2007

Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box

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Recommended Citation
Peter T. Wendel, Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box, 76 Fordham L. Rev. 1015 (2007). Available at: http://ir.lawnet.fordham.edu/flr/vol76/iss2/17

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PROTECTING NEWLY DISCOVERED ANTQUITIES: THINKING OUTSIDE THE “FEE SIMPLE” BOX

Peter T. Wendel*

Newly discovered antiquities are “mixed goods.” They have a physical component (the object itself) and an intangible component (the archeological and historical information associated with the discovery). This dual nature justifies government intervention into the market, not to capture the positive externalities associated with the antiquity, but to minimize the negative externalities associated with the law of finders. When the typical finder excavates an antiquity, its historical and archeological information is severely damaged, if not destroyed. In response to this problem, source countries have enacted state ownership/retention statutes. These laws, however, have their own negative externalities. They create incentives for finders to turn to the black market to secure financial compensation and to destroy the historical and archeological information to make it more difficult to catch them. This raises the issue of which is worse: market failure or government intervention failure?

Source countries need to create a stronger incentive for finders to report their finds. In theory, this is easy: Pay the finders more. In practice, this is difficult because source countries tend to be antiquities-rich but revenue-poor. A possible solution is a “possessory estate and future interest approach” to newly discovered antiquities. If the finder reports the find, he receives a transferable term of years and the source country receives the future interest. A transferable term of years creates an incentive for the finder to go public with the find—the finder can profit from his or her discovery. The source country receives ultimate ownership of all newly discovered antiquities at minimal cost (Western museums will be the likely purchasers; they will pay for the cost of creating the incentive). A possessory estate and future interest approach could help end the current feud between source countries and Western museums, two entities that should work together to secure and protect newly discovered antiquities, not waste resources fighting each other.

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INTRODUCTION

On June 21, 2006, the J. Paul Getty Museum announced that it had reached a tentative agreement (the Getty Agreement) with Italian authorities to return a number of very significant pieces in its antiquities collection to Italy.\(^1\) The Getty Agreement received international recognition.\(^2\) It followed a painful and protracted process in which a former Getty antiquities curator was charged with conspiring to traffic in illegally exported antiquities\(^3\) and the ethics of the Getty Trust were called into

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1. The agreement reached between the J. Paul Getty Museum and the Italian government for the return of allegedly looted antiquities (the Getty Agreement) was only tentative. See Elisabetta Povoledo, Getty Accord with Italy Could Take Months, N.Y. Times, June 21, 2006, at E8. In November 2006, the talks stalled over which exact objects should be returned. Hugh Eakin & Elisabetta Povoledo, Italy Has Regained Many Stolen Antiquities, but Its Talks with the Getty Stall, N.Y. Times, Nov. 9, 2006, at E3. Director of the Getty Museum Michael Brand stated that the Getty had made several compromises during negotiations, but when Italy issued an ultimatum that any agreement must include an excavated stone statue thought to be Aphrodite and a bronze Statue of a Victorious Youth, the discussions ended. Press Release, J. Paul Getty Museum, Museum Director Reconfirms Decision to Return 26 Objects to Italy; Repeats Offer to Continue Discussions Toward a Comprehensive Collaborative Agreement (Nov. 23, 2006) (on file with author). Thereafter, negotiations resumed and culminated with an August 1, 2007, announcement that the Getty had agreed to return a total of forty antiquities (including the twenty-six previously agreed to) that Italian authorities claimed were illegally exported from the country, including the Aphrodite. The parties also agreed to put aside discussions on the Statue of a Victorious Youth until after an Italian court had the opportunity to consider the issue of whether it had been illegally exported. Elisabetta Povoledo, Getty Agrees to Return 40 Antiquities to Italy, N.Y. Times, Aug. 2, 2007, at E1. In addition, the Getty has finalized an agreement with Greek authorities to return two important antiquities from its collection to Greece. Helena Smith, Greece Expands Antiquities Pursuit, Art News, Feb. 2007, at 66.


question over their acquisition practices.\footnote{See generally Ralph Frammolino & Jason Felch, The Getty’s Troubled Goddess, L.A. Times, Jan. 3, 2007, at A1; Randy Kennedy & Hugh Eakin, The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy, N.Y. Times, Feb. 3, 2006, at A1. To be fair, the Getty Museum’s acquisitions practices were not the only ones questioned. So too were those of other prominent American, European, and Asian museums. See Hugh Eakin, Greece and Italy Team Up to Reclaim Lost Art, Int’l Herald Trib., Dec. 11, 2006, at 2.} The Getty Agreement was hailed as a watershed development that would constitute a substantial step forward in the fight to protect newly discovered antiquities\footnote{There is no generally agreed upon definition of what constitutes an antiquity. The U.S. federal government defines an “archaeological resource” as “any material remains of past human life or activities which are of archaeological interest” and which are at least one hundred years old. 16 U.S.C. § 470bb(1) (1994). Some states have their own definition of what constitutes an antiquity or archeological artifact, as do many foreign countries. See Ind. Code Ann. § 14-21-1-2 (LexisNexis 2003); Va. Code Ann. § 10.1-2300 (2006); Antiquities Law No. 59 of 1936, amended by No. 120 (1974), No. 164 (1975) (Iraq); Law no. 117 of 1983 on the Protection of Antiquities art. 1 (Egypt), quoted in United States v. Schultz, 333 F.3d 393, 399 (2d Cir. 2003). An antiquity is a subset of “cultural property” which is defined by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science . . . .” Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 96 Stat. 2329, 2330–63, 823 U.N.T.S. 231 [hereinafter Convention on Cultural Property], reprinted in The Protection of Movable Cultural Property 357 (1984); see also Robin Hardy Villanueva, Note, Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities, 29 Geo. Wash. J. Int’l L. & Econ. 547, 547 n.1 (1995). Antiquities can be divided into two categories: (1) newly discovered antiquities that have not been reported to the state, and (2) previously discovered antiquities that the state knows about but which are still in the ground and at risk of being stolen. Protection of the latter is primarily a question of source countries providing adequate resources to deter criminal activity. Protection of the former, the newly discovered antiquity, is more difficult in that the source countries do not even know of the antiquity unless and until the finder reports his or her find to the proper authorities. Most of the antiquities in question in the Getty dispute, including the 2400-year-old statute of Aphrodite, the best known work in the Getty’s antiquities collection, are alleged to have been newly discovered antiquities that were illegally excavated and exported for profit. See Frammolino & Felch, supra note 4; Elisabetta Povoledo, Casting Blame for Looting in Trial of Getty Ex-Curator, N.Y. Times, Jan. 18, 2007, at E3 (referring to forty-six antiquities).} by curtailing the international black market for illegally exported antiquities.\footnote{A deal with the Getty would be the capstone so far in a campaign by Italy to end the smuggling of its vast trove of antiquities to the world’s top museums and private collections, a clandestine operation spanning generations and continents.” Wilkinson et al., supra note 2.} Unfortunately, newly discovered antiquities will continue to be at risk until source countries do a better job of creating incentives for finders of such antiquities to report their finds to the proper authorities.\footnote{While the Getty Agreement may affect the willingness of museums to purchase antiquities with questionable provenance, it will not affect the willingness of other parties who deal on the thriving international black market for antiquities, such as individual collectors, from transacting. In fact, one could argue that the Getty Agreement will only force more illegally exported antiquities to be sold to less scrupulous parties on the international black market, which will decrease the likelihood that the source countries, and the public in general, will ever see the antiquity again.}
Whether agreements like the Getty Agreement will improve protection of newly discovered antiquities begs the question of whether they should be protected. Source countries maintain that newly discovered antiquities are unique and should be protected. Source countries typically protect newly discovered antiquities by claiming ownership over them and/or restricting their transfer. But neoclassical economics maintains that utility and social welfare are maximized when goods are freely transferable. Assuming, arguendo, that newly discovered antiquities should be protected, there is ample evidence suggesting the source countries’ current approach to protecting newly discovered antiquities is ineffective. A thriving black market for antiquities exists which undermines source countries’ efforts at securing ownership/retention. The value of a newly discovered antiquity, coupled with the minimal compensation—if any—offered by source countries for it, create an incentive for finders to turn to the black market that many cannot resist.

The solution appears simple: Reward finders of newly discovered antiquities who report their find. The traditional method of rewarding finders is to grant them title. Finders of antiquities, however, typically sell them to museums in consuming countries, which conflicts with source countries’ efforts at retaining possession of all archeological artifacts. In the alternative, source countries could reward finders by purchasing the newly discovered antiquity. But source countries tend to be antiquities-rich but revenue-poor. Requiring source countries to pay market prices, or even close to market prices, for all newly discovered antiquities is not financially feasible. But failure to pay reasonable compensation is what drives the black market for antiquities, which in turn undermines source countries’ efforts at retaining possession of all newly discovered antiquities.

Moreover, antiquities are dualistic. They have the obvious tangible artistic component, but they have an equally important, if not more important, “intangible” archeological, historical, and cultural component. This information, which is very valuable and fragile, is maximized when the finder leaves the newly discovered antiquity in the ground and permits archeologists to excavate it. Theoretically, awarding all property rights in newly discovered antiquities to the source country protects this information.

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8. See infra notes 57–63 and accompanying text.
9. See infra note 64 and accompanying text.
10. See infra notes 33–37 and accompanying text.
11. See infra notes 137–40 and accompanying text.
12. See infra Part I.B.
13. See infra note 45 and accompanying text.
14. See infra notes 203–05 and accompanying text.
15. See infra notes 63–68, 206–08 and accompanying text.
16. See infra note 217 and accompanying text.
17. See infra note 218 and accompanying text.
18. See infra notes 95–96 and accompanying text.
because finders have no incentive to touch the antiquity—they have no right to it. In practice, however, rational, self-interested finders typically refuse to recognize the state’s claim of ownership/retention. The prevailing source country approach then becomes counterproductive. Finders have an incentive to destroy the archeological, historical, and cultural information associated with the newly discovered antiquity to obfuscate its provenance, thereby minimizing the chances that the government can prove the antiquity was illegally excavated and transferred.

The goal is to devise a legal system which protects both the tangible and intangible components of a newly discovered antiquity. If the legal system is to provide meaningful protection, it needs to create an incentive for finders of newly discovered antiquities to come forward and report their find to the proper authorities. The dilemma is how to create such an incentive without requiring source countries to sacrifice either (1) their goal of retaining ownership and control of all newly discovered antiquities, or (2) their financial stability.

The prevailing analysis of the source countries’ dilemma has floundered because it assumes an all-or-nothing approach to allocating property rights to newly discovered antiquities: It assumes that all property rights must be assigned either to the finder or to the source country. If, however, one thinks outside the fee simple box and applies a “possessory estate and future interest approach,” a viable solution emerges. The finder could be awarded a transferable term of years, with the source country retaining the future interest. Awarding finders a transferable term of years would create a strong financial incentive for finders to report their finds, but not at the expense of the source countries. The purchaser of the term of years would pay for the incentive. The purchasers typically will be consuming country museums, which are in the best position to distribute the cost. In return, the museums get good, albeit limited, title to the newly discovered antiquity, which includes the right to study and show the antiquity. Granting the future interest to the source country satisfies the country’s interest in retaining ultimate ownership and control over the antiquity.

A possessory estate and future interest approach would constitute a substantial step forward in the fight to protect newly discovered antiquities. It would help curtail the international black market for antiquities by

20. See infra note 135 and accompanying text.
21. See infra notes 137–39 and accompanying text.
22. See infra notes 141–44 and accompanying text.
23. See infra notes 218–25 and accompanying text.
24. See infra notes 225–26 and accompanying text.
25. See infra notes 226–32 and accompanying text. The term of years could be conditioned upon the finder reporting the find to the source country in a timely manner. See infra note 248 and accompanying text.
26. See infra note 230 and accompanying text.
27. See infra notes 253–58.
28. See infra notes 243–44 and accompanying text.
29. See infra Part IV.H.
creating a financially more attractive alternative for finders of newly discovered antiquities. It would also facilitate protection of the newly discovered antiquity’s archeological, historical, and cultural information. A longer term of years could be awarded to a finder who reports, but leaves undisturbed, a newly discovered antiquity. The longer term of years would be more valuable, thereby creating a financial incentive for finders to preserve the antiquity’s intangible component. Archeologists could then gather the archeological, historical, and cultural information associated with the find and ensure that the antiquity is removed with minimal damage.

A possessory estate and future interest approach to allocating property rights to newly discovered antiquities is a "win-win" approach for all interested parties. It would maximize protection of newly discovered antiquities at minimal cost to source countries.

I. SHOULD NEWLY DISCOVERED ANTIQUITIES BE "PROTECTED" OR FREELY TRANSFERABLE?

A. Economic Introduction

Economics is the study of how society allocates its scarce goods. Individuals seek to maximize the utility they receive from their limited goods, and societies seek to maximize the social welfare they receive from their scarce resources. Economics assumes that utility and social welfare are maximized when goods are freely transferable. The assumption is that market transactions will result in goods being allocated to their highest and most valuable use, thereby maximizing utility and social welfare. From an economic perspective, the source countries’ ownership rights would remain in place, giving the country maximum protection of new finds and the costs are at a minimum. This is a “win-win” solution for all.

30. See infra Part IV.C-D.
31. See infra notes 236–37 and accompanying text.
32. See infra Part IV.C-D.
34. See Mark Seidenfeld, Microeconomic Predicates to Law and Economics 6 (1996).
35. Because utility is subjective and cannot be quantified, technically it is inappropriate to speak of maximizing social utility. See Cole & Grossman, supra note 33, at 3; Seidenfeld, supra note 34, at 6 (discussing how utility is relative, not absolute, and therefore can only be compared for one individual, not for more than one); Debra Lyn Bassett, The Forum Game, 84 N.C. L. Rev. 333, 375 n.173 (2006); Gregory Mitchell, Book Review, Libertarian Paternalism Is an Oxymoron, 99 Nw. U. L. Rev. 1245, 1267 (2005). Instead, economists tend to speak of maximizing social welfare or efficiency. See Cole & Grossman, supra note 33, at 9–10; Mankiw, supra note 33, at 5; Eric A. Posner, Probability Errors: Some Positive and Normative Implications for Tort and Contract Law, 11 Sup. Ct. Econ. Rev. 125, 140–41 (2004). But Professor Eric Posner, one of the gurus of the law and economics movement, maintains that society’s goal is to maximize social wealth, not utility or welfare. See Richard A. Posner, The Problems of Jurisprudence 391 (1990). The differences between social utility, efficiency, social wealth, and social welfare, and the debate over which is the appropriate social goal, are beyond the scope of this Article, but the concepts are similar.
36. See Cole & Grossman, supra note 33, at 10–13; David D. Friedman, Law’s Order 20–21 (2000); Mankiw, supra note 33, at 4–5, 8–9.
37. See Cole & Grossman, supra note 33, at 10–13; Friedman, supra note 36, at 20–21.
approach of "protecting" newly discovered antiquities is counterproductive because it prevents their transfers, which prevents maximizing utility and social welfare.

B. Traditional Approach: The Law of Finders

Historically, source countries did not protect newly discovered antiquities; they were treated like any other found property. The socially desirable goal for found property is to return it to its original owner, if possible. The first step in the process of returning found property to its rightful owner is for the finder to go public with the find.

1. Found Property and the Incentive to Go Public

From a law and economics perspective, a finder has no incentive to go public with found property. The finder currently possesses the item, and while possession is not title, possession carries with it many benefits. Going public with found property only increases the probability that the true owner will learn of the find and reclaim the item, leaving the finder


39. Leeanna Izuel, Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659, 1671 (1991); see also Patty Gerstenblith, Identity and Cultural Property: The Protection of Cultural Property in the United States, 75 B.U. L. Rev. 559, 587 (1995). Otherwise, the objective is to get the item back into circulation and productive use by awarding it either to the finder or the owner of the locus in quo where it was found. Whether the finder or the owner of the locus in quo where the item was found have the stronger claim to the item in the event the true owner does not reclaim the item depends on two variables: how the item is classified legally (lost, mislaid, abandoned, or treasure trove/embedded) and where the item was found (public versus private location). See generally Comment, Lost, Mislaid, and Abandoned Property, 8 Fordham L. Rev. 222, 224–28 (1939). While mislaid property is generally awarded to the owner of the locus in quo where it is found, lost, abandoned, and treasure trove/embedded property is generally awarded to the finder as long as he or she was not trespassing when he or she found the property; and if he or she was trespassing, the found property is usually awarded to the owner of the locus in quo. Id. at 226, 234, 236. See generally R.H. Helmholz, Equitable Division and the Law of Finders, 52 Fordham L. Rev. 313 (1983).

40. See Harris, supra note 38, at 228; Izuel, supra note 39, at 1671.

41. See Helmholz, supra note 39, at 314 ("[D]epriving the finder of any share of... property... indirectly encourages him to [keep secret] what he has found.").

with nothing. Thus, while this is the socially desirable goal, it is not necessarily the finder’s goal.

The law of finders counters this economic risk by offering offsetting benefits to the finder who comes forward. If the finder goes public with the find, and the true owner does not claim the item within a reasonable period of time, typically the finder is awarded title to the found property. On the other hand, if a finder does not come forward with his or her find, he or she does not gain title to the item, and he or she may be subject to civil and/or criminal penalties. The combined “carrot and stick” approach to the law of finders does a reasonably good job of creating incentives for a finder to go public with his or her find.

2. The Incentive to Go Public and Newly Discovered Antiquities

As applied to newly discovered antiquities, the law of finders does an even better job of creating an incentive for the finder of an antiquity to go public than it does with your typical found item. Under the traditional law of finders, the finder of a newly discovered antiquity quickly performs a cost-benefit analysis and realizes the risk associated with coming forward with the antiquity is negligible. Most antiquities are hundreds, if not thousands, of years old. The chance that anyone would be able to claim

43. See supra note 39 and accompanying text.
44. See David Riesman, Jr., Possession and the Law of Finders, 52 Harv. L. Rev. 1105, 1108–11, 1132 (1939) (“If the finder has publicized his find, he gets title by affirmative prescription after the passage of a stated time.”).
45. This idea is implemented through statute in most states. If a true owner fails to claim property within a certain time of the finder publishing notice, the finder has superior rights over everyone else except the true owner. See Armory v. Delamirie, (1722) 93 Eng. Rep. 664 (K.B.). In addition, the typical “found” item is one which does not have a written record of ownership. So the added benefit of title arguably is not that great—it typically is not what motivates the finder to come forward.
46. Where a finder intentionally does not make reasonable efforts to find the true owner, the finder can be held guilty liable for conversion if not criminally liable for theft. See Ray Andrews Brown, The Law of Personal Property § 3.5 (3d ed. 1975); Norman Palmer, Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title, 38 Vand. J. Transnat’l L. 947, 958 (2005).
47. An added benefit of the traditional law of finders is that the incentive for the finder to go public with the find is created at minimal administrative cost. For a discussion of the administrative costs associated with the approach, see infra notes 181–90 and accompanying text.
ownership of the item is almost zero. For all practical purposes, under the
traditional law of finders, possession of a newly discovered antiquity equals
title.50

Moreover, going public with the find gives the finder free publicity,
thereby establishing some record of the antiquity’s provenance and helping
to create a market for the antiquity.51 An antiquity’s provenance constitutes
added value.52 Where it was found and how it was found contribute to the
archeological and historical value of the antiquity.53 In addition, the better
the condition of the antiquity, the more money it commands on the
market.54 The traditional “finders” approach to newly discovered
antiquities creates a strong incentive for a finder of a newly discovered
antiquity to go public with the find, and as part of that process, providing at
least some information concerning the antiquity’s provenance.

This traditional law of finders approach to newly discovered antiquities is
consistent with neoclassical economic principles. Typically the finder was

50. Harris, supra note 38, at 228 (“Should the treasure trove appear ancient and look as
if someone concealed it, then courts generally award the treasure to the finder.”); see also
Helmholz, supra note 39, at 314 (“If the property is genuinely lost, ... it has been thought
preferable to allow the finder to prevail in this situation ....” (citing Foulke v. N.Y. Consol.
R. Co., 127 N.E. 237 (N.Y. 1920)). See generally Riesman, Jr., supra note 44 (explaining
the law of finders).

51. See Lindsay E. Willis, Looting in Ancient Mesopotamia: A Legislation Scheme for
describing Iraq law granting the first right of publicity to the finder subject to detailed
accounts of the excavation and any publications about the antiquity); Jason C. Roberts,
Comment, The Protection of Indigenous Populations’ Cultural Property in Peru, Mexico
and the United States, 4 Tulsa J. Comp. & Int’l L. 327, 358–59 (1997) (discussing the traits
that would create a market to which sellers and buyers of antiquities would be attracted).

52. See Jessica L. Darraby, To Have & To Hold, Cal. L., May 2006, at 22, 25; see also
Borodkin, supra note 49, at 410–11 (noting that the development of the illicit market has
created an incentive for sellers “to strip as much information as possible from an
artifact” before putting it on the market); Jonathan S. Moore, Note, Enforcing Foreign
Ownership Claims in the Antiquities Market, 97 Yale L.J. 466, 466 (1988) (explaining that
when antiquities are “removed from a site without first being studied by anthropologists,
the historical record that can be constructed through scientific evaluation ... is destroyed”).

53. See Darraby, supra note 52, at 25; see also Sue Choi, Note, The Legal Landscape of
167, 192–93 (2005) (discussing the value information adds to a market of antiquities);
Moore, supra note 52, at 466. See generally Patty Gerstenblith, The Public Interest in the

54. Borodkin, supra note 49, at 383 (commenting on how the current state ownership
regime encourages the defacement of antiquities to make them less recognizable and easier
to smuggle); see also Inbal Baum, The Great Mall of China: Should the United States
Restrict Importation of Chinese Cultural Property?, 24 Cardozo Arts & Ent. L.J. 919, 937
(2006) (implying importance in location of antiquities as the Chinese government spent
fifteen million yuan to protect antiquity sites, specifically including the “layout” and
“features” of the sites); Choi, supra note 53, at 192–93.
awarded sole and exclusive ownership of the newly discovered antiquity, including the right to transfer it. As long as finders of newly discovered antiquities are free to transfer their finds, the subsequent market transactions would appear to maximize utility and social welfare by ensuring that the antiquities are transferred to those who value them the most.

C. Advent of Cultural Property: Cultural Nationalism Versus Cultural Internationalism

During the twentieth century, however, source countries began to reconsider the wisdom of the law of finders approach to newly discovered antiquities. This philosophical change coincided with the advent of "cultural property." Although the cultural property movement can trace its heritage back to the first-century Greek historian Polybius, it did not take root until the late nineteenth and early to mid-twentieth centuries. Cultural property encompasses property that has become so associated with a people that it is deemed to represent and/or reflect the history, architecture, culture, and/or values of the people. While authorities

55. Gov't of Peru v. Johnson, 720 F. Supp. 810, 813 (C.D. Cal. 1989); John Alan Cohan, An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One), 27 Environ Envt'l L. & Pol'y J. 1, 7 (2004); Gerstenblith, supra note 53, at 229–30; Harris, supra note 38, at 227. The finder typically is awarded title unless he or she was trespassing, and even then the finder is awarded title unless the landowner can prove that the finder was trespassing at the time of the find. See Paul M. Bator, An Essay on the International Trade in Art, 34 Stan. L. Rev. 275, 286 (1982) (acknowledging this point as applied to newly discovered antiquities which technically have been claimed by the state). For the more general principle that title to an object typically includes the bundle of rights to it, including the right to transfer, see Shackleford v. United States, 262 F.3d 1028, 1032 (9th Cir. 2001) ("The right to transfer is one of the most essential sticks in the bundle of rights that are commonly characterized as property[].") (internal quotation marks omitted); F. Gregory Lastowka & Dan Hunter, The Laws of the Virtual Worlds, 92 Cal. L. Rev. 1, 30–31 (2004).


57. See supra note 5 and accompanying text; see also infra note 60 and accompanying text.


disagree as to what constitutes the scope of cultural property, there is widespread agreement that it includes antiquities. The issue is whether designating antiquities to be cultural property affects what the socially desirable goal is with respect to newly discovered antiquities. In particular, should newly discovered antiquities be freely transferable or should they be owned/retained by the source country?

Cultural property advocates argue that because cultural property is so intimately connected to the history, architecture, culture, and/or values of the people, “the people” should have greater rights to cultural property. Such rights range from complete state ownership to greater regulation of the private owner’s right to possess and/or transfer the antiquity. Any such communal property rights inherently conflict with traditional property rights based on the neoclassical economic assumption that individual ownership and control of property is best.
As applied to newly discovered antiquities, this tension is reflected in the cultural nationalism versus cultural internationalism debate. Cultural nationalism asserts that cultural property is the heritage of the country of origin. As such, it belongs to the country of origin. It should not be transferred out of the country of origin, and if not currently in the country of origin, it should be returned to the country of origin. Cultural internationalism, on the other hand, asserts that cultural property is the cultural heritage of all mankind. As such it belongs to no particular country and should be freely transferable (particularly if it helps to preserve and protect the property) to promote accessibility and research. Scholars disagree over which approach should apply to antiquities.

inefficiencies of public ownership versus the efficiencies of private ownership. See Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968).

66. For an explanation of ideologies and discourses regarding the international movement of cultural property, see Merryman, supra note 56, at 9-13.

67. See Adam Goldberg, Comment, Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects, 53 UCLA L. Rev. 1031, 1060 (2006); see also Knox, supra note 58, at 322–24; Merryman, supra note 58, at 832, 842–45.

68. See Goldberg, supra note 67, at 1060; see also Knox, supra note 58, at 322–24; Merryman, supra note 58, at 832, 842–45.

69. Goldberg, supra note 67, at 1061–62; see also Knox, supra note 58, at 319–22; Merryman, supra note 58, at 845–49. At the theoretical and academic level, some authorities have tried to mitigate the cultural property movement by arguing that to the extent cultural property rights exist because the property is deemed to have such an important connection to the culture of the people, the issue becomes who constitutes “the people.” Early notions of cultural property assumed that “the people” were defined on a national or subnational level. More recently, however, scholars have argued that as the world gets “smaller,” the role of countries and notions of national cultural property become increasingly outdated. See Merryman, supra note 58, at 831–32, 852–53. Under this approach, most, if not all, cultural property belongs to everyone. Inasmuch as universal ownership is not practical, who happens to own and possess the property is merely incidental—there is no special case for state ownership of cultural property or national retention of cultural property. The overriding consideration should be who is in the best position to preserve the property. See Laura M. Siegle, United States v. Schultz: Putting Cultural Property in its Place, 18 Temp. Int’l & Comp. L.J. 453, 454 (2004); Karen Goepfert, Note, The Decapitation of Rameses II, 13 B.U. Int’l L.J. 503, 507–08 (1995). Not surprisingly, the directors of many of the most prominent museums around the world recently endorsed the notion of global cultural property. See John Alan Cohan, An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two), 28 Environ’s Envt’l L. & Pol’y J. 1, 93–94 (2004); Knox, supra note 58, at 325–26.

70. See Knox, supra note 58, at 321 (2006); Merryman, supra note 58, at 846; Goepfert, supra note 69, at 514.

71. Knox, supra note 58, at 319–22 (addressing the flaws in both theories); Merryman, supra note 58, at 831–32, 845–49 (advocating for cultural internationalism); Goldberg, supra note 67, at 1061–63 (discussing cultural nationalism, cultural internationalism, and contextualism).
D. Economic Analysis of Cultural Nationalism Versus Cultural Internationalism

Implicit in the debate between cultural nationalism and cultural internationalism is the issue of which approach maximizes utility and social welfare. Cultural nationalism, with its state ownership/retention policies, appears inherently inconsistent with maximizing utility and social welfare to the extent it prevents market transactions. Neoclassical economics espouses that voluntary market transactions are the means by which utility and social welfare are maximized. Only if antiquities are freely transferable can utility and social welfare be maximized.

1. Assumption of Perfectly Competitive Market Conditions

The economic principle that voluntary market transactions maximize utility and social welfare, however, assumes perfectly competitive market conditions. Perfectly competitive market conditions include, among other factors, that the good in question is a private good, as opposed to a public good, which generates no externalities (all costs and benefits are captured...
within the market). A private good has two characteristics: It is both excludable and rivalrous. Excludable means it is easy to exclude others from using/enjoying the good. Rivalrous means one person's use prevents/seriously interferes with the ability of others to use the good. Conversely, a public good is nonexclusive and non-rivalrous. It is difficult to exclude others from using the good, and one person's use does not prevent/seriously interfere with the ability of others to use the good.

2. Private Goods Versus Public Goods

There are classic examples of private and public goods. A classic private good is an ice cream cone. An ice cream cone is excludable because it is easy to exclude others from using that particular ice cream cone.
cream cone is rivalrous because one person’s consumption prevents others from being able to consume that particular cone.\textsuperscript{88} Moreover, one’s consumption of the ice cream cone does not generate any externalities—positive or negative. As long as there is more ice cream and there are more cones, one person’s consumption of one ice cream cone has no effect on others. On the other hand, a classic example of a public good is a lighthouse.\textsuperscript{89} A lighthouse is non-excludable because it is difficult to exclude others from using and enjoying the light from the lighthouse.\textsuperscript{90} In addition, a lighthouse is non-rivalrous because one party’s use and enjoyment of the light from the lighthouse does not interfere with others’ ability to use and enjoy the light.\textsuperscript{91} Moreover, the light from a lighthouse generates substantial positive externalities.\textsuperscript{92} Building a lighthouse for one boat produces light which can be used and enjoyed by many other boats, without cost, to avoid the coastline (a positive externality). The greater the positive externalities, the greater the likelihood the good is a public good.\textsuperscript{93}

From an economic perspective, the terms “private good” and “public good” are not so much different categories as they are two ends of a spectrum.\textsuperscript{94} Many goods fall somewhere in between the classic private good and the classic public good. A good which has characteristics of both a private good and a public good is a “mixed” good.\textsuperscript{95}

3. A Newly Discovered Antiquity Constitutes a Mixed Good

A newly discovered antiquity is a mixed good. A newly discovered antiquity has both tangible and intangible components. The tangible component is self-evident: It is the object itself. The intangible component is the architectural, historical, and cultural value associated with the newly discovered antiquity. The architectural, historical, and/or cultural characteristics are the unique aspects of the item and are what qualify it as

\textsuperscript{88} See id.
\textsuperscript{89} Cole & Grossman, supra note 33, at 16; Alan L. Durham, Consumer Modification of Copyrighted Works, 81 Ind. L.J. 851, 870 (2006); Lee Kovarsky, A Technological Theory of the Arms Race, 81 Ind. L.J. 917, 920 n.10 (2006).
\textsuperscript{90} Cole & Grossman, supra note 33, at 16.
\textsuperscript{91} Id.
\textsuperscript{92} See id. at 15 (defining positive externalities). Positive externalities are spillover benefits which are produced by the conduct or transaction in question which the party undertaking the action or conduct cannot capture and hence are freely distributed to third parties. For a discussion of externalities generally, see supra note 78 and accompanying text.
\textsuperscript{93} See Cole & Grossman, supra note 33, at 16; Van den Bergh & Montangie, supra note 85, at 192; Blocher, supra note 85, at 371.
\textsuperscript{95} See Gerstenblith, supra note 39, at 567–68 (“The term ‘culture’ describes the relationship between a group and the objects it holds important. The concept of ‘property’ in its traditional sense” focuses on the legal rights of private individuals).
an antiquity. The tangible component of an antiquity is similar to the classic private good. For example, assume the antiquity is a vase or similar item of personal property. It is excludable because it is easy to exclude others from using that particular vase. It is rivalrous because one person’s possession prevents others from being able to possess that particular vase at the same time. The intangible component of the antiquity, however, resembles the classic public good. The intangible characteristics are non-rivalrous because use and enjoyment of the architectural, historical, and/or cultural features of the antiquity by one does not necessarily interfere with the simultaneous use and enjoyment of these attributes by others. The intangible component of an antiquity is also non-excludable. It is difficult to exclude others from using and enjoying the architectural, historical, and/or cultural features of the antiquity at the same time.

4. Newly Discovered Antiquities and Positive Externalities

The non-excludability and non-rivalrous nature of an antiquity’s intangible qualities are evidence of the antiquity’s substantial positive externalities. Positive externalities arise when a good/transaction creates benefits for the community that the owner/parties to the transaction cannot internalize. The very nature of an antiquity is that it has special value for a whole community, if not a whole country. An antiquity reflects, and represents, the architecture, history, culture, and/or values of the people. Once knowledge of the newly discovered antiquity has been disseminated, the community/country as a whole receives an intangible cultural benefit

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96. As one scholar noted, “Antiquities have been around a long time.” Merryman, supra note 60, at 345 (quoting Jody Maxmin). Simply being around a “long time,” however, is not what makes an item an antiquity. An antiquity has certain characteristics; it reflects the history, architecture, culture, and/or values of the people who created it. See supra note 60 and accompanying text.

97. For a discussion of the exclusivity component of a private good, see supra notes 80–81, 86–87 and accompanying text.

98. For a discussion of the rivalrous component of a private good, see supra notes 80, 82, 86, 88 and accompanying text.

99. For a general discussion of the non-rivalrous nature of a public good, see supra notes 83, 85, 91 and accompanying text.

100. For a general discussion of the nonexclusive nature of a public good, see supra notes 83, 84, 90 and accompanying text. This statement, however, is admittedly overly broad. Where the antiquity is an object of personal property, personal enjoyment of the antiquity can be exclusive by hiding the antiquity. Once knowledge of the antiquity and its metaphysical components is public information, however, like any other information, that aspect of the antiquity is a public good that is nonexclusive.


102. See supra note 60 and accompanying text.

103. See id.
that is shared and enjoyed by all.\textsuperscript{104} It is difficult, if not impossible, to exclude the community or country from this benefit. The greater the positive externalities associated with a good, the stronger the argument that it should be classified as a public good.\textsuperscript{105} The intangible architectural, historical, and/or cultural characteristics of an item are primarily what qualify it as cultural property.\textsuperscript{106} It is these exact qualities which generate the positive externalities and define the newly discovered antiquity as a public good. To the extent an antiquity is a mixed good, it is much closer to the public good end of the spectrum.

5. Public Goods and Market Failure

The economic significance of an antiquity’s positive externalities and its public good characteristics is that these are commonly recognized sources of “market failure”—where the assumption that market transactions will maximize social welfare does not apply.\textsuperscript{107} A classic example of market

\begin{itemize}
\item \textsuperscript{104} See id.
\item \textsuperscript{105} See supra note 93 and accompanying text.
\item \textsuperscript{106} See supra note 5 for a discussion of what constitutes an antiquity.
\end{itemize}

This is easy to understand as applied to antiquities. In the absence of transaction costs and strategic behavior, economics assumes that those who enjoy the positive externalities from the antiquity would be willing to contribute towards its purchase price. If there were no transaction costs or strategic behavior, theoretically a source country would outbid all other bidders for an antiquity which constitutes cultural property for its people.

A neoclassical economic response to the source country’s assertion that state ownership/retention of newly discovered antiquities is an appropriate response to the market failure is that transaction costs and strategic behavior can be eliminated by having the source country tax its citizens to purchase the antiquity. Requiring the government to compensate the party from whom property is taken is an efficient way to acquire a public good when transaction costs and/or strategic behavior preclude purchasing the property interest in a voluntary market transfer because it forces the government to assess the full costs of its state ownership policy. Only if the benefits truly outweigh the costs of compensating the party would the government acquire the property.

The rationale of the takings compensation requirement, however, does not apply to newly discovered antiquities. The compensation requirement is to deter the government from unduly burdening a minority of the community by taking their property. But a newly discovered antiquity constitutes an unexpected windfall which can be awarded to either the finder or the state. Awarding the property interest to the state does not constitute a “taking” in the traditional sense of the doctrine. The finder never had a vested property right. It was always contingent on no one with a superior right asserting claim to the found object. As applied to antiquities, by claiming ownership of all unowned and undiscovered antiquities, source countries have decided that they hold a superior right to the finder. Awarding the property rights to newly discovered antiquities to the state does not involve the same public policy considerations as does the classic takings scenario. Moreover, the state has a legitimate interest in deterring finders from taking possession of newly discovered antiquities. The state is claiming ownership not to unfairly burden a minority of the populace but rather to advance a legitimate state interest in maximizing the social utility associated with newly discovered antiquities. The economic arguments in favor of requiring the state to compensate a party when the state “takes” property from the individual do not
failure involving negative externalities is pollution. If a factory that produces widgets also produces pollution, the pollution is a negative externality to those who live in the area. They are harmed by it, but the factory does not have to internalize the cost of the pollution in calculating what it costs to produce its widgets. The result is that the market fails to properly price the cost of widgets, leading to overproduction of widgets and excessive pollution which harms those who live near the factory. Government intervention is needed to correct the market failure by requiring the factory to internalize the cost of its pollution.

A classic example of market failure involving positive externalities is the lighthouse example discussed above. Because it is difficult to exclude others from using and enjoying the light from the lighthouse, it is difficult to charge them for enjoying the benefits of the lighthouse. In contrast to market failure involving negative externalities, which leads to overproduction of the good or activity in question absent government intervention, market failure involving positive externalities leads to underproduction of the good or activity in question absent government intervention. Hence, the reason most lighthouses were built and operated by the government.

apply with equal relevance when the state claims ownership of all unowned and undiscovered antiquities.


109. See supra note 78 and accompanying text for a general discussion of externalities.

110. See Podolsky, supra note 108, at 1012.

111. Id.


114. See supra notes 89–93 and accompanying text; see also LeBoeuf, supra note 113, at 568.


6. Market Failure and Government Intervention

Traditional economic wisdom holds that market failure justifies government intervention to maximize social welfare. One way to view the prevailing source country ownership/retention approach to newly discovered antiquities is that the substantial positive externalities associated with the antiquities warrant government intervention. The intangible architectural, historical, and cultural characteristics of the antiquity generate incalculable benefits for the whole source country. Where there are substantial positive externalities associated with a good, market failure usually occurs, justifying government intervention to maximize social welfare. Source countries have responded to the perceived market failure with respect to newly discovered antiquities by adopting state ownership/retention laws in an attempt to capture the positive externalities and maximize their social welfare.

From an economic perspective, government intervention is assumed to be necessary because without it the private market will not provide the necessary incentive for the good to be provided at the efficient level—a level which maximizes social welfare. Neoclassical economics assumes that the non-excludability and non-rivalrous nature of the public good means that the market will not be able to capture the positive externalities associated with the good, leading to underproduction of the good. With regard to antiquities, however, this assumption does not apply. Newly discovered antiquities are not “produced,” they are found. Historically, the law of finders provided ample incentive for antiquities to be “produced,” i.e., found and brought to market. In light of the success the law of finders had in bringing newly discovered antiquities to market, it is difficult to defend the prevailing source country ownership/retention approach as necessary to counter the market failure caused by the antiquities’ positive externalities. A number of commentators have implicitly or explicitly concluded as much, arguing that source countries should return to a law of finders/market based approach to who owns newly discovered antiquities. That opinion, however, sees only the benefits...

119. See Petr, supra note 49, at 518.
120. See supra notes 107, 116 and accompanying text.
121. See supra notes 41–48 and accompanying text.
123. See supra notes 41–48 and accompanying text.
124. See Paul M. Bator, The International Trade in Art 46 (1981) (arguing that the “best way to keep art is to let a lot of it go”—a call to permit at least some market transactions); Cohan, supra note 69, at 57 (discussing Professor Merryman’s view); Amy E. Miller, The
associated with the law of finders; it fails to take into consideration the costs—the negative externalities.

E. The Law of Finders and Negative Externalities

The problem with the traditional law of finders as applied to newly discovered antiquities is that its strength is also its weakness. The law of finders rewards the finder who goes public with the found property.\textsuperscript{125} The first step, however, is taking possession of the found item. Taking first possession is what gives the finder superior rights over all but the true owner.\textsuperscript{126} But as applied to newly discovered antiquities, the moment the finder takes possession of the antiquity, the damage has been done.

1. The Intangible Component of a Newly Discovered Antiquity

Much of the invaluable archeological, historical and/or cultural information associated with the antiquity can only be captured while the antiquity is still in the ground.\textsuperscript{127} Once the finder takes possession of the found antiquity—by removing it from the ground—the intangible components of the antiquity have been compromised, if not destroyed.\textsuperscript{128} Just as the law of first possession has been rightfully criticized for contributing to the near extinction of certain wild animals,\textsuperscript{129} the law of first
possession should also be criticized for contributing to the destruction of invaluable archeological, historical, and cultural information connected to newly discovered antiquities. The law of finders, with its implicit requirement of first possession,130 creates substantial negative externalities as applied to newly discovered antiquities. Although the finder’s action of taking possession of the newly discovered antiquity generates substantial benefit to the finder, the rest of society is harmed because the act of taking possession damages, if not destroys, much of the invaluable, intangible information connected to the antiquity.131 Where an activity generates substantial negative externalities, this is evidence of market failure.132 Where there is market failure, government intervention may be needed to increase social welfare.133


130. See Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450, 460 (4th Cir. 1992); Eads v. Brazelton, 22 Ark. 499, 501 (1861); Marian Leigh Miller, Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel?, 20 Emory Int'l L. Rev. 345, 354–55 (2006). The problem is newly discovered antiquities suffer from the “tragedy of the commons.” See Hardin, supra note 65 (explaining the “tragedy of the commons” to be the concept that free access and unrestricted demand for a resource that is in limited or finite supply will inevitably lead to overexploitation of that resource). For all practical purposes, a finder considers a newly discovered antiquity to be unowned property and assumes that to establish property rights in the antiquity he or she needs to take possession of it. If the finder fails to take possession, there is the risk that someone else may come along and find it, thereby establishing a competing, if not a superior, claim. But as applied to newly discovered antiquities, taking first possession generates substantial negative externalities in terms of the lost intangible property.


2. Government Intervention to Minimize Negative Externalities

Source country state ownership/retention rules, particularly the ownership rules, are not so much an attempt at "taking" property from a finder\(^{134}\)—so as to maximize positive externalities—as they are an attempt at maximizing social welfare by minimizing the negative externalities associated with the act of the finder taking possession. Under the state ownership/retention approach, because all newly discovered antiquities are essentially owned by the state,\(^{135}\) in theory the finder has no incentive to touch the antiquity. In the perfect economic world, the rational finder realizes that he or she has no interest in the antiquity and therefore has no incentive to exert any effort to take possession of it. The finder should leave the antiquity where it is and report the find to the proper authorities. Under these assumptions, the state ownership/retention approach would maximize social welfare. It should result in greater archeological, historical, and/or cultural property being produced because, after the find is reported, trained archeologists will excavate the antiquity, gathering all the available intangible information in the process and minimizing the harm to the antiquity.\(^{136}\)

In practice, however, the state ownership/retention approach has proven to be counterproductive. Rather than creating an incentive for finders of newly discovered antiquities to report their finds, the state ownership/retention form of government intervention has created an incentive for finders to turn to the vast and thriving international black market for illegally exported art.\(^{137}\) While the exact magnitude of the illegal sale of antiquities is unknown, estimates for the illegal international sale of art range from a low of hundreds of millions to a high of billions of dollars annually.\(^{138}\) Some experts have opined that it is the second largest form of international crime, behind only the international sale of narcotics.\(^{139}\) And it is widely acknowledged that the cause of the vast and vibrant international black market for illegally exported antiquities that effectively undermines the goal of retaining cultural property is the state

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\(^{134}\) Some American commentators have argued that source country retention rules constitute takings. See Borodkin, supra note 49, at 393.

\(^{135}\) See supra note 73.

\(^{136}\) Villanueva, supra note 5, at 579.


\(^{138}\) Symeon C. Symeonides, A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property, 38 Vand. J. Transnat'l L. 1177, 1178 (2005) ("[S]tolen art and antiquities [are] . . . estimated to net from one to ten billion dollars annually."); Chang, supra note 42, at 832–33 ("The income generated by illicit trade in art has been estimated to be as high as 6 billion dollars per year."); Moore, supra note 52, at 468 n.12.

\(^{139}\) See Dutra, supra note 61, at 66–67; Borodkin, supra note 49, at 377–78; Moore, supra note 52, at 468 n.12.
Moreover, these numbers do not tell the complete story.

In an attempt to hide the provenance of the illegally exported antiquities, and thereby further their criminal enterprise, finders often destroy features of the antiquity which may provide clues as to where and/or when the antiquity was found. Artistic features may be defaced, and priceless archeological and historical information often is destroyed typically in a manner which makes it impossible to recreate the information. The goal of the unscrupulous finder is to turn the newly discovered antiquity into an archeological "orphan" whose lineage is unknown, thereby permitting "foreign adoption" via the black market with minimal chances of the "child" being reunited with its natural parent/source country. The illegal excavation and exportation of a newly discovered antiquity not only causes the loss of the antiquity for the source country, it also causes intangible archeological, historical, and cultural loss for the global community. And while the source country's loss may be temporary—the illegally exported antiquity may be recovered—the archeological, historical, and cultural losses usually are permanent. And these intangible losses are incalculable.

The ineffectiveness of the prevailing source country form of market intervention, the state ownership/retention laws, raises the question of whether the intervention constitutes government failure. Government failure occurs because policy makers and legislators are not omniscient. Even when well intentioned, efforts at government intervention may fail to improve social welfare. Under the state ownership/retention approach to newly discovered antiquities, finders not only have an incentive to turn to the black market to sell their newly discovered antiquities, they have an incentive to destroy much, if not all, of the intangible archeological,

140. See Cohan, supra note 55, at 357; Dutra, supra note 61, at 68; Osman, supra note 124, at 993.
141. See Borodkin, supra note 49, at 383; Park, supra note 137, at 932–33.
143. See Cohan, supra note 69, at 7–8; Park, supra note 137, at 931–33.
144. See Osman, supra note 124, at 994 (noting the intentional destruction of antiquities and their locus to facilitate removal and export); Borodkin, supra note 49, at 410–11; see also Choi, supra note 53, at 192–93 (discussing how the process results in artwork that is "divorced from its cultural roots").
145. While scholars argue over whether cultural property should be defined on a national or international basis, all agree that the losses caused by the black market for illegally exported antiquities is international. See Cohan, supra note 69, at 7–8.
146. See Szopa, supra note 62, at 65.
148. See Morriss & Dudley, supra note 133, at 287.
149. See supra note 137 and accompanying text.
historical, and cultural information associated with the find to minimize the chances that their illegal activities will be discovered. The harm associated with the state ownership/retention approach may be worse than its benefit.

A hard-line neoclassical economist may argue that the poor performance of the state ownership/retention approach to date proves the neoclassical view that market failure is always better than government intervention. That may be overstating the case. At a minimum, however, the ineffectiveness of the state ownership/retention approach qualifies the traditional economic wisdom that market failure always justifies government intervention. Market failure may justify government intervention if the government intervention increases social welfare. The issue is whether the state ownership/retention approach to newly discovered antiquities increases social welfare.

II. THE STATE OWNERSHIP/RETENTION APPROACH VERSUS THE LAW OF FINDERS APPROACH

A. Protecting the Tangible Component: The Incentive to Go Public

The principal problem with the state ownership/retention approach to newly discovered antiquities is that it turns the incentive for the finder on its head. While the traditional law of finders approach maximizes the probability that the finder of a newly discovered antiquity will go public with the find, the state ownership/retention approach maximizes the probability that the finder will not go public. Under the law of finders, the principal reason the finder came forward with the antiquity is the near zero probability that anyone with a superior claim would claim the antiquity. The nature of the antiquity basically guaranteed that it would be virtually impossible to prove who owned it. In the absence of a

150. See supra notes 141–43 and accompanying text.
153. See supra notes 44–48 and accompanying text.
154. See supra note 137 and accompanying text.
155. See supra notes 50–51 and accompanying text.
superior claim, the finder is granted sole and exclusive ownership, including the right to transfer it for valuable consideration.157

Conversely, under the prevailing state ownership/retention approach, if the finder goes public with the find there is near certainty that a superior claim will be asserted: The state will claim the newly discovered antiquity, or at least the right to restrict its export,158 either way depriving the finder of substantial economic benefit. Based on the vibrant black market for illegally exported antiquities, many finders conclude that it makes no sense for them to go public with the newly discovered antiquity under the prevailing state ownership/retention approach.159 The cost of going public with the found antiquity is obvious. At a minimum, the finder will lose the item; and unlike the typical found item, which is of little value, the typical found antiquity is worth thousands, if not millions, of dollars.160 From an economic perspective, it is easy to understand why finders are reluctant to go public with the newly discovered antiquity under the state ownership/retention approach.

Some may argue that the finder should feel satisfied at fulfilling a civic duty furthering the source country’s cultural heritage.161 But most finders fail to see the government’s distinction between found antiquities and other found property.162 Inasmuch as the finder of other found property is awarded title if the true owner does not step forward and claim the property, 163

157. See supra notes 44–48, 55–56 and accompanying text.
158. The state will either claim it completely or, under the state ownership/retention approach, the state will claim the right to restrict the transfer of the found antiquity, thereby depriving the finder of the financial benefit of the find. See supra notes 63–66, 73 and accompanying text.
159. See supra notes 137–40 and accompanying text (regarding the size of the black market).
162. For an exception to this, see Andrew L. Slayman, Where the Past Serves the Present, Archaeology, Jan.–Feb. 1996, at 79, 84 (reporting that the residents of Nevis, a Caribbean island, routinely turn over newly discovered artifacts to the Nevis Historical and Conservation Society).
why should the finder of an antiquity not be treated likewise? Similarly situated people should be treated the same, and most finders do not see the fact that the found item is an antiquity as justifying different treatment. Some scholars agree, arguing that the state ownership/retention approach to newly discovered antiquities is analogous to a taking for which the finder should be compensated. While not all agree with the "takings" characterization, most acknowledge that the state ownership/retention approach has played a key role in creating and sustaining the vibrant black market that exists for the sale of illegally exported antiquities.

Source countries have tried to counter the incentive for a finder not to report a newly discovered antiquity by imposing criminal penalties for the failure to do so. The problem is that failure to report the newly discovered antiquity is the classic "victimless" crime. There is no one to file a complaint. The only party who knows of the crime is the perpetrator, the finder. Source countries have to rely on law enforcement authorities to discover the crime. Although there are no statistics as to how successful source countries' criminal laws are at countering the incentive for finders of newly discovered antiquities to turn to the black market, the vibrant international black market for antiquities is evidence that many finders do not consider the source countries' criminal laws and enforcement activities much of a deterrent. Moreover, once the antiquity

165. See supra notes 137–50 and accompanying text.
167. See Steven Eisenstat, Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment, 50 Wayne L. Rev. 1115, 1143 n.132 (2004) (defining "victimless crime"); Jeffrey Manns, Private Monitoring of Gatekeepers: The Case of Immigration Enforcement, 2006 U. Ill. L. Rev. 887, 891 n.8 (noting the possibility of a "victimless" crime); Benji McMurray, The Mitigating Power of a Victim Focus at Sentencing, 19 Fed. Sent'g Rep. 125, 126 (2006) ("In the case of 'victimless' crimes, the premise is that all of society was harmed but that no one in particular was harmed.").
leaves the country, the chances of that finder being charged and convicted decrease significantly. There appears to be widespread support for the conclusion that the prevailing source country approach to protecting newly discovered antiquities—state ownership coupled with criminal sanctions for not reporting the find—is not very effective at getting finders to go public with their finds.

B. Protecting the Intangible Component: The Archeological, Historical, and/or Cultural Information

Under the traditional law of finders, the typical finder may accidentally damage the archeological, historical, and other intangible information associated with the newly discovered antiquity. The typical finder is not a trained archeologist and does not appreciate the importance, and fragility, of the locus in quo of the find. The finder’s focus is on the tangible antiquity itself, not the intangible archeological, historical, and/or cultural information connected with the find. Accordingly, the typical finder will extract the antiquity with little to no care for the intangible components of the find. But often the find will result in at least some of the intangible information being secured. As long as the finder was not trespassing, the finder has an incentive to disclose information concerning the find. This information will help to establish the provenance of the antiquity, and the more information about the provenance, the more valuable the antiquity. In addition, if the site of the find has not been damaged too much by the untrained finder, there is a chance that some of the archeological, historical,
and/or cultural property can be saved by proper excavation. The incentive to go public with the find positively affects the chances that at least some of the archeological, historical, and other intangible information connected with the find can be salvaged.

In contrast, under the state ownership/retention approach, once the finder decides to turn to the black market, the finder has an incentive intentionally to destroy the archeological, historical, and cultural intangible information connected with the find in an attempt to minimize discovery and detection.\textsuperscript{178} If the principal purpose of the state ownership/retention approach is to counter the negative externalities associated with the law of finders,\textsuperscript{179} the case can be made that the negative externalities associated with the government intervention may be as great as, if not greater than, the negative externalities associated with the law of finders. No doubt the drafters of the state ownership/retention approach realized the potential for—though probably not the magnitude of—the negative externalities associated with the approach, hence the criminal sanctions under the state ownership/retention approach for those who violate it.\textsuperscript{180} From an economic perspective, the goal is to offset the potential benefits of the black market with the risk of criminal sanctions, but this offsetting risk comes at a steep cost.

C. Administrative Costs

From a law and economics perspective, laws are adopted to create incentives for people to engage in socially desirable behavior.\textsuperscript{181} At the macro level, these incentives can be divided into two categories: laws either “reward” a party for acting in the socially desirable manner, or laws “punish” a party for not acting in the socially desirable manner.\textsuperscript{182} In

\textsuperscript{178} See Maria Aurora Fe Candelaria, \textit{The Angkor Sites of Cambodia: The Conflicting Values of Sustainable Tourism and State Sovereignty}, 31 Brook. J. Int’l L. 253, 270 n.102 (2005); Borodkin, \textit{supra} note 49, at 410–11; Choi, \textit{supra} note 53, at 192–93 (noting that “participant[s] in the illicit antiquities market [have] an incentive to strip as much information as possible from an artifact before it enters the . . . legitimate art market”).

\textsuperscript{179} See \textit{supra} notes 125–36 and accompanying text.

\textsuperscript{180} See \textit{supra} notes 166–72 and accompanying text.


general, laws that reward are more efficient than laws that punish. Laws that reward typically are self effectuating. The traditional law of finders is a good example. With minimal administrative costs, it creates an incentive for the party to act in the socially desirable manner—for the finder to come forward with the found property. If the finder comes forward and the true owner does not reclaim the item within a reasonable period of time, the finder is awarded title.

For the most part, the law is self effectuating. There is minimal administrative cost imposed on public resources.

On the other hand, laws that create incentives by punishing people tend not to be self effectuating. Criminal laws are a good example. Members of society who might be tempted to engage in behavior that society has decided is not socially desirable run the risk of being punished, but only if they (1) engage in the behavior, (2) are caught, and (3) are convicted. The punishment approach to creating incentives inherently includes significantly higher administrative costs: (1) there must be a police force to investigate and arrest the party; (2) there must be a judicial system to try the party; and (3) there must be a penal system to punish the party.

184. See West, supra note 182, at 372 (recognizing that the Japanese finders' law "creates . . . incentives to encourage finders to report their finds and disincentives to misappropriation").
185. See id. at 372 (describing Japanese finders' law). The traditional law of finders also creates a reciprocal duty/benefits mentality where finders come forward with someone else's property in the hope and expectation that if someone finds an item they have lost, that finder will come forward, thereby maximizing the probability that they will get their own property back.
186. That is not to say that the law of finders is without administrative costs. In many jurisdictions, the duty to come forward includes the duty to turn the found property over to the police during the time the original owner has the right to return and reclaim. See id. at 372, 380. It should also be acknowledged, however, that where a finder intentionally does not make reasonable efforts to find the true owner, the finder can be held civilly liable for conversion, if not criminally liable for theft. See Brown, supra note 47, § 3.5.
189. See Dezhbakhsh, Rubin & Shepherd, supra note 188, at 356–57; Seidman, supra note 188, at 320.
The prevailing state ownership/retention approach to protecting newly discovered antiquities is not nearly as self effectuating as the law of finders. Because the state ownership/retention approach creates an incentive for a finder not to go public with the find, to be effective it requires an offsetting sanctions component.\(^{191}\) The administrative costs associated with this "stick" approach are substantial. Because the failure to report the find is a victimless crime, rarely is there a complaining party to start the process. Source countries must maintain an extensive and expensive law enforcement system devoted to this cause if they are to have much of an impact.\(^{192}\) The source countries' financial resources are not up to the challenge. Despite the source countries' statutory prohibitions and law enforcement efforts, the thriving international black market evidences that a substantial percentage, if not a majority, of all newly discovered antiquities are illegally exported.\(^{193}\) The result is that source countries have to take an international approach to a problem created by their rejecting an international approach to the issue. Source countries must rely on consuming countries expending resources to help enforce the laws of the source countries.\(^{194}\) In addition, the ensuing litigation to recover antiquities that the source countries claim were illegally exported has had a chilling effect on the market for all antiquities.\(^{195}\) Many antiquities lack a proper paper trail of their provenance.\(^{196}\) The costs, administrative and other, associated with the prevailing source country approach to state ownership/retention are substantial.\(^{197}\)

The logical issue is whether the prevailing source country approach to newly discovered antiquities, the state ownership/retention approach, has improved social welfare. Intuitively, doubts can be raised due to the

\(^{191}\) See supra notes 165–72 and accompanying text.

\(^{192}\) See supra notes 188–90 and accompanying text.


\(^{194}\) See Bator, supra note 55, at 327; Chang, supra note 42, at 837.


\(^{196}\) See Simon R.M. Mackenzie, Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities Market, 45 Brit. J. Criminology 249, 253 (2005) (stating that "documentary evidence of a past chain of ownership is notably absent from most transactions in the antiquities market, [and it is usually] impossible for purchasers to tell whether the object that they buy has been recently looted, or [whether it] has been circulating in the market for many years"); Jason M. Taylor, Note, The Rape and Return of China's Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China's Cultural Heritage in a Flawed System?, 3 Loy. U. Chi. Int'l L. Rev. 233, 234 (2006) (noting that "seventy-five percent of all antiquities [sold] in London auctions have no published provenance").

\(^{197}\) See supra notes 188–90, 192 and accompanying text. This assessment of costs fails to take into account the added costs imposed as a result of (1) the loss to consumers in consuming countries from not being able to see the antiquities, and (2) the loss to those who hold valid title to the antiquity but either cannot sell it or must sell it at a reduced price due to the chill caused by the source countries' approach to the antiquities market.
negative externalities and high administrative costs associated with the approach.\textsuperscript{198} Practically, it is impossible to know because it is impossible to ascertain hard data on (1) how many newly discovered antiquities are being illegally exported, (2) how many archeological sites are being damaged/destroyed, (3) what percentage of illegally exported antiquities will be recovered, and (4) the administrative costs associated with the approach. In light of the obvious costs and potential costs associated with the state ownership/retention approach, the question that arises is whether there is another approach to protecting newly discovered antiquities which may constitute a better chance at achieving the socially desirable goal of improving social welfare.

III. PROPOSED ALTERNATIVE APPROACHES TO PROTECTING NEWLY DISCOVERED ANTIQUITIES

A. Return to the Traditional Law of Finders

One popular proposal for improving protection of newly discovered antiquities is to return to the traditional law of finders approach: Award sole and complete ownership of the antiquity to the finder.\textsuperscript{199} Compared to the state ownership/retention approach, the traditional law of finders approach maximizes the chances that the finder will go public with his or her find.\textsuperscript{200} The traditional law of finders approach also helps to protect the physical characteristics and to some degree, the provenance of a newly discovered antiquity: The better the condition of the antiquity, and the more information about the antiquity, the greater its value.\textsuperscript{201} The traditional law of finders would obviate the international black market for newly discovered antiquities. Finders could openly sell the antiquities to the highest bidder. The global community, particularly museums in consuming countries, would benefit from the increased supply of antiquities.

But the proposals to return to the law of finders harkens back to the cultural nationalism versus cultural internationalism debate.\textsuperscript{202} Giving the finder exclusive and absolute property rights in the newly discovered antiquity will maximize the probability that the antiquity will end up in a consuming country’s museum or collector’s hands.\textsuperscript{203} Whether this maximizes social welfare depends on who constitutes “the society”—the

\textsuperscript{198} See supra notes 137–46.
\textsuperscript{199} See supra notes 38, 48–50 and accompanying text.
\textsuperscript{200} See supra notes 39–56 and accompanying text.
\textsuperscript{201} See supra notes 52–54 and accompanying text.
\textsuperscript{202} See supra notes 63–71 and accompanying text.
country of origin or the global community? Collectively, antiquity consumers in market countries typically have greater financial resources than source countries. Market country antiquity consumers typically outbid source countries' consumers, with the result being that source country archeological artifacts will be depleted, causing substantial cultural and economic loss to source countries.

Acting as rational self-interested actors, source countries have concluded that the proposals to return to the traditional law of finders approach to protect newly discovered antiquities are not in their best interests. There is little doubt that the traditional law of finders approach fails to maximize the cultural benefits and social welfare of the source country. Moreover, although individual finders of newly discovered antiquities look with disdain on the state ownership/retention laws, as evidenced by the thriving black market for illegally exported antiquities, there is widespread public support within source countries for cultural nationalism and the state ownership/retention approach. No doubt source country legislators realize the political gain to be reaped by philosophically adopting cultural nationalism and by legally adopting state ownership/retention laws. Source countries are unlikely to return to the traditional law of finders approach because of its potential for antiquities to be exported—a politically unacceptable option. The source countries' refusal to return to the law of finders approach is consistent with the public choice school of law and economics.


205. Graham Green, Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases, 44 Harv. J. on Legis. 251, 252 (2007); Merryman, supra note 58, at 831–32; Rogers, supra note 204, at 933.

206. The number and size of source country protests demanding the return pursuant to source country ownership/retention laws is increasing. See Malcolm Moore, Italian Villagers Fight New York's Met for 2600-Year-Old Chariot, Daily Telegraph (London), at 19, available at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/09/wchariot09.xml; Lawrence Van Gelder, Arts, Briefly: Athens Protest Seeks Return of Elgin Marbles, N.Y. Times, Jan. 31, 2007, at E2 (reporting protest involving approximately 2000 students and teachers who formed a chain around the Acropolis to draw attention to Greece's request that Britain return the Elgin Marbles); see also Sarah Gauch, In Hot Pursuit of Egypt's Lost Mummies, Christian Sci. Monitor, Jan. 4, 2007, at 7 (describing the tactics used by the investigator who is leading the campaign as being controversial outside of Egypt but that "his calls to return national treasures" is playing well in Egypt).

207. Increasingly, source country politicians are leading the campaign for the return of antiquities, an implicit acknowledgment of the widespread public support for such actions. Moore, supra note 206. Similarly, politicians in consuming countries are resisting calls for repatriation or even loans where they believe there is political gain to be had. See Bitter Battle over Bust's True Home, N.Z. Herald, May 11, 2007, at B03, available at, http://www.nzherald.co.nz/category/story.cfm?c_id=18&objectid=10439055.

maximizing their self-interest. Return to the traditional law of finders approach, while theoretically appealing in some respects, is not practically and politically viable.

B. Compensate the Finder/Finder’s Fee Approach

Another possible approach to protecting newly discovered antiquities is a modified law of finders approach. There are several variations to this approach, but each basically requires the source country to compensate the finder in exchange for the source country taking possession and ownership of the newly discovered antiquity. The issue is how much compensation the source country should be required to pay.

A handful of source countries offer the finder a finder’s fee in exchange for reporting the find.209 The problem is that the finder’s fee is usually either (1) a fixed sum that is substantially less than the market value of the antiquity (or what the finder thinks is the market value210 or the black market value of the antiquity), or (2) a percentage of the fair market value of the antiquity as determined by the government (without the benefit of the finder being able to test the market).211 Either way, the bottom line offer

209. See Joseph L. Sax, Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures 185 (1999) (listing Iraq and Sudan as two such countries at the time of publication). Italy also offers a finder’s fee to the owner of the property—not necessarily the finder—where the item was found. Stephanie Doyal, Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy, 39 Colum. J. Transnat’l L. 657, 677 n.88 (2001). China also offers a finder’s fee to those who report a found antiquity to the state. See Dutra, supra note 61, at 88.

210. See Dutra, supra note 61, at 88. In addition, often there are administrative requirements which complicate, and cloud, the issue of whether the fee must be paid. Although Italy offers a finder’s fee that in theory can reach up to twenty-five percent of the value of the found property, the found property must “immediately” be turned over to the state to be entitled to the finder’s fee. See Doyal, supra note 209, at 677. In addition, finder’s fees are determined administratively and there is no opportunity to test the market. Id.; see also Dutra, supra note 61, at 88. Lastly, in some countries, after reporting the find, the state may also take the land where it was found, without compensation, because of its archeological significance. See Osman, supra note 124, at 993. Any finder’s fee would likely pale in comparison to the loss of land.

211. For example, Italy offers a percentage which in no event can exceed twenty-five percent of the value of the found antiquity, but the government determines the fee. While the finder can appeal the fee, the finder bears all costs associated with the appeal. See Doyal, supra note 209, at 677 n.88. The Chinese finder’s fee is even smaller. See Dutra, supra note 61, at 88. In the case of the Elmali Hoard, an American collector purchased a hoard of almost 2000 ancient coins for $3.2 million. When Turkey learned of the coins, it brought suit claiming the coins had been illegally exported and seeking return of the coins. Under pending litigation that looked bleak from the purchaser’s perspective, the American collector decided to “voluntarily” return the coins. The Turkish government gave him a medal in the shape of a coin. One can only speculate what the Turkish government would have given the original finder, but one can only assume that it would have paled in comparison to the coins’ estimated value of $10 million. See Jason McElroy, The War Against the Illegal Antiquities Trade: Rules of Engagement for Source Nations, 27 Hastings Comm. & Ent. L.J. 547, 557–59 (2005).
typically is relatively low. The current practice of finders favoring the black market over offers of finder’s fees from the source country supports the conclusion that finder’s fees would have to be significantly increased to create the necessary incentive for finders to come forward with a newly discovered antiquity.\textsuperscript{212} The ultimate finder’s fee would be to require the state to purchase the find at full market value, which is similar to the export licensing approach adopted by England.\textsuperscript{213}

The English approach awards property rights to the finder, but the government is granted a right in the find: the right to purchase the item before it is exported by matching any offer made by a third party.\textsuperscript{214} This approach gives the finder the right to test the market and to secure full financial value for finding the antiquity, while giving the government the benefit it seeks: the right to retain all archeological artifacts that it deems worthy of retaining. Any archeological artifact the country is not interested in retaining can then be sold on the international market to the highest bidder, thereby meeting some of the international demand by museums and collectors for antiquities.

From a theoretical perspective, adopting the English approach is a “win-win” for all parties involved. Finders have an incentive to come forward with their finds and to preserve and protect the physical characteristics and provenance of the find. Source countries would have the right to retain the antiquities that they want. Museums and collectors in market countries would have the opportunity to acquire some antiquities, though probably not the most culturally sensitive ones.

The problem is that while in theory the English model should work in most source countries, in practice it would not. England is a country that is relatively poor in newly discovered antiquities\textsuperscript{215} of significance and relatively rich in revenues.\textsuperscript{216} The English approach is rarely applied so it costs relatively little. England can afford such an approach. On the other hand, most source countries are antiquities-rich but revenue-poor.\textsuperscript{217} If a source country were to adopt such an approach and attempt to implement it with respect to most, if not all, newly discovered antiquities it wished to retain, the result would be a financial disaster. The full compensation

\begin{itemize}
\item \textsuperscript{212} See Stephanie Doyal, supra note 209, at 677 n.88; Dutra, supra note 61, at 88; see also Sax, supra note 209, at 185; Borodkin, supra note 49, at 412–13.
\item \textsuperscript{213} See Tompa, supra note 166, at 101–02; Borodkin, supra note 49, at 392.
\item \textsuperscript{214} Gerstenblith, supra note 53, at 213 n.59. For other examples of first refusal states, see Roberts, supra note 51, at 345; Tompa, supra note 166, at 76; Goldberg, supra note 67, at 1038.
\item \textsuperscript{216} See Johnson, supra note 215, at 420; Margules, supra note 171, at 613; Schmidt, supra note 215, at 190–91.
\item \textsuperscript{217} See Margules, supra note 171, at 613; Rogers, supra note 204, at 933–34; Schmidt, supra note 215, at 190–91.
\end{itemize}
approach would bankrupt the source country. From a practical perspective, the full finder’s fee approach is politically and economically unacceptable to source countries.

Source countries are stuck between a rock and a hard place. If they continue with their current state ownership/retention approach, in theory they protect their archeological artifacts, but in practice much, if not most, of the newly discovered antiquities end up on the international black market, which undermines the socially desirable goal of retaining this cultural property within the source country. If the source countries return to the traditional law of finders approach, or adopt a reasonable finder’s fee/compensation approach, finders will no longer have an incentive to turn to the black market; however, the source countries will not have the resources to purchase all found antiquities, resulting in many, if not most, of the newly discovered antiquities ending up on the legal international market for antiquities and ultimately being transferred to museums or collectors in market countries. Either way, the source country loses.

C. Protecting the Intangible Component: Negative Externalities

Moreover, both the traditional law of finders approach and the finder’s fee approach do little to protect the intangible archeological, historical, and cultural components of a newly discovered antiquity. Both approaches reward a finder for coming forward with the find, but coming forward with the find invariably involves excavating and taking first possession of the antiquity. When excavation is performed by an untrained finder, much, if not all, of the historical and archeological value of the antiquity is lost forever. Ideally, newly discovered antiquities should be excavated by archeologists to maximize protection for the antiquity’s historical and archeological information. The problem is that finders will be reluctant to leave a newly discovered antiquity in the ground because of the “tragedy of the commons.” If the finder does not take physical possession of the

218. See Taylor, supra note 196, at 234 (“In large part, the current international regime is inadequate in controlling the flourishing black market of international antiquity trade. Despite an international effort to stem illicit import of cultural property, nearly ‘seventy-five percent of all antiquities offered for sale in London auctions have no published provenance.’” (quoting Hannah Beech, Spirited Away, TimeAsia, Oct. 13, 2003, available at http://www.time.com/time/asia/covers/501031020/story.html)).

219. See Tompa, supra note 166, at 101–02.

220. See supra notes 173–75 and accompanying text.


newly discovered antiquity, another finder may come along, take possession, and reap all the benefits. Moreover, although the state ownership/retention approach in theory protects the intangible component of a newly discovered antiquity, in practice it may do more harm than good to the archeological, historical, and cultural information connected to the find.

The challenge is to craft a financially viable approach that creates the proper incentives for the finder of a newly discovered antiquity while upholding the source country's socially desirable goal of maximizing and retaining its archeological artifacts. The proposals to date have struggled to find the proper balance between the competing interests because they typically assume an "all or nothing" approach to allocating property rights to the newly discovered antiquity: that fee simple in the antiquity had to be given either to the finder or to the state. The problem is that if fee simple is awarded to the finder, the state holds no interest, and the finder has the right to transfer the property to whomever he or she wishes. On the other hand, if fee simple to the antiquity is awarded to the state, the finder holds no interest and has no incentive to come forward with the find. The fee simple mentality offers no viable solution to the dilemma, other than awarding the property interest to the finder and requiring the state to compensate the finder for the find, an economically unacceptable option for source countries. An alternative approach is to split the property interest in a newly discovered antiquity between the finder and the source country: to adopt a possessory estate and future interest approach.

IV. THE POSSESSORY ESTATE AND FUTURE INTEREST APPROACH

A. Introduction

Adopting a possessory estate and future interest approach to who owns a newly discovered antiquity provides an economically viable solution that maximizes the protection of both the tangible and the intangible components while balancing the competing interests of the finder and the source country. "[J]ust as property can be divided physically, property

223. Peter Benson, Contract as a Transfer of Ownership, 48 Wm. & Mary L. Rev. 1673, 1697 (2007) ("Having physical possession of the thing transferred, the appropriating party can rightfully exclude any and every third party who does not already have possession of it. Vis-à-vis such others, first possession is the basis of entitlement."); Richard A. Epstein, How to Create—or Destroy—Wealth in Real Property, 58 Ala. L. Rev. 741, 742 (2007) ("The backbone of the common law system of property rights is the rule of first possession, which allows individuals to acquire property over which they enjoy rights of use or disposition.").

224. See supra note 73 and accompanying text.

225. See supra notes 141–46 and accompanying text.
rights can be divided temporally.226 Possessory rights and future interests split property rights over time. The party who holds the possessory estate has the right to possess the property at that moment.227 The party who holds the future estate has the present right to possess the property in the future, when the possessory estate ends.228 Property rights in a newly discovered antiquity could be awarded to both the finder and the source country: The finder could be awarded a term of years,229 and the source country could be awarded the future interest in fee simple absolute.230 A term of years can be for any fixed period of time231 and is transferable.232

B. The Incentive to Go Public with Found Property

As long as the term of years is transferable, the finder has an incentive to go public with the find. The finder can transfer his or her term of years, thereby realizing a financial return on his or her find. The issue is whether this incentive is greater than the incentive to turn to the black market.233 As long as the term of years is of reasonable duration, the value of the term of years should be greater to the finder than the value of the antiquity on the black market. Finders of antiquities who turn to the black market typically

227. See Wendel, supra note 226, at 1; Ronald R. Volkmer, Nebraska’s “Total Return Trust” Statute: Unitrust Conversion and the Challenges of Managing a Trust and Drafting a Trust, 40 Creighton L. Rev. 135, 138 (2007).
228. See Wendel, supra note 226, at 1–2; Becker, supra note 226, at 782.
229. A term of years is a finite possessory estate where the end date can be calculated on the first day. Black’s Law Dictionary 1478 (7th ed. 1999); Wendel, supra note 226, at 42, 46. In many respects, it is easier to conceive of a system which would award the finder a life estate. A life estate is a possessory estate, the duration of which is the duration of the party’s life. Life is fragile. A life estate can end at any moment. The uncertainty of a life estate reduces its value as compared to a term of years for a comparable number of years. See Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 Ind. L.J. 1, 36 (1992) (explaining the risk associated with a life estate).
230. There is an interesting issue here of whether the future interest should be called a reversion or a remainder. If the future interest following a finite estate (here, a term of years) is retained by the grantor, it is called a reversion; if the future interest following a finite estate is granted to a third party, it is called a remainder. Wendel, supra note 226, at 47. Because the newly discovered antiquity is not really being “conveyed” but rather the property rights are being awarded as a matter of law, it appears to make more sense to call the source country’s future interest a reversion. Fee simple absolute is the most complete form of ownership. In theory, it lasts forever; there is no future interest that follows it. Id. at 6–7. It is what the layperson thinks of as complete ownership.
231. As long as the last day is calculable on the first day, the interest is a term of years, regardless of the duration of the period. See Black’s Law Dictionary, supra note 229, at 1478; Wendel, supra note 226, at 46.
233. See Cohan, supra note 69, at 8–9; see also Sax, supra note 209, at 185; Warring, supra note 170, at 276–77; Borodkin, supra note 49, at 412.
get but a small fraction of the value of the antiquity. In addition, the black market value has to be discounted by the added risks the finder takes by turning to the black market. If caught, the finder will be fined, if not imprisoned. If finders were presented with the option of a limited, but valuable, property right which is transferable, the likely result is that most finders would opt to come forward with their find. It would be to their financial advantage.

C. Protection of the Newly Discovered Antiquity’s Intangible Component

In addition, the possessory estate and future interest approach can be used to maximize protection of the intangible components of a newly discovered antiquity. To maximize protection of the archeological, historical, and cultural components of a newly discovered antiquity, there must be an incentive for the finder to leave the antiquity in the ground where it is found to permit an archeologist to excavate the antiquity. All things being equal, finders are unlikely to do so because of the risk that another finder may come along and claim the antiquity. A possessory estate and future interest approach to allocating property rights can provide an incentive for finders to behave in the socially desired manner. If the law granted the finder an extended term of years for not taking possession of the newly discovered antiquity, the longer term of years would provide a financial incentive for finders to leave excavation to the archeologists.

D. Incentive to Expedite Excavations

The extended transferable term of years could also be used to maximize protection of newly discovered antiquities by creating an incentive to expedite the excavation process with respect to all newly discovered antiquities. It is widely acknowledged that museums in consuming countries are interested in obtaining rights to exhibit newly discovered

234. See Borke, supra note 203, at 394 (“The original finder of an antiquity that is traded on the illicit market receives less than 2% of the price paid by the final purchaser.”); Borodkin, supra note 49, at 378 (“Typically, middlemen retain most of the profits in the antiquities black market, while the finders of artifacts often receive less than one percent of the retail value of their discoveries.”). This is not to say that the antiquity is actually sold for a small fraction of its value, but rather that the finder will receive only a small fraction of the value. While an antiquity’s value on the black market may be less than the value of a legitimate antiquity, the value can still be considerable. For example, a Turkish farmer who ran over the sculpted leg of a grand marble Hellenistic table turned down a local offer of $1500 and took the sculpture to Istanbul, where he received $7000. The sculpture was eventually sold to the Atlantis Gallery for $540,000 and was then listed for sale at $850,000. See Geraldine Norman, Talking Turkey, Indep. (London), June 13, 1993, at 86–87.

235. Criminal punishment for looting antiquities has not proven very effective as a deterrent. A former head of Peru’s National Institute of Culture said that looting is “almost as profitable as the cocaine trade, but without the risks.” Nathaniel C. Nash, Poor Peru Stands by as Its Rich Past Is Plundered, N.Y. Times, Aug. 25, 1993, at A3.

236. See supra note 221 and accompanying text.

237. See supra notes 222–23 and accompanying text.
antiquities. Directors of many of the leading consuming country museums have gone on record as opposing cultural nationalism because it restricts the flow of antiquities to consuming country museums. Scholars have openly acknowledged that the source countries' ownership/retention approach to newly discovered antiquities has reduced the supply of antiquities to the frustration of museums in consuming countries. A possessory estate and future interest approach could be used to bring source countries and Western museums back together for the common goal of protecting newly discovered antiquities. Source countries could offer museums that fund archeological digs (1) first right to purchase the term of years of any antiquities discovered during the dig, and/or (2) the exclusive option to acquire an even longer term of years. Increasing funding for more archeological excavations maximizes protection of all newly discovered antiquities by securing as much historical and archeological information as possible and by ensuring acquisition of the antiquity before natural elements cause any further deterioration to both the tangible and intangible components of the find. Absent extraordinary circumstances which justify leaving the antiquity in its natural state, most parties agree that the best protection for an antiquity is not in the ground subject to the elements but rather in protective custody where it can be preserved and studied. Granting museums in consuming countries either an exclusive option on antiquities unearthed during an archeological dig that the museum funds, or a longer term of years for all antiquities discovered during the dig, would be a “win-win” for the finder, the museum, the source country, and all who enjoy antiquities and the archeological, historical, and cultural information connected to the antiquities.

E. Distribution of Costs

Moreover, the funding museums would be in the best position to distribute the costs associated with the archeological dig and acquisition of the term of years. The museum could partner with universities, and source country museums, and hire local source country citizens to conduct the excavation work. Universities could contribute to the costs and provide

238. See Cohan, supra note 69, at 68; Merryman, supra note 58, at 847; Taylor, supra note 196, at 252. See generally Knox, supra note 58.
239. See generally Knox, supra note 58; Merryman, supra note 58.
240. See Cohan, supra note 69, at 57–58; Merryman, supra note 58, at 847. See generally Pearlstein, supra note 195.
241. See Bator, supra note 55, at 295–98 (discussing the preservation of newly discovered antiquities); Aisha Y. Salem, Finders Keepers? The Repatriation of Egyptian Art, 10 J. Tech. L. & Pol’y 173, 179 (2005); Waring, supra note 170, at 261.
man power (faculty, students, and alumni) for the excavation. The
universities' participation would not only provide an additional source of
funding, it also would facilitate educating the public at large and the
individuals who participate in the excavation about the importance of
proper protection of newly discovered antiquities. The funding museums
could offset the costs of funding the archeological dig and acquiring the
term of years interest through their endowments, their fund-raising efforts,
their admission fees to see the exhibits, and by partnering with universities
and seeking contribution from the universities to help cover the expenses.
From an economic perspective, creating an incentive for consuming
museums to get involved in the excavation process would further maximize
protection of newly discovered antiquities. Interestingly, the United States
and Italy recently entered into an agreement to encourage long-term
exchanges of objects of archeological or artistic interest and to encourage
"American museums and universities jointly to propose and participate in
excavation projects authorized by the Ministry of Culture, with the
understanding that certain of the scientifically excavated objects from such
projects could be given as a loan to the American participants through
specific agreements with the Ministry of Culture...."244 All that is
missing is the incentive for the finder to report the archeological site to the
Ministry of Culture—an incentive the American museums and universities
should be encouraged jointly to participate in creating/funding.

F. Administration

While the possessory estate and future interest approach may appear, at
first blush, to be a radical departure from previous approaches to allocating
property rights to newly discovered antiquities, in application there are
existing practices which the parties can draw upon in implementing this
approach. First, it is fairly common for museums to loan artwork or

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244. Stephen W. Clark, Cultural Property Update, in ALI-ABA Course of Study, Legal
antiquities to other museums. Such loans grant the right to possession to the acquiring museum while the lending institution retains the future interest—the right to possession when the loan ends. Such loans typically are for a number of months or years (a term of years). With respect to newly discovered antiquities, source countries could condition the transferable term of years on the same basic terms as the current practice of loaning antiquities to museums in consuming countries. Moreover, source countries could condition the award of the transferable term of years to the finder on the finder reporting the discovery in a timely manner. Such antiquities could then be registered, creating an unambiguous chain of title. Finders who fail to report their finds in a timely manner would have no rights in the antiquity, thereby posing no risk to the current efforts of source countries to recover illegally exported antiquities.

In addition, the term of years approach is similar to the de facto outcome when a source country successfully recovers an antiquity which was illegally exported and/or sold to a museum or collector. For example, in 2006, the Metropolitan Museum of Art (the Met) pledged to return to Italy the Euphronios krater, a 2500-year-old vase that it had purchased in 1972 for approximately $1 million. The de facto result is that the Met had a term of years interest in the vase for thirty-four years. The problem is that under the current regime, the bulk of the money the Met paid for that term of years went to the middlemen in the black market, not to the

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245. See Clark, supra note 244, at 141; Palmer, supra note 47, at 950. Interestingly, the Metropolitan Museum of Art and the Ministry of Culture entered into an agreement whereby the Met will return the Euphronios krater to Italy and, in exchange, Italy will be making long-term loans of works of equal value to the Met. See Briggs, supra note 221, at 623.
246. See generally Palmer, supra note 47.
247. See generally Briggs, supra note 221, at 623; Palmer, supra note 47.
248. Such a reporting requirement is already in place in some source countries, either as a requirement to receive the state sanctioned finder’s fee or to avoid criminal sanctions. See Doyal, supra note 209, at 677 (stating that the finder’s fee system in Italy requires finders to turn the antiquity over immediately to receive the compensation); Gerstenblith, supra note 53, at 240 n.190 (discussing England’s Treasure Act of 1996 which imposes penalties on finders who fail to report found treasure trove). Timely reporting requirements date back to 1624 when the Catholic Church required landowners to report finds within twenty-four hours of discovery. See Brian Bengs, Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law, 6 Transnat’l L. & Contemp. Probs. 503, 512 (1996).
251. The Met technically did not have a term of years because the last day of the term was not calculable from the first day. See supra note 229. Looking at it ex post, however, the de facto effect of the possession is similar to a term of years.
In addition, there is no doubt that substantial administrative costs were expended both by the Met and the Italian authorities during the recovery process. Instead of expending resources at the back end on administrative costs, these funds would be better spent on the front end, compensating the finder for his or her term of years. The ex post effect is that the antiquity was basically "loaned" to the Met for the term in question. If the Met had known that it was not acquiring a fee simple absolute, but only a term of years, there is no doubt that it would not have paid a million dollars. But even if one substantially discounts how much the Met would have paid for the term of years, the amount would still be much more than the original finder received when he or she sold it to the first middleman.

Creating a legal market in which finders can transfer a term of years interest in newly discovered antiquities would maximize social welfare: (1) it would create a financial incentive for finders to come forward with their finds; (2) it would create an incentive for finders to leave the antiquity in the ground to permit excavation by archeologists; and (3) it would create an incentive for museums in consuming countries to fund such excavations, thereby maximizing protection of both the tangible and the intangible characteristics of the antiquity at minimal cost to the source countries.

G. Costs of Administration

Under the possessory estate and future interest approach to awarding property rights to newly discovered antiquities, the financial incentive for finders to come forward with their archeological artifacts would be provided at minimal expense to source countries. By awarding the finder a transferable term of years, source countries would be ensured ultimate ownership and possession of the antiquity at minimal out-of-pocket expense. The financial incentive would be provided by the market, i.e., by those interested in purchasing the terms of years. As long as the duration of the term of years is reasonable, there would be a vibrant market.

Moreover, the market for the transferable term of years should be controlled by the source country. The source country could hold periodic sales of all newly discovered antiquities found within the country. Finders would be required to register their finds with the proper authorities to

252. See Borke, supra note 203, at 394–95; Briggs, supra note 221, at 637 n.79 ("It is estimated that 98 percent of the profit from looted antiquities goes to the middlemen."); Campagna, supra note 131, at 286 ("As sad as all this is, it is more painful still to know that a poor Iraqi peasant who digs up a few cuneiform tablets, just to 'try to add to his meager income, is exploited twice: [h]is own culture and history are destroyed, and he gets paid only peanuts by the middlemen.'" (quoting Francis Deblauwe, Melee at the Museum, Nat'l Catholic Rep., Oct. 17, 2003, http://www.natcath.com/NCR_Online/archives2/2003d/1101730/101703n.htm)).

253. See supra note 252. As long as the term of years is long enough, the finder's compensation should also be greater than he or she would have received under any finder's fee approach currently in place in any source country. See supra notes 209–12 and accompanying text.
In contrast to the high administrative costs associated with the current enforcement efforts under the state ownership/retention approach, the possessory estate and future interest approach would minimize administrative expenses by giving an incentive for finders to report their finds to the proper authorities. In addition, by conducting the sales, the authorities could ensure that only qualified prospective purchasers participated, including museums and reputable dealers and collectors. By conducting the sales, the source countries would also have a paper trail of the antiquity’s transfer. Lastly, such sales could also generate revenue for the source countries by way of sales and transfer taxes. These revenues could be used to pay not only for the administrative costs of the transfer system, but also to compensate any property owners whose land or development rights may be taken due to its archeological significance.

H. Market Country Perspective

The possessory estate and future interest approach would go a long way toward satisfying the interests of an important market player in consuming countries: museums. Museums in market countries have, as part of their mission, the desire to house, study, and exhibit newly discovered antiquities. While they would prefer ownership, the ability to house and study such antiquities for an extended period of time, which a reasonable term of years would grant them, should be adequate. Museums and reputable dealers and collectors would much prefer the certainty that a sanctioned market in newly discovered antiquities would offer to the

254. See supra notes 248–49 and accompanying text.
255. Source countries which have adopted the state ownership/retention approach typically also have antiquities police to ensure enforcement. See Goldberg, supra note 67, at 1038. Moreover, [b]ecause there is no legal trade in the antiquities, all exportation and trade will be relegated to the illegal market, creating an even larger black market system that is much more difficult to police and prevent. However, [t]he attempt to embargo the flow of art to other countries suffers from another vice: The broader and more inclusive the embargo, the more difficult it is, physically and economically and politically, to enforce effectively.

Willis, supra note 51, at 234 (internal quotation marks omitted).
256. See Osman, supra note 124, at 996–97 for a discussion of a managed market likewise limited in participants. Participants could be required to post a bond or letter of credit to ensure return of the antiquity when the term of years had expired.
257. See supra note 249 and accompanying text.
258. For evidence of the need to compensate such property owners, see Cohan, supra note 69, at 56; Borodkin, supra note 49, at 406; Chang, supra note 42, at 835–36.
259. See Briggs, supra note 221, at 627; Cohan, supra note 69, at 57.
260. See Briggs, supra note 221, at 627–28. See generally Knox, supra note 58 (discussing the Bizot Group’s Declaration on the Importance and Value of Universal Museums).
261. It is well recognized that if an international market for legitimate antiquities were to emerge, the certainty associated with such transactions would ensure a vibrant and profitable market. Museums and reputable dealers and collectors would much prefer the certainty associated with a legitimate market over the current uncertainty. See Borodkin, supra note 49, at 412–13; Petr, supra note 49, at 504.
uncertainties of the current regime where an antiquity’s provenance is often ambiguous at best. Under the current regime, museums and collectors run the risk of not only losing their investment if the antiquity turns out to have been illegally exported, but they also suffer stiff penalties and the public embarrassment of being involved in an illegal conveyance.\textsuperscript{262} Museums and reputable collectors would welcome the opportunity to purchase a legal property interest in newly discovered antiquities, even if only for a limited period of time.\textsuperscript{263}

\begin{itemize}
\item I. Source Country Perspective
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The drawback to the possessory estate and future interest approach to newly discovered antiquities is that the source country must relinquish possession of the antiquity for the term of years.\textsuperscript{264} The loss of this cultural property, even for a limited period of time, no doubt is a cost to the source country. But this loss must be compared to the costs currently imposed on source countries under the prevailing state ownership/retention approach. Although there is no way to know for sure, it is widely acknowledged that most finders of newly discovered antiquities turn to the black market.\textsuperscript{265} Source countries lose possession of these antiquities, and there is little chance that they will ever regain possession of them.\textsuperscript{266} In addition, even if such illegally exported antiquities are recovered, often the artifact has sustained artistic damage,\textsuperscript{267} and much, if not all, of the historical and archeological information which was inherent in the find is lost forever.\textsuperscript{268} As the Getty and Met Agreements demonstrate, even where recovery efforts are successful, the source country often will have been deprived of possession of the antiquity for years, if not decades.\textsuperscript{269} Why not voluntarily agree to give up that possession in exchange for the benefits of the certainty of return at a fixed point in the near future coupled with the added value of enhanced artistic, historical, and archeological benefits?

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\item 262. See Briggs, supra note 221, at 627–28; Pearlstein, supra note 195, at 138–39; Warring, supra note 170, at 297; Petr, supra note 49, at 513–17.
\item 263. The time-honored practice of countries loaning out collections to museums in exchange for valuable consideration shows that at least museums would be interested in purchasing a term of years. From the museums’ perspective, there is not much difference between the two arrangements—only to whom the payment is being made. See generally Palmer, supra note 47.
\item 264. Of course, a source country could purchase the term of years of the antiquities it deemed too important to let leave the country.
\item 265. See Moore, supra note 52, at 468–69; see also Robin Morris Collin, The Law and Stolen Art, Artifacts, and Antiquities, 36 How. L.J. 17, 17 (1993); McElroy, supra note 211, at 549.
\item 266. Dutra, supra note 61, at 75; Margules, supra note 171, at 611; Willis, supra note 51, at 224.
\item 267. See supra note 141 and accompanying text.
\item 268. See supra notes 141–43 and accompanying text; see also Park, supra note 137, at 933.
\item 269. See Povoledo, supra note 1; see also supra note 251 and accompanying text.
\end{itemize}
J. The Problem of "Looted" Antiquities

While a possessory estate and future interest approach to the allocation of property would go a long way toward creating an incentive for otherwise law-abiding finders who unexpectedly, and often accidentally, stumble upon a newly discovered antiquity to report the find to the proper state authorities, there is also the problem of looted antiquities being sold on the international black market. As used here, looted antiquities are those intentionally and illegally taken from known and reported archeological sites and/or antiquities found by professional thieves who trespass on private and/or government property in the hope of finding, excavating, and exporting antiquities. These finders are much more intent upon breaking the law. It is unclear how much of the black market consists of the sale of "accidentally found" newly discovered antiquities and how much of the black market consists of "looted" antiquities, but many claim that the bulk of the transactions involve looted antiquities. It might appear that the possessory estate and future interest approach to who owns a newly discovered antiquity would have no impact on the problem of looted antiquities, but the opposite is true: The adoption of the possessory estate and future interest approach would have a meaningful and positive effect on reducing the black market for looted antiquities.

1. Enlisting Private Landowners

First, many "looted" antiquities are newly discovered antiquities that are found by "tombaroli" or grave robbers—professional thieves who trespass onto others' lands in search of undiscovered antiquities. The practice of looting is more widespread than it should be because under the prevailing state ownership/retention approach, undiscovered antiquities suffer from the "tragedy of the commons." Private landowners have no real incentive to protect against tombaroli coming onto their property in search of antiquities because they have no meaningful legal interest in such items. In fact, such tombaroli might actually be doing the landowner a favor if the discovery of the antiquity would cause the state to take not only the antiquity but the real property where it was found because of its archeological significance. If, on the other hand, landowners were granted a term of years in any and all antiquities on their land, under the


272. Looters of newly discovered antiquities are called tombaroli in Italy. See Bator, supra note 55, at 292; see also Briggs, supra note 221, at 637; Park, supra note 137, at 931–32.

273. See Bator, supra note 55, at 292; McElroy, supra note 211, at 555; Chang, supra note 42, at 835 n.39.

274. See supra note 222 and accompanying text.

275. See supra note 258 and accompanying text.
traditional law of finders approach, their property rights would prevail over a trespassing finder.\textsuperscript{276} If the landowners were granted an interest in any newly discovered antiquities on their land, they would be much more diligent in protecting their property from the tombaroli. All landowners would immediately, and costlessly, be enlisted in the national project of protecting the country's archeological artifacts. More antiquities would be found by otherwise law-abiding individuals who would now have an incentive to come forward with their finds as compared to the current regime where the landowners may even be thankful that the tombaroli have secreted the antiquities off their land. A possessory estate and future interest approach would reduce the prevalence of looted antiquities,\textsuperscript{277} thereby reducing the supply for the black market and increasing the supply for the source country sanctioned sales.

2. Enhancing Enforcement Efforts

A possessory estate and future interest approach to newly discovered antiquities would also enhance source country enforcement efforts. Under the prevailing state ownership/retention approach, source country enforcement efforts are spread thin because they have to try to uncover the illegal exporting of newly discovered antiquities as well as looting from known archeological sites.\textsuperscript{278} Under a possessory estate and future interest approach, local landowners would have an interest in protecting their lands from thieves who trespass onto their lands in search of undiscovered antiquities. By enlisting the aid of local landowners with respect to newly discovered antiquities, source countries could focus their enforcement efforts on known archeological sites.

In addition, if source countries were to partner with Western museums that fund the archeological excavation of the site, the museums would have an incentive to fund increased security measures at the site. The museums would have a vested interest in protecting their investment. This would also free up the source countries' enforcement resources at that site so that they could be transferred to other sites that lacked international funding.

Better focused efforts should be more productive in deterring those who might be tempted to loot antiquities and in catching those who do loot.

\textsuperscript{276} See Goldberg, supra note 67, at 1051; see also Moorman, supra note 156, at 720 n.27; Sharma, supra note 142, at 753–54. Where the trespass is trivial or technical, the trespasser may prevail in his or her claim. See Edward P. Morton, \textit{Public Policy and the Finders Cases}, 1 Wyo. L.J. 101, 105 (1947).

\textsuperscript{277} This assumes that the source countries use some of the revenues generated by the auction of the term of years to compensate property owners for any lands taken because of their archeological significance. See supra note 258 and accompanying text. Otherwise, the incentive provided by the term of years may not offset the potential loss if property owners’ land can still be taken without compensation.

antiquities. A possessory estate and future interest approach would increase protection for newly discovered antiquities by making enforcement efforts more effective.

3. Reducing Demand in Market Countries

A possessory estate and future interest approach would also help reduce the international black market for looted antiquities by reducing demand in the market countries. Many commentators have argued that the driving force behind the problem of looted antiquities is the excessive demand and minimal supply of antiquities.\textsuperscript{279} Under such conditions, prices soar, thereby increasing the "incentive for finders and smugglers of newly discovered antiquities to take the risks inherent in turning to the black market.\textsuperscript{280} If, however, a legitimate market for newly discovered antiquities were established, museums and other reputable dealers and collectors would prefer the certainty of the legitimate market over the uncertainty of the black market.\textsuperscript{281} This is particularly true with respect to the more valuable antiquities. As the demand for black market antiquities drops, particularly the more valuable ones, so too will prices, thereby reducing the incentive for finders to turn to the black market. The black market for looted antiquities could be reduced to an illicit trade of less valuable antiquities.

CONCLUSION

Social welfare with respect to newly discovered antiquities, whether measured nationally or internationally, is maximized by maximizing protection of the antiquities. Maximizing protection includes not only protecting the tangible component of the antiquity, but also its intangible archeological, historical, and/or cultural components. Museums and source countries should be working together to maximize the protection of newly discovered antiquities, but the "all or nothing" fee simple absolute approach to awarding property rights in newly discovered antiquities has driven a wedge between them. The traditional law of finders, which awards a freely transferable fee simple to the finder, typically results in the newly discovered antiquity ending up in a consuming country museum to the chagrin of the source country. In theory, the prevailing source country state ownership/retention approach awards title to the source country, which will result in the newly discovered antiquities remaining in the source country to the chagrin of the museums in consuming countries. In practice, the effect of the prevailing source country state ownership/retention approach has resulted in many, if not most, newly discovered antiquities being sold to

\textsuperscript{279} See Jowers, supra note 243, at 147–48; Merryman, supra note 58, at 831–33; Szopa, supra note 62, at 75–76 (acknowledging that while the supply has increased due to black market transfers, relative to the demand the supply is still minimal).

\textsuperscript{280} See Bator, supra note 55, at 291 n.41; Borke, supra note 203, at 394–95.

\textsuperscript{281} See supra note 261 and accompanying text.
private collectors on the black market to the chagrin of both the source countries and the consuming country museums. Consuming country museums and source countries need to work together if protection for newly discovered antiquities is to be maximized. While the Getty Agreement and other agreements like it will result in Western museums acquiring far fewer antiquities with questionable provenances, such agreements will not stop the thriving black market in illegally exported antiquities. Instead, these agreements will shift the demand side to unscrupulous buyers, thereby reducing the chances that newly discovered antiquities sold on the black market will ever be seen and appreciated by the public. To maximize social welfare, source countries and consuming museums need to work together to protect newly discovered antiquities by thinking outside of the traditional “fee simple” box.

To maximize protection of newly discovered antiquities, finders should be granted a possessory estate—a term of years—with the future interest being granted to the source country. The term of years should be freely transferable as long as the finder registers the find with the source country and transfers the antiquity in a source country sanctioned sale. Purchasers can be limited to museums and other reputable collectors in revenue-rich but antiquities-poor consuming countries that are interested in acquiring such antiquities, albeit for a relatively limited period of time. The result would be a “win-win” for all interested parties. Finders of newly discovered antiquities “win” because they would have a financial incentive to come forward with their find—the right to sell their possessory estate, a valuable property interest. More importantly, the incentive would be created at almost no cost to the source countries. The cost would be placed primarily on prominent museums in consuming countries. Such museums are in the best position to bear and distribute such costs. Museums around the world “win” because they would acquire the right to temporarily house, study, and show newly discovered antiquities, thereby furthering their mission and providing the consuming country’s public with an opportunity to see such antiquities. Source countries “win” because they would receive ultimate ownership of all antiquities found within their borders, which is their socially desirable goal, albeit delayed, at minimal administrative costs. From both a theoretical and a practical perspective, the best approach to who owns a newly discovered antiquity is a possessory estate and future interest approach.
Notes & Observations