

# “The Gales of November Remembered”:<sup>1</sup> The Edmund Fitzgerald, Cultural Heritage Protection, and Underwater Tombs

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## I. INTRODUCTION

Shipwrecks capture the human imagination.<sup>2</sup> The popular culture that has evolved from such events as the tragic *RMS Titanic* and SS *Edmund Fitzgerald* sinkings<sup>3</sup> and the alluring treasure finds of the *Nuestra Señora de Atocha* and the SS *Brother Jonathan*<sup>4</sup> contain elements of mystery, harsh environments, and riches. Especially in the cold of the Great Lakes, these sites have become well-preserved time capsules from which interpretations of humanity’s seafaring past can

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1. GORDON LIGHTFOOT, *The Wreck of the Edmund Fitzgerald*, on Summertime Dream (Vinyl Record, Reprise Recs. 1976).

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2. ROBERT F. MARX, *SHIPWRECKS OF THE WESTERN HEMISPHERE*: 1492-1825 xi (David McKay Co., Inc., N.Y. 1975).

3. See, e.g., WALTER LORD, *A NIGHT TO REMEMBER* (Penguin Books, 4th ed. 2012) (documenting the *Titanic* sinking); *TITANIC*, VHS (Paramount Pictures 1997) (popular Hollywood adaptation of the *Titanic* sinking); LIGHTFOOT, *supra* note 1 (folk-rock ballad on the *Edmund Fitzgerald*’s sinking).

4. See generally Lawrence D. Bradley, Jr., *U.S. Treasure Trove Law*, 10-SPG EXPERIENCE 24, 24-28 (2000) (discussing the attraction and discoveries of the *Atocha* and the *Brother Jonathan*); see also *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 336-38 (5th Cir. 1978) (discussing the *Atocha*).

emerge.<sup>5</sup> However, what is often overlooked by the general public is that the places where these vessels came to rest are both a part of humanity's shared cultural heritage as well as grave sites deserving of solemnity and reverence.

At the fiftieth anniversary of the *Edmund Fitzgerald*'s sinking, this Article examines cemetery site protections, sport diving, modern archaeological science, and the law to contextualize the legal landscape and management of such sites.<sup>6</sup> In the years since the wreck of the *Edmund Fitzgerald*, archaeologists have drastically changed their views on engaging with the dead as well as displaying and protecting their final resting places in ways that have not yet meaningfully percolated to the public or lawmakers.<sup>7</sup>

Maritime heritage and submerged graves are at risk from looting, with artifacts and human remains regularly appearing on the open antiquities market.<sup>8</sup> This commodification of humanity's heritage and the associated site destruction demonstrate the misalignment of preservation concepts and legal protections. How the public, scientists, and lawmakers engage with shipwrecks and submerged archaeological sites and what levels of legal protection are appropriate lead to the

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5. The sheer number of probable wrecks in the Great Lakes, which one author puts at around 25,000 over the past 300 years, is staggering. MARK L. THOMPSON, GRAVEYARD OF THE LAKES 22 (Wayne State Univ. Press, 2000).

6. Interestingly, as much popular culture that has been generated by the sinking of the *Edmund Fitzgerald*, that event, aside from several misused quotations in out-of-context articles, there is surprisingly little legal literature about the wreck. What such literature exists does not include an analysis of the gravesite nature of the wreck site. See Carlyle H. Whipple & Laura Naus Whipple, *Wisconsin Shipwrecks: Finders Keepers?*, 74-SEP WIS. LAW. 18, 20 (2001); Jeffrey A. Weiss, *Maritime Disasters Through the Ages*, 32 J. MAR. L. & COM. 215, 235–36 (2001); Luke A. Sanders, *A Path Towards Arctic Presence: Stricter Regulation as the First Step in Free Navigation*, 71 HASTINGS L.J. 229, 256 (2019); Brian K. McNamara, *Organizing Marine Casualty Investigations: A “Wicked Problem” for Maritime Regulators*, 40 TUL. MAR. L.J. 307, 328 n.101 (2016); Kincaid C. Brown, *Is the Shipwreck I Found in Lake Michigan Mine? Great Lakes Shipwreck Legal Research Basics and Sources*, 101-AUG MICH. B.J. 53, 54 (2022) (each of these articles mention the *Edmund Fitzgerald*, but in some capacity other than the subject of this Article. This list appears to be the exclusive list of law articles that mention the *Edmund Fitzgerald* in a context not associated with Gordon Lightfoot's song.).

7. See generally RYAN M. SEIDEMANN, *CEMETERY PROTECTIONS IN URBAN ENVIRONMENTS: ARCHAEOLOGY, PRESERVATION, AND THE LAW* xiii–xv, 63–101 (Univ. of Fla. Press 2025) (discussing the changing ethical standards of anthropology regarding human remains over the past century).

8. See, e.g., Christine L. Halling & Ryan M. Seidemann, *They Sell Skulls Online?!* *A Review of Internet Sales of Human Skulls on eBay and the Laws in Place to Restrict Sales*, 61 J. OF FORENSIC SCI. 1322 (discussing the online human remains market); see also Craig J. S. Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 331 n.100 (2003) (discussing several examples of illicit removal of shipwreck artifacts); see also Josh Martin, *A Transnational Law of the Sea*, 21 CHI. J. INT'L L. 419, 461 (2021) (discussing looted shipwreck artifacts ending up on the black market).

focus of this Article: an examination of science and the law with a series of recommendations for legal paths forward that can help preserve humanity's sacred landscapes and features.

This Article calls for the innovation of new legal protections and for the repurposing of ancient protections for such popular sites. Some of these innovations can bring to bear necessary protections as new threats from technological advances allow looters and sport divers to reach ever deeper sites. Although some of these advances bring new information to light as in the cases of the rediscovery of the Arctic exploration vessels, the HMS *Erebus* and the HMS *Terror*,<sup>9</sup> they also bring new threats through high-stakes disaster tourism (e.g., the *Titan* submersible in 2023).<sup>10</sup> This latter threat is substantially contributing to the destruction of vessels such as the *Titanic*,<sup>11</sup> resulting in lost history. In shallower waters, the threats to these sites are even more acute due to their popularity with sport divers and curiosity seekers removing artifacts to keep as curios.<sup>12</sup>

## II. THE S.S. EDMUND FITZGERALD AND ITS LEGACY

As alluded to in the introduction, the *S.S. Edmund Fitzgerald* is one of the few shipwrecks that has attained popular culture status, along with such other vessels as the *RMS Titanic*, the *USS Monitor*, and the *CSS Hunley* to name just a few.<sup>13</sup> Whether for good, for bad, or for

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9. GILLIAN HUTCHINSON, SIR JOHN FRANKLIN'S EREBUS AND TERROR EXPEDITION: LOST AND FOUND 78–84, 85–89 (Bloomsbury Publ'g 2017) (explaining the discovery of the HMS *Erebus* and the HMS *Terror* with photographs).

10. U.S. COAST GUARD, REPORT OF THE MARINE BD. OF INVESTIGATION INTO THE IMPLOSION OF THE SUBMERSIBLE TITAN (CG1788361) IN THE N. ATL. OCEAN NEAR THE WRECK SITE OF THE RMS TITANIC RESULTING IN THE LOSS OF FIVE LIVES ON JUNE 18, 2023, MISLE Activity No.: 7724663 81 (2025).

11. William J Broad, *Scientists Warn That Visitors Are Loving Titanic to Death: A Shipwreck in Decay*, N.Y. TIMES (Aug. 9, 2003), <https://www.nytimes.com/2003/08/09/world/scientists-warn-that-visitors-are-loving-titanic-to-death.html>.

12. NAUTICAL ARCHAEOLOGY SOC'Y, ARCHAEOLOGY UNDERWATER: THE NAS GUIDE TO PRINCIPLES AND PRACTICE 21 (Martin Dean et al. eds., 1st ed. 1992).

13. The *Titanic* has been the subject of considerable popular culture attention since its sinking in 1912. It has been the subject of at least one fictionalized book, multiple films, and, following its rediscovery by Dr. Robert Ballard in 1986, countless documentaries, popular nonfiction books and articles, and even some scientific research. *See, e.g.*, ROBERT D. BALLARD & CHRISTOPHER DREW, INTO THE DEEP: A MEMOIR FROM THE MAN WHO FOUND TITANIC (Nat'l Geographic Partners, 2021) (discussing Ballard's life). The *USS Monitor*, the first fully ironclad warship, was built by the Union in 1862 and ushered in the modern era of naval warfare. The *Monitor* was largely a subject of legend following its sinking off the North Carolina coast while being towed for repairs after its famed battle with the Confederacy's iron-reinforced *CSS Virginia* (the former *USS Merrimack*). Following its discovery, the *Monitor* has been the subject of popular and scientific publications and spurred Congress to create the only marine sanctuary under the act of the same name to protect its final resting place from looters. *See generally* RICHARD SNOW, IRON DAWN: THE MONITOR, THE MERRIMACK, AND THE CIVIL WAR SEA BATTLE THAT CHANGED HISTORY (Scribner, 2016) (for a review of the *Monitor*'s

indifference, largely due to Gordon Lightfoot's 1976 ballad, "The Wreck of the Edmund Fitzgerald," the *Edmund Fitzgerald* is fully situated within this pantheon of storied shipwrecks.

The *Edmund Fitzgerald*, loaded with iron ore and in transit between industrial facilities along Lake Superior to its destination at Cleveland, Ohio, on Lake Erie, lost radio contact with shore and other vessels during a bad storm and sank on November 10, 1975.<sup>14</sup> The vessel, near the mouth of Whitefish Bay, came to rest on the lakebed just 0.5 miles (0.8 km) over the United States/Canada border on the Canadian side.<sup>15</sup> Accordingly, unlike much of the law discussed in this Article, the *Edmund Fitzgerald*'s wreck site is subject to Canadian law.<sup>16</sup> Indeed, Ontario has specifically amended its law to provide for the protection of the *Edmund Fitzgerald*.<sup>17</sup>

The vessel did not survive its descent to the lakebed intact. Its bow currently rests upright and its stern, separated roughly amidship from the bow by a debris field, rests upside down, both at a depth of 530 feet (160 m).<sup>18</sup> All twenty-nine crew members died from the sinking, though the exact manner of their deaths and that of the *Edmund Fitzgerald*'s fate are still the subject of disagreement.<sup>19</sup> While the crew most likely died from drowning, it is not impossible that some survived in air pockets and ran out of oxygen, succumbed to hypothermia, or

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history and demise as well as the history of the *Virginia/Merrimack*); Peter Hershey, *Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites*, 27 J. ENVT'L. L. & LITIG. 363, 389–90 (2012) (discussing the creation of the marine sanctuary to protect the *Monitor*). The *CSS Hunley*, the first functional and modern military submarine sunk in Charleston Harbor in 1864 after its successful sinking of the *USS Housatonic*. With a discovery and recovery championed by the author Clive Cussler, the *Hunley* also gained popular culture fame for its appearance in multiple films, documentaries, and popular and scientific publications. David L. Conlin & Matthew A. Russell, *Archaeology of a Naval Battlefield: H. L. Hunley and USS Housatonic*, 35 INT'L J. OF NAUTICAL ARCHAEOLOGY 20 (2006) (discussing the history and context of the *Hunley*). The *Edmund Fitzgerald* is fully situated within this pantheon of storied shipwrecks.

14. See generally ROBERT J. HEMMING, THE GALES OF NOVEMBER: THE SINKING OF THE EDMUND FITZGERALD (Thunder Bay Press, 1981) (providing an account of the *Fitzgerald*'s sinking).

15. See GOOGLE EARTH, <https://earth.google.com/web/> (last visited Dec. 3, 2025) (measuring the distance between the Wreck of the Edmund Fitzgerald and the U.S.- Canada border in Lake Superior by using coordinates published by the National Transportation Safety Board).

16. See Marine Archaeology Sites, O. Reg. 11/06 (Can.).

17. *Id.* For completeness, it is also acknowledged that the change in the law also resulted in greater protection for the United States naval vessels from the War of 1812, the *USS Hamilton* and the *USS Scourge* in Lake Ontario. Alternate Distances, O. Reg. 11/06, s.2(1) (Can.).

18. Sean Ley, *The Fateful Journey*, GREAT LAKES SHIPWRECK MUSEUM, <https://shipwreckmuseum.com/the-fateful-journey/> (last visited Nov. 21, 2025).

19. *Id.*

were so physically injured during the sinking that the proximate cause of their death was trauma. As for the ship itself, despite remote operated vehicle discovery and reconnaissance shortly after the sinking, it is still unclear whether the vessel broke apart on the surface and sunk as two distinct pieces or whether it broke apart on the descent.<sup>20</sup> Further, the actual cause of the wreck is also unknown.<sup>21</sup> The United States Coast Guard's official report concluded that the *Edmund Fitzgerald* took on more water than it could handle due to faulty hatch covers.<sup>22</sup> This conclusion was largely shared by the National Transportation Safety Board.<sup>23</sup> Nonetheless, theories of shoaling, rogue waves, and other causes still persist.<sup>24</sup> Even more recent direct observations of the site have not resolved definitively the cause for the sinking.

These more recent direct observations—seemingly shared by the Ontario government when it amended its site protections of the *Edmund Fitzgerald* in 2006—highlight the need for additional protections for such sites, even those at such substantial depths.<sup>25</sup> Technological advances in diving and remote submersibles are putting such wrecks within reach of inexpensive would-be looters who threaten the archaeological integrity and the sacred nature of these vessels. These legal protections are only a part of the *Edmund Fitzgerald*'s legacy. The vessel, having sunk within the living memory of many Americans, means that directly-affected descendants and family are still alive and concerned with the site's integrity.<sup>26</sup> In addition, the attraction to many of the mystery of many shipwrecks, especially those in the Great Lakes, contributes to substantial tourism and a consumer

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20. *Id.*

21. *Id.*

22. U.S. COAST GUARD MARINE Bd. OF INVESTIGATION, MARINE CASUALTY REPORT SS EDMUND FITZGERALD; SINKING IN LAKE SUPERIOR ON 10 NOV. 1975 WITH LOSS OF LIFE, Rep. No. USCG 16732/64216 (July 26, 1977).

23. NAT'L TRANSP. SAFETY BD., MARINE ACCIDENT REPORT SS EDMUND FITZGERALD SINKING IN LAKE SUPERIOR NOVEMBER 10, 1975, Rep. No. NTSB-MAR-78-3 (May 4, 1978).

24. See generally HEMMING, *supra* note 14. (discussing multiple theories of causes for the *Fitzgerald*'s sinking).

25. See Ontario Heritage Act, R.S.O. 1990, c. O-18 (O. Reg. 11/06 was amended in 2006 to expand the no-dive/no-submersible buffer zone around the three wrecks to which it applies to limit access to even the debris fields of these ships.).

26. Alyssa Bloechl, *Families of the Fitzgerald Remember*, GREEN BAY PRESS GAZETTE (Nov. 10, 2015), <https://www.greenbaypressgazette.com/story/news/local/door-co/news/2015/11/10/families-fitgerald-remember/75526204/> (commenting in 2015 about living descendant's memories); *Family of Edmund Fitzgerald's Crew on Hand as Swimmers Finish Intended Route to Mark 50 Years Since Sinking*, CBC NEWS (Aug. 29, 2025), <https://www.cbc.ca/news/canada/windsor/family-of-edmund-fitgerald-s-crew-on-hand-as-swimmers-finish-intended-route-to-mark-50-years-since-sinking-1.7621070> (a 2025 commemoration of the sinking that included living family members of the deceased mariners).

industry that has direct impacts on the circum-Great Lakes region.<sup>27</sup> The *Edmund Fitzgerald*, due in part to its fame and in part to its increasing accessibility, serves as a bellwether for site protection and, on the fiftieth anniversary of its loss, should also serve as a springboard for discussing the protection of sunken gravesites at large.

### III. BROADER SUBMERGED GRAVE PROTECTIONS AND THEIR SHORTCOMINGS

In 1987, the United States Congress enacted the Abandoned Shipwrecks Act (ASA).<sup>28</sup> With that law, Congress acknowledged the United States' sovereign ownership of all shipwrecks in the navigable waters of the nation.<sup>29</sup> In that same law, Congress relinquished the jurisdiction of all such resources to the individual states within whose boundaries the shipwrecks are located.<sup>30</sup> In essence, Congress created the federal authority for shipwrecks to be vested in state ownership if they are in navigable waters of a state, but then punted to the states for them to establish their own regulatory scheme to permit access to and protection of these resources. Although the ASA was a good starting point to establish baseline protection of shipwreck sites, there are real loopholes in the coverage of the law. Some of these loopholes have been filled by states acting in their sovereign capacity through their legislators, such as Louisiana,<sup>31</sup> which protects both shipwrecks as well as now-submerged terrestrial archaeological sites. Similarly, Michigan has enacted specific protections for submerged sites within its sovereign jurisdiction,<sup>32</sup> going so far as to limit the state's liability from injuries sustained while scuba diving on shipwrecks.<sup>33</sup>

In order to understand some of the significant loopholes of the ASA, it is essential to understand the actual coverage of the law. The coverage of the ASA is tied to the federal definition of "submerged lands," which largely refers to the navigable waters of the states (and certain tidally influenced areas) at the time of their admission into the Union.<sup>34</sup> Thus, the ASA defers to state tests of navigability for questions of whether particular wrecks are protected under the law.

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27. Indeed, part of Michigan's official tourism website invites people to visit the state to dive on Great Lakes wrecks. *Dive into Michigan Shipwrecks at these 12 Underwater Preserves*, PURE MICH., <https://www.michigan.org/article/trip-idea/dive-michigan-shipwrecks-these-underwater-preserves> (last visited Nov. 21, 2025).

28. 43 U.S.C. §§ 2101–06.

29. 43 U.S.C. § 2105(a).

30. 43 U.S.C. § 2105(c).

31. LA. STAT. ANN. §§ 41:1604–05 (2025).

32. MICH. COMP. LAWS ANN. § 324.76103 (West 2025); MICH. COMP. LAWS ANN. §§ 324.76107–324.76109 (West 2025).

33. MICH. COMP. LAWS ANN. § 324.76115 (West 2025).

34. 43 U.S.C. §§ 1301, 2102(f).

In Michigan, as in many other states, the state does not claim historically non-navigable waterways.<sup>35</sup> Thus, any wrecks in waterways that are unable to be proven to have been navigable in 1837 (the date of Michigan's statehood) are not under the protective umbrella of the ASA. Although one would think that the discovery of a shipwreck in a waterway that is otherwise considered non-navigable would be a strong argument to the contrary, the law does not always favor logic. This is one loophole in the law. Certainly, there are archaeologically significant wrecks in waterways that do not meet the legal classification for navigability so these wrecks would not be protected under the ASA.

An example of the problems with shipwrecks being located in non-navigable waterways comes from the relatively recent discovery of an unidentified vessel in Webster Parish, Louisiana. In 2010, the Louisiana Department of Wildlife and Fisheries received reports that a wooden vessel was poking out of the unusually low waters along Bayou Dorcheat in North Louisiana.<sup>36</sup> Visual inspections by wildlife agents and Louisiana's Northwest Regional Archaeologist, Jeff Girard, confirmed the reports. Although no detailed examination was possible, it is suspected that the vessel was either a shallow-draught ferry or a flatboat.<sup>37</sup> Due to the perishable nature of such vessels, their existence today is a rarity, making the discovery one of some scientific importance. However, the riparian landowner was adamant that no one was to approach his property to view or salvage the vessel. The landowner's insistence was based on a 1920s Louisiana Supreme Court decision that had declared the particular reach of Bayou Dorcheat in which the wreck is located to be non-navigable,<sup>38</sup> and the owner believed that the identification of a ship on the property would allow for a revisiting of the navigability issue from a legal perspective that would threaten his claims to minerals underlying the waterway. Thus, the riparian owner claimed that the wreck was on his private property and he had already begun to disassemble the wreck for his own purposes.<sup>39</sup> Although Mr. Girard was ultimately able to convince the owner of the importance of this vessel and dissuade him from further destruction (at least in the short term), this situation highlights the shortcomings of the reach of the ASA when wrecks are found in waterways that were once thought to be non-navigable. This matter has

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35. 18A MICH. CIV. JUR. *Navigable Waters* § 3, Westlaw (last updated Aug. 2025); 25 MICH. CIV. JUR. *Water* § 48, Westlaw (last updated Aug. 2025).

36. Email from Keith Cascio to Ryan Seidemann (Oct. 18, 2010) (on file with author).

37. Email from George Castille to Ryan Seidemann (Oct. 20, 2010) (on file with author).

38. Bodcaw Lumber Co. of La. v. Kendall, 108 So. 664, 665 (La. 1926).

39. Email from Andrew Pistorius to Ryan Seidemann (Oct. 16, 2010) (on file with author).

not yet been resolved, and it is unclear on what legal basis such a resolution may be reached.

Further limiting the scope of the ASA's protections, the law also constricts the concept of "navigable waters" by providing that the boundary of state-owned submerged lands shifts over time with natural processes such as accretion and reliction.<sup>40</sup> Thus, movement of the water course and the sloughing off or adding to of the banks of a waterway alters the coverage of protections afforded by the ASA. This exemption becomes especially acute in some of the inland rivers, streams, and creeks in places where the watercourses constantly shift.<sup>41</sup> Under this loophole, if a ship sinks in a navigable waterway, and that water course later shifts, causing the wreck to be partially or wholly stranded on dry ground, the ASA likely does not apply. This scenario has famously occurred in the Midwest with sunken steamboats that become stranded in cornfields when water courses shift.<sup>42</sup>

A more complex example of such a problem has occurred in Louisiana in situations in which the United States Army Corps of Engineers has undertaken straightening activities on waterways.<sup>43</sup> When the waterways are straightened, the water usually follows the easier route, leading to accretion in the originally-navigable channel. In these situations, anthropogenic activities have led to portions of navigable waterways drying up (usually at sharp bends), thereby stranding wrecks that had previously been in a navigable waterway. When these waterways completely dry up, the legal regime of ownership changes. Under Louisiana law, as accretion occurs, the newly accreted area inures to the ownership of the riparian owner.<sup>44</sup> Thus, in addition to the ASA not applying due to its exception of accreted lands, most state protections of archaeological resources on state lands are also lost.

One example of this channel-shifting problem is highlighted by the wreck of the steamboat *Kentucky* in the Red River near Shreveport, Louisiana. The *Kentucky* sank on June 9, 1865, while transporting 900 passengers, mostly paroled Confederate soldiers, from Shreveport to

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40. 43 U.S.C. § 1301(a)(1).

41. Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVT. L.J. 93, 118–29 (2009).

42. See Annalies Corbin, *Shifting Sand and Muddy Water: Historic Cartography and River Migration as Factors in Locating Steamboat Wrecks on the Far Upper Missouri River*, 32 HIST. ARCHAEOLOGY 86 (1998); GREG HAWLEY, TREASURE IN A CORNFIELD: THE DISCOVERY AND EXCAVATION OF THE STEAMBOAT ARABIA 20–22 (Paddle Wheel Publ'g, 1998).

43. See generally Seidemann, *supra* note 41 (discussing those federal activities).

44. LA. CIV. CODE ANN. art. 499 (2024). Michigan also has an analogous legal regime. 25 MICH. CIV. JUR. Water § 53, Westlaw (database updated Aug. 2025).

New Orleans.<sup>45</sup> It is estimated that 200 passengers lost their lives when the *Kentucky* struck a snag just south of Shreveport and sank quickly.<sup>46</sup> At the time of the archaeological investigation of the *Kentucky*, the remains of the vessel were situated across three potential legal regimes of property ownership, two of which are likely exemptions to the ASA's coverage. Although it is not apparent that these legal issues were a problem for the archaeological interpretation of this vessel, the issue highlights the problems with the scope of the ASA.

When the *Kentucky* went down in 1865, it was in the navigable channel of the Red River.<sup>47</sup> Over time, the River's course shifted, leaving a portion of the wreck in the original channel, a portion in the new channel, and a portion stranded beneath a newly-created island in the channel.<sup>48</sup> It is clear that the portion of the wreck lying beneath the original channel of the Red River is covered by the ASA as being embedded in a navigable waterway. However, the portion that has become stranded under the newly-created island will belong to the owner of that terrestrial property.<sup>49</sup> If the shift in the Red River that created the *Kentucky* scenario was occasioned by the Corps cutting a new channel to straighten the flow of the River, this new channel was likely (as is often the case) acquired by way of an easement (i.e., not in full ownership).<sup>50</sup> In such cases, the property remains the private property of the landowner across whose land the channel now runs and that person owns anything embedded in the water bottom. Accordingly, assuming that the new channel was acquired by way of an easement, although it now carries the waters of a navigable waterway, it is privately owned and thus that portion of the *Kentucky* lying in the new channel is also privately owned and is not subject to the ASA. Further complicating the ownership of the *Kentucky* and its protection under the ASA is the fact that the old channel will slowly dry as the water follows the course of the new channel. As the old channel dries, the accretion formed by the drying inures to the ownership of the private riparian owners, thus exempting the wreck from the ASA and state property protections.

Despite the shortcomings noted above, the ASA does provide substantial protection for shipwrecks that are in clearly navigable

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45. See generally R. Christopher Goodwin and John L. Seidel, PHASE II AND PHASE III ARCHAEOLOGICAL INVESTIGATIONS OF THE SHIPWRECK *KENTUCKY* (SITE 16BO358) AT EAGLE BEND, POOL 5, RED RIVER WATERWAY, BOSSIER PARISH, LOUISIANA, REPORT TO U.S. ARMY CORPS OF ENGINEERS, VICKSBURG DISTRICT, R. Christopher Goodwin & Assoc. (2004).

46. *Id.*

47. *Id.*

48. *Id.* at fig. 21.

49. La. C.C. arts. 482; 490; Michigan also has an analogous legal regime. 25 MICH. CIV. JUR. Water § 53, Westlaw (database updated Aug. 2025).

50. Seidemann, *supra* note 41.

waterways within state waters. Unfortunately, this is only one part of the picture. The other part concerns available protections in federal waters that are more murky and sparse, with one relatively new exception as discussed below.

The protections for shipwrecks in federal waters is, at best, a cobbled-together hodgepodge of laws with differing scopes and protections. The coverage of these laws is far from comprehensive. The traditional terrestrial archaeological site protections available under the National Historic Preservation Act (NHPA)<sup>51</sup> and the Archaeological Resources Protection Act (ARPA),<sup>52</sup> which are largely triggered by the National Environmental Policy Act (NEPA),<sup>53</sup> provide scant support for the protection of shipwrecks in federal waters.<sup>54</sup> Under these laws, protections for shipwrecks are only triggered when there is federal action or a federal permit involved. Thus, in federal waters, these laws do not cover salvage operations—a gaping hole in the protection of shipwrecks in federal waters. In addition, the punitive provisions of these laws are not well tailored to counter the traditional dreams of shipwrecks full of gold that are the motivating factors for salvage companies. From the perspective of these companies, such penalty provisions are simply seen as a cost of doing business.<sup>55</sup> Finally, the recent Marin Audubon Society decision out of the D.C. Circuit in 2024 that found unconstitutional all of the regulations promulgated under NEPA casts substantial doubt on the utility of the laws that depend on NEPA's structure to protect not just shipwrecks, but all historic and archaeological resources.<sup>56</sup> Thus, NEPA, the NHPA, and ARPA are fairly weak points in the protection of shipwrecks in federal waters.

Regardless of the weaknesses of NEPA, the NHPA, and ARPA, there were some strong points in the protection of shipwrecks in federal waters. The National Monuments Act (NMA) stated that,

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands

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51. 16 U.S.C. § 470-1–6.

52. 16 U.S.C. § 470aa–mm.

53. 42 U.S.C. § 4321–70h.

54. Ryan M. Seidemann, *Protection of Shipwrecks in Louisiana and Federal Waters*, 81 LA. COASTAL L. 1, 1–2 (2003).

55. Ryan M. Seidemann, Shipwreck Protection: Coverage of the Laws, Problems, and Suggestions for Broader Protection, Paper presented at the 2011 Annual Meeting of the Louisiana Archaeological Society, Alexandria, LA (2011) (on file with author).

56. Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902, 915 (D.C. Cir. 2024).

on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.<sup>57</sup>

Although the plain language of this statute is powerful with regard to its coverage and what is restricted, the law only carried with it a \$500 penalty provision.<sup>58</sup> Admittedly, the NMA was passed in 1906, which may be an explanation for the minimal penalty provision, but the practical reality is that the strong enforcement language is undermined by the weak penal provision, thus limiting the law's utility, especially in the salvage context.

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, the Fifth Circuit Court of Appeals held that the NMA is not limited to terrestrial settings and that it applies to federal waters in the same manner as it would to federal lands.<sup>59</sup> Unfortunately, the court limited the protections afforded by the NMA to the twelve nautical mile extent of federal waters.<sup>60</sup> In other words, the court refused to apply the law to areas beyond statutory federal waters, where the federal government clearly exercises jurisdiction.<sup>61</sup> This appears to be an incorrect interpretation of the law because, as noted above, the NMA explicitly applies to "lands owned or controlled by the Government of the United States."<sup>62</sup> Admittedly, when the *Treasure Salvors* case was decided in 1978, the volume of federal activity beyond the twelve nautical mile statutory limit of federal waters was less than it is today. At a minimum, it seems that, based upon the volume of federal mineral leasing and regulation on the Outer Continental Shelf at the present time (which is largely beyond the twelve-mile limit), a court interpreting the NMA today would have to seriously reconsider the *Treasure Salvors* twelve-nautical mile limitation, as such areas are now clearly "lands owned or controlled by the Government of the United States."<sup>63</sup>

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57. 16 U.S.C. 433, *repealed by*, National Park Service and Related Programs, Pub. L. No. 113-287, § 7, 128 Stat. 3272 (2014). This latter law moved the NMA to 54 U.S.C. 320301-320303. However, with that move, the penalty provision quoted here was amended and moved to 18 U.S.C. § 1866.

58. *Id.*

59. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 340 (5th Cir. 1978).

60. *Id.* at 337-38.

61. In this regard, the federal government exercises some jurisdiction over waters and bottoms to the extent of the Exclusive Economic Zone some 200 miles from shore.

62. 16 U.S.C. § 433, *repealed by*, National Park Service and Related Programs, Pub. L. No. 113-287, § 7, 128 Stat. 3272 (2014).

63. *Id.*; See *Treasure Salvors*, 569 F.2d at 337.

Another law that protects shipwrecks in federal waters is the Marine Sanctuaries Act (MSA).<sup>64</sup> Unlike the NMA, the MSA contains strong penal provisions. The MSA specifically provides for the protection of cultural resources. In fact, the first marine sanctuary was created to protect the *U.S.S. Monitor* shipwreck off of the North Carolina coast.<sup>65</sup> The penal provisions of this law are substantial: they include forfeiture of the equipment used to loot shipwreck sites, forfeiture of the ill-gotten material culture, imprisonment, and steep fines.<sup>66</sup> However, the shortcoming of this law is its limited application. The MSA applies only to specifically-designated marine sanctuaries, which, in the grand scheme of things, are very small in area and there are only eighteen of them nationwide.<sup>67</sup> If Congress would combine the penal provisions of the MSA with the geographic scope of the NMA, it is probable that the bulk of shipwrecks contained within waters controlled by the United States government would come under substantial protections from looting.

The most recent activity in this area by Congress is the Sunken Military Craft Act (SMCA).<sup>68</sup> This law provides virtually absolute protections for United States (U.S.) war crafts, including not just sea-going vessels, but also aircraft and spaceships in U.S. waters. Thus, under this law, U.S. military craft cannot be salvaged in U.S. waters.<sup>69</sup> In addition, the SMCA, makes it illegal to salvage U.S. military craft in the waters of other nations.<sup>70</sup> Further, SMCA makes it illegal to salvage foreign military craft in U.S. waters.<sup>71</sup> The law has a broad reach with fines of \$100,000 per violation, per day.<sup>72</sup> These types of restrictions are what are missing from the MSA and the NMA, and they effectively make salvaging such craft too expensive to be considered a simple cost of doing business for salvage companies.

Further bolstering protections from the SMCA, unlike the ASA, this law does not distinguish between military craft located in the water and on land. The SMCA simply applies to sunken military craft, with no specification as to where the craft is currently located. Although this

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64. 16 U.S.C. § 1433–45c-1.

65. 16 U.S.C. § 1445; *see also* William J. Chandler & Hannah Gillean, *The History and Evolution of the National Marine Sanctuaries Act*, 34 ENV'T L. REP. NEWS & ANALYSIS 10505, 10529–30 (2004) (describing strict regulations imposed to limit activities that could damage the wreck).

66. 16 U.S.C. § 1437(c)–(e).

67. *National Marine Sanctuaries*, NAT'L OCEANOGRAPHIC & ATMOSPHERIC ASS'N, <https://sanctuaries.noaa.gov> (last visited Oct. 10, 2025).

68. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Title XIV, §§ 1401–08, 118 Stat. 1811 (2004).

69. *Id.* at § 1402.

70. *Id.* at § 1406(c).

71. *Id.* at § 1406(d).

72. *Id.* at § 1404(b).

law has not yet been tested in the courts,<sup>73</sup> it appears that a strong argument can be made—at least as to military craft—that the SMCA’s protections extend to such resources even when the sovereign waters in which they sank have since dried up or changed course. The threshold question with the applicability of this law appears to be whether the craft was sunken, not where it sunk and who now owns the property on which it sank. Theoretically, the SMCA could apply to terrestrial sites that would otherwise be protected by private property rights (i.e., sites off-limits to ASA and state law protections) and may now fall under the “do not salvage” provisions of the SMCA if the subject craft was one of military use.

Between the ASA and state laws in state waters, and the SMCA (and, to a lesser extent, NEPA, NHPA, ARPA, NMA, and MSA) in federal waters, there emerges a complex legal scheme under which it is arguable that fairly substantial protections from looting should apply to a wide swath of vessels, especially military craft. In federal waters, what is now left largely unprotected are vessels whose use or origin cannot reasonably be identified or tied to the military. In state waters, non-military vessels located on private property (in either terrestrial or non-navigable settings) are left largely unprotected. Nonetheless, even some of those settings have some interesting law that applies.

#### IV. A PROPOSAL TO EXTEND TERRESTRIAL CEMETERY PROTECTIONS TO WRECKED VESSELS

As evidenced by Ontario’s need to enact specific laws aimed at the protection of the *Edmund Fitzgerald*, it is clear that existing statutory schemes are insufficient to manage access to and prevent looting of many shipwrecks. Certainly, there is a disconnect between the various state and federal shipwreck protections reviewed above from the *Edmund Fitzgerald* situation merely due to the 0.5 mile distance between the wreck site and U.S. waters. In other words, the above-reviewed U.S. laws are inapplicable to the *Edmund Fitzgerald* because of a chance distance of 2,640 feet between the wreck site and the U.S. border. Furthermore, because the nearest land—Michigan’s Upper Peninsula—is roughly sixteen miles from the wreck site, the ASA would not apply had the *Edmund Fitzgerald* come to rest on the U.S. side of the border. It would have been in the much less regulated federal waters of Lake Superior, only able to avail itself of the above hodgepodge of federal protections for sunken vessels. Moreover, because the *Edmund Fitzgerald* was a commercial freighter rather than a military vessel, none of the strong protections of the SMCA would

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73. The SMCA was a partial subject of the recent matter of *Glob. Marine Expl., Inc. v. Republic of France*, 151 F.4th 1296 (11th Cir. 2025), but the potential use here contemplated was not a part of that matter. This appears to be the only reported case citing that law since its passage in 2004.

apply. Though the wreck is today protected by Ontario law, that half-mile distance to the lightly regulated U.S. waters is not insignificant. Protection of that site would have required congressional action if it had been on the U.S. side of the border—a far more complex process than protection by the ASA under Michigan law. Simply put, all of the above highlights a gaping hole in the legal protections afforded to sunken vessels in federal waters, and both the scientific significance of such sites and the sacred nature of them as tombs for their former crews weigh heavily in favor of adapting existing laws to protecting these sites in federal waters. In fact, some such laws are already applicable to federal land through basic common law concepts, and only a minor tweak would make them applicable to submerged graves.

The ancient concept of the cemetery dedication, at least in Louisiana, is emerging as a stronger site-protection tool than the more recent historic preservation legislation.<sup>74</sup> This is an interesting reality, as the latter laws were intended specifically to stem the impacts of development and looting of cemeteries, while the former was not. The significance of the emergence of the cemetery dedication as a grave protection and a historic preservation tool has nationwide implications, as the cemetery dedication is virtually ubiquitous across all fifty states,<sup>75</sup> and where it is not codified by statute, it exists through general common law or in reported jurisprudence.<sup>76</sup> Ultimately, this means that little-known and underused tools for the protection of these sacred spaces are lurking in most jurisdictions. This research aims to investigate the history, existence, and usage of such tools in Louisiana.

In terms of strict legal classifications of cemetery land in general, under the law in Louisiana, the purposeful interment of human remains in the ground (or entombment on the ground, as the case may be) creates a legal cloud on a property's title.<sup>77</sup> This cloud, codified in Louisiana (as an example scenario) at La. R.S. 8:304-307, is known as the “cemetery dedication.”<sup>78</sup> The cemetery dedication is a common

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74. See generally SEIDEMANN, *supra* note 7, at 102–34 (explaining that effective cemetery protection may lie not in new legislation but in longstanding dedication doctrines).

75. *Id.* at 116–17 (providing a comprehensive listing of all cemetery dedication laws in the United States as of 2025).

76. *Id.* Michigan is one such state where the cemetery dedication only exists in the jurisprudence. *Richmond Hills Memorial Park Ass'n v. Richardson*, 266 N.W. 396, 397–98 (Mich. 1936). Only Alaska, the Northern Mariana Islands, South Dakota, Utah, and Wyoming appear to lack any such law, but the general common law supplies a concept of the cemetery dedication that is available in these jurisdictions.

77. See generally Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEVELOPMENT 1, 17–28 (2013).

78. For Michigan's equivalent of this law, see *Richmond Hills Memorial Park Ass'n v. Richardson*, 266 N.W. 396, 398 (Mich. 1936) (observing that “[w]hen this land was thus dedicated to burial purposes, such a public use was fastened on same that it

legal concept across the U.S. and basically stands for the premise that once human remains have been interred in a tract of land that land is, forever, classified as a cemetery and cannot be put to alternative uses.<sup>79</sup>

Louisiana's dedication law serves as a good proxy for similar laws in other states and is used in this manner here. When the Louisiana Cemetery Act was enacted in 1974, the Legislature included provisions to ensure sanctity of cemeteries that appear to represent the strongest legal protections in existence in Louisiana for such spaces. These provisions, known as the cemetery dedication, have not materially changed since their original enactment, and are comprised of four statutes in Title 8 of the Louisiana Revised Statutes: La. R.S. 8:304 through 307.<sup>80</sup> These statutes provide, in pertinent part, as follows:

After property is dedicated to cemetery purposes pursuant to this Chapter, neither the dedication nor the title of a plot owner shall be affected by the dissolution of the cemetery authority, by nonuse on its part, by alienation of the property, or otherwise, except as provided in this Title. . . .<sup>81</sup>

\* \* \*

Dedication to cemetery purposes pursuant to this title is not invalid as violating any laws against perpetuities or the suspension of the power of alienation of title to or use of property but is expressly permitted and shall be deemed to be in respect for the dead, a provision for the interment of human remains, and a duty to and for the benefit of the general public.<sup>82</sup>

\* \* \*

Property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless and until the dedication is removed from all or any part of it by judgment of the district court of the parish in which the property is situated in a proceeding brought by the cemetery authority for that purpose and upon notice of hearing to the board, and by publication as hereinafter provided, and proof satisfactory to the court: (1) That no interments were made in or that all interments have been removed from that portion of the property from which dedication is sought to be removed; and (2) That the portion of the property from which dedication is

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became different from other land and was no longer subject to unrestricted sale for commercial purposes. In any sale made, its use and identity as a cemetery and home of the dead must be respected and preserved. The purchaser must buy a cemetery with its restrictions and limitations").

79. SEIDEMANN, *supra* note 7, at 114.

80. Although La. R.S. 8:307 is a part of the cemetery dedication, it merely contains procedural notice requirements for the removal of the dedication and is thus not reproduced here.

81. LA. STAT. ANN. § 8:304(A) (2025).

82. LA. STAT. ANN. § 8:305 (2025).

sought to be removed is not being used for interment of human remains.<sup>83</sup>

Read together, these provisions stand for the proposition that, once human remains have been interred in a piece of property, that property is forever dedicated as a cemetery. In addition, such property cannot be put to any use other than a “cemetery use” unless all human remains are removed from the property and a court of competent jurisdiction issues an order removing the dedication.<sup>84</sup>

The cemetery dedication clearly mandates that once property is dedicated for use as a cemetery, the legal cloud that hangs over that property exists until removed by a court judgment finding that “all interments have been removed” from the property.<sup>85</sup> Accordingly, there can be no alternative use of cemetery property until all of the remains have been removed. Whether scientifically or economically preferable, the absolute ban on alternative uses of cemetery property under the cemetery dedication is the mandatory legal manner in which cemeteries must be treated in Louisiana. Whether this mandate is applicable to all property in Louisiana in which human remains are interred depends on the history of the law itself.

## V. DISCUSSION

The Detroit Mercy special Law Review symposium titled “Sinking of the Edmund Fitzgerald: Exploring the Legal Issues Surrounding Deadly Shipwrecks and Honoring the 50th Anniversary of a Great Lakes Tragedy” was created in part to commemorate one of the most storied maritime graves in history, that of the mariners lost when the *Edmund Fitzgerald* sunk in 1975. On land, burial places, otherwise known as cemeteries, enjoy a particularly unique set of legal protections that can be traced back as early as the Institutes of Justinian in Christian Rome.<sup>86</sup> These protections largely place off limits, intentional burial places for conversion into other property uses.<sup>87</sup> Certainly, history has told us that *de jure* protection under western traditional law, even though it has been incorporated into virtually every common and civil law jurisdiction since Christian Rome, is often not followed in practice.<sup>88</sup> The *de facto* application, or lack thereof, of cemetery site protections

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83. LA. STAT. ANN. § 8:306(B) (2025).

84. SEIDEMANN, *supra* note 7, at 114.

85. LA. STAT. ANN. § 8:306 (2025).

86. SEIDEMANN, *supra* note 7, at 125–27.

87. *Id.* at 128.

88. This is not to suggest that historic Europeans always practiced what they preached. As Iserson has noted, history is replete with stories and evidence of the deconsecration and moving of cemeteries. See Kenneth V. Iserson, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES?, Galen Press, Ltd., 529–31 (2001).

to terrestrial burial sites has been researched and written about extensively.<sup>89</sup>

What has not been substantially examined is the classification of shipwrecks as deserving of the same protection as cemeteries on terrestrial property. Shipwrecks seldom meet the legal definition of a cemetery such that those intent on their preservation and protection can avail themselves of the ancient protections afforded to such sites by way of the cemetery dedication, and, in more recent years, innumerable specific enactments for the protection of unmarked and historic graves.<sup>90</sup>

The key component of the legal definition of a cemetery in the Western world is a place where human remains were intentionally entered or entombed.<sup>91</sup> By definition, most shipwrecks are unintentional. Certainly, it is easy to point to wartime sinking of military vessels, and, indeed, some merchant and other non-military vessels—the great majority of shipwrecks around the world were caused not by intentional sinking—but rather by accident.<sup>92</sup> The *Edmund Fitzgerald* typifies this type of wreck. Cultures have long acknowledged the gravesite nature of sunken war vessels and calls for the regulation of these sites as cemeteries are not new.<sup>93</sup> Indeed, as discussed above, Congress' 2004 enactment of the SMCA created a law intended to ensure the protection of sunken vessels associated with military uses.

The remaining wrecks, even those within U.S. waters that are not military in nature and are not located on navigable water bottoms, are largely unprotected. It is important to note that the United Nations has passed, and many nations have ratified, the Convention on the Protection of Underwater Cultural Heritage.<sup>94</sup> While that convention may be able to fill some of the existing gaps in U.S. law, the U.S. is not a party to the treaty and, thus, has no obligations thereunder.<sup>95</sup> For that reason and because the focus of that treaty is broader than simply protecting ships as graves, it is discussed no further here.

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89. See generally SEIDEMANN, *supra* note 7, at 132.

90. SEIDEMANN, *supra* note 7, at 98–99 tbl 3.1 (containing a list of all states with statutory unmarked burial protections as of 2025).

91. *Id.* at 172.

92. See generally MARX, *supra* note 2 (discussing the nature of many shipwrecks, the majority of which were unintentional sinkings).

93. See generally Elena Perez-Alvaro, *Shipwrecks and Graves: Their Treatment as Intangible Heritage*, 17 INT'L J. INTANGIBLE HERITAGE 184 (2022) (calling for submerged human remains to be respected and preserved).

94. U.N. Educational, Scientific and Cultural Organization, 31 C/Res. 24 (Nov. 2, 2001).

95. See generally Ryan M. Seidemann, *What Does It Mean for Us? The United Nations Convention on the Law of the Sea*, 5 SAA ARCHAEOLOGICAL RECORD 36 (Jan. 2005) (noting that the United States is not a party to either the U.N. Convention on the Law of the Sea or the UNESCO Convention on the Protection of the Underwater Cultural Heritage).

As the *Edmund Fitzgerald* has demonstrated, along with vessels such as the *Titanic*,<sup>96</sup> the *RMS Lusitania*,<sup>97</sup> and many other non-military vessels, shipwrecks are increasingly within reach of treasure salvors.<sup>98</sup> If military wrecks are viewed as protected grave sites (e.g., the *USS Arizona*), it is clear that non-military sites that, though they do not meet the legal definition of a cemetery, should also be protected as sacred spaces. The *Edmund Fitzgerald* and many other wrecks like it are the unplanned, unwitting, and largely unwilling tombs of their crews. As cultural resource heritage, they are valuable insights into humanity's shared historic maritime heritage. As gravesites, such wrecks are sacred spaces to which descendants ascribe significant status,<sup>99</sup> and, as with our reverence for the dead on land, they are entitled to at least the same protections as terrestrial cemeteries.

This particular anniversary provides an opportunity to visit an area in which the law has not remained apace with modern reality. The last of the federal enactments concerning the treatment of submerged sites (the SMCA) is now more than twenty years old. Noticeably absent from that law is any recognition of non-military vessels as the tombs of their crews. Surely, the government in Ontario has seen fit, on multiple occasions, to extend specific and explicit legal protections to the final resting place of the *Edmund Fitzgerald*,<sup>100</sup> as well as two wrecks of the

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96. Admittedly, despite continued tourist-caused degradation to the *Titanic*, that vessel is ostensibly protected by both U.S. law and an international agreement. *See* 16 U.S.C. §§ 450rr-rr-6 (1986); Agreement Concerning the Shipwrecked Vessel RMS *Titanic*, Nov. 6, 2003, T. I. A. S. 19-1118.

97. The *RMS Lusitania*, as perhaps the most famous shipwreck during World War I, sits in a dubious legal situation for the purposes of this research. Although it was a civilian vessel and the loss of life when it was torpedoed and sunk by a German U-20 U-Boat in 1915 was decried as an attack on civilians during wartime, suspicions have lingered since the sinking that the vessel was covertly transporting military equipment and munitions to England from the United States along with the civilian crew and passengers. *See* ERIK LARSON, DEAD WAKE: THE LAST CROSSING OF THE LUSITANIA 325 (2015) (describing "dark talk of exploding munitions and a secret cargo of explosive materials"). If the suspicions prove to be true, it is possible that the *Lusitania* could be considered for military vessel protection. Regardless, the site is protected under Irish law (in whose waters the *Lusitania* sank), making the distinction between a military and civilian vessel merely an academic curiosity. Oliver McBride, *Marine Notice: RMS Lusitania Wreck Site Receives Enhanced Protection*, THE FISHING DAILY (July 19, 2024), <https://thefishingdaily.com/latest-news/marine-notice-rms-lusitania-wreck-site-receives-enhanced-protection/>.

98. Leigh Bishop, *Return to the Lusitania*, ADVANCED DIVER MAG., <https://advanceddivermagazine.com/articles/lusitania/lusitania.html> (last visited Oct. 10, 2025) ("In the case of *Lusitania*, the tech divers are operating at nearly 95m, this is between two and three times the depth attainable with mainstream scuba equipment.").

99. *See generally* Perez-Alvaro, *supra* note 93, at 187 (describing the values attributed to submerged human remains).

100. Marine Archaeological Sites, O. Reg. 11/06 (Can.).

War of 1812.<sup>101</sup> This action is largely an anomaly, both domestically and internationally.

A large part of the problem that leaves sunken vessels exposed to modern plunder is that even those that are protected within state waters by the ASA may still be salvaged and looted with near perfect impunity. On the best of days, the ASA authorizes states to regulate salvage operations on sunken vessels. That law does not explicitly or implicitly cover sunken vessels as final resting places. This reality is not particularly surprising because it was mostly treasure ships whose discovery spurred the enactment of the ASA, but it is an oversight that should be remedied.

Under basic common and civil law traditions, there are existing protections of cemeteries from damage or destruction. However, it is apparent from the disparate laws that apply to cemeteries that the key component to availing a site of cemetery protection rests with the intent of the person who created that mortuary space. In this regard, very simply, what makes a burial ground a protected site is human intent. Those who are buried in cemetery sites, the sites protected by Western legal traditions as sacred and inviolate, have been put in the ground or in tombs on the ground with the idea and expectation that these sites will remain untouched and undamaged because of the unique nature of that property.

Contrarily, in cases of crimes involving death, though there may be intent to kill the person, and there may be an intent to dispose of the body in one way or another; there is seldom, if ever, any intent to create a cemetery by that body disposal. The same can be said of disaster situations in which bodies are left in all manner of disposition. In these instances, intent is lacking, and, therefore, the sites where those remains come to lie are not considered a cemetery under the law.<sup>102</sup>

Analogously, as with the *Edmund Fitzgerald*, and so many other wrecks over the centuries, none of the mariners who perished in those events set out on their voyages with the intent of creating their own tomb or their crew members' own cemetery on the sea floor. The SMCA protects as gravesites the military watercraft, aircraft, and spacecraft of the U.S., while also commanding that U.S. similarly treat the military vessels of other nations if found in U.S. waters.<sup>103</sup> The ASA is directed at protecting the material culture of humanity's maritime exploits and never mentions or seems to consider the remains of those who lost their lives in the events that created these material culture-rich sites. Lacking intent, existing protections of cemeteries do not apply to shipwrecks.

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101. *Id.* (referring to the *USS Hamilton* and the *USS Scourge*).

102. SEIDEMANN, *supra* note 7, at 6–7.

103. Sunken Military Craft Act, Pub. L. No. 108-375, Div. A, Tit. XIV, §§ 1401–08, 118 Stat. 1811, 2094–98 (2004).

As long been recognized by American courts, the intentional burial or entombment of human remains in or on a piece of ground forever converts that space to a protected cemetery.<sup>104</sup> As advancements in technology allow sport divers and salvage companies to reach ever greater depths, the *de facto* tombs of past mariners are under ever increasing threats of plunder and desecration. Without adopting an analogous legal scheme within the U.S. and abroad, these sites will continue to be increasingly at risk as curiosity seekers and those bent on profit will visit such sites with an eye towards removing pieces of them for collection and sale. The reality of this type of activity is precisely akin to stealing human remains, tombstones, and other mortuary paraphernalia from a traditional cemetery.

This position is not to suggest that wrecked vessels with no loss of life should simply be open to a looting free-for-all. Such a position would strip humanity of its shared cultural heritage and what can be learned from such sites. However, it is clear with humanity's treatment of human remains in terrestrial contexts that those vessels in which the dead are entombed are deserving of additional consideration and protection.

This Article proposes that Congress amend the ASA to explicitly provide that any vessels that sank with a loss of life shall be considered as cemeteries and all of the protections afforded to those sites, including but not limited to the cemetery dedication, henceforth apply to shipwreck sites and their debris fields. For this change to be meaningful, Congress must explicitly direct that this classification of shipwrecks applies not only to the vessels in state waters already covered by the ASA, but also to all shipwrecks that resulted in a loss of life in federal waters and those submerged lands over which any agency of the U.S. exerts regulatory jurisdiction. With such a change, vast new swaths of land containing likely thousands of wrecks will become immediately protected as gravesites. Accidental interference with such sites can be excepted from the law in the same manner as are inadvertent discoveries of Indigenous burial sites under existing federal law. This carve-out, with a responsibility to report unintentional impacts to vessels to the Coast Guard, will provide exemptions that should satisfy any commercial fishing in those waters.

While Congress can directly protect such wrecks in federal waters, an amendment to the existing ASA could also grant states the ability to extend those protections to all wrecks within their individual jurisdictions. Thus, the only wrecks that may not be covered by such amendments would be ones that have become terrestrial sites like the *Kentucky* steamboat discussed above. Because Western jurisprudence holds sacrosanct graves and burial grounds, it is a logical extension of

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104. See SEIDEMANN, *supra* note 7, at 113, 116–17 tbl. 4.1 (depicting the prevalence of cemetery dedication laws in the United States).

this reverence to include shipwrecks associated with loss of life that now happen to lie on terrestrial property. Congress should include such a provision with the amendment of the ASA. To the extent that such an amendment represents an impingement on private terrestrial property, the cemetery dedication provides considerable analogous protection for landscapes of death that have been recognized by the courts for centuries. Amending the ASA in this manner is viable and should cost the government little to no funds for implementation and enforcement. Such an amendment represents merely a specific law that provides for shipwrecks associated with a loss of life the existing gravesite protections against desecration, reuse, or disturbance that is enjoyed by terrestrial cemeteries and by military vessels—a small change indeed.

## VI. CONCLUSION

Such innovations are becoming critical as, due to climate change, many terrestrial burial grounds (e.g., the yellow fever cemetery at Florida's Fort Jefferson) are becoming submerged and are facing the same risks and fates as shipwrecks.<sup>105</sup> However, because of the cemetery dedication, those sites will be protected from looting and desecration. As this Article demonstrates, the same cannot be said of shipwreck sites that are also associated with loss of human life.

The proposal to extend protections to non-military shipwrecks in U.S. waters is simple. Common and civil law have long recognized and acknowledged the sacred and inviolate nature of human burial spaces.<sup>106</sup> Without Ontario's protections specifically directed at the *Edmund Fitzgerald*, that wreck would not be considered a sacred gravesite. Moreover, untold numbers of merchant vessels, especially in the accessible waters of the Great Lakes and otherwise within U.S. territorial waters are unprotected. These sites are in and on navigable waterways owned by sovereign states and the U.S. To create a special kind of protection for non-military vessels as gravesites impinges on no private property right save perhaps that of the insurance company that has a monetary claim to a ship's cargo. The reason that this proposal impacts no private property rights is because the navigable water bottoms of this nation are sovereign property. Thus, imposing restrictions thereon affects only the government and not private landowners.

These sites are tombs, even though they were never intended to be classified as cemeteries. They should be treated accordingly.

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105. *National Park Archeologists Find Remains of an Underwater Hospital and Cemetery at Dry Tortugas*, NAT'L PARK SERV. (May 5, 2023), <https://www.nps.gov/drtu/learn/news/underwater-hospital-and-cemetery.htm>.

106. See generally SEIDEMANN, *supra* note 7, at 102–34 (describing the history of cemetery dedication laws in Louisiana, Rome, Spain, and the United States).