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# Archaeology, Relics, and the Law

**Second Edition**

**Richard B. Cunningham**

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*To my wife Susan, with immense gratitude for  
her unfailing encouragement and support.*



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# Preface

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This is a book about relics. It is also about archaeology, and how our law has developed doctrines that determine the ownership of relics. Beyond ownership, however, the law must also address the processes of discovery that bring those relics to light, as well as the rules of curation and preservation that attempt to assure protection of the past for the future.

A relic is any object that has survived from the past. That term includes things as diverse as organic refuse, artifacts, human remains, sites of human occupation, and monumental ruins. To an archaeologist, each of those objects of antiquity would be viewed simply as different categories within a broad group known as archaeological (or cultural) resources. Individually and collectively, all of those items have the potential to contribute to a better understanding of vanished peoples and cultures. To a lawyer, those same items may retain distinct identities, each one apparently governed by different rules of law. Merging the two professional viewpoints has proven difficult, and only recently has an integrated and comprehensive law of archaeology begun to develop.

All of the materials here focus on events and controversies that illuminate the legal problems of archaeology, arranged to suggest a pattern of coherent legal doctrine. For many of those controversies, judicial opinions represent merely a part of the larger context, which requires that we also utilize legislation, commentary, and analytical notes to produce a more complete understanding of the current law. This second edition includes a variety of new materials that have clarified several important aspects of the law of archaeology. As with the earlier edition, the materials allow us to appreciate the fascinating process by which public and private law responds to changing political, ethical, and technical circumstances.

R.B. Cunningham  
San Francisco, June 2005





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\* \* \*

A word on style; all of the court opinions reproduced here have been edited for length and relevancy, with some format changes made to achieve uniformity within the book. Major omissions in the opinions are indicated by ellipses, but minor stylistic changes, omission of footnotes, and reduction of internal citations were made without indication in order to enhance readability; dissenting or concurring opinions were sometimes omitted without notation. Footnotes within opinions and articles have been renumbered. Alterations to articles and commentary by individual authors are for the most part clearly marked; those readings were edited primarily to reduce length or enhance coordination among the materials.

# Glossary

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**Abandoned Shipwreck Act (ASA):** federal legislation, the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 to 2106.

**archaeology:** a multi-disciplinary study of the life and culture of ancient peoples, based on the scientific excavation and study of material remains; it may be concerned with either prehistoric or historic cultures. Occasionally spelled “archeology.”

**Anasazi:** The now-contested term, derived from a Navajo word, and popularized in the 1930s, to describe an early Native American agricultural culture. The Anasazi first occupied the “Four Corners” area of Arizona-New Mexico-Colorado-Utah around 400 AD, and their civilization climaxed between 1100–1300 AD, more or less contemporaneously with Hohokam and Mogollon cultures to the south. Noted for fine polychrome pottery and extensive ruins such as those at Mesa Verde and Chaco Canyon. Their territory eventually was occupied by modern tribes, including the Apache, Hopi, Navaho, and Zuni. Some Native American groups now prefer the more generic term “ancestral Puebloans.”

**antique:** an artifact or relic, often of a statutorily-defined age, such as 100 years, but generally understood to be anything old, or of ancient times.

**antiquities:** [usually plural]: a term used predominantly in the 18th and 19th centuries, and still occasionally in international law, to refer generally to any relics, monuments, or artifacts of ancient times. Hence, “**antiquarians**” or “**antiquaries**” were early students and collectors of “**antiquities**.” Note the Antiquities Act of 1906 concerned “objects of antiquity.”

**antiquity:** ancient times, the remote past, or the quality of being ancient.

**Antiquities Act:** The 1906 federal Act for the Preservation of American Antiquities, 16 U.S.C. §§ 431–433.

**ARPA:** The Archaeological Resources Protection Act of 1979, 16 U.S.C.A. § 470aa et seq.

**arrowhead:** the head or tip of an arrow, traditionally formed of flint or stone; the term is often used generally to describe most small projectile points. Partially exempted from the protection of ARPA by 16 U.S.C.A. § 470ee(g) when found on the surface of the ground, and by §\_.3 (b) of the uniform federal regulations; similarly exempted from statutory protection in some states, e.g., Ariz. Rev. Stats. § 41-841 B.

**artifact:** any human-made object, whether portable (e.g., a spear point) or in situ (e.g., post molds), made of any material. The form and design (attributes) of artifacts are believed to reflect many aspects of the culture of their makers. Spelled “artefact” by the British.

**ASA:** the federal Abandoned Shipwreck Act.

**assemblage:** a group of different artifacts found in association with one another, often thereby suggesting functional relationships among them, and by extension, various behavioral patterns of the community or culture that produced them.

**atlatl:** a hand-held throwing device that increases the velocity of a thrown spear shaft; usually superseded by bow-and-arrow technology.

**barrow:** a heap of rocks or earth, usually a burial mound.

**burial:** v., the act, process, or ceremony of disposition of a dead body, usually into the earth, but may occur at sea or other locations. n., a place of interment, grave, tomb.

**cache:** n., a place in which stores of food or supplies are hidden; a safe place for hiding or storing things; hence, a group of artifacts found together (and presumably concealed); v., to hide or store goods and provisions in a cache. The term was widely used to refer to the practice of trappers and explorers in early America. [Derived from the French verb “cacher,” to hide or conceal.] Compare “hoard.”

**cairn:** [Scot.] a rounded or conical heap of stones built as a monument, memorial, landmark, or trail marker.

**cemetery:** a private or public place or area set apart for burial of the dead; graveyard, burial ground. Statutory definitions vary considerably, and are often much narrower.

**cenotaph:** an empty tomb, a monument erected in memory of someone buried elsewhere.

**conservator:** a person who protects and preserves artifacts. The process of conservation begins when an object is first discovered (stabilizing, packaging), and later involves cleaning, preparation for study or display, and restoration where appropriate.

**context:** the whole situation or environment surrounding a particular artifact or site, considered by archaeologists to be essential to understanding the relationship of particular artifacts to the site and to each other. Knowledge of the context allows interpretations and inferences to be made regarding the nature and age of a past culture.

**contract archaeology:** site investigations performed by and under the direction of professional archaeologists working in contract relationships with landowners, government project managers, or with regulatory agencies. See also “salvage archaeology.”

**Convention on Cultural Property Implementation Act (CCPIA):** the 1983 federal Act, 19 U.S.C.A. § 2601 et seq., by which the United States implements provisions of the 1970 UNESCO Convention. Sometimes the prefix “Convention on” is omitted, and then abbreviated CPIA.

**coroner:** originally a public officer of the English crown with important duties under ancient statutes and the common law. The duties included summoning of a jury (a “coroner’s inquest”) to determine causes of death, or in Britain, the disposition of treasure trove. In many American states the coroner serves as a county officer with authority for inquests, autopsies, burials, and disposition of unclaimed property of a decedent. The coroner may have additional specific duties mandated by unmarked burials statutes.

**cultural property:** broadly, any objects of historical or archaeological importance. A specific term employed in Article 1 of the 1970 UNESCO Convention on Cultural Property, and the 1983 United States implementing legislation (19 U.S.C.A. § 2601 (6)), to include property designated as “being of importance for archaeology” and including many types of items more than 100 years old. A similar definition exists for the essentially synonymous “archaeological resource” under the provisions of ARPA (16 U.S.C.A. 470bb (1)). Some states use the term in a similar specific statutory context. Compare “heritage,” “patrimony.”

**Cultural Property Implementation Act (CPIA):** see Convention on Cultural Property Implementation Act.

**culture:** patterns of learned behavior transmitted and shared by human societies.

**curation:** the care, restoration, maintenance, and occasional display, of relics, usually for educational and scientific purposes, occasionally for commercial ends.

**curator:** a guardian; one in charge of exhibits, research, and personnel of a museum or similar institution.

**dart:** the removable projectile tip on a shaft thrown by an atlatl.

**desecrate:** to violate, or contaminate, the sanctity of an object or place, thus, to make profane a formerly sacred thing or place. **Desecration** of a place of worship or burial, human burial, or public monument is frequently a misdemeanor, but recently has been elevated to criminal status in several states.

**dig:** v. to excavate; n. an excavation, especially by an archaeologist, or the site of an excavation.

**Etruscans:** an indigenous culture flourishing from about 900 to 300 B.C. in Northern Italy, leaving numerous artifacts and tombs. The Etruscans traded widely with Phoenicians, Greeks, and Carthaginians, and were skilled potters and metallurgists. Their civilization declined contemporaneously with expansion by the Gauls, Greeks, and Romans.

**excavate:** to uncover or expose by digging, especially using the deliberate techniques of archaeology.

**exhume, exhumation:** to dig out of the earth or other place of burial, to disinter [ex: out + humus: the ground]. The removal from the earth of anything previously buried, particularly a human corpse.

**find-site:** the specific location at which an artifact was discovered; important to establish context and ownership. See also the older term, “locus in quo.”

**funeral:** the ceremony of interment, or more broadly, the rites used in any means of disposition of the dead.

**funerary:** pertaining to, or associated with, funeral or burial.

**ghoul:** a person who robs graves; the term sometimes carries intimations of cannibalism or necrophilia.

**grave:** a place of (usually intentional) interment of a dead body (see “burial”); a tomb, sepulcher.

**grave goods:** objects placed with a human body at the time of burial; funerary objects.

**huaquero:** [Sp.] a tomb robber of central or South America; derived from “huaca,” a pyramid mound of brick or stone that served as a temple base or tomb. Compare “tombarolo.”

**heritage:** (narrowly) property that is inherited, (and more widely) culture or tradition derived from one’s ancestors.

**history, historic:** generally, an account and analysis of past events, but used more specifically to refer only to written records of those events. Hence, “historic” refers to a period for which contemporaneous written accounts exist. A historic period thus begins in each culture or area with the introduction of writing. (This reflects the absurd truism that only literate societies have history!) The problem remains what

to call the preliterate period? “Protohistory” may be used to refer to a period for which only limited documentation is available, or for which some early writing is extant. “Pre-historic” refers to any period for which contemporaneous written documentation does not exist. Archaeology may deal with either prehistoric or historic cultures.

**historic registers:** listings of historically significant buildings or sites maintained by state or federal officers, usually under the impetus of the National Historic Preservation Act of 1966.

**hoard:** n., a supply or collection of material, put aside for preservation or safekeeping, and often deposited in the ground, usually with the implied motive of concealment or preservation. In times of war, hoards were frequently buried in anticipation of enemy raids or invasion. However, the word also carries implications of greed, or miserly hiding. Compare “cache,” “grave goods,” and “treasure trove.” v., the act of creating a hoard.

**Indian or American Indian:** any of the aboriginal inhabitants of North or South America or their descendants. The term generally is interchangeable with “Native American,” but has specific statutory significance in many state and federal laws. Thus, federal statutes often define an “Indian” as a person who is a member of a recognized Indian tribe (e.g., 25 U.S.C.A. §450 (b)), but the term frequently is not limited to those who choose to maintain tribal relations. The Secretary of the Interior maintains an alphabetical tribal roll of recognized tribes; see generally 25 C.F.R. Part 54.

**inhumation:** the practice of burying the dead, in *interment*. See also “inter” and “exhume.”

**in situ:** in position, in the original or natural position or location; used to describe an artifact, exposed during excavation, discovered in its original position.

**inter:** to bury; to put a body into a grave or tomb (pronounced “*intur*”). Derived from *in* + *terra* the earth; thus usually understood to be burial in the ground. Frequently used with prefix *re-* to mean reburial, and in the past tense is then spelled “reinterred.”

**lithic:** of stone; also used as a combining form (“-lithic”) referring to a specific stage in the use of stone.

**locus in quo:** Lat., “the place in which,” usually used by courts in the early twentieth century to refer to the actual location of a find.

**loot:** v., to pillage or plunder; n., the material so taken.

**Maya:** the language or people of present-day Guatemala, El Salvador, Belize, Honduras, and south-central Mexico, descendants of the Maya whose civilization dominated the region from the “preclassic” period beginning about 2000 B.C. until conquered by the Spanish in the late 16th century. The “classic” Maya period is generally considered to have existed from about 250 to 900 A.D.

**Mesoamerica:** the prefix “meso-” means middle; hence, the Central American area, especially Southern Mexico, Guatemala, Belize, El Salvador. Seen also in e.g., Mesolithic (the middle stone age), etc.

**midden:** a mound or heap of refuse, usually indicating the site of a human settlement, sometimes appearing merely as a stratum. A “kitchen midden” is comprised primarily of domestic food refuse; middens comprised largely of seashells (“shell middens”) are common worldwide in coastal areas. Analysis of middens yields infor-



mation on ancient diets, seasons of site occupation, and environmental conditions. Also termed “shell mounds;” compare “tell.”

**monument:** an object set up or maintained to keep alive the memory of a person or event, and more generally, any object which, by surviving from a former period, represents an earlier achievement. Sometimes [obs.] a burial vault. The term is generally understood in English-speaking jurisdictions to refer only to immovable objects, but may include “movables” as well, *e.g.*, the prohibition on importation of pre-Columbian monuments or sculpture in 19 U.S.C.A. §§ 2092, 2095(3). Compare “antiquities,” “artifact,” “relic.”

**mortuary:** *n.*, a place where dead bodies are kept prior to burial; *adj.*, pertaining to the dead or to burial.

**mortuary archaeology:** the organized excavation and study of graves and cemeteries, usually by physical anthropologists or forensic osteologists.

**mound builders:** any of the prehistoric peoples of the central or upper Mississippi and Ohio valleys who built elaborate temple, effigy, and burial mounds.

**NAGPRA:** federal legislation, the **Native American Graves Protection and Repatriation Act** of 1990, located primarily at 25 U.S.C.A. §§ 3001 to 3013.

**National Historic Preservation Act of 1966:** a federal act, primarily codified at 16 U.S.C. § 470 *et seq.*, establishing policies and procedures for federal agencies that deal with historic sites or objects.

**National Register:** the National Register of Historic Places maintained by the Secretary of the Interior under the National Historic Preservation Act of 1966. See generally 36 C.F.R. parts 60 to 63.

**necro-:** a combining form meaning death, corpse.

**necropolis:** cemetery, burial ground, especially of an ancient city.

**necrophilia:** an abnormal, often erotic, fascination with corpses, or death generally.

**neo-:** a prefix meaning “new,” also used to describe the re-emergence of a culture following a decline.

**osteology:** the study of the structure and function of bones; classical physical anthropologists often maintained large osteological collections.

**ossuary:** a place or container for the deposit of bones, or ashes, of the dead.

**paleo-:** a prefix meaning remote, ancient, old. Used to describe fields of study (*e.g.*, paleoethnology, paleobotany) as well as particular periods (*e.g.*, paleolithic) or cultures (*e.g.*, Paleo-Indian).

**paleontology:** a branch of geology concerning ancient organisms undertaken through the study of plant and animal fossils.

**patrimony:** (literally) property inherited from one’s father, or (more generally) from one’s ancestors, hence its larger meaning is more accurately “heritage.” Sometimes used (in a rather sexist fashion) as “cultural patrimony,” especially in international terminology.

**pedigree:** a term used occasionally as a substitute for “provenance.”

**petroglyphs:** carvings on rock, or rock art, especially prehistoric; frequently the target of vandalism. **Rock carvings** are specifically included within the protection of Section 3 of ARPA, and sometimes granted state protection, *e.g.*, Ariz. Rev. Stats. § 13-3702.

**pilfer:** to steal in small quantities, to practice petty theft.

**pilferage:** a pilfering; *n.*, something pilfered.

**pillage:** v., to deprive of property by open violence, to loot, to rob, to engage in plunder; n., the act of pillage, or the booty or loot which results from it. [Derived from the Fr. “piller,” to rob.]

**plunder:** v., to take, rob, or steal, usually by violence or open force; n., the personal property so taken, often by an enemy during war.

**pothunters:** a descriptive or derisive term, embracing both innocent amateur collectors and thieves, meaning anyone who searches for or collects artifacts in the field.

**potsherds** (or **sherds**) (usually spelled and pronounced *shards*): any fragments of pottery, frequently useful for establishing the chronology at a site, identity of the maker, patterns of trade, etc.

**pre-Columbian:** the period of Western Hemisphere prehistory before the arrival of Columbus and the consequential beginning of general European influence.

**projectile points:** darts, or the tips of spears, as distinguished from the heads of arrows. A distinction emphasized by the ARPA regulations.

**proto-:** a prefix meaning an early developmental stage.

**provenance:** origin, derivation, source; generally, information and authentication regarding the precise source of an artifact. Vitaly important for serious cultural or archaeological information, and more recently, considered necessary to establish legal title or right of possession; hence, increasingly important for establishing the basis for high sales prices in the art or antiquities market. Sometimes used narrowly to mean simply the identification of the place where an artifact was found. Less commonly termed “provenience.”

**provenience:** see provenance.

**reinter:** reburial of human remains. See “inter.” Reinterment is required in certain cases under several recent state and federal statutory procedures.

**registrar:** an officer of a museum entrusted with creation and maintenance of documents of accession, loan, title, and deaccession.

**relic:** any object, whether whole or fragmentary, and usually moveable, that has survived from the near or distant past. Considered interesting, or even venerated or esteemed, because of its age or associations. See also “artifact.”

**repatriate:** literally, to return or restore to the country of origin or allegiance; said of persons or artifacts. Now used frequently to include return of items to any group claiming legitimate rights of succession or possession.

**rescue archaeology:** the specific term used in Section 54 of the United Kingdom’s Ancient Monuments and Archaeological Areas Act of 1979 to establish rules for the custody of artifacts during examination and preservation work undertaken to protect artifacts or a site. See also “salvage archaeology.”

**ruin:** anything fallen down; the remains of something decayed, destroyed, or disintegrated.

**salvage archaeology:** study (and usually excavation) undertaken on short notice to study or preserve a site threatened by destructive change. (See also “rescue archaeology.”) Many archaeologists otherwise would prefer to leave known sites unexcavated as the best means of preservation whenever possible. Salvage work usually involves different and accelerated planning and excavation techniques. The related concept of “marine peril” was a frequent rationale for underwater work under theories of admiralty law until limited severely by the passage of § 7 of the Abandoned Shipwreck Act of 1987 (43 U.S.C.A. § 2106 (a)).

- salvor:** a person or ship that assists in salvage of a ship or its cargo.
- salvage:** to save a ship from danger, to restore sunken or wrecked ships using special apparatus; the compensation allowed under admiralty law to persons who perform salvage.
- sepulcher:** n., a place for the interment of a dead body; tomb, vault; v. to place in a sepulcher, to bury or to be buried.
- sepulture:** burial, interment; often used as in the phrase “right of sepulture.”
- shard:** a fragment, usually of pottery (see “potsherd”), shell, or other brittle substance.
- shell mound:** a shell midden, or kitchen midden; see “midden.”
- SHPO:** a State Historic Preservation Officer, established in each state under the provisions of the National Historic Preservation Act of 1966.
- site:** the position, or space occupied, by an activity or artifact. Generally used to refer to the particular location of an excavation, and especially to the contextual association of the artifacts (see “context”).
- stele:** an upright slab or pillar, usually of stone, bearing engraved or sculptured inscriptions or designs, usually erected as a monument. (Traditionally spelled as “stela” singular, and “stelae” (or steles) for the plural.)
- stratum:** a horizontal layer of material; used to describe the visible layers of soil deposits (strata) that often exist across archaeological sites. The layering is termed stratification, and its study, “stratigraphy.” Because the geophysical “law of superposition” suggests that deeper layers will nearly always represent older materials, stratigraphy is essential for the relative dating of archaeological materials.
- tell:** a mound comprised of the accumulated debris of a long-term human settlement. A phrase primarily used in the Middle East, where mud brick buildings repeatedly eroded or collapsed and were rebuilt, creating highly stratified mounds of substantial thickness. Study of classic tells contributed greatly to our understanding of stratigraphy as a means of establishing chronology. Compare “midden.”
- tomb:** n., a cavity in which a corpse is deposited, a grave, or any place of interment. A chamber or vault, either within or above the ground, for the reception of the dead. v., to place in a tomb, bury, entomb.
- tombarolo:** [Ital.] one who plunders or robs tombs, a grave robber, especially of the ancient Etruscan tombs of Tuscany.
- treasure:** any accumulation of wealth, often money, jewels, or precious metals. Something of great wealth or value. [Derived from OF and ME “tresor,” from L. “thesaurus,” hoard or treasure.]
- treasure trove:** in former British law, generally defined as gold or silver coin, plate, or bullion, found purposefully concealed in the earth or a structure, the original owner of the treasure being unknown. In Great Britain, treasure trove belonged to the Crown as a royal prerogative. In those American jurisdictions that purport to recognize the doctrine, possession of treasure trove usually is awarded to the finder, and competing claims by landowners may not be recognized. [Derived from *tresor* + “trove” the pp. of the French “trover,” to find; hence literally, “found treasure.”] Compare “cache,” “hoard.”
- tumulus:** (pl. tumuli) an artificial stone or earthen mound, especially an ancient burial mound; see also “barrow.”
- vandalism:** malicious or ignorant damage or destruction of public or private property, especially of things beautiful or artistic. Compare “plunder,” “pillage.” [Derived

from the actions of the Vandals, a barbarous Germanic tribe that ravaged Gaul, Spain, and Rome circa the fifth century.]

**Vikings:** warriors among the Norsemen; especially Scandinavian raiders of the ninth and tenth centuries.

**votive:** a., given, dedicated, or done in fulfillment of a religious vow or pledge; usually applied as the assumed motive for relics found at certain archaeological sites, or perhaps in cases of alleged treasure trove.