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National Treasure: A Comparative Analysis of Domestic Laws Criminalizing Illicit Excavation and Exportation of Archaeological Objects

by Kimberly L. Alderman*
and Chelsey S. Dahm**

I. INTRODUCTION

*Some participants in the illicit antiquities trade
are more equal than others.*

For every good that is subject to governmental regulation, there is a corresponding underground economy.¹ Archaeological materials are no exception to this rule.² Antiquities have been heavily sought after and collected since Roman times.³ As the trade of antiquities becomes more

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1. Michael Michaely, *A Geometrical Analysis of Black-Market Behavior*, 44 AM. ECON. REV. 627, 627 (1954).

2. See Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 624-25 (2011) [hereinafter Alderman, *Honor Amongst Thieves*].

3. *The Acquisition of Cultural Property: Collecting and Looting*, ARCHAEOLOGY AND CONTEMPORARY SOCIETY, http://pcwww.liv.ac.uk/~Sinclair/ALGY399_Site/acquisition.html.

global and sophisticated, so does the corresponding underground economy.⁴

The global antiquities trade has been referred to as a “grey market,” because it is not distinctively “black” or “white.”⁵ Many antiquities are discovered through illicit excavations and transported to the country of their final purchaser through illicit exportation.⁶ Although the majority of antiquities transactions are illicit,⁷ the face of the global antiquities trade—auction houses and sophisticated art dealers—gives the industry a “patina of legitimacy.”⁸

Antiquities are labeled as licit or illicit based upon whether the excavator and exporter had the appropriate permits.⁹ Permits are an important consideration because tainted objects do not, on their face, carry the appearance of having been illegally obtained or exported.¹⁰

Ascertaining the licit or illicit nature of an object through permits is far from conclusive. Provenance paperwork establishes an antiquity’s lineage by documenting all known previous owners, excavation permits, and export permits.¹¹ Even with paperwork documenting an antiquity’s entire life it is difficult for auction houses to determine when the paperwork is forged or manipulated.¹²

4. *Id.*

5. See Blythe A. Bowman, *Transnational Crimes Against Culture: Looting at Archaeological Sites and the “Grey” Market in Antiquities*, 24 J. CONTEMP. CRIM. JUST. 225, 226 (2008); Simon Mackenzie, *The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market*, in CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 69, 71-72 (Stefano Manacorda & Duncan Chappell eds., 2011) [hereinafter CRIME IN THE ART AND ANTIQUITIES WORLD].

6. See PETER WATSON, SOTHEBY’S: THE INSIDE STORY 304 (1997) (indicating that studies show that about 90% of antiquities sold through auction houses are illegally excavated or exported).

7. See Stefano Manacorda & Duncan Chappell, *From Cairo to Vienna and Beyond: Contemporary Perspectives on the Dialogue About Protecting Cultural Artefacts from Plunder*, in CRIME IN THE ART AND ANTIQUITIES WORLD, *supra* note 5, at 6.

8. See NEIL BRODIE, JENNY DOOLE & PETER WATSON, THE McDONALD INST. FOR ARCHAEOLOGICAL RESEARCH, STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 1, 29 (2000), available at <http://www.stanford.edu/group/chr/stealinghistory.pdf> (“Looted antiquities then acquire a patina of legitimacy when ultimately they are sold, without provenance, by dealers and auction houses.”).

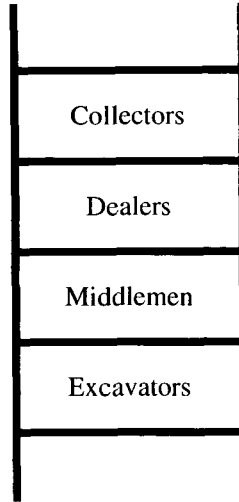
9. See generally Alderman, *Honor Amongst Thieves*, *supra* note 2, at 612.

10. Kimberly Alderman, *The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry*, 14 ILSA J. INT’L & COMP. L. 549, 560 (2008) [hereinafter Alderman, *Ethical Trade*].

11. See THE THAMES AND HUDSON DICTIONARY OF ART TERMS 154 (E. Lucie-Smith ed., 1984).

12. See Richardo J. Elia, *Digging Up Dirt: An Antiquities Case Unearths Corruption*, WALL ST. J. (June 20, 2002), <http://www.opinionjournal.com/la/?id=110001867>.

Whether licit or illicit, the vast majority of antiquities share the same distribution ladder¹³ as shown below in a pictorial representation of this path.



The path of an antiquity in the modern day begins with excavation—the process of discovering and removing an antiquity from the place where it has rested for many years.¹⁴ The people who first discover and unearth antiquities are called excavators, and they occupy the bottom rung of the distribution ladder.¹⁵ The countries from which antiquities generally originate—sometimes called source nations¹⁶—usually have patrimony statutes under which the government claims ownership of unearthed cultural objects.¹⁷ These laws prohibit citizens from searching for or removing antiquities without a license from the government.¹⁸ Therefore, excavations are illicit whenever antiquities are discovered through unregulated or otherwise illegal excavations.¹⁹ While most illicit excavators are motivated by poverty, in some areas there is substantial profit to be made in plundering.²⁰

13. Alderman, *Honor Amongst Thieves*, *supra* note 2, at 615, 615 n.112 (discussing the distribution ladder for antiquities).

14. PHILIP BARKER, *TECHNIQUES OF ARCHAEOLOGICAL EXCAVATION* 13 (3d ed. 1993).

15. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

16. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995).

17. Simon Mackenzie, *Illicit Antiquities*, *TRAFFICKING CULTURE* (Aug. 17, 2012), <http://traffickingculture.org/encyclopedia/terminology/illicit-antiquities>.

18. *See id.*

19. *Id.*

20. See Borodkin, *supra* note 16, at 378, 406.

Illicit excavators generally lack the means and connections to transfer their finds to collectors, who tend to reside outside of source countries.²¹ This is because most source countries impose export restrictions on antiquities.²² In these instances, to transport antiquities across national borders, archaeological objects must necessarily be illegally exported.²³ Accordingly, the illicit excavator's role in the global antiquity trade is limited to unearthing objects and selling them to middlemen.²⁴

For the purposes of this discussion, middlemen include wholesalers and traffickers.²⁵ Both are classified as middlemen on the second rung of the antiquities distribution ladder.²⁶

The majority of illicit excavators sell to wholesalers.²⁷ Wholesalers are essential to the illicit antiquities trade because they facilitate the smuggling of antiquities into "market countries"—countries where antiquities tend to be sold to their ultimate owners.²⁸ Specifically, wholesalers find traffickers or dealers for the illegally excavated antiquities.²⁹ They may also arrange for false bills of provenance to aid traffickers in smuggling antiquities out of the source nation or into an intermediate or market nation.³⁰ Wholesalers make much larger

21. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 614-16.

22. Raymond Fisman & Shang-Jin Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques* (Nat'l Bureau of Econ Research, Working Paper No. 13446, 2007), available at <http://www.nber.org/papers/w13446>.

23. Fisman & Wei, *supra* note 22.

24. See Amir Ganor, Director, Robbery Prevention Division, *ARCHAEOLOGY* (2010), available at http://www.archive.archaeology.org/israel_antiquities_authority/ganor.html.

25. As the Author noted previously in *Honor Amongst Thieves*, in literature on the illicit antiquities trade, the terms "middleman" and "wholesaler" are generally synonymous, and fall into a different category from "traffickers." Alderman, *Honor Amongst Thieves*, *supra* note 2, at 614-18. When wholesalers employ crews of diggers or engage in trafficking themselves, the general distinctions between wholesalers and traffickers are challenged. *Id.* Regardless, wholesalers and traffickers share the middle rung of the distribution ladder for illicit antiquities. *Id.* Accordingly, for the purposes of this Article, "middlemen" refers to wholesalers and traffickers generally, and "wholesaler" refers to the person to whom criminal excavators sell their goods.

26. See Figure A-1.

27. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 615-16.

28. See *id.*; Nate Mealy, Note, *Mediation's Potential Role in International Cultural Property Disputes*, 26 OHIO ST. J. DISPUTE RESOLUTION 169, 176 (2011); Cristina Ruiz, *My Life as a Tombarolo*, ART NEWSPAPER No. 112 (Mar. 2001), available at <http://www.museum-security.org/tombarolo.htm>.

29. See Chauncey D. Steele IV, *The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts*, 23 SUFFOLK TRANSNAT'L L. REV. 667, 680-81 (2000).

30. *Id.* at 681.

financial gains than do illicit excavators.³¹ Occasionally, wholesalers employ their own teams of diggers to perform the illegal excavations.³²

While some wholesalers move the illicit antiquities across country borders themselves, many instead opt to use professional traffickers.³³ Trafficking itself is the act of illegally transporting an object across national borders.³⁴ These objects may have been lawfully unearthed and then stolen, or simply lawfully unearthed but not permitted to leave the source nation.³⁵ Traffickers pass the antiquities along to dealers, who serve as intermediaries between wholesalers and end purchasers of illicit antiquities.³⁶ Traffickers smuggle illicit antiquities across national borders or from remote to urban areas within the source nation.³⁷

Dealers occupy the third rung of the distribution ladder.³⁸ Through dealers, antiquities that have successfully been brought into a market country are sold to their final owners.³⁹ Illicit antiquities often pass through several dealers before they are eventually sold to private or institutional collectors.⁴⁰ Antiquities may travel through several types of specialized dealers, including antique shops,⁴¹ auction houses,⁴² specific collectors or curators,⁴³ private dealers,⁴⁴ or even eBay.⁴⁵

31. Juliana V. Campagna, *War or Peace: It is Time for the United States to Ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts*, 17 FLA. J. INT'L L. 271, 286 (2005); Asif Efrat, *A Theory of Internationally Regulated Goods*, 32 FORDHAM INT'L L.J. 1466, 1479 (2009).

32. See Ganor, *supra* note 24.

33. Alderman, *Honor Amongst Thieves*, *supra* note 2, at 616.

34. See *id.*

35. See *id.* at 617.

36. *Id.* at 616-18. For the purposes of this discussion, end purchasers of antiquities are referred to as "collectors."

37. See Steele, *supra* note 29, at 681.

38. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 618.

39. See Peter Brems & Wim Van den Eynde, *Blood Antiques* (Journeyman Pictures television broadcast Oct. 8, 2009), transcript available at <http://www.journeyman.tv/?lid=59906&tmpl=transcript>.

40. See Gregory Elich, *Spoils of War: The Antiquities Trade and the Looting of Iraq*, CTR. FOR RESEARCH ON GLOBALISATION (Jan. 3, 2004), <http://www.globalresearch.ca/articles/ELI401A.html>.

41. See Brems & Van den Eynde, *supra* note 39.

42. Alderman, *Ethical Trade*, *supra* note 10.

43. Brems & Van den Eynde, *supra* note 39.

44. See *id.*

45. See, e.g., Patrick Tyler, *Museum Asks EBay to Block Some Sales*, N.Y. TIMES (Oct. 30, 2004), available at http://www.nytimes.com/2004/10/30/arts/30trea.html?_r=1&ref=patricktyler.

The last rung on the distribution ladder is reserved for the final owners of antiquities. Two large classes of final owners are private collectors and institutional collectors.⁴⁶

Private collectors tend to be wealthy, "high society" people.⁴⁷ Their affluence allows them to pay premium prices for objects that generated only small profits for the local people in source countries who unearthed them.⁴⁸ Collectors are able to individually sidestep prosecution for collecting illicit antiquities and use their collective influence to lobby for less restrictive import regulations.⁴⁹

Another class of final owners is institutional collectors, typically museums. Historically, museums have participated in the illicit antiquities trade as well, even if inadvertently.⁵⁰ A large part of this participation is the collection of poorly documented antiquities with questionable provenance.⁵¹ However, many museums have responded to increasing pressure to make acquisition and loan policies more stringent.⁵² Similarly, museums are becoming increasingly likely to return objects on ethical grounds, even when source countries lack a legal basis on which to premise repatriation demands.⁵³ Although some museums may require certain items to have paperwork of acceptable provenance,⁵⁴ it is difficult to know when the paperwork is forged or manipulated.⁵⁵

46. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 622.

47. See Brems & Van den Eynde, *supra* note 39 ("This is a world of its own, one that doesn't take to being investigated. It's a high society world. If you'd really start digging in the art world, heads of people in high places would roll. There's also the aristocracy, some of whom also have collections, of so-called 'blood antiquities.'").

48. See Borodkin, *supra* note 16, at 406.

49. See Elich, *supra* note 40.

50. Alderman, *Honor Amongst Thieves*, *supra* note 2, at 622; see Randy Kennedy, *Museum Defends Antiquities Collecting*, N.Y. TIMES (Aug. 12, 2012), available at http://www.nytimes.com/2012/08/13/arts/design/cleveland-museum-buys-antiquities-stirs-ethics-debates.html?pagewanted=1&_r=2&src=rechp.

51. See Kennedy, *supra* note 50.

52. Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 628-29 (2007).

53. See BRODIE, DOOLE & WATSON, *supra* note 8, at 27 ("[I]n the spring of 1999 [Medici] came to an agreement with the Italian carabinieri to return three fragments of a bowl made by the well-known ancient potter Euphronios. The other fragments of this bowl were in the J. Paul Getty Museum in Los Angeles, and . . . the museum voluntarily returned what it possessed to Italy.")

54. See Hans Kennon, *Take a Picture, It May Last Longer if Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373, 382-83 n.45 (1996).

55. Alderman, *Ethical Trade*, *supra* note 10, at 560.

The distribution ladder for licit and illicit antiquities exemplifies the intertwined nature of the “black” and “white” market aspects of the global antiquities trade. Because there is not a separate channel of distribution for an antiquity based on whether it is of licit or illicit origin, its route from excavator to final owner may display aspects of both.⁵⁶ As with any underground economy, the nature of the illicit trade breeds inequality amongst its participants.⁵⁷

II. INEQUALITY IN THE ILLICIT ANTIQUITIES TRADE

The illicit antiquities distribution ladder⁵⁸ does more than just show how antiquities move in commerce from beneath the earth to their final owners. It also shows a continuum from poor to rich, from politically powerless to politically empowered, from culturally connected to disconnected, and from criminally vulnerable to insulated from liability.

A. Moral Right to Participate in the Illicit Antiquities Trade

Arguably, those at the bottom of the illicit antiquities distribution ladder have the greatest moral right to participate in the illicit antiquities trade. Looters sometimes have a direct ancestral tie to the crafts of excavated materials.⁵⁹ They often have few employment options, as source countries are more likely to be economically depressed than market countries.⁶⁰ Essentially, the money illicit excavators earn from unearthing antiquities often goes to feed their families.⁶¹

The same cannot be said of those at the top of the ladder, who arguably have the least moral right to participate in the illicit antiquities trade. Private collectors tend to be wealthy, “high society” people.⁶² They are culturally disconnected from the archaeological materials that

56. See generally Borodkin, *supra* note 16, at 385.

57. See generally Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606, 615.

58. See Figure A-1.

59. See, e.g., David Matsuda, *The Ethics of Archaeology, Subsistence Digging, and Artifact Looting in Latin America: Point, Muted Counterpoint*, 1 INT’L J. CULTURAL PROP. 87, 88 (1998) (“Many of Latin America’s indigenous peoples see themselves as the legitimate heirs to both seeds and artifacts, which are conceived of as ancestors’ gifts, given to humanity by real or mythological patrons to be harvested, or excavated, as it were, by later generations.”).

60. See Ruiz, *supra* note 28 (recording one criminal excavator’s explanation that, “[T]here’s no alternative for me or for my men. We work to put food on the table for our families . . . [w]e are all unemployed.”); see *The Acquisition of Cultural Property: Collecting and Looting*, *supra* note 3 (describing the flow of antiquities from poor to wealthy nations).

61. Ruiz, *supra* note 28.

62. Brems & Van den Eynde, *supra* note 39.

they purchase⁶³ and are not motivated by economic necessity, as are the illicit excavators discussed above. Whereas illicit excavators sometimes feel that excavation is the only means through which they can provide for their families, collectors tend to purchase antiquities for enjoyment or investment.⁶⁴

B. Profit from Participation in the Trade

Antiquities tend to come from developing nations.⁶⁵ Illicit excavators tend to be impoverished, often indigenous, and usually marginalized people.⁶⁶ The further one moves up the illicit antiquities distribution ladder, the more likely participants are wealthy and in a developed nation.⁶⁷

Illicit excavators make the least profit of all the participants in the illicit antiquities trade. Studies have consistently shown that looters receive only 1% - 2%, or less, of the final selling price of looted materials.⁶⁸ Wholesalers and traffickers make significantly more than that, but dealers receive the lion's share of the total profit made off of any particular antiquity.⁶⁹

It is also worth noting that dealers trade in many objects, as opposed to the occasional few traded by most illicit excavators.⁷⁰ This allows for

63. See Jason C. Roberts, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States*, 4 TULSA J. COMP. & INT'L L. 327, 330 (1997) (explaining that after illicit antiquities are looted, they are moved across international borders, away from their nations of origin, to their ultimate purchasers).

64. See generally *Why Buy Art?*, ECONOMIST (June 22, 2012), <http://www.economist.com/blogs/prospero/2012/06/art-market>.

65. See Alia Szopa, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 60 (2004) ("Antiquities are heavily looted in these developing countries which are often poor and in the process of developing; these countries are also known as 'artifact-rich' or 'source' nations.").

66. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606-07.

67. See INT'L SCIENTIFIC & PROFESSIONAL ADVISORY COUNCIL OF THE UNITED NATIONS CRIME PREVENTION & CRIM. JUSTICE PROGRAMME, ORGANISED CRIME IN ART AND ANTIQUITIES 33 (Stefano Manacorda ed., 2008) ("The flow of artefacts in the antiquities market is entirely in a direction leading from poor to rich nations.").

68. See Borodkin, *supra* note 16, at 378 n.10 (describing instances in Turkey and the United States where finders received very small amounts compared to the ultimate selling prices of a marble statue and a Mimbres pot, respectively).

69. See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 181 (2007) ("These price differentials demonstrate that from the source at a looted archaeological site . . . to the transit points . . . to the ultimate market in [various] locations . . . mark-ups for antiquities can be a hundredfold or more.").

70. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 618 (explaining that some antiquity dealers own antique shops, necessarily dealing in many objects); Adel H. Yahya,

compound profit, with dealers making tens or hundreds of times more profit than the criminal excavators.⁷¹

C. Prosecution & Defense of Antiquities Crimes

Collectors and dealers tend to be prosecuted under the laws of the market country where illicit antiquities are often sold to their final owners.⁷² Meanwhile, criminal excavators and wholesalers (and, to a lesser extent, traffickers) are likely to be prosecuted under the laws of the source country in which the antiquity originated.⁷³

In the source nations where antiquities tend to originate, criminal prosecutions are straightforward. The issue at trial is, usually, “Did the defendant have a permit for excavating or trading in the antiquity?”⁷⁴ In market countries, however, prosecutions are most often done through general stolen property laws.⁷⁵ In the United States, for instance, prosecutions of those who buy or sell an illicit antiquity are often done through the National Stolen Property Act (NSPA).⁷⁶ The prosecution must prove the defendant knew the object was improperly excavated or exported from its country of origin.⁷⁷ This is difficult because of the

Looting and ‘Salvaging’ the Heritage of Palestine, PRESENT PASTS (2) (2010), available at <http://www.presentpasts.info/article/view/pp.26/48> (noting that whereas dealers in illicit antiquities receive antiquities directly from many middlemen, illicit excavators have the tedious task of discovering such antiquities, so they necessarily trade in fewer objects than their dealer counterparts).

71. See Yahya, *supra* note 70.

72. See, e.g., Celestine Bohlen, *Illicit Antiquities and a Test Case Fit for Solomon; The Trial of a Dealer Divides the Art World*, N.Y. TIMES (Jan. 30, 2002), available at <http://www.nytimes.com/2002/01/30/arts/illicit-antiquities-test-case-fit-for-solomon-trail-dealer-divides-art-world.html> (discussing the trial of an antiquities dealer in New York City for antiquities taken from Egypt).

73. See Jessica Eve Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to its Rightful Foreign Owners*, 30 B.C. INT’L & COMP. L. REV. 249, 252 (2007) (explaining that most source countries have national patrimony laws that allow them to make illicit excavation and export a crime within the antiquity’s country of origin).

74. See, e.g., Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 636-39 (2007) (discussing the United Kingdom’s Export of Goods (Control) Order 1992 that “prohibits the export without a license of any goods produced more than [fifty] years before the export”).

75. Fincham, *supra* note 74, at 611.

76. *Id.* (“[T]he NSPA has been adapted to respond to the illicit trade in antiquities.”); 18 U.S.C. §§ 2311, 2314-2315 (2012).

77. See 18 U.S.C. § 2314 (“Whoever receives [or] possesses . . . any goods . . . knowing the same to have been stolen, unlawfully converted, or taken. . .”).

secrecy involved in antiquities transactions.⁷⁸ In order for an antiquity to be “stolen,” the prosecuting nation must usually have an international agreement with the country of origin to enforce the source country’s patrimony laws.⁷⁹ Accordingly, those at the bottom of the illicit antiquities distribution ladder are easier to prosecute than those at the top—proving that someone lacked a permit is easier than proving that someone knew an antiquity was illicit in character. Furthermore, impoverished criminal excavators often live in developing countries that are unable to provide appointed counsel.⁸⁰

In contrast, those at the top of the distribution ladder—private collectors and the representatives of institutional collectors, as well as the dealers who service them—are more politically empowered and have greater access to funds, which results in better access to quality defense counsel.⁸¹ Many source nations do not afford indigent defendants the right to government-funded counsel, so criminal excavators are particularly susceptible to being prosecuted without any legal representation.⁸²

III. CULTURAL PROPERTY PENALTIES

Given the foregoing, it is clear that criminal excavators are at a disadvantage because they face the greatest risk of prosecution and conviction, yet stand to make the least in terms of compensatory profit for taking that risk. Meanwhile, dealers stand to make the greatest profit while incurring the least criminal liability.⁸³ The inquiry next turns to whether this socioeconomic disparity similarly manifests itself in domestic criminal laws pertaining to cultural property.

78. See Fincham, *supra* note 74, at 611-12 (“[T]his element [knowing] can be extremely difficult to establish in the context of cultural property because of the shroud of secrecy surrounding art and antiquities transactions.”).

79. Alderman, *Honor Amongst Thieves*, *supra* note 2, at 618 (“If a dealer or auction house is selling an object they know to have been illegally exported from a source nation, but their home nation does not have a bilateral agreement to enforce the export laws of that source nation, then the transaction is legal.”).

80. ERIK ANDRE ANDERSON & BIRGIT LINDSNAES, *TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS* 38 (2007) (explaining that in many developing countries the state cannot provide appointed counsel).

81. Simon Mackenzie & Penny Green, *Performative Regulation: A Case Study in How Powerful People Avoid Criminal Labels*, 48 *BRIT. J. CRIMINOLOGY* 138 (describing antiquities dealers as “powerful and influential traders”).

82. *Cf.* Gideon v. Wainright, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”); *Assigned Counsel*, 1 *ENCYCLOPEDIA BRITANNICA* 644 (2012), available at <http://www.britannica.com/EBchecked/topic/39319/assigned-counsel>.

83. See Part II.A; see also Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

This section compares and analyzes domestic statutory schemes in forty-six countries that impose criminal penalties for the illicit excavation or export of antiquities.⁸⁴ The legislation examined for the purpose of this Article affects criminal excavators, wholesalers, traffickers, and dealers for actions taken in legislating countries only.⁸⁵ The forty-six criminal statutory schemes examined each impose fines, penalties, or both for participation in the illicit antiquities trade within national borders. The Authors acknowledge that research into these statutory schemes is inherently limited by a lack of official translations, in many instances, and the dynamic nature of the provisions themselves.

Figure A-2 shows the forty-six countries whose laws have been considered for the purposes of this analysis. Countries whose laws were evaluated and integrated into the following analysis are shown in black, while all other countries are shown in white.

The Authors attempted to select a cross-section of countries in terms of relative socioeconomic and political status, but the general trend nonetheless swayed toward more advanced countries for several reasons. First, the Authors relied on countries for which there were acceptable and understandable translations. To find these laws, the Authors used the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Database of National Cultural Heritage Laws, available online.⁸⁶ Many of the countries with translated laws in the UNESCO Database are countries whose legal systems parallel the American legal system, rendering a number of the statutes easy to understand by American attorneys.

It is worth noting that the forty-six criminal cultural property laws that have been considered do not preclude the existence of other laws

84. Countries studied for purposes of this research are Afghanistan, Albania, Argentina, Australia, the Bahamas, Bahrain, Brazil, Cambodia, Canada, Chad, Colombia, Croatia, Cyprus, the Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Hungary, India, Indonesia, Iraq, Ireland, Italy, Japan, Jordan, Kuwait, Mexico, Montenegro, New Zealand, Norway, Peru, Poland, Romania, Saudi Arabia, Serbia, Singapore, Slovenia, South Korea, Spain, Sweden, Switzerland, Thailand, Turkey, the United Kingdom, and the United States of America.

85. A domestic law criminalizing unauthorized excavation or exportation of archaeological materials will apply only within the borders of the enacting nation. Accordingly, a United States law authorizing fines or prison time as a punishment for illicit excavation will pertain only to archaeological materials unearthed within its borders. See 16 U.S.C. § 470ee(a) (2012). When this Article refers to a "country of origin," it means the country from which an object was originally unearthed or exported from.

86. *UNESCO Database of National Cultural Heritage Laws*, United Nations Educational, Scientific, and Cultural Organization (UNESCO), www.unesco.org/culture/natlaws/index (last visited Oct. 27, 2013).

under which a participant in the illicit antiquities trade can be prosecuted.⁸⁷ However, this Article examines only those laws that are specific to cultural property crimes, namely the illicit excavation and exportation of antiquities.

A. *General Characteristics of Criminal Domestic Laws Pertaining to Cultural Property*

The majority of the forty-six countries with punitive cultural property laws allow for both fines and confinement as punishment for the illicit excavation or export of antiquities.⁸⁸ Five of the forty-six countries

87. For instance, in the United States, an antiquities trafficker may be prosecuted under the NSPA, even though the NSPA does not pertain to cultural property specifically. 18 U.S.C. § 2314-2315. However, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm (2012), pertains to cultural property specifically and thus was applicable and included in the analysis herein.

88. The twenty-nine countries that allow for both fines and confinement are the following: (1) *Australia*, Protection of Movable Cultural Heritage Act 1986, (Cth) Pt. II, Div. 1, Para. 9 (Austl.), available at http://www.unesco.org/culture/natlaws/media/pdf/australia/au_actprotmovableculhrtgel1986_engorof.pdf; (2) *Bahamas*, Antiquities, Monuments and Museum Act, No. 5, Pt. IV(12), VII(33)(b), (e) (1998) (Bah.), available at http://www.unesco.org/culture/natlaws/media/pdf/bahamas/bahamas_act_5_12_05_1998_eng_orof.pdf; (3) *Bahrain*, Decree Law No. 11 Regarding the Protection of Antiquities, Ch. VI, Art. 47, 48 (1995) (Bahr.), available at http://www.unesco.org/culture/natlaws/media/pdf/bahrain/bahrain_decree_law25_06_1995_ang_tof.pdf; (4) *Cambodia*, Law on the Protection of Cultural Heritage, NS/RKM/0196/26, Ch. 1, Art. 40, 56, 63(a) (1996) (Cambodia), available at http://www.unesco.org/culture/natlaws/media/pdf/cambodia/cambodia_roydec019626_engtno.pdf; (5) *Canada*, Cultural Property Export and Import Act, R.S.C. 1985, c. C-51 (Can.), available at http://www.unesco.org/culture/natlaws/media/pdf/canada/canada_cultural_property_export_import_act_engorof.pdf; (6) *Cyprus*, Antiquities Law, Ch. 31, Pt. III, § 14(2), Pt. VII, § 27(4) (2006) (Cyprus), available at http://www.unesco.org/culture/natlaws/media/pdf/cyprus/cy_law_antiquities_engtof.pdf; (7) *Dominican Republic*, Law No. 564 (of September 27, 1973) on the Protection and Preservation of National Ethnological and Archaeological Objects, Official Gazette No. 9315, Art. 10(a), (c) (1973), available at http://www.unesco.org/culture/natlaws/media/pdf/dominicanrepublic/reptom_law564_engtof.pdf; (8) *Egypt*, Law No. 117 of 1983 (The Issuance of Antiquities' Protection Law), *Al-Jarida Al-Rasmiyya*, 11 Aug. 1983 (Egypt), available at http://www.unesco.org/culture/natlaws/media/pdf/egypt/egypt_law117_1983_engtof.pdf; (9) *India*, The Ancient Monuments and Archaeological Sites and Remains Act, No. 24 of 1958, INDIA CODE (1958) (India), available at http://www.unesco.org/culture/natlaws/media/pdf/india/inde_act24_1958_engorof; (10) *Indonesia*, Law of the Republic of Indonesia Number 5 of the Year 1992 Concerning Items of Cultural Property, Ch. IV, Art. 29-30, Ch. VIII, Art. 45(1) (1992) (Indon.), available at http://www.unesco.org/culture/natlaws/media/pdf/indonesie/indonesia_comilation_of-Law_2003_engl_orof.pdf; (11) *Iraq*, Antiquities & Heritage of Iraq Law No. 55 of 2002 (Iraq), available at <http://www.cemml.colostate.edu/cultural/09476/pdf/irqantiquities-law-2002.pdf>; (12) *Ireland*, National Monuments Act 1930 (Pub. State. No. 2/1930) (Ir.), available at <http://www.irishstatutebook.ie/1930/en/act/pub/0002/print.html>; (13) *Italy*, Decreto Legislativo 22 gennaio 2004, n. 42 (It.), available at http://www.unesco.org/culture/natlaws/media/pdf/italy/italy_law_antiquities_engtof.pdf

provide for periods of confinement but do not provide an independent

org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritge2004_engtof.pdf; (14) *Japan*, Bunkazihogohou [Law for the Protection of Cultural Property], Law No. 214 of 1950, art. 193 (Japan), available at http://www.unesco.org/culture/natlaws/media/pdf/japan/japan_law_protectionproperty_entno.pdf; (15) *Jordan*, Law of Antiquities No. 21, Official Gazette No. 4662, Art. 26(a) (1)–(2), (7) (2004) (Jordan), available at http://www.unesco.org/culture/natlaws/media/pdf/jordan/jo_antiquitieslaw21_engtof.pdf; (16) *Kuwait*, Law of Antiquities, Princely Decree No. 11 of 1960, § 6, Art. 43 (Kuwait), available at http://www.unesco.org/culture/natlaws/media/pdf/kuwait/kuw_decree_11_law_antiquities_engtof.pdf; (17) *Mexico*, Ley Federal de Monumentos y Zonas Arqueológicas, Artísticos e Historicos [Federal Law on Archaeological, Artistic and Historic Monuments and Areas], Art. 47, 49, Diario Oficial de la Federación [DO], 6 de mayo de 1972 (Mex.), available at http://www.unesco.org/culture/natlaws/media/pdf/mexico/mexique_legislative_text_1972_engl_tno.pdf; (18) *Norway*, Act of 9 June 1978 No. 50 Concerning the Cultural Heritage, Ch. VI, § 27 (Nor.), available at <http://www.regjeringen.no/en/doc/Laws/Acts/cultural-heritage-act.html?id=173106#>; (19) *Peru*, Law Amending Articles 226 and 228 of the Criminal Code About Crimes Against Cultural Property, Law No. 28567, Art. 228 (2005) (Peru), available at http://www.unesco.org/culture/natlaws/media/pdf/peru/per_law28567_engtof.pdf; (20) *Poland*, Act of 23 July 2003 on the Protection and Guardianship of Monuments, Journal of Law No. 03.162.1568, Ch. 11, Art. 109 (2003) (Pol.), available at http://www.unesco.org/culture/natlaws/media/pdf/poland/poland_act2302003_engtof.pdf; (21) *Saudi Arabia*, Regulations for Antiquities, Royal Decree No. M/26, 23 Jumada II 1392, Pt. VII, Art. 67, 69, 71 (1972) (Saudi Arabia), available at http://www.unesco.org/culture/natlaws/media/pdf/saudi Arabia/saudi Arabia_royaldecreeantiquities1972_engtof.pdf; (22) *Serbia*, Law on Cultural Property, Official Gazette of the Republic of Serbia No. 71, Ch. 11, Art. 130, 132, 134 (1994) (Serb.), available at http://www.unesco.org/culture/natlaws/media/pdf/serbia/serbia_law1994_engtof.pdf; (23) *South Korea*, Munhwa yusan beob [The Cultural Heritage Protection Act], Act No. 961, January 10, 1962, amended by Act No. 8346, April 11, 2007 (S. Kor.), available at http://www.unesco.org/culture/natlaws/media/pdf/republicofkorea/repkorea_culturalheritage_protectionact_amended_2007_engtof.pdf; (24) *Sweden*, 3-5, 7(1), 12 § ACT ON PENALTIES FOR SMUGGLING (Swedish Code of Statutes [SFS] 2000: 1225) (Swed.), available at <http://www.government.se/content/1/c6/02/77/68/c656cb4d.pdf>; 1 ch. 21 § HERITAGE CONSERVATION ACT (Swedish Code of Statutes [SFS] 1988:950) (Swed.), available at http://www.unesco.org/culture/natlaws/media/pdf/sweden/se_ordincehertgeconservat1998_engtno.pdf; (25) *Switzerland*, Bundesgesetz über den internationalen Kulturgütertransfer [KGTG] [Federal Act on the International Transfer of Cultural Property], June 20, 2003, SR 444.1, art. 24 (Switz.), available at http://www.unesco.org/culture/natlaws/media/pdf/switzerland/ch_act_intaltrsfertcultproties2005_engtno.pdf; (26) *Thailand*, Act on Ancient Monuments, Antiques, Objects of Art and National Museums, B.E. 2504, Government Gazette, Vol. 78, No. 66, Ch. 5, §§ 31, 37 (1961) (Thai.), available at http://www.unesco.org/culture/natlaws/media/pdf/thailand/thailand_act_1961_engl_orof.pdf; (27) *Turkey*, Legislation for the Conservation of Cultural and Natural Property, Pt. 6, Art. 65 (Turk.), available at http://www.unesco.org/culture/natlaws/media/pdf/turkey/turk_legislation2863_conservation_culturalnaturalproperty_engtno.pdf; (28) *United Kingdom*, Dealing in Cultural Objects (Offences) Act, 2003, c. 27, § 1 (U.K.), available at http://www.unesco.org/culture/natlaws/media/pdf/gb/gb_dealingcultobjsoffences2003_engorof.pdf; (29) *United States*, Archaeological Resources Protection Act, 16 U.S.C. § 470ee(d) (2012).

legislative basis for fines.⁸⁹ Ten of the forty-six countries impose only fines without providing for confinement as a punishment for illicit excavation or export.⁹⁰

89. These five countries are the following: (1) *Afghanistan*, Law on the Protection of Historical and Cultural Properties, Issue No. 828, Ch. 8, Art. 74, 77 (2004) (Afg.), available at <http://www.cemml.colostate.edu/cultural/09476/pdf/afghan-antiquities-law-2004.pdf>; (2) *Argentina*, Law No. 25.743, June 26, 2003, 30.170 B.O. 1 (Arg.), available at http://www.unesco.org/culture/natlaws/media/pdf/argentina/argentina_loi26_06_2003_eng_orof.pdf; (3) *Greece*, Nomos (2002:3028) Gia tin prostasia ton Archaiofiton kai Politistikis Klironomiás sti Geniki [On the Protection of Antiquities and Cultural Heritage in General], 2002, Art. 61, 63 (Greece), available at http://www.unesco.org/culture/natlaws/media/pdf/greece/gre_law_3028_engtof.pdf; (4) *Hungary*, National Legislation for the Protection of Cultural Heritage, Act No. 63 of 2001 on the protection of cultural heritage, Decree 17/2001 on Restrictions to the Export of Cultural Objects (2001) (Hung.) (summarizing the situation of heritage protection in Hungary), available at http://www.unesco.org/culture/natlaws/media/pdf/hungary/hu_text_summarizing_heritageprotection_engtof.pdf; (5) *Romania*, Law no. 182 of 25th October 2000 Regarding the Protection of the Movable National Heritage, Official Gazette No. 530, § Art. 69 (2000) (Rom.), available at http://www.unesco.org/culture/natlaws/media/pdf/romania/rom_law_182_engtof.pdf.

90. These ten countries are the following: (1) *Albania*, Law on the Protection of Immovable and Movable Cultural Property, Law Nr. 7691, Art. 30 (1992) (Alb.), available at http://www.unesco.org/culture/natlaws/media/pdf/albania/albania_loi_eng_orof.pdf; (2) *Brazil*, Lei No. 3.924, de 26 de Julho de 1961, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.7.1961 (Braz.), available at http://www.unesco.org/culture/natlaws/media/pdf/brazil/brazil_lei_3924_26_07_1961_eng_tno.pdf; (3) *Chad*, Act No. 14-60 of 2 November 1960 for the Purpose of the Protection of Natural Monuments and Sites, Sites and Monuments of a Prehistoric, Archaeological, Scientific, Artistic or Picturesque Character, the Classification of Historical and Ethnographic Objects and the Regulation of Archaeological Excavations, Act. No. 14-60, Tit. II, Art. 33, Tit. III, Art. 44, 46 (1960) (Chad), available at http://www.unesco.org/culture/natlaws/media/pdf/chad/chad_act_14_60_engtof.pdf; (4) *Colombia*, L. 1185, marzo 12, 2008, Diario Oficial [D.O.] (Colom.), available at http://www.unesco.org/culture/natlaws/media/pdf/colombia/colombia_ley1118_engtof.pdf; (5) *Croatia*, Act on the Protection and Preservation of Cultural Objects, 01-081-99-1280/2, Art. 115 (5), 116 (1999) (Croat.), available at http://www.unesco.org/culture/natlaws/media/pdf/croatia/croatia_act_protectionculturalgoods_engtof.pdf; (6) *Ecuador*, General Bylaws to the Law of Cultural Patrimony, Executive Decree 2733, Official Registry 787, Ch. 9, Art. 73, 79 (1984) (Ecuador), available at http://www.unesco.org/culture/natlaws/media/pdf/ecuador/ec_decretregltdecretreglt1984_engtof.pdf; (7) *Montenegro*, Protection of Cultural Property Act, Book No. 1 for 2010, Item No. 66, Art. 138 (2010) (Montenegro), available at http://www.unesco.org/culture/natlaws/media/pdf/montenegro/montenegro_protectionculturalpropertyact_engtof.pdf; (8) *New Zealand*, Protected Objects Act 1975 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1975/0041/latest/DLM432116.html>; (9) *Slovenia*, Cultural Heritage Protection Act (ZVKD-1), Official Gazette of the Republic of Slovenia 16/2008, Art. 126 (1) (2008) (Slovn.), available at http://www.unesco.org/culture/natlaws/media/pdf/slovenia/slovenia_culturalheritageact_2008_engtno.pdf; (10) *Spain*, Law 16/1985 dated 25 June, on the Spanish Historical Heritage (B.O.E. 1985) (Spain), available at http://www.unesco.org/culture/natlaws/media/pdf/spain/spa_law_16_1985_engtof.pdf.

The forty-six national statutory schemes examined for this analysis each necessarily define illicit excavation.⁹¹ Some of the statutes describe how to *legally* excavate cultural objects—generally involving obtaining a permit—then prescribe a penalty for persons who do not follow this procedure.⁹² Many laws simply prohibit the act of excavating cultural materials, without providing further explanation.⁹³ When statutes do provide further detail on what constitutes excavation, these explanations run the gamut from vague⁹⁴ to particular.⁹⁵

The statutory sections concerning illicit export are similar to those concerning illicit excavation, in that many of them do not define what it means to export cultural property. Most of the statutes used for this research simply prohibit “export” of specific categories of cultural material.⁹⁶ Some use the terms “smuggling”⁹⁷ or “trafficking”⁹⁸ instead of “exporting.” When statutes do provide further detail on what constitutes illicit exporting or smuggling, they again run the gamut from vague⁹⁹ to detailed.¹⁰⁰

B. Observations on Maximum Potential Periods of Confinement for Illicit Excavation and Exporting

Figure A-1 shows the maximum periods of confinement for illicit excavation. The x-axis shows the countries ordered by their 2012 International Monetary Fund (IMF) ranking for per capita gross domestic product (GDP). (Simplified, the left end of the x-axis has the wealthier countries, while the right end of the x-axis shows countries with fewer economic resources.) The y-axis shows the potential periods

91. See, e.g., Jordan, *supra* note 88, at Art. 26; Montenegro, *supra* note 90, at Art. 138(1)(5).

92. See, e.g., Singapore, Preservation of Monuments Act, Act 45 of 1970, Chap. 315, §§ 7(1), 17 (Jan. 29, 1971) (Sing.), available at http://www.unesco.org/culture/natlaws/media/pdf/singapore/singapore_act_chap315_29_01_1971_engl_orof.pdf.

93. See, e.g., Norway, *supra* note 88, at § 83.

94. See, e.g., Bahamas, *supra* note 88, Pt. IV, § 12(a) (describing excavation as “search[ing] for antiquities”).

95. See, e.g., Bahrain, *supra* note 88, Ch. II, Art. 10 (describing excavation as “digging, examining and investigation that aim[s] at discovering movable and immovable antiquities underground or on land or in water streams, pools, qanats or territorial sea”).

96. See, e.g., *id.* at Art. 2, 3; Cambodia, *supra* note 88, at § 9, Art. 51.

97. E.g., Bahrain, *supra* note 88, at Ch. VI, Art. 47 (instituting a penalty for “[a]nyone who smuggled or took part in smuggling antiquity outside the country”).

98. See, e.g., Iraq, *supra* note 88, at Art. 44.

99. See, e.g., Cambodia, *supra* note 88, at § 9, Art. 51 (prohibiting “the export of any cultural object”).

100. See, e.g., Brazil, *supra* note 90, at Ch. V, Art. 20 (prohibiting “transferr[ing] [antiquities] abroad without [] express authorization”).

of confinement in years that each country's criminal cultural property law allows, going up to ten years.¹⁰¹ For the twenty-nine countries that have laws providing for confinement for illicit excavation, the potential periods of confinement range from one month¹⁰² to ten years.¹⁰³ For some countries, such as South Korea, the term of imprisonment is accompanied by labor.¹⁰⁴ As Figure A-1 indicates, comparing these maximum periods of confinement reveals a tendency for more resource-challenged countries to allow for harsher confinement terms as punishment for the illicit excavation of archaeological resources.

The same trend exists in terms of potential periods of confinement for illicit export of archaeological materials. Figure A-2 shows the maximum periods of confinement for illicit export. As with Figure A-1, the x-axis shows the countries ordered by their 2012 IMF ranking for per capita GDP. The y-axis shows the potential periods of confinement in years that each statute allows and goes up to twelve years.¹⁰⁵ For the twenty-seven countries that have laws providing for confinement as punishment for illicit export, the potential periods of confinement range from one month¹⁰⁶ to twelve years.¹⁰⁷

Figure A-3 compares the potential terms of confinement for illicit excavation and export. In eight of the twenty-one countries that provide for potential periods of confinement for either crime, illicit export is punished more severely.¹⁰⁸ In eleven countries, the maximum potential term of confinement is equal for both illicit excavation and export.¹⁰⁹ In one country, Thailand, the potential maximum period of

101. All penalties for illicit excavation presented in this Article fall within this range.

102. See Figure A-1.

103. *Id.*

104. South Korea, *supra* note 88, at Art. 104(2).

105. As noted above with penalties for illicit excavation, all penalties for illicit export presented in this Article fall within this range.

106. See, e.g., Norway, *supra* note 88, at § 27.

107. See, e.g., Mexico, *supra* note 88, at Art. 53.

108. The eight countries are the following: (1) Afghanistan, *supra* note 89, at Ch. 8, Art. 77; (2) Dominican Republic, *supra* note 88, at Art. 10 (a), (c); (3) Iraq, *supra* note 88; (4) Italy, *supra* note 88; (5) Mexico, *supra* note 88; (6) Peru, *supra* note 88, at Art. 228; (7) Romania, *supra* note 89, at Art. 69; (8) Sweden, ACT ON PENALTIES FOR SMUGGLING, *supra* note 88, at 12, 13 §§, HERITAGE CONSERVATION ACT, *supra* note 88, at 1 Ch. 21 §, 5 Ch. 17 §.

109. The eleven countries are the following: (1) Cambodia, *supra* note 88, at § 11, Art. 63; (2) Cyprus, *supra* note 88, at Pt. III (14), Pt. VII (4); (3) Greece, *supra* note 89; (4) Jordan, *supra* note 88, at Art. 26; (5) Kuwait, *supra* note 88, at § 6, Art. 43; (6) Norway, *supra* note 88, at § 27; (7) Saudi Arabia, *supra* note 88, at Art. 69; (8) South Korea, *supra* note 88; (9) Switzerland, *supra* note 88, at § 9, Art. 24; (10) United Kingdom, *supra* note 88, at § 1; (11) United States, *supra* note 88.

confinement for illicit excavation is actually longer than it is for illicit export.¹¹⁰

As Figure A-3 shows, in terms of confinement, the general trend is to either punish illicit excavation and export equally or to punish illicit export more severely.¹¹¹ This might be the case because looters are often working-class people dealing in an occasional item, and they are often, literally, putting food on the table for their families.¹¹² Meanwhile, wholesalers and traffickers who illicitly export as a matter of course engage in the illicit antiquities trade as a business, enjoying higher profits off the archaeological objects in which they trade and making greater individual contributions to the illicit antiquities trade.¹¹³

It is worth noting that there is less of a difference in statutory confinement penalties for illicit excavation and export in wealthier nations than in developing nations.¹¹⁴ It appears that, in wealthier nations, it is more likely that the criminal exposure for looting and trafficking are the same. The Authors speculate that this is because, in wealthier nations, the perception may be that there is less economic disparity between illicit excavators and exporters. However, this issue may be better fleshed out in a subsequent inquiry.

C. Observations on Maximum Allowable Fines for Illicit Excavation and Export

Thirty-seven of the forty-six statutory schemes examined gave an independent basis for the imposition of fines as punishment for cultural property crimes. These thirty-seven statutes varied tremendously in not only the amount of the fine imposed, but also in the method used to calculate the fines.

Of the thirty-seven fine systems examined, twenty-seven have maximum fines.¹¹⁵ Maximum fines are indicated within the text of the

110. Thailand, *supra* note 88, at Ch. 5 §§ 31, 38.

111. See, e.g., Cyprus, *supra* note 88, at Pt. 3, § 14(2); Pt. 7, § 27(4); Mexico, *supra* note 88, at Ch. 6, Art. 47, 53.

112. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

113. See *id.* at 615-17.

114. Compare, e.g., Switzerland, *supra* note 88, at § 9, Art. 24, with Romania, *supra* note 89, at Art. 67, 69.

115. These countries are: (1) Albania, *supra* note 90, at Art. 30; (2) Australia, *supra* note 88, at pt II div 1 para 9 (3B); (3) Bahamas, *supra* note 88, at Pt. VII (33) (b), (e); (4) Bahrain, *supra* note 88, at Ch. VI, Art. 47, 48; (5) Brazil, *supra* note 90; (6) Canada, *supra* note 88; (7) Colombia, *supra* note 90; (8) Croatia, *supra* note 90; (9) Cyprus, *supra* note 88, at Pt. III (2), Pt. VII (4); (10) Dominican Republic, *supra* note 88, at Art. 10(a), (c); (11) Egypt, *supra* note 88; (12) Iraq, *supra* note 88; (13) Ireland, *supra* note 88, Pt. 1, § 24(3);

statute itself.¹¹⁶ An example of a maximum fine can be found in the Archaeological Resources Protection Act, a United States cultural property statute, which provides: "Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than \$10,000. . . ." ¹¹⁷

Of the remaining eleven fine systems,¹¹⁸ three base the fine on the value of the object involved in the offense,¹¹⁹ four base the fine on variables unrelated to the value of the object involved,¹²⁰ and four simply state the possibility that fines may be imposed.¹²¹ In all three countries that have maximum potential penalties based on the value of the archaeological object that was the subject of the illicit act, the fine is twice the value of the object.¹²² The four statutory schemes that presented alternative fine systems unrelated to the value of the object involved based maximum fines upon "vital minimum wages,"¹²³ "minimum legal monthly salaries,"¹²⁴ "fine-days,"¹²⁵ and the "amount of the minimum earnings [of the country]."¹²⁶ The remaining four countries did not specify a maximum or means of determining the fine,

(14) Italy, *supra* note 88, at Ch. I, Art. 174; (15) Japan, *supra* note 88; (16) Kuwait, *supra* note 88, at § 6, Art. 43; (17) Mexico, *supra* note 88, at Art. 53; (18) New Zealand, *supra* note 90; (19) Saudi Arabia, *supra* note 88, at Art. 67, 69, 71; (20) Serbia, *supra* note 88, at Art. 130; (21) Slovenia, *supra* note 90, at Art. 126; (22) South Korea, *supra* note 88, at Art. 104; (23) Spain, *supra* note 90, at Art. 76; (24) Switzerland, *supra* note 88, at § 9, Art. 24; (25) Thailand, *supra* note 88, at Ch. 5 §§ 31, 37; (26) Turkey, *supra* note 88, at Art. 68, 74; (27) United States, *supra* note 88.

116. See, e.g., Kuwait, *supra* note 88, at Art. 43; Saudi Arabia, *supra* note 88, at Art. 67.

117. 16 U.S.C. § 470ee(d).

118. Cambodia, *supra* note 88; Chad, *supra* note 90; Ecuador, *supra* note 90; Iraq, *supra* note 88; Montenegro, *supra* note 90; Norway, *supra* note 88; Peru, *supra* note 88; Poland, *supra* note 88; Sweden, *supra* note 88; United Kingdom, *supra* note 88.

119. Cambodia, *supra* note 88, at Art. 63; Chad, *supra* note 90, at Art. 44; Iraq, *supra* note 88, at Art. 42.

120. Colombia, *supra* note 90, at Art. 10(1); Ecuador, *supra* note 90, at Art. 79; Montenegro, *supra* note 90, at Art. 138(2); Peru, *supra* note 88, at Art. 228.

121. Norway, *supra* note 88, at § 27; Poland, *supra* note 88, at Art. 109; Sweden, *supra* note 88, at § 21; United Kingdom, *supra* note 88, at (3).

122. Cambodia, *supra* note 88, at § 11, Art. 63; Chad, *supra* note 90, at Art. 47; Iraq, *supra* note 88, Ch. 6, Art. 38.

123. Ecuador, *supra* note 90, at Ch. 9, Art. 79; Donna MacIsaac & Martín Rama, *Determinants of Hourly Earnings in Ecuador: The Role of Labor Market Regulations*, 15 J. Labor Econ., S136, S138-39 (1997).

124. Colombia, *supra* note 90, at Art. 15.

125. Peru, *supra* note 88, at Art. 228.

126. Montenegro, *supra* note 90, at Art. 138.

even though the statutes specified one could be imposed.¹²⁷ These statutes presumably leave this determination to the court's discretion.

Figure A-4 shows the maximum allowable fines—in United States (U.S.) dollars—for illicit excavation under the examined criminal cultural property laws. The x-axis, as before, is ordered by the 2012 IMF ranking for per capita GDP, with wealthier nations on the left and resource-challenged nations on the right. The y-axis shows the maximum potential fine for illicit excavation of archaeological materials for each country. The y-axis goes up to \$200,000.00. The maximum permitted fines range from \$2.02¹²⁸ to \$189,773.47.¹²⁹ As might be expected, the maximum fines tend to be lower in countries with a lower-per-capita GDP.

To create a meaningful comparison, the Authors chose to represent the fines for all countries shown in Figure A-4 in U.S. dollars. This required converting the currency from twenty-five statutes.¹³⁰ These currencies were converted directly to U.S. dollars from the currency listed in the statute, even where the listed currency is now obsolete.¹³¹ Four of the statutes, those of Ireland,¹³² Spain,¹³³ Italy,¹³⁴ and Cyprus,¹³⁵ rely on currency that is now obsolete. All four of these countries currently use the euro; however, their statutes list their respective past currencies.¹³⁶ For purposes of converting listed fines to U.S. dollars, the Authors converted the amounts for these countries from the obsolete currency, rather than the euro. The converted penalty amounts were

127. Norway, *supra* note 88, at § 27; Poland, *supra* note 88, at Art. 109; Sweden, ACT ON PENALTIES FOR SMUGGLING, *supra* note 88, at 3, 7 §§ & HERITAGE CONSERVATION ACT *supra* note 88, at 1 ch. 21 §; United Kingdom, *supra* note 88, at § 1.

128. Italy, *supra* note 88.

129. Spain, *supra* note 90.

130. Fines from Switzerland were converted from the Swiss Franc, Kuwait from the Gulf Rupee, Ireland from the Irish Pound, Slovenia from the Euro, Cyprus from the Cypriot Pound, Bahrain from the Bahraini Dinar, Saudi Arabia from the Saudi Arabian Riyal, Croatia from the Croatian Kuna, Mexico from the Mexican Peso, Turkey from the Turkish Lira, Indonesia from the Rupiah, Brazil from the Brazilian Cruzeiro, Serbia from the Yugoslav Dinar, Thailand from the Thai Baht, Dominican Republic from the Dominican Peso, Albania from the Albanian Lek, Egypt from the Egyptian Pound, Jordan from the Jordanian Dinar, Iraq from the Iraqi Dinar, India from the Indian Rupee, and Chad from the CFA Franc.

131. Amounts were converted online in September of 2012 using a currency conversion site. XE CURRENCY CONVERTER, <http://www.xe.com/currencyconverter/>.

132. Ireland, *supra* note 88.

133. Spain, *supra* note 90.

134. Italy, *supra* note 88.

135. Cyprus, *supra* note 88, at Pt. VII, § 4.

136. See Cyprus, *supra* note 88, at § 26(7) (pound); Ireland, *supra* note 88, at § 24(3) (pound); Spain, *supra* note 90, at Art. 76 (peseta).

current at the time of writing; however, it is the nature of exchange rates to remain in flux.

Figure A-5 shows the maximum fines for the illicit export of archaeological materials. The x-axis remains the same, while the y-axis now goes up to a maximum fine of \$800,000.00.¹³⁷ As was with the case with looting, the maximum fines appear to decrease in rough proportion to the countries' per capita GDP. The maximum permitted fines range from \$17.97¹³⁸ to \$759,064.57¹³⁹. The twenty-five countries represented in Figure A-5 are those that provide a fine of a flat amount.

The remaining eight countries are not represented in Figure A-5. Montenegro, Colombia, and Ecuador impose fines based on national wages.¹⁴⁰ Failing to report an archeological find in Montenegro results in a fine of "twentyfold to two hundredfold [of the] amount of the minimum earnings in Montenegro."¹⁴¹ In Colombia, the penalty for illicit export is between 5 and 500 minimum legal monthly salaries.¹⁴² In Ecuador, the penalty for illicit export is "four to a hundred vital minimum wages."¹⁴³ Such statutes appear to refer to the national minimum wage.¹⁴⁴

Meanwhile, Cambodia, Chad, and Guatemala impose fines based on the value of the archaeological object. For each country, the specified fine is twice the value of the object at issue.¹⁴⁵ The Cambodian antiquities law states that the fine for the illicit excavation or export of Cambodian antiquities is "equal to two times the value of the object in question."¹⁴⁶ It further provides that the value shall be determined by expert opinion.¹⁴⁷ The antiquities law of Chad does not indicate how the value of the object is to be determined.¹⁴⁸ The Guatemalan law indicates that the value of the cultural property shall be established by the General Direction of Cultural and Natural Patrimony.¹⁴⁹

137. No fines exceed this amount.

138. Kuwait, *supra* note 88, at § 6, Art. 43.

139. Spain, *supra* note 90.

140. Colombia, *supra* note 90; Montenegro, *supra* note 90, at Art. 138; Ecuador, *supra* note 90, at Ch. 9, Art. 73, 79.

141. Montenegro, *supra* note 90, at Art. 138.

142. Colombia, *supra* note 90.

143. Ecuador, *supra* note 90, at Ch. 9, Art. 79.

144. *Id.*; MacIsaac & Rama, *supra* note 123.

145. Cambodia, *supra* note 88, at § 11, Art. 63; Chad, *supra* note 90, at Art. 44; Guatemala, Law for the Protection of the Cultural Patrimony of the Nation Decree Number 26-97, Ch. X, Art. 45.

146. Cambodia, *supra* note 88, at § 11, Art. 63.

147. *Id.*

148. Chad, *supra* note 90, at Art. 44.

149. Guatemala, *supra* note 145, at Ch. X, Art. 45.

Three countries—Norway, Sweden, and the United Kingdom—did not specify a maximum fine or means of determining the fine.¹⁵⁰ The respective statutes for these countries simply specified that fines would be imposed.¹⁵¹ This type of statute gives the courts discretion in deciding what kind of fine to impose, and they may base it on the crime, the defendant, or other aggravating or mitigating factors.¹⁵²

In terms of fines, the general trend is either to punish illicit excavation and export equally or to punish illicit export more severely.¹⁵³ As with confinement trends, this might be the case because criminal excavators are often low-income people dealing in an occasional item, and they are often working to feed their families.¹⁵⁴ Meanwhile, wholesalers and traffickers who illicitly export as a matter of course are engaging in the illicit antiquities trade as a business, enjoying higher profits made off of the archaeological objects in which they trade and making greater individual contributions to the illicit antiquities trade.¹⁵⁵

Also similar to the trends for terms of confinement, there is less of a difference in statutory fines for illicit excavation and export in wealthier nations than in developing nations.¹⁵⁶ There is again a higher probability that the criminal exposure for looting and excavating are the same in wealthier nations.¹⁵⁷ The Authors speculate that this trend occurs because there may be a perception in wealthier nations that there is less economic disparity between illicit excavators and exporters.

D. Relationship Between Confinement & Fines

Whether a country punishes those involved in the illicit antiquity distribution ladder through fines, confinement, or both, the general trends remain the same. Most often, countries will either punish illicit excavation and export equally or punish illicit export more severely than

150. Norway, *supra* note 88, at § 27; Sweden, ACT ON PENALTIES FOR SMUGGLING, *supra* note 88, at 3, HERITAGE CONSERVATION ACT, *supra* note at 88, at 1 ch. 21 §; United Kingdom, *supra* note 88, at § 1.

151. See Norway, *supra* note 88, at § 27; Sweden, ACT ON PENALTIES FOR SMUGGLING, *supra* note 88, at 3, 7(1), 12 §; Heritage Conservation Act, *supra* note 88, at 1 Ch. 21 §; United Kingdom, *supra* note 88, at § 1.

152. See, e.g., Sweden, ACT ON PENALTIES FOR SMUGGLING, *supra* note 88, at §§ 4, 7.

153. See, e.g., Italy, *supra* note 88, at Art. 169, Art. 174.

154. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

155. See *id.* at 615-17.

156. Compare, e.g., United States, *supra* note 88, with Chad, *supra* note 90.

157. See, e.g., Cyprus, *supra* note 88, at 14, 27(4).

illicit excavation.¹⁵⁸ When confinement is the penalty, the length of confinement is greatest for the most resource-challenged nations and is lowest for the wealthiest nations.¹⁵⁹ Conversely, when the penalty is a fine, the value of the fine in U.S. dollars is the greatest in the wealthier nations and the lowest in the more resource-challenged nations.¹⁶⁰ These trends should be considered against the backdrop that those who commit criminal excavation tend to be poor, while those who commit criminal export tend to be less economically challenged.¹⁶¹

A comparison of the maximum periods of confinement for illicit excavation versus illicit export reveals that the relative difference in statutory confinement penalties for illicit export and excavation is smaller in wealthier nations, while greater in more resource-challenged nations.¹⁶² In other words, it appears that in wealthier nations the criminal exposure for illicit export and excavation is about the same, while in developing nations the criminal exposure for illicit export is notably greater than the criminal exposure for illicit excavation.¹⁶³ The disparity in developing nations appears to complement the ethical considerations that illicit excavators are less morally culpable for their actions because many of them are motivated by poverty, tend to have a stronger cultural connection to the objects, and often receive a mere pittance for their finds.¹⁶⁴ Alternatively, those who illicitly export objects are more morally culpable and make much more profit from their part in the illicit antiquities ladder.

Figure A-6¹⁶⁵ compares the value of the maximum fines in U.S. dollars to each nation's per capita gross domestic product (GDP). This figure reveals that, even though the amount of the fines themselves are higher in wealthier nations, the statutory fines are relatively more *expensive* in resource-challenged nations.¹⁶⁶ The difference in the value of the statutory fine for export versus excavation is wider in the

158. Compare, e.g., Switzerland, *supra* note 88, at Art. 24, with Turkey, *supra* note 88, at Art. 68, 74.

159. Compare, e.g., Mexico, *supra* note 88, at Art. 47, 53, with the United States, *supra* note 88, at 470ee(d).

160. See Figure A-4; compare, e.g., Chad, *supra* note 90, at Art. 46, 47, with Spain, *supra* note 90, at Art. 76.

161. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

162. See Figure A-3.

163. See Figure A-3; Compare, e.g., United States, *supra* note 88, at 470ee(d), with Chad, *supra* note 90.

164. See Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606-07.

165. Although the y-axis only goes to \$100,000, the maximum fines for three countries, Switzerland, Spain, and Egypt, exceed this cap.

166. See Figure A-1.

resource-challenged nations.¹⁶⁷ Accordingly, in resource-challenged nations, the financial exposure for illicitly exporting cultural property is relatively greater than the same exposure in the wealthier nations.¹⁶⁸ Even where the statutory fines are larger for wealthier nations, this does not necessarily create an effective deterrence.¹⁶⁹ Many of those involved in the illicit antiquities trade in wealthier nations either have the funds to simply pay the fine without consequence or to hire sophisticated defense attorneys to have the fine reduced or eliminated.¹⁷⁰

IV. CONCLUSION

The Authors do not purport that the research contained within this Article constitutes an exhaustive inquiry into domestic statutory schemes aimed at thwarting the illicit excavation and export of antiquities. Rather, the Authors hope that this research will provide the basis for meaningful discourse on the ethical dilemmas related to the ways in which participants in the illicit antiquities trade are punished. Moreover, this research may provide a platform for designing and implementing more effective and ethical statutes in the fight against the illicit antiquity trade.

There is a clear socioeconomic disparity inherent within the illicit antiquities distribution ladder.¹⁷¹ Examining the domestic criminal legislation in forty-six countries reveals that this disparity is at times magnified by domestic legislation criminalizing the illicit excavation and export of antiquities. The overarching problem is that, despite this legislation, marginalized creator cultures continue to unearth antiquities for which there remains a bustling market abroad.¹⁷²

The trade in illicit antiquities will likely continue to thrive under the current statutory schemes. The cultures that are punished most drastically will continue to reoffend in order to feed their families.¹⁷³ Those who arguably fuel the trade through high-dollar purchases of illicit antiquities will fail to be deterred due to access to the resources necessary to minimize or eliminate any potential criminal exposure.¹⁷⁴

167. See Figure A-1.

168. See, e.g., Serbia, *supra* note 88, at Art. 130, 132-33.

169. See Figure A-1.

170. See, e.g., Alderman, *Honor Amongst Thieves*, *supra* note 2, at 622-23.

171. See generally *id.* at 606, 608, 622.

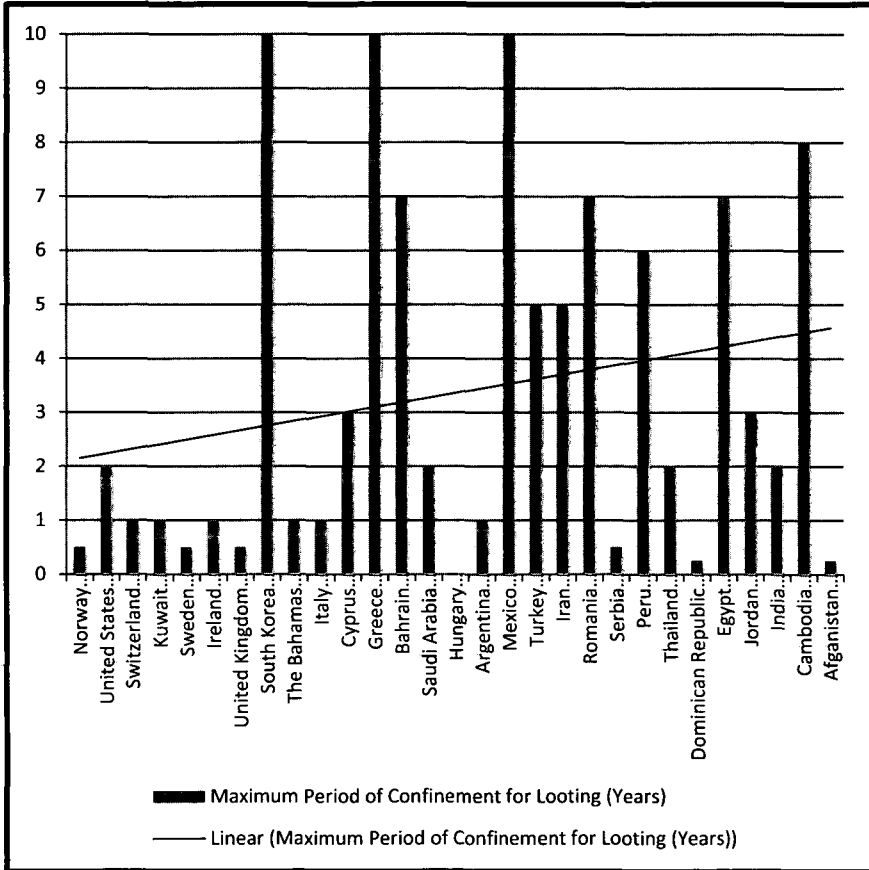
172. See generally Szopa, *supra* note 65, at 58-59.

173. See generally Alderman, *Honor Amongst Thieves*, *supra* note 2, at 606.

174. See generally Finchman, *supra* note 74, at 633.

Figure A-1

Maximum Periods of Confinement for Looting by IMF Ranking

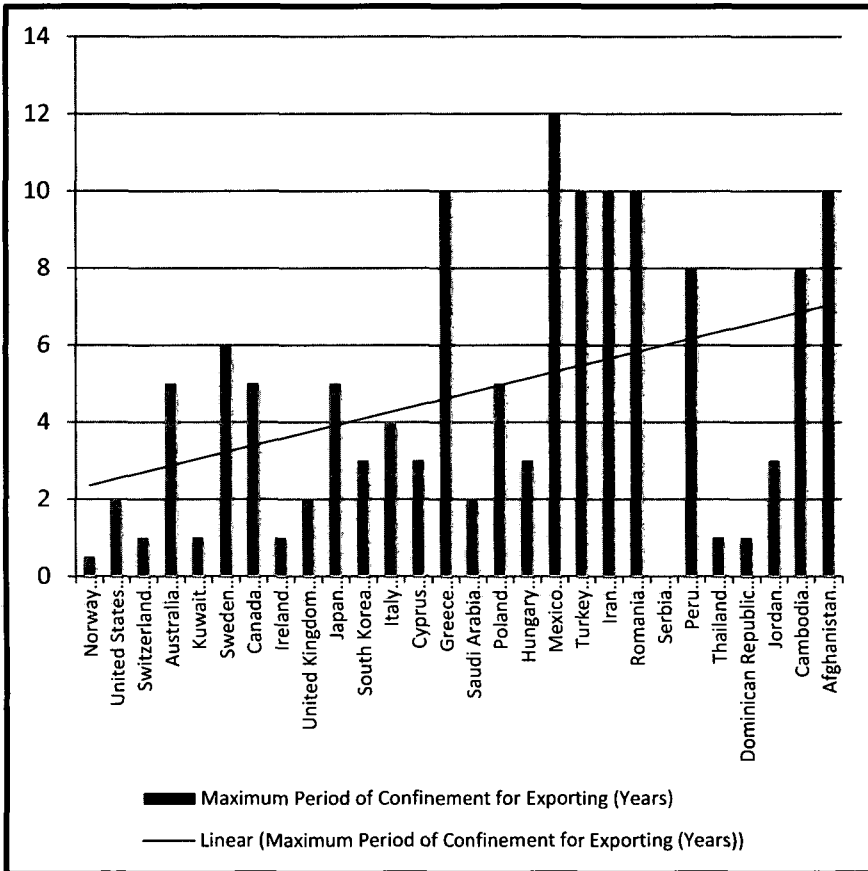


Data Fields for Figure A-1

International Monetary Fund Ranking	Country	Maximum Period of Confinement for Looting (Years)
4	Norway	0.5
7	United States	2
8	Switzerland	1
12	Kuwait	1
13	Sweden	0.5
15	Ireland	1
22	United Kingdom	0.5
25	South Korea	10
27	Bahamas	1
29	Italy	1
31	Cyprus	3
33	Greece	10
34	Bahrain	7
39	Saudi Arabia	2
46	Hungary	0
51	Argentina	1
63	Mexico	10
64	Turkey	5
69	Iran	5
73	Romania	7
79	Serbia	0.5
83	Peru	6
86	Thailand	2
87	Dominican Republic	0.25
104	Egypt	7
107	Jordan	3
129	India	2
147	Cambodia	8
172	Afghanistan	0.25

Figure A-2

Maximum Periods of Confinement for Exporting by IMF Ranking

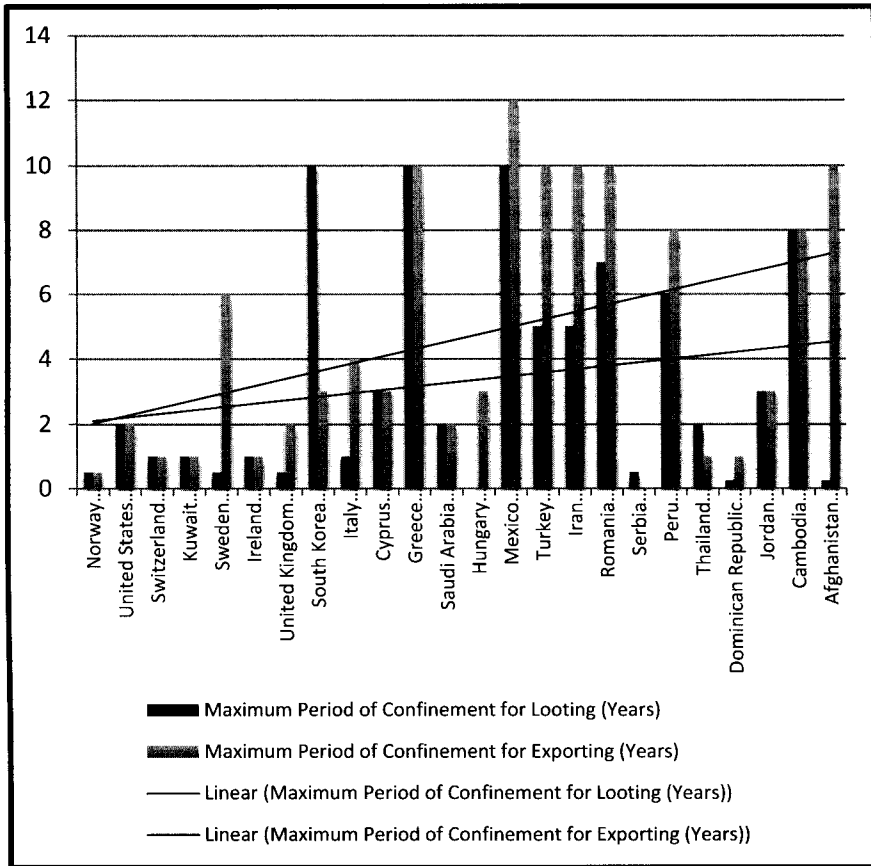


Data Fields for Figure A-2

International Monetary Fund Ranking	Country	Maximum Period of Confinement for Exporting (Years)
4	Norway	0.5
7	United States	2
8	Switzerland	1
11	Australia	5
12	Kuwait	1
13	Sweden	6
14	Canada	5
15	Ireland	1
22	United Kingdom	2
24	Japan	5
25	South Korea	3
29	Italy	4
31	Cyprus	3
33	Greece	10
39	Saudi Arabia	2
44	Poland	5
46	Hungary	3
63	Mexico	12
64	Turkey	10
69	Iran	10
73	Romania	10
79	Serbia	0
83	Peru	8
86	Thailand	1
87	Dominican Republic	1
107	Jordan	3
147	Cambodia	8
172	Afghanistan	10

Figure A-3

Comparison Maximum Periods of Confinement for Looting and Exporting by IMF Ranking

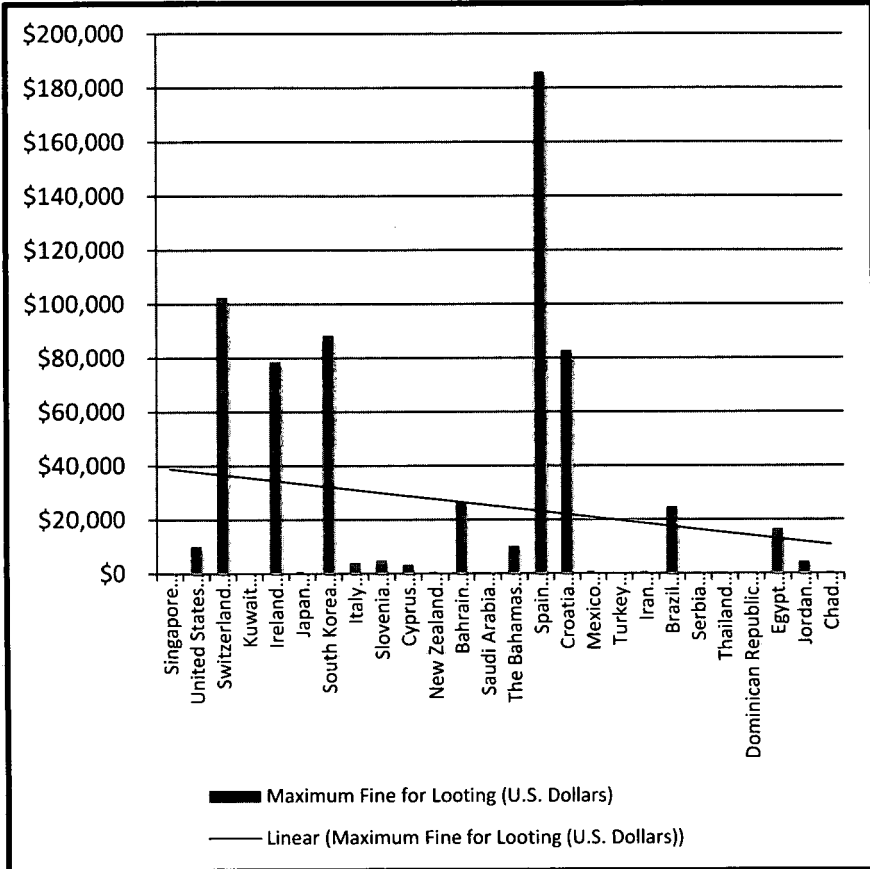


Data Fields for Figure A-3

International Monetary Fund Ranking	Country	Maximum Period of Confinement for Looting (Years)	Maximum Period of Confinement for Exporting (Years)
4	Norway	0.5	0.5
7	United States	2	2
8	Switzerland	1	1
12	Kuwait	1	1
13	Sweden	0.5	6
15	Ireland	1	1
22	United Kingdom	0.5	2
25	South Korea	10	3
29	Italy	1	4
31	Cyprus	3	3
33	Greece	10	10
39	Saudi Arabia	2	2
46	Hungary	0	3
63	Mexico	10	12
64	Turkey	5	10
69	Iran	5	10
73	Romania	7	10
79	Serbia	0.5	0
83	Peru	6	8
86	Thailand	2	1
87	Dominican Republic	0.25	1
107	Jordan	3	3
147	Cambodia	8	8
172	Afghanistan	0.25	10

Figure A-4

Maximum Fine for Looting (U.S. Dollars) by IMF Ranking

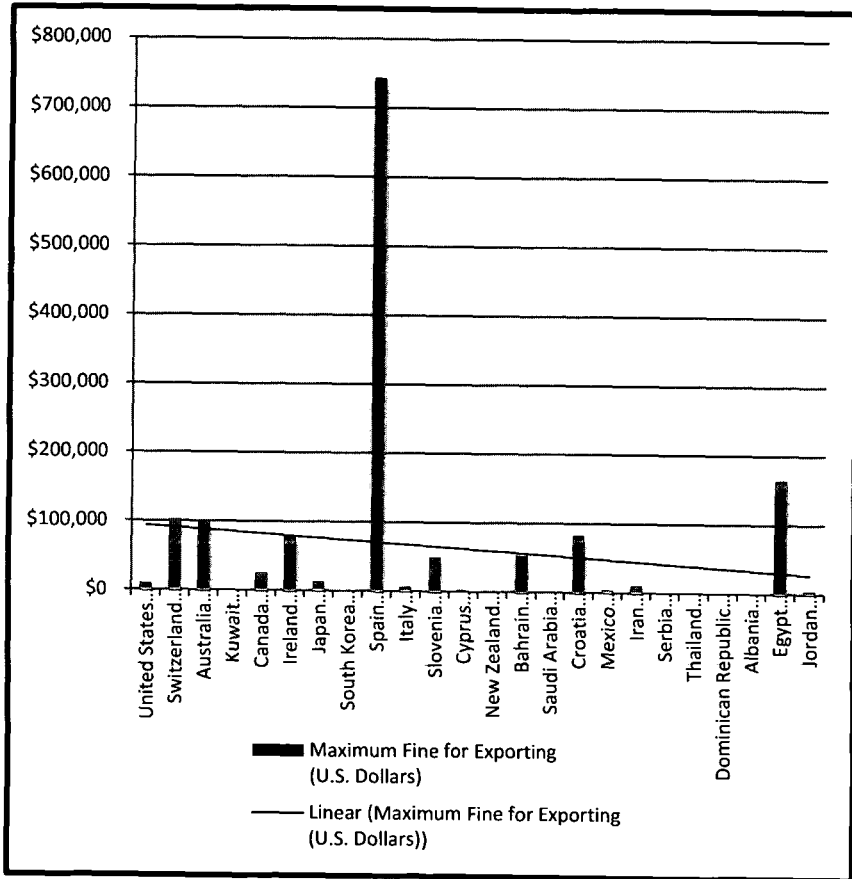


Data Fields for Figure A-4

International Monetary Fund Ranking	Country	Maximum Fine for Looting (U.S. Dollars)
3	Singapore	\$200
7	United States	\$10,000
8	Switzerland	\$102,343.67
12	Kuwait	\$18.07
15	Ireland	\$78,464.06
24	Japan	\$638.13
25	South Korea	\$88,320.08
29	Italy	\$3,830.09
30	Slovenia	\$4,933.54
31	Cyprus	\$3,167.83
32	New Zealand	\$500
34	Bahrain	\$26,526.96
39	Saudi Arabia	\$266.66
46	The Bahamas	\$10,000
47	Spain	\$185,682.52
49	Croatia	\$82,730.41
63	Mexico	\$760.59
64	Turkey	\$111.49
69	Iran	\$527.43
75	Brazil	\$24,680.34
79	Serbia	\$10.53
86	Thailand	\$127.17
87	Dominican Republic	\$12.77
104	Egypt	\$16,469.04
107	Jordan	\$4,243.28
153	Chad	\$376.05

Figure A-5

Maximum Fine (U.S. Dollars) for Exporting by IMF Ranking

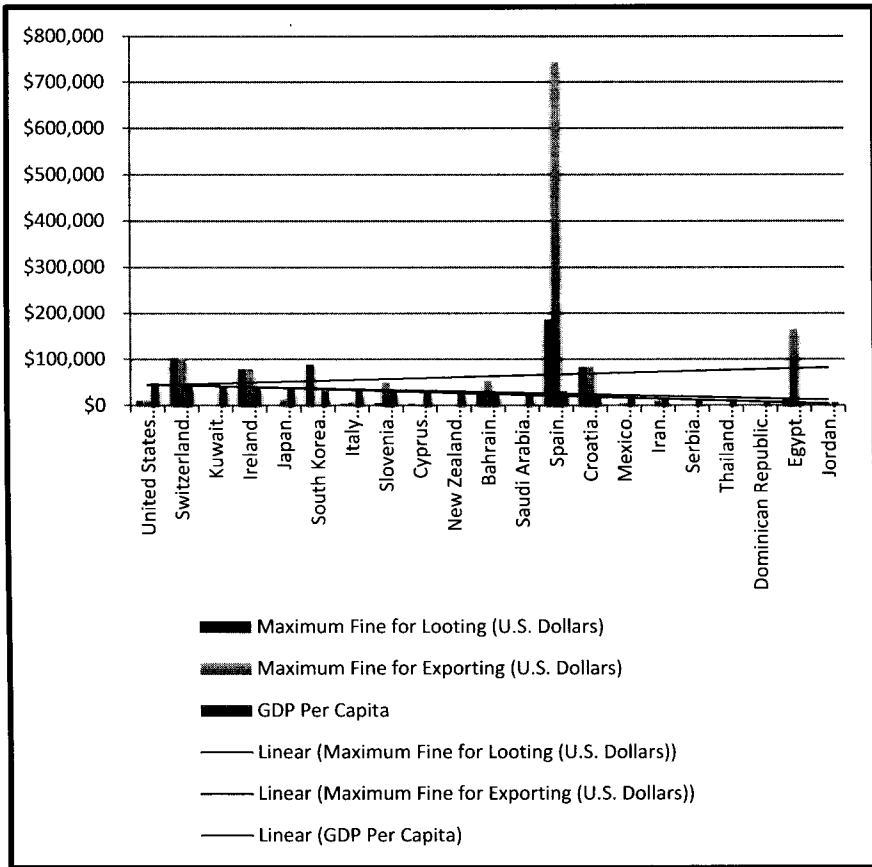


Data Fields for Figure A-5

International Monetary Fund Ranking	Country	Maximum Fine for Exporting (U.S. Dollars)
7	United States	\$10,000
8	Switzerland	\$102,343.67
11	Australia	\$100,000
12	Kuwait	\$18.07
14	Canada	\$25,000
15	Ireland	\$78,464.06
24	Japan	\$12,762.35
25	South Korea	\$0
47	Spain	\$742,720.21
29	Italy	\$6,383.08
30	Slovenia	\$49,332.90
31	Cyprus	\$2,111.86
32	New Zealand	\$1,000
34	Bahrain	\$53,053.92
39	Saudi Arabia	\$266.65
49	Croatia	\$82,730.41
63	Mexico	\$3,803.38
69	Iran	\$10,548.52
79	Serbia	\$105.30
86	Thailand	\$63.58
87	Dominican Republic	\$127.71
96	Albania	\$899.69
104	Egypt	\$164,690.38
107	Jordan	\$4,243.28

Figure A-6

Comparison of Maximum Fine (U.S. Dollars) for Looting and Exporting by IMF Ranking



Data Fields for Figure A-6

International Monetary Fund Ranking	Country	Maximum Fine for Looting (U.S. Dollars)	Maximum Fine for Exporting (U.S. Dollars)	GDP Per Capita (2012)
7	United States	\$10,000	\$10,000	44,452
8	Switzerland	\$102,343.67	\$102,343.67	41,701
12	Kuwait	\$18.07	\$18.07	40,838
15	Ireland	\$78,464.06	\$78,464.06	34,748
24	Japan	\$638.13	\$12,762.35	31,220
25	South Korea	\$88,320.08	\$0	30,464
29	Italy	\$3,830.09	\$6,383.08	28,843
30	Slovenia	\$4,933.54	\$49,332.90	27,521
31	Cyprus	\$3,167.83	\$2,111.86	28,012
32	New Zealand	\$500	\$1,000	27,735
34	Bahrain	\$26,526.96	\$53,053.92	24,411
39	Saudi Arabia	\$266.66	\$266.65	30,478
47	Spain	\$185,682.52	\$742,720.21	18,014
49	Croatia	\$82,730.41	\$82,730.41	14,653
63	Mexico	\$760.59	\$3,803.38	13,184
69	Iran	\$527.43	\$10,548.52	10,409
79	Serbia	\$10.53	\$105.30	9,398
86	Thailand	\$127.17	\$63.58	9,287
87	Dominican Republic	\$12.77	\$127.71	6,455
104	Egypt	\$16,469.04	\$164,690.38	5,907
107	Jordan	\$4,243.28	\$4,243.28	48,328

