

The Stolen Memory: The Legal Crisis of the Hispanic Sunken Heritage in America and its causes

José María Lancho

Legalventure, C/Sagasta nº 24, 6º D, Madrid, Spain

Email: Jml@josemarialancho.com

Abstract

The exam of the legal practice related to the Hispanic underwater heritage in the last 10 years in the United States shows that this has been the main resource of a mature treasure hunter industry in that country; that this industry has developed a specific discourse denying intrinsic cultural value to the Hispanic historical remains; and that this discourse has had an influence over the juridical and administrative authorities in the United States in such a way that legal, academic and media approaches to this archaeological legacy show an inadvertent but significant discrimination against the Hispanic Heritage -instead of Heritage of other cultural origins-, with the result that an important record of American history has been reduced to a mere industry and a resource for exploitation without requiring a minimal scientific counterpart, constituting without doubt one of the most serious and consummate problems within the entire historical record of the American history. In Hawaii in a recent court case, in which a Spanish galleon appears to be involved, we face the problem of fitting the Hispanic legacy in America in its legal and academic form, specifically because it brings into question the fact that Captain James Cook became the first European to discover the Hawaiian Islands, and makes manifest the extra historical relevance this assumption still holds. In this paper we deal with legal, historical and social aspects of this issue.

Key words: Hispanic Heritage, shipwrecks, treasure-hunters, national and international waters, legal approaches

Introduction

The history of the submerged Hispanic heritage in the United States is the story of a stolen memory. In fact, it is of a memory that can still be robbed and one that has not had the effective legal protection that it deserves, given the nature of the destruction done and the irreversible loss of a common and valuable legacy. The scarcity of academic and scientific debate that this destructive process has meant for the entire historical registry of the history of the United States is surprising, especially when it involves a country that is without a doubt the largest archaeological power in the world. For every meter of marine depth that technology has conquered for mankind, thousands of square miles of sea bottom have been made vulnerable and unknown areas opened

up to underwater archaeological ransacking. Nevertheless, in the United States that destruction has been selective. As a matter of fact, a close look into the legal and administrative practice involved with commercial access to marine archaeological sites in the U.S. evidences an unquestionable asymmetry in its treatment by virtue of its cultural origins.

The above statement does not mean that the heritage stemming from other cultural origins has not been subject to what we can only define as legal plundering, but that in particular and foremost, the Hispanic cultural heritage –in spite of its special entity-has been subjected to quite specific aggression supported by concrete supra-scientific arguments, that have enjoyed scarce legal and judicial reaction in light of the dimension

of such destruction, which we say has had a numbing effect on the American cultural and scientific conscience as it regards the disappearance of said legacy. Unfortunately,

Admiralty Law perspective and



Fig. 1 Abraham Ortelius 1570 map. With Los Bolcanes and La Farfana the first names applied to Hawaiian Islands. (Biblioteca Nacional de España)

new internal regulations have not served to discourage treasure-hunters, nor have they provided homogenous rules to regulate activities directed at the underwater cultural heritage. In spite of the debates that have existed between the various administrations involved with marine sanctuaries, the different states and the U.S. National and Oceanographic and Atmospheric Administration (NOAA), and the advances that have undoubtedly taken place, the situation is such that underwater excavations by treasure-

hunting companies continue to be carried out on shipwreck sites by means of simple administrative permits that usually end up having no real scientific consequences (Fig.1).

Analysis of the judicial practice in the United States related to the Hispanic sunken heritage in American waters

My concerns for the weak legal situation of the Hispanic historical heritage in the United States made me undertake an analysis of the scope of this problem, and part of the conclusions reached are included herein¹. An attempt has been made to explain the legal situation of the Spanish historical heritage in American waters as a “before and after” issue after the U.S. Court of Appeals for the 4th Circuit, in its sentence dated 21st July 2000 concerning the remains of the Spanish frigates “La Juno” and “La Galga”, ruled in favor of the Kingdom of Spain sovereign immunity². However, these statements have not stopped additional jurisdictional activity, or even administrative authorizations, from favoring the treasure hunters’ looting of Hispanic shipwrecks, whether warships or any other kind. As a result,

the treasure-hunting industry has basically survived the last 20 years by ransacking the underwater historical Spanish heritage in the United States. The district Courts reflected a number of guidelines in their rulings, in all matters related to the adjudication of archaeological sites that correspond to archaeological guarantees in the protocols regarding access to the sites. Those guidelines are analyzed as follows:

Type of Legal Action Exercised

Action *in rem* exercising the finder’s rights and subsidiary right of salvage.

Preliminary Archaeological Design

In none of the cases did the treasure-hunting company provide a project design for the activity on the site, nor contrasted prior information and background studies about the shipwrecks.

Scientific Intervention Criteria

· Proposed criteria: None at the point of origin. Treasure-hunting companies have never set forth any archaeological or research objectives. In all the claims and their related extensions, there are no descriptions or proposals for specifically-determined archaeological criteria, methodology or techniques. In some cases there have been references made to matters of ecological, but not archaeological, impact.

- Prior methodology or techniques required by the Courts: None. The Courts have not identified or made any references to any internationally-accepted archaeological criteria.
- Archaeological monitoring and supervision established by the Courts: Not found in any case. The Courts do not demand any site management or maintenance plans.

Scientific results of the excavations

As no archaeological project has been submitted, the Courts have never defined or proposed any appropriate methods and working techniques.

- Dating and identification methods and on-site documentation: Unknown. Treasure-hunting companies go out of their way to hide the shipwrecks' identity-or delay disclosing as much information as possible-, especially when of Spanish origin. In the latter cases, there are no obstacles to obtain excavation rights. However, in 30% of the cases, the companies stated they knew the identity of the wrecks.

As excavation often entails the destruction of the wrecks, on-site documentation needs to be produced for any subsequent reconstruction.

- Historiographical analysis of the sunken remains: No scientific reporting. Only occasionally and with a markedly commercial intent, a non-scientific publication is produced and the name or identity of the sunken vessel furnished. However, no requests are made to show proof of its identity.
- Other analysis made of the salvaged materials: None. There are no academic post-fieldwork activities. No scientific data is obtained or added to site interventions that may be associated with the application of any internationally-acceptable archaeological and scientific methods.
- Guarantees of access and dissemination to the scientific community: None.
- Scientific results published: None. There has been no publication of any scientific results, except for what could be considered commercial literature aimed at facilitating the sale of the excavated remains.

These conclusions about the facts involved in the context of legal proceedings in the 21st century give us ample indications of what happened in the 20th century and the enormous destruction that this industry has brought about.

Norms and standards not applied to the sunken Hispanic archaeological heritage

There is a powerful paradox within the scope of archaeological protection. In the meantime, United States Courts have been able to establish legal requirements, at least in theory, granting rights over historical shipwreck sites. That has been the case of *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel* (11th Circuit, 1985), which ruling established that the rescue of historical ships could not entail a greater risk than to leave the remains on the seabed, and that any excavation should follow clear archaeological criteria. Along those lines was the ruling in *Cobb Coin Company, Inc. v. Unidentified Wrecked*, the only one of its kind regarding the Hispanic heritage, dealing with the property rights over the historical objects obtained from a Spanish wreck. In that case the court said: [...] there can be no suggestion that federal admiralty procedures sanction salvaging methods, which fail to safeguard items and the invaluable archaeological information, associated with the artefacts salvaged”.

Notwithstanding these statements, in their practical application concerning the underwater Spanish heritage we can arrive at the following conclusions without the smallest margin of error:

- 1) The radical lack of application of any archaeological requirements on the part of American jurisprudence with regards to excavation of historical shipwreck sites.
- 2) The non-observance of scientific standards, at least those enjoying minimal recognition by the international community, and in particular the ones included in the 2001 UNESCO Convention.

The divergence in the American judicial practice concerning the submerged historical patrimony of Hispanic origin has been radically contradictory not only with the increasingly-consolidated archaeological principles in academic circles, but also of the UNESCO itself. Despite this contradiction it is surprising that such divergence has not been dealt with in American academic debates.

It is enough to point out the internationally-consolidated principle of giving preference to the *in situ* conservation of the underwater patrimony, the first of the options that must be considered prior to the intervention of a shipwreck site, according to Article 1 (fundamental principles) of the International Charter on the Protection and Management of the Underwater Cultural Patrimony, as ratified by the 11th ICOMOS General

Assembly (1996). That very same criteria is also set forth in Article 2.5 of the 2001 UNESCO Convention. That is, any manipulation or removal that has not been given prior scientific consideration to its adoption in a subsidiary way to the *in situ* preservation is in violation of internationally recognized archaeological criteria. Notwithstanding, the Courts have allowed the archaeological debate over the access of treasure-hunting companies to historical shipwreck sites. In the 2004 case of Great Lakes Exploration Group LLC vs. Unidentified Wreck, the Western District Court of Michigan (1:04-cv-00375), the court denied the treasure-hunting company its request for excavation due to its lack of furnishing archaeological guarantees in it. In the matter of Columbus America Discovery Group vs. Atlantic Mutual Insurance Company (974 F. 2nd 450, 468), the court concludes that the efforts made to protect the historical element and archaeological value is a factor to ponder in determining the compensation of a salvage operation. In that case the shipwreck was that of the S.S. Central America, an American steamer sunk by a hurricane in 1857.

In yet another case, Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel (4:96-cv-00194-JFN), the U.S. District Court for the Southern District of Georgia in Savannah granted the exclusive rights on the wreck to Marex because the company included the following elements in their methodology: compilation of a historical register of the remains; divers involved had been trained in the use of archaeological methods and employment of thorough excavation techniques; the use of a laboratory with the capacity of preserving the salvaged artifacts; and the hiring of experts to help evaluate and preserve the extracted remains. This matter involved the S.S. North Carolina, an American ship.

However, despite the wisdom and intellectual acumen shown by the U.S. Courts in establishing these requirements, when the law is applied to underwater sites of Hispanic origin, for the most part those Courts not only fail to apply those laws directly, but they do not demand nor verify any aspects concerning archaeological criteria. This discrimination or “asymmetry” is even noticed nowadays in non-judicial administrations. Of over a dozen sites that correspond to historical remains designated by the State of Florida in the National Register of Historic Places, only two belong to Spanish sunken

ships and are located in already-looted sites, even though dozens more are exploited annually with the knowledge of the Florida authorities³ (Fig. 2).

Causes: The ideological element in carrying out the law

Once the objective element of the problem is exposed, the significant fact remains that even the most benign aspects of U.S. norms are not applied in the case of sunken heritage of Hispanic origin. We then examine the direct ideological causes of this problem, which in a quantitative and qualitative way could be described as a cultural genocide, as well as one of the greatest cultural disasters in the 20th and 21st centuries. There is a generalized and highly-effective discourse throughout the treasure-hunting industry with respect to the historical patrimony of Hispanic origin, which was expressed as “The curse of the Black Legend” by the American reporter Tony Horwitz (2006) in The New York Times.

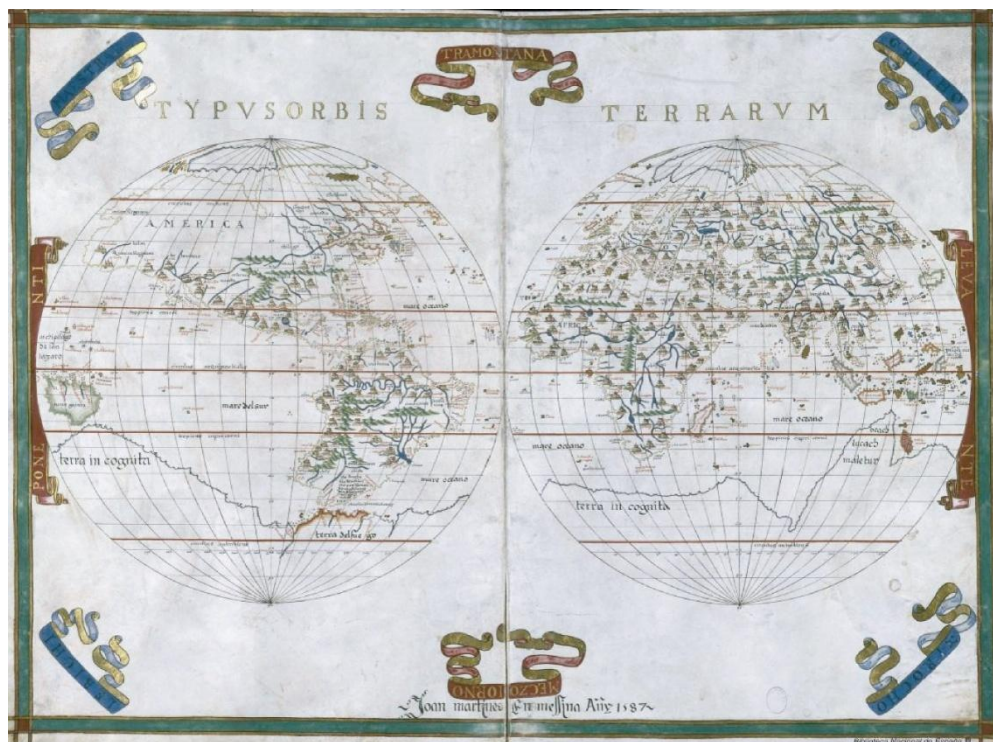


Fig. 2 Joan Martines 1587 map. (Biblioteca Nacional de España)

Treasure-hunters avail themselves of a brief but efficient “ideological capsule” from both the Courts and the academic world’s silent majority: the idea that the remains of Hispanic shipwrecks were tainted by a certain moral deficiency that excluded them from

being considered historical legacies. The end result is that treasure-hunters become the executing arm of a sort of yellow historicism and retrospective pseudo-justice that makes archaeological sites incompatible with any inherent historical and scientific value. We all remember that during the negotiations of the Convention on the Protection of the Underwater Cultural Heritage some illustrious members of the treasure-hunting family had no qualms about wearing jewels and personal objects that had been plundered from shipwrecked marine graveyards.

Even the official reports to the shareholders and third parties put out by companies like Admiralty Holding Co. (published by the Securities and Exchange Commission in its 8-K form dated 9th October 2006) carry statements of that kind: "The treasure stolen from the New World was very important to the King of Spain and it actually sustained the economy of Spain during the period that it was being taken to Spain". We are dealing with quite a generalized phenomenon, which uses the black legend to legitimize the ransacking of historical underwater remains of Hispanic origins, which thereby negate the true American historical and archaeological character, and even a moral or legal nexus with the societies to which those archaeological remains belong. Without a doubt, it is one of the most grievous cultural attacks that a develop society can perpetrate, while bearing what is necessarily a *de facto* extinction of an entire historical register of American history. Such attacks are similar to censure, book-burning or cultural assimilationist practices of the 19th and 20th centuries.

"There's a lot of blood on that gold", someone in charge of Deep Blue told The Associated Press as he announced the likely finding of "El Salvador", whose value was estimated to be \$500 million. The scientific level and methodology that guides the treasure-hunting companies is thus evidenced. This line of reasoning becomes the redeeming force behind the precious metal that is the object of looting, while also destroying the cultural element that stigmatizes it. This argument is proper of the Black Legend and quite a handy one for ensuring the financial and legal survival of the treasure-hunting industry. It is equally striking that a discourse based on the reality of a cultural catastrophe could be so foreign to modern American society that has not been able to come up with a reply, nor seen enough merit to spark an academic debate. But what is even more striking is that such a level of discourse is allowed to caricaturize the

history of Hispanic culture in North America, an essential part of the United States' own history, which has so effectively used the Black Legend to deny any cultural value to the pillaged archaeological remains that were originally associated with the –mestizo, of course-- Hispanic culture in America.

It is this same interchange of ideas that supports the criteria of the Sanctuary of the Florida Keys, as Pat Clyne (a historic treasure-hunter and executive vice-president of the Mel Fisher Maritime Heritage society), expressed when he said in a formal meeting before the Sanctuary authorities: "It is amazing that the very people who seem so sensitive of the gravesites of their ancestors, these very conquistadors who have...". The invocation of a supposed original illegitimacy in relation to the ships' cargoes, the previous contextual reference to the Indians' suffering as a preliminary debate surrounding the present ransacking activities is practically universal, co-substantial with this emerging industry's search for legitimacy. Likewise, it is a way of substituting any archaeological, cultural value, or moral rights debate, with a nationalist mechanical discourse. The urgent need for a new discourse is clear (Fig. 3).

History hunters and golden legends: a legal epilogue in Hawaii

Very recently, Kohala Coast Enterprises (KCE) petitioned the District Court for the District of Hawaii⁴, to grant exclusive salvage rights for an archaeological site that the company claims to have discovered on 23rd November 2011. The site corresponds to a probable 16th or 17th century shipwreck of a Spanish vessel, within navigable waters off the coast of the Island of Hawaii. The remains were found in an area which lies within the Hawaiian Islands Humpback Whale National Marine Sanctuary, jointly managed by the State of Hawaii and the United States, through the National Oceanic and Atmospheric Administration (NOAA).

Despite the fact that the company asked the judge to keep the location of the site secret and has also done its best to keep the cultural origin of the archaeological site under wraps, after consulting with NOAA, this organization issued a document through Malia Chow, the Sanctuary Superintendent of the Hawaiian Islands Humpback Whale National Marine Sanctuary, that is one of the most singular and referable works that

could open a whole new era when dealing with sunken heritage from Hispanic origins that have been targeted by treasure hunters. Some of the aspects and principles listed in that document include: archaeological preservation, the scientific objective of the intervention, as well as cooperation and information with the country of origin. However, the future problems faced by this possible discovery are much larger, as the scarce repercussion this case is having in the media and academic circles demonstrate. No doubt the history of the Pacific and its societies has suffered from the relentless succession of Eurocentric historicisms. Here, I must refer to one of the latest: the Anglo-Saxonism as a golden legend. The origin and development of this ideology does not come from long ago: Madison Grant (1916), John Robert Seeley (Bell 2005), Frank Hankins (1926), Joseph Arthur Gobineau (1853)... All of them describe the necessary nature of any golden legend: antagonism. This ideological element should not be minimized when we talk about heritage and its preservation.

Conclusions

No doubt a thorough questioning of the image of Captain Cook as the first European to set foot on the Islands of Hawaii may affect the historicist vision of that great navigator. This ideological element exists and I think it is easy to prove it. It is not possible to find in the English historiography the connection between: (1) the capture of the city of Manila by the English in 1762, (2) the steal by the last British governor of Manila, Alexander Dalrymple, of all the Spanish cartography in that city, i.e. more than two centuries of navigation and cartographical documents in the Southern Seas, (3) the conception, planning and documentation of Cook's voyages, significantly, by Dalrymple. My modest contribution to this work is that of identifying Alexander Dalrymple as the character that locates, works on, translates, classifies and summarizes the centuries of Spanish cartography in Manila and conceives a project for a British Empire⁵ that is being reborn from its ashes after the independence of its American colonies, and to single him out as the person who hands this decisive material to Cook for his later discoveries.

British historians never linked the maps stolen from Manila to Cook's voyages. The lack of reference to Dalrymple in British historiography is no accident: the theft of the maps, the conception of an expedition that would allow reorienting the Imperial impulse towards the Pacific and the replacement by Cook in the climax of that intellectual

adventure. The Admiralty needed a hero, free of suspicion of espionage, a new man not encumbered by intellectual debts to an enemy power that had to be replaced. The man chosen to command the missions to the Austral continent and the Pacific islands is Cook, a discrete, but talented Master of the royal Armada. At that moment he was not even a lieutenant. Cartography, exploration, discoveries... the narration of history has been, and still is, a tool for nationalisms, as the black and golden legends like that of Lord Sandwich's conceived how the history of Cook's voyages should be told. Regardless of whether the ultimate goal is economic or political, it is interesting to observe how both survive. Can an archaeological discovery question the iron-clad axioms of the golden legend? Despite the communication from NOAA, the reach of the possible above-mentioned discovery in Hawaii has gone unnoticed by the academic world. As for the press, it will have to decide if it is willing to question the North American identity, overrule Anglo-morphism as an ideology and challenge its own identity. All this, as usually happens around the limits of knowledge, will be limited by prejudice.

American waters have become a modern-day mythological River Lethe for a people and a historical record, the common heritage of the North-American and Hispanic peoples. There is a powerful and prevailing prejudice that affects the North-American scientific community and keeps American laws and legal practice from guaranteeing that a submerged archaeological site that corresponds to a shipwreck of Spanish origins may enjoy the maximum legal guarantees and protection, in line with American laws. Let the old verses of Homer serve as a warning to an American nation that accepts the socially-tainted fruit of the science of the forgotten: "Whoever tasted the soft sweetness of the lotus fruit, no longer thought about exploration nor returning home...".

Acknowledgements

The author takes this opportunity to gratefully acknowledge the assistance of Agustin Rodriguez Gonzalez and Mrs. María Cruz Berrocal for their invaluable help and guidance.

Table of cases

· Grumpy v. Unidentified Vessel, United States District Court for the Eastern District of Louisiana, 93-CV-26210H.

- BDJ Discovery Group v. Shipwrecked Vessel Filed: September 23th, 2005 as 4:2005cv00122.
- Sub Sea Research v. Unidentified Wrecked U.S. District Court Southern District of Florida 4:04cv10119-KMM.
- Sub Sea Research Vessel, et al. v. Abandoned Vessel, et al. 4:02CV10068.
- Marine Salvage, Inc District Court Southern District of Florida 04-22679
- Cobb Coin Company, Inc v. Unidentified Wrecked and Abandoned Mailing Vessel 525 F. Supp. 186, 208, 1983 AMC 966 (S.D. Fla 1981).
- EURISCO CORP v. The Unidentified, Wrecked and Abandoned Sailing Vessel 98-10002 CIV-KING.
- Bradley Williamson v. The unidentified, Wrecked and Abandoned Vessel, 9:07-cv-81030-KAM.
- Bradley Williamson v. The Unidentified Wrecked and Abandoned Vessel 9:2008cv80106.
- United States District Court Middle District of Florida (Tampa Division), Odyssey Marine Exploration, Inc v. Unidentified, Shipwrecked Vessel/The Kingdom of Spain, The Republic of Peru, *Case n°8:07cv00614-SDM-MAP, doc 270*, 3 June 2009.
- United States Court of Appeals for the Eleventh Circuit, Odyssey Marine Exploration, Inc. v. Kingdom of Spain, *Case n°10-10269, document n°8:07cv00614-SDM-MAP*, 21 September 2011.

Endnote

¹The conclusions were presented at the Royal Academy of Jurisprudence and Legislation, December 18th 2012.

²Sea Hunt, In c.v. The Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634,638, 642 (4th Cir. 2000)

³It is only right and just to recognize the moral and scientific solvency of the State of Texas authorities in the "Platoro" matter, and the archaeological efforts made versus the court's criteria

⁴Kohala Coast Enterprises, LLC vs. The Unidentified, Shipwrecked Vessel, District Court for the District of Hawaii CV12-00552 SOM-RLP.

⁵In his book "An account of the discoveries made in the South Pacific Ocean, previous to 1764" (Dalrymple, 1767), in page VII and ss, there is an explanation by the author himself. In fact Dalrymple was elected to membership in the Royal Society (1771) as a result of his translations "of voyages to the South Seas & other places from Spanish".

References

Bell, D., 2005. *Unity and Difference: John Robert Seeley and the Political Theology of International Relations*. Review of International Studies, Vol. 31 (3): 559-579.

Dalrymple, A., 1767. *An account of the discoveries made in the South Pacific Ocean, previous to 1764*. Dalrymple, A, London.

Gobineau, J. A., 1853. *Essaisurl' inégalité des races humaines*. Librairie de Firmin Didot Freres, Paris.

Grant, M., 1916. *The Passing of the Great Race*. Geographical Review, Vol. 2 (5): 354-360.

Hankins, F., 1926. *The Racial Basis of Civilization; a Critique of the Nordic Doctrine*. Alfred A. Knopf, New York.

Horwitz, T., 2006. *Immigration - and the Curse of the Black Legend*. [The New York Times](#), July 9.

José María Lancho Rodríguez (Madrid, 1970) is a Spanish lawyer expert in historical heritage and technology law. He has actively intervened in the case Odyssey Marine Exploration in advising both the Kingdom of Spain and at the Spanish Courts in the criminal action derived from this case. He has published articles in various magazines, newspapers, journals and blogs. His research and advocacy interests also include legal enforcement of environmental laws, intellectual property, antitrust and the patient self-determination rights. He has been involved in relevant cases on those fields. He is also president of Hispalinux, the largest association of users and developers of free software in Spain.