, who embrace ritualized traditions, have an easier time with the transition of the loss of a loved one and there are less dramatic effects and social disruptions.²³⁶ This concept of being able to "move on" makes it easier for a soldier to psychologically bear a battle when his comrades and predecessors have fallen before him.

(1) Modern Military Practices and the Unique Cultural Facets
Involving the Modern U.S. Soldier

The culture of the United States military is noticeable to the public through remembrance holidays such as Veterans Day and Memorial Day, when military graveyards are decorated with American flags and speeches and articles are written to remind us of the deep sentiment associated with the holiday. Other traditions and norms are more subtle, hence less noticeable to the civilian population.

For instance, Basic Training ushers in the need to prepare for survival and the realistic possibilities of facing severe injury or even death. Recruits are given several vaccinations to protect them from potentially deadly diseases prevalent in exotic locations. Early in their training, recruits begin to train with weapons. They learn general first aid, and how to don chemical protective gear to avoid death from tasteless, odorless, invisible toxic agents. Recruits are taught how to react in a near-automatic fashion to life-threatening situations.²³⁷ Subtle tactical techniques are taught to

234. *Id.* The difficulty in replacing a reservist will be multiplied since not only is a soldier and family member lost, but a civilian employee is lost as well.

235. STANNARD, *supra* note 183, at x. (quoting ROBERT HERTZ, *THE COLLECTIVE REPRESENTATION OF DEATH* 76 (Rand C. Needham trans., The Free Press, 1960).

236. *See id.* at xii.

237. BRAUN, *supra* note 223, at 251.

avoid death, such as how to properly hold and smoke a cigarette so as to avoid easy detection by the enemy and not saluting officers in the field. Recruits are reminded that they may face a death so violent or disfiguring that they will not be easily recognized. They give DNA and fingerprint samples and are issued dog tags which will be used to identify their bodies.²³⁸

Many rituals and superstitions have developed that soldiers believe help them to avoid death. Tattoos were initially indicators of high status and noble birth, but were also the “garb of warriors.” The body of the warrior was itself an “heraldic device” upon which he could emblazon the “values which proclaimed his honour.”²³⁹ Although the tattoos would likely be hidden by clothes and armor during battle, “the Pazyryk warrior’s skin was protected by its motifs of power and danger from its rupture and the resultant moral danger of the body’s permeability, disfigurement and death.”²⁴⁰ Drawings and markings are not uncommon on vessels. The term “eyes” of a vessel has been traced to the figureheads drawn on the bow of warships to ward off evil spirits.

Soldiers wear a St. Christopher’s medal, tap their guns with rosary beads, and avoid others who have little time left in the war zone.²⁴¹ U.S. soldiers have developed and commonly use slang to speak of death.²⁴²

(2) Motivation to Fight and Incentive to Join

The risk of death to a soldier induces intense psychological pressures that can affect unit morale which, like momentum in the last 2 minutes of

238. *Id.* at 252.

239. P. Treherne, *The Warrior’s Beauty: The Masculine Body and Self-Identity in Bronze-Age Europe*, 3 J. OF EUR. ARCHAEOLOGY, 104–44 (1995); see also PEARSON, *supra* note 152, at 67.

240. Treherne, *supra* note 239, at 104–44.

241. BRAUN, *supra* note 223, at 254–55.

242. Such jargon includes: “Dutch courage” (the square-faced gin given to Dutch soldiers before battle so they could bear the possibility of death), “lawn darts” (crashed airplane), “dope on a rope” (a soldier rappelling from a helicopter is an easy target), “gardens of stone” (slang term for graveyards during Vietnam), “Tail-gunner Charlie” (the last airplane flying in formation which is more likely to draw fire), “the walk” (the path of the sentry at the Tomb of the Unknown soldier), “cancel Christmas” (meaning one has died), and “old lie” (meaning that a soldier’s death is “dulce and decorum” or sweet and fitting). *Id.* “Davy Jones’ locker” has been defined as “[a] familiar name among sailors for Death, formerly for the evil spirit who was supposed to preside over the demons of the sea. He was thought to be in all storms, and was sometimes seen of gigantic height, showing three rows of sharp teeth in his enormous mouth, opening great frightful eyes, and nostrils which emitted blue flames. The ocean is still termed by sailors Davy Jones’s locker.” LOVETT, *supra* note 202, at 236 (quoting William A. Wheeler).

a basketball game, can dictate the outcome of a battle. "[I]n war three-fourths of this business is moral, while the balance of material forces constitutes only one-fourth."²⁴³ Xenophon, a Greek soldier and author has said that "no numbers or strength bring victory in war; but whichever army goes into battle stronger in soul, their enemies generally cannot withstand them."²⁴⁴ Clausewitz has compared morale to the "precious metal, the real weapon, the finely-honed blade" of a sword as opposed to mere physical power being the less threatening wooden hilt of the sword.²⁴⁵ Field-Marshal Montgomery has stated that "[t]he morale of the soldier is the greatest single factor in war."²⁴⁶

One way to ensure a fighting spirit is to honor those of yesterday in order to demonstrate to the soldiers of today, that their efforts will be remembered and rewarded.²⁴⁷ The death of a comrade is depressing and tends to decrease morale by reminding soldiers that their death may be imminent.²⁴⁸ Therefore, it becomes important to enable soldiers to see that their comrades and predecessors are properly honored to ensure the soldiers will continue to help with the mission.

"By seeing or participating in efforts to recover remains, service members realize that if they are killed in action, the same efforts will be expended for them."²⁴⁹ These traditions include the Navy's capabilities to store bodies aboard ship, and the Army and Marine Corps' policy of not leaving bodies behind on the battlefield.²⁵⁰ An example followed the peacetime mass casualties aboard the U.S.S. Iowa and the U.S.S. Stark; service members were asked to piece together the remains of their comrades for identification purposes.²⁵¹

Another incentive to fight besides the ideological factors of patriotism and pride is the more humble notion of protecting *my* home and *my*

243. SAMUEL DUMAS & K. O. VEDEL-PETERSEN, *LOSSES OF LIFE CAUSED BY WAR* 19 (Oxford: Clarendon Press, NY, 1923) (quoting Napoleon); *see also* KEEGAN, *supra* note 180, at 39.

244. KEEGAN, *supra* note 180, at 39.

245. *Id.*

246. *Id.*

247. *Id.* at 47.

248. *Id.* at 265.

249. BRAUN, *supra* note 223, at 254.

250. *Id.*

251. *Id.* at 256. The incidents occurred in 1989 and resulted in 47 deaths on the USS Iowa and 37 on the USS Stark.

family.²⁵² This factor becomes increasingly more important with the proximity of battle.²⁵³

One way to counterbalance the negative feelings associated with the occupation is to encourage team-building activities and “jody calls” while marching in cadence to instill a “fighting spirit” necessary for troops to continue with their mission despite injuries, suffering, and the death of comrades.²⁵⁴ Similarly, the Marine Hymn demonstrates the pride and honor attached to the realistic possibility that one might die for his country.²⁵⁵ It reads in part: “Here’s to health to you and to our corps/Which we are proud to serve/In many a strife we’ve fought for life/And never lost our nerve.”

The recruitment process attempts to lure civilians with the romanticized ideas of patriotism, courage, heroism, and the possibility of making the ultimate sacrifice for one’s nation.²⁵⁶ The risks associated with being a soldier are glorified and accepted as part of the nature of the duty.²⁵⁷ This is one of the few occupations where the mission is to give every effort, including one’s life, for the sake of the country. Although Patton made it quite clear that no man ever won a war by dying for his nation, the idea remains constant that a soldier must be prepared to make the ultimate sacrifice. The recruitment process today is far different than it was in the past. This suggests that there is a resurgence of the ancient principles that serving and dying for one’s country is a noble act worthy of praise from family and peers.²⁵⁸

Throughout history, there have been times when it was difficult to recruit soldiers.²⁵⁹ In such times, men were lured into service by the

252. See KEEGAN, *supra* note 180, at 49.

253. An ordeal the U.S. has not had to face for some time excluding occasional acts of terrorism, some of which are committed by citizens. Among recent acts of terrorism are the World Trade Center and Oklahoma City bombings.

254. BRAUN, *supra* note 223, at 251–52. One example is: “If I die in the combat zone/Pack me up and ship me home/Pin my medals upon my chest/Tell my mom I did my best.” *Id.* at 252. Other cadences include the ideas that people at home are anxiously awaiting their return, such as: “In her hair she wore a yellow ribbon/She wore it in the Spring time and in the merry month of May/And if you ask her why the heck she wore it/She wore it for that soldier who was far, far, away.” The yellow ribbon is a symbol representing a dedication to those who are fighting for our nation; their popularity re-surged during Operation Desert Storm.

255. BRAUN, *supra* note 223, at 252.

256. *Id.* at 250.

257. *Id.*

258. This can be seen in the Armed Forces recruitment campaigns waged in the public emphasizing heroism, courage, and joining a team of select courageous individuals.

259. Although there are likely to be varying reasons why, examples may include a strong

opportunity to loot, earn pay, receive alcohol or drugs.²⁶⁰ For instance, if one takes the guided tour from London to Greenwich by boat, the guide points out the bars known to be frequented by young men during the periods when England was at war. Representatives from the Royal Navy would enter the pubs in the early hours to "recruit" new troops who would find themselves, upon becoming fully roused, already out to sea and a new member of the Royal Navy, perhaps involuntarily.

Some cultures (past and present) employed other methods to entice troops such as permitting pillaging and stealing, because an ancient rule allowed property found on the dead to be considered spoils of war. Today, however, many states' militaries are more professional and do not experience the same unwillingness to join the military. Therefore, the attraction to permit pillaging and plundering is less of an incentive to join the military.²⁶¹ Also, disciplining a soldier for taking the belongings of a belligerent has become the norm and such practices are less likely to damage unit integrity and motivation.²⁶²

The next section addresses the problems associated with unrestrained national pride and exceptions to exercising absolute sovereign immunity.

3. Restraints in War

I do not love my Empire's foes,/Nor call 'em angels; still,/What is
the sense of 'atin' those/'Oom you are paid to kill?/So, barrin' all
that foreign lot,/Which only joined for spite,/Myself, I'd just as
soon as not/Respect the man I fight.²⁶³

"No doctrine has been more dear to the modern national State than that of its sovereignty."²⁶⁴ This concept is designed to protect the state's collective consciousness called national honor, dignity, national interest, national security, and national survival.²⁶⁵ The natural effect of a state exercising its powers to the fullest extent results in the depletion of humanitarian principles and a tyrannical, unwielded force without end. Therefore, some restraint is necessary.

economy where people were reluctant to leave to prepare for war, or the population not being in favor of the government's motives.

260. KEEGAN, *supra* note 180, at 53-54.

261. Elliott, *supra* note 91, at 14.

262. *Id.*; see discussion *supra* section III.A.1.a.

263. Rudyard Kipling, "Piet" (1901).

264. BEST, *supra* note 181, at 18.

265. *Id.*

Just as a purely patriotic mindset may serve to neglect the truth in the history of war,²⁶⁶ a purely patriotic mindset neglects the broader interests in an international community. The exercise of restraint in sovereignty is comparable to the practice of pro-bono legal work in a capitalist society. In both instances, the subservient concepts go against the natural grain of theoretical beliefs, yet are necessary for the maintenance of a more peaceable, functionable society.²⁶⁷ "Respect for the law of war, which has often been a point of honour, pride and self-respect with military men because of its moral, even religious content, is a virtue in a political sense as well; something in which military men have as much interest as everyone else within their country."²⁶⁸ "[Justice] must even be preserved in the dealings with enemies" and restraint must be shown.²⁶⁹

Since a military represents a willingness to defend against others with opposing viewpoints, when the militaries can agree on a concept such as proper respect for the burial of soldiers, it makes the concept that much more significant.²⁷⁰ The issue of respect and protection for a nation's sunken warships and the remains of the soldiers aboard present an opportunity for such strides.

a. Movements Towards Humanity in Warfare

Lord Clarendon, a British diplomat, pointed out in 1856 when discussing the Declaration of Paris and noting the importance of humanizing warfare that "[i]t is far better to do the thing *grandement* and to pay homage [sic] to the civilization of the age."²⁷¹

Distinguishing between unjust and just war is based on religious concepts such as those espoused by St. Augustine. Humanitarian concepts, however, are present regardless of the distinction between just and unjust war. For example, the Red Cross will provide assistance without a moral

266. *Id.* at 26.

267. This oxymoron reminds the author of an oft-questioned military phrase, occupation, and oxymoron: "military intelligence."

268. BEST, *supra* note 181, at 24.

269. BAILEY, *supra* note 150, at 5 (quoting St. Ambrose, *De Officiis Ministrorum*, i.29, ¶¶ 139–140 (probably later than 386 c.e.) (Eng. Translation in: *Select Library of Nicene and Post-Nicene Fathers of the Christian Council*, 2nd ser., x: *Select Works and Letters*, at 24 (Oxford, 1896).

270. Therefore, universal agreements between militaries represents an opportunity to take the largest strides towards global peace. See BEST, *supra* note 181, at 17.

271. BEST, *supra* note 181, at 139; see also OLIVE ANDERSON, *A LIBERAL STATE AT WAR*, 273 (St. Martin's Press 1967).

inquiry to the motivations behind warfare. The concepts of right or wrong are irrelevant to the non-ideological notions of humanitarianism.²⁷²

The progression of humanity in warfare and restraints on the exercise of sovereignty can be traced to the Bible. An example of a limitation ordained by God exists in Deuteronomy in the Old Testament. When the Israelites attacked the heathen tribes of Canaan, they were enjoined from destroying the fruit trees, because doing so would afflict the civilian population.²⁷³

During the French Revolution, Dumouriez demanded the strictest regard for the enemy's civilian persons and property. Custine, in an apologetic note to the National Convention, wrote that he took drastic steps to save a village from devastation by pillage because "[t]here was no other way to arrest the disorder and to save the honour of the name of France."²⁷⁴ This implies that with restraint comes honor, a common theme of the mores of the warrior culture.

The period between 1815–1914 was a time of significant strides in the humanitarian movement. This has been evidenced by the Alabama Bell incident, the Geneva Conventions, the foundation of the Red Cross and the various acts associated with Florence Nightingale, the increased codification of the international law of war, and the Hague Conferences.²⁷⁵

b. Examples of Restraints in Warfare—Civilians, Medics, and Clergy

Although there is a tendency in war for the efforts to become "total," there is also a classic distinction in the law of war between combatants and non-combatants.²⁷⁶ A primary example of restraint involves the humane treatment of civilians, medical personnel, and clergy servicemen.

The concepts of restraint are evident in Lieber's Code.²⁷⁷ The Code affords protection to the innocent, injured, and to religious personnel. The theory behind immunizing civilians from war is that they are not actually participating in the combative actions.²⁷⁸ This inherently includes the lack

272. BEST, *supra* note 181, at 3–5.

273. Deuteronomy, 20:19–20; GREEN, *supra* note 199, at 18.

274. BEST, *supra* note 181, at 80 (quoting Custine, *Moniteur* (May 31, 1792), quoting from his speech during the National Convention on May 30, 1792).

275. BEST, *supra* note 181, at 133–35, 138, 148.

276. *Id.* at 261–62.

277. This has become customary international law. GREEN, *supra* note 199, at 27–28.

278. HARTIGAN, *supra* note 203, at 19–20 (citing U.S. WAR DEPT., *THE WAR OF THE REBELLION: 3 A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* ser.3, at 150).

of necessity to harm soldiers' remains. The people with the most recognizable interest in the remains of soldiers are the families, often civilians. Therefore, to damage the integrity of the remains of the soldiers would be to inflict harm upon a class of people, namely civilians, that are intended to be immune from war. As there is no threat associated with a dead body (absent disease), it should be afforded protection out of respect for the sake of the next-of-kin.

Two notable symbols of restraint are the white flag for surrender and a red cross for medical attention. When the red cross is seen, it will temporarily suspend hostilities. It is the only symbol representing interests in humanity at large and the moral reality/necessity of war. Personnel tasked with ensuring medical attention have received unique treatment for their efforts.

In what turned out to be a predecessor to the Geneva Conventions, fifteen states sent representatives to an International Conference for the Neutralization of Army Medical Services in the Field in August 1864.²⁷⁹ One of the ten articles that resulted from the Conference addressed the treatment of the sick and wounded and ordered that they be treated humanely and cared for regardless of their nationality. The rationale offered was that the wounded soldier was "no longer an effective enemy but just an unfortunate human being."²⁸⁰ The same rationale applies and should be used to protect the treatment of dead soldiers.²⁸¹

The Oxford Manual on the Laws of War on Land prohibits robbing or mutilating the dead.²⁸² Yet the manual applies only during time of war and on land.²⁸³ The United Nations Charter, Article 55(c) describes the need for universal respect for honoring "rights and fundamental freedoms," but leaves the phrase undefined.²⁸⁴ Therefore, there are still gaps in the codified international law related to the treatment of dead soldiers.

Special privileges are afforded non-combatants, such as clerks, monks, friars, and their property, during wartime.²⁸⁵ The U.S. military, and others, have clergy serving in the armed forces to assist soldiers in preparing to

279. See *The Origins of the American National Red Cross*, at <http://chapters.redcross.org/oh/delaware/national.html> (last visited Mar. 17, 2002).

280. BEST, *supra* note 181, at 150.

281. IGNATIEFF, *supra* note 194, at 149 (quoting INT'L CMTY. OF THE RED CROSS, CHRONICLES OF ISLAMIC-ARAB HISTORY).

282. Oxford Manual on the Laws of War on Land (Manual), Institute of International Law (1880), Articles 19 and 20.

283. Elliott, *supra* note 91, at 7.

284. U.N. CHARTER art 2, ¶c, available at <http://www.un.org/aboutun/charter/chapter9.htm> (as of Mar. 4, 2002).

285. MERON, *supra* note 206, at 91-92.

enter the metaphysical state. Clergy are not involved in fighting because their efforts are "fixed more on the duty of the soul than on that of the body."²⁸⁶ This exemption from battle is relevant to dead bodies because there is an inextricable link between a dead body, whose soul is now believed to be a member of another dimension, and a clergy member, who is a representative or disciple of a higher affiliation. Dead soldiers thus move into a metaphysical status worthy of protection from the wrath of war comparable to the status of clergymen. To dishonor the remains of a soldier would therefore be comparable to waging war against the clergy themselves.

C. Protection of the Deceased Warrior

1. Examples of Warriors' Honor

The material presented below is evidence that nations have generally increased the level of professionalism associated with their military endeavors to protect sunken warships as gravesites at sea.

a. U.S. Practices

Disturbing unabandoned sunken warships is generally improper, but "especially" so when the vessel contains the remains of deceased soldiers.²⁸⁷ Today, the United States recognizes a duty owed to those who die on the battlefield.²⁸⁸ They must be treated honorably²⁸⁹ and their graves must be respected.²⁹⁰ Dead bodies should be identified and given a decent burial according to the Red Cross and/or Geneva standards.²⁹¹ The same rationales should apply to the death of soldiers during peacetime. The counterargument, however, is that the only reason the remains are

286. BAILEY, *supra* note 50, at 5 (quoting St. Ambrose, *supra* note 269, at 129, 28, ¶ 131; 38, ¶ 176 (ET pp. 22-3, 30)).

287. Legal Regulation of Use of Force, 1980 Digest § 1, at 1006. Although *Deklyn v. Davis* (1 Hipk. Ch. 154) allowed implied abandonment of a warship due to the passage of time, the more modern trend practiced by the United States and other countries has been to the contrary. *Id.* at 1004. One rationale offered has been respect for the final resting place of military personnel. *Id.*

288. The policy of non-abandonment of vessels sunk in the Civil War is due to the sensitivity that wrecks of warships "are the watery graves of American war dead." *U.S. v. Steinmetz*, 973 F.2d 212, 222 n.11 (3d. Cir. 1992) (quoting Brief for Appellee, 7).

289. Elliott, *supra* note 91, at 18.

290. *Id.* at 12.

291. Elliott, *supra* note 92, at 11. This is to show honor for the violence endured.

significant is that the soldiers were fighting during a time of national crisis, which is an event significant to the nation's cultural heritage. Nonetheless, consistent with arguments posed in this paper,²⁹² it is likely that a soldier who perishes with a warship will be accorded a proper, honorable gravesite.

Generally, the Navy has a non-abandonment policy for ship and aircraft wrecks. This is based primarily on the Property Clause of the Constitution²⁹³ and articles ninety-five and ninety-six of UNCLOS.²⁹⁴

Salvors may not presume that sunken U.S. warships have been abandoned; they must seek permission from the United States to salvage its warships.²⁹⁵ U.S. policy has been to uniformly reject salvage requests when the ships contain the remains of deceased servicemen.²⁹⁶ The reason asserted is that disturbance of a sunken warship is improper when it is the final resting place of deceased military personnel.²⁹⁷

Finally, the NPS Guidelines specifically address human remains:

To the extent possible, human remains in shipwrecks should be left in place as burials at sea. However, when remains (whether of known or unknown persons and whether intact or decomposed) are being disturbed by unavoidable or uncontrollable human activity, they should be removed and appropriately disposed of. Where the remains are of known individuals, a reasonable effort should be made to contact relatives of the deceased to discuss the removal and disposition of the remains. Until human remains are removed, activities that would disturb them should be prohibited.²⁹⁸

b. Practices of Other Nations

The adoption of the Hague Convention, the Geneva Convention, and the International Red Cross represent a shift toward a more globally aware and less ethnocentric battlefield.²⁹⁹ Among the honors typified were an

292. Discussed *supra* section III.B.1–2.

293. U.S. CONST., art. IV, § 3, cl. 2.

294. However, the issue of war graves is addressed by the Navy in accordance with wreck site management, a general duty prescribed by the National Historic Preservation Act, 16 U.S.C. §§ 470–470mm (1994).

295. For a list of a great number statutes governing submerged ship and aircraft wreck sites, see Dept. of the Navy, *Department of the Navy Policy Regarding Custody*, at www.history.navy.mil/faqs/faq28-1.htm (July 20, 2000).

296. Legal Regulation of Use of Force, *supra* note 287, at 999.

297. *Id.* at 1005. Other reasons asserted include the inapplicability of public policy reasons to allow salvage to warships, plus danger from munitions.

298. Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116, 50,130 (Dec. 4, 1990).

299. Some authors have identified the Crimean War and the American Civil War as the

individual burial with its own headstone. Older military traditions of honoring soldiers were refurbished and a new age of democratic battle emerged and extended the "decencies of nurture and memorial beyond the aristocratic warrior elite to the common man."³⁰⁰

During the sinking of the British warship the HMS Birkenhead, soldiers stood at attention while women and children boarded the lifeboats. The English government has thus attached particular historical and sentimental value to the remains of the soldiers who went down with the ship through its enactment of the Protection of Military Remains Act.³⁰¹ The Act prohibits tampering with the remains aboard sunken British ships.³⁰² The Act generally does not apply to merchant vessels since its aim is to create war graves.³⁰³ The Act extends to international waters, yet only British nationals are subject to its extraterritorial jurisdiction.³⁰⁴ The Ministry of Defense (MOD) has had difficulty asserting this statute in foreign waters. For instance, Indian authorities have claimed an interest in a part-British, part-American ship sunk near Bombay during World War II.³⁰⁵ Under this statutory scheme, the MOD may permit a salvage operation in exchange for a percentage of the artifacts recovered. These may consist of sailors' personal effects rather than treasure.³⁰⁶

The Commonwealth War Graves Commission in Belgium created Tyne Cot which contains 11,908 graves.³⁰⁷ All British soldiers who died in battle are commemorated by name on monuments such as the Menin Gate and the Thiepval Memorial.³⁰⁸

A 1995 joint statement by the United States, France, Germany, Japan, The Russian Federation, and the United Kingdom recognized that sunken warships are often the "last resting places of many sailors and airmen who died in the service of their nations."³⁰⁹ State vessels and aircraft containing

turning point when the idea of proper treatment of dead soldiers became "general currency." See, e.g., IGNATIEFF, *supra* note 194, at 113.

300. *Id.* at 114.

301. 1986, c. 35, (Eng.); Dromgoole, *supra* note 49, at 228.

302. *Id.* at §2(2).

303. See *id.* at §9(2).

304. *Id.* at §3(1).

305. Dromgoole, *supra* note 48, at 227.

306. Adam Goodheart, *Of History*, PRESERVATION, Jan.-Feb. 1999, at 42 (discussing Greg Stemm's salvage operation on the English warship Cambridge). The British also maintain property interests via subrogation rights over their vessels through the payment of war risk insurance. Dromgoole & Haskell, *supra* note 48, at 226.

307. KEEGAN, *supra* note 180, at 160-161.

308. *Id.* at 161.

309. See Robert S. Neyland, *Sovereign Immunity and the Management of United States Naval Shipwrecks*, Naval Historical Center Homepage, available at <http://www.history.navy.mil>.

human remains deserve special respect as war graves, and should not be disturbed, and the flag state may use all lawful means to prevent any disturbance or salvage thereof.³¹⁰

In conclusion, it has been said that much of the burial and commemoration of the dead depends on the hostility of nations following war.³¹¹ If this is true, it would explain much of the fluctuation over time as to the treatment of war graves. It remains a central position asserted in this paper, however, that there is a superior alternative that may be asserted to afford protection for the remains of soldiers who lose their life at sea aboard warships. This being the nearly universal desire to protect the sunken warships that were the final resting place of soldiers.

2. Current Military Burial Aspects

Two reasons to bury the military dead are to compensate them for their services given to the nation and to fulfill obligations owed to their next of kin.³¹² Due to the nature of the business, the military must be prepared to respond to large scale death tolls including dealing with the grieving families of the deceased and rapidly returning the group to full-scale productivity.³¹³

“Because of the frequent international character of honors and ceremonies, it is especially important that they be so rendered and conducted as to reflect credit on the Navy and on the United States.”³¹⁴

Naval funerals are an, “open recognition of the Nation’s debt for the services and sacrifices of its Navy men and women.”³¹⁵ “Death is at all times solemn, but never so much as at sea.”³¹⁶ “Ever since the beginning of navies, there have been laws peculiarly applicable to the sea and

navy.mil/branches/org12-7h.htm (last visited Apr. 18, 2001).

310. *Id.*

311. KEEGAN, *supra* note 180, at 161.

312. Elliott, *supra* note 91, at 3–7.

313. Discussed *supra* section III.B.2.c.

314. COMMANDER JOHN V. NOEL, JR., U.S.N., & COMMANDER CHARLES R. CHANDLER, U.S.N., *THE WATCH OFFICER’S GUIDE* (U.S. Naval Institution 1958); see LOVETTE, *supra* note 202, at 79. Also, the strongest protests by Soviets regarding Project Jennifer related to the disposition of the bodies of ten Soviet crewmen. Michael G. Collins, *The Salvage of Sunken Military Vessels*, 10 Int’l Law. 683 n. 15 (1976); see Migliorino, *supra* note 24, at 246 n. 9.

315. Horsely, Jr., G.W., *Navy Funerals at Arlington National Cemetery*, Naval Military Personnel Command, NAVPERS 15956B, at i (Jan. 16, 1980).

316. LOVETTE, *supra* note 203, at 50 (quoting Charles Dana).

seafaring people.”³¹⁷ The question remains as to why death at sea has been so intriguing.

Burials at sea are an ancient tradition, pre-dating all other military funeral ceremonies dating back to the Pagan burial rights in the days of Greece and Roman empires.³¹⁸ Coins were placed in the mouths of the deceased to pay Charon for transportation over the River Styx.³¹⁹ A custom developed when preparing a body for burial at sea to sew the last stitch of canvas shroud (generally a sailcloth) through the nose of the deceased.³²⁰ The body would be carried feet first, then the sent overboard after the appropriate religious ceremony.³²¹ These traditions grew out of a need to dispose of bodies during a long sea voyage. Today, if a sailor dies at sea, the body is kept in a cooling system on board ship until it can be properly delivered home.

Burials at sea are still commonplace and may be performed upon request of the deceased serviceperson's successors in interest. Modern ceremonial procedure for burial at sea disposition is very detailed and exacting.³²²

The tradition of placing the flag over the casket began in the American Revolution “to symbolize the obligation of the nation to care for those who it ordered to guard it.”³²³ In England, the Union Jack is laid upon the body of a soldier who died while in service in recognition that England took responsibility for what it ordered the soldier to do.³²⁴

317. *Id.* at 66 (quoting Rear Admiral Albert E. Jarrell, U.S.N.).

318. *See id.* at 50.

319. *Id.*

320. *Id.*

321. *Id.* at 51.

322. The military funeral regulations dictate the conduct of the ceremony including where family members sit, what is said to the next of kin, how the flag is presented, when to salute, etc. BRAUN, *supra* note 223, at 258. It begins by stationing the firing squad, casket bearers, and a bugler. Then an officer orders “All hands [to] bury the dead” at which point the vessel should be stopped if practicable and the colors lowered to half-mast. Then there is an assembly and the soldiers are called to attention, then given the command of Parade Rest. The Scripture is read, the prayers are read with heads bowed, the Committal is given with the soldiers at attention and rendering a hand salute, then the Benediction is read while the troops are at Parade Rest with heads bowed. Three volleys are fired with the soldiers at attention rendering a hand salute, taps is played and the colors are closed and encased. *Naval Historical Center Homepage—Frequently Asked Questions Page: Burial at Sea*, available at <http://www.history.navy.mil/faqs/faq85-1.htm> (last visited Apr. 18, 2001).

323. BRAUN, *supra* note 223, at 258.

324. LOVETTE, *supra* note 202, at 50 (quoting Stephen Graham, a private in the British Guards).

Another tradition at the funeral is the roll-call which began in the Civil War battle of New Market to honor a group of cadets from the Virginia Military Institute. The deceased soldier's name is called three times to signify the absence of the member.³²⁵ The silence after one's name at any roll call is a torturous moment when all soldiers are glad to be present since the absent soldier is generally subject to discipline for being absent. Therefore, it is easy to imagine how momentous the impact is for a comrade to hear no report back during a roll-call at a funeral ceremony.

Occasionally, a riderless horse with boots placed backwards in the stirrups will be present; planes may fly in formation overhead; or the twenty-one gun salute may be given by seven rifles firing three shots each in unison.³²⁶ This tradition stems from the Roman ritual of three-volleys, when earth was thrown three times into a sepulchre, the family called the name of the deceased three times, then would say vale, or farewell, three times as they left the grave site.³²⁷ The three volleys have also been said to be fired at imaginary devils that might sneak into men's hearts at the weighty occasion when a fellow soldier died.³²⁸ Yet, during the Civil War, this tradition changed due to the proximity of the enemy and the three-volley tradition is often not employed during wartime.³²⁹

The rifle salute was a custom for opposing armies to declare a truce to bury the dead.³³⁰ To acknowledge the shame associated with killing, and as a symbol of reverence, the rifles are held in reverse.³³¹ The reversal of rank at a military funeral is to acknowledge that, at death, all men are equal.³³² The Romans had a custom of reversing rank and position when celebrating the feast of Saturn.³³³ At a "Dining In," an unoccupied table is placed at the front of the room and is decorated with a yellow ribbon, a glass of water, dog tags draped over backwards boots, and a single lit candle. A toast is made to "our fallen comrades."³³⁴

325. BRAUN, *supra* note 223, at 258.

326. *Id.* at 258-59.

327. *Id.* at 259.

328. Horsley, *supra* note 315, at i.

329. Renita Foster, *The Sound of Tradition*, SOLDIERS 30 (Dec. 1997) available at <http://www.ditc.mil/soldiers/dec97/index.html> (last visited Dec. 3, 2001).

330. United States Army Chaplains, *A Tribute to a Soldier*, Arlington National Cemetery, at 14 (1988); available at the University of Miami, Richter Library card catalog no. D101.2: SO 4/4.

331. BRAUN, *supra* note 223, at 259; *see also* LOVETTE, *supra* note 202, at 50.

332. Horsley, *supra* note 315, at i; LOVETTE, *supra* note 204, at 49.

333. LOVETTE, *supra* note 202, at 50.

334. BRAUN, *supra* note 223, at 259.

The Navy Hymn, entitled "Eternal Father, Strong to Save" is often used at funerals for personnel who served in or were associated with the Navy. It was penned as a hymn by Rev. William Whiting (1825–1878) inspired by surviving a furious storm in the Mediterranean Sea. Lt. Cdr. Charles Jackson Train began the still current practice of concluding Sunday's Divine Services at the U.S. Naval Academy in Annapolis in 1879 by singing the first verse of the hymn. President Franklin D. Roosevelt who had served as Secretary of the Navy, was honored with Eternal Father, his favorite hymn at his funeral in Hyde Park, New York. The same hymn was played when President John F. Kennedy's body was carried to the steps of the Capitol.³³⁵

Probably the most recognized tradition related to a U.S. military funeral is solemn recital of Taps on a bugle. The bugle has been used to call soldiers to battle, pay call, meals, and rest at the end of the working day. Halting a military installations' operations to honor the Retreat Ceremony means more than simply recognizing the end of the workday. The tradition has been compared to "stopping to smell the roses" as you go through life.³³⁶ Taps is traditionally played on a bugle³³⁷ to signify the end of the work day and the end of a soldier's life. It represents the ultimate in retirement and relief of military duties. Taps is played as a "truce to pain."³³⁸

The last bugle call gives promise of reveille. Thus playing Taps at the funeral gives promise of "the 'greatest reveille' which ultimately the Archangel Gabriel will blow."³³⁹ The Navy has recognized that Taps marks "the beginning of the last, long sleep, and to express hope and confidence in an ultimate reveille to come."³⁴⁰

335. *Naval Historical Center Homepage—Frequently Asked Questions Page: The Navy Hymn*, available at <http://www.history.navy.mil/faqs/faq53-1.htm>.

336. Foster, *supra* note 329, at 28 (quoting Ed Devlin, director of training at Ft. Monmouth).

337. Although today it is often a tape recording played over a loudspeaker.

338. BRAUN, *supra* note 223 at 259. Taps was created when Gen. Daniel Butterfield of the federal Army of the Potomac ordered brigade bugler, Oliver W. Norton to signal the end of the day, in 1862. The solemn tune debuted in July at Harrison's Landing, Virginia. The words to Taps are occasionally read at the benediction at the end of military funerals: "Day is done. Gone the sun, From the lake, From the hill, From the sky. All is well, Safely rest, God is nigh. Thanks and praise, For our days, 'Neath the sun, 'Neath the stars, 'Neath the sky. As we go, This we know: God is nigh." Foster, *supra* note 329, at 30.

339. LOVETTE, *supra* note 202, at 50 (quoting Stephen Graham, a private in the British Guards before the American Revolution).

340. Horsley, *supra* note 315, at i.

VI. CONCLUSION

Due to the capability through modern technology to recover sunken vessels, there is a likelihood that more sunken warships containing the remains of deceased soldiers aboard will be located and recovered. Such vessels containing the remains of deceased soldiers, are entitled to protection by the flag state. The primary basis for this protection is the traditionally noble status of the warrior that should entitle the vessel containing his remains to be afforded the protections of a gravesite or tomb.

There is a tradition of special treatment for the burial of warriors. While global states' property laws and regulations may vastly differ, the concept of protection for the dead, especially deceased soldiers who died while in service for their nation, is nearly universal. Professionalism and courtesy among warrior brethren should be a concept upon which all nations can rely.

In conclusion, the legal arguments and historical accounts pronounced in this paper demonstrate why a flag state may legally assert protection over its sunken warships containing the remains of deceased soldiers.

