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Risking Criminal Liability in Cultural Property Transactions

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> "It's my nature," [Michael Steinhardt] said. "As an investor, I welcomed the qualities of risk in all sorts of investments, and I didn't necessarily shy away from risk."[1]

> After the Dubai trip in 2010, Mr. Carroll said he twice told [Steve] Green to end the purchase negotiations because of "issues of provenance" with the cuneiform tablets. He said Mr. Green told him, "My family is not averse to risk." Mr. Green did not dispute Mr. Carroll's account.[2]

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1 Christian Berthelsen & Katya Kazakina, *Hex of the Idol: Steinhardt, Christie's Fight Heritage Claim*, BLOOMBERG (Aug. 18, 2017, 5:00 AM), https://www.bloomberg.com/news/articles/2017-08-18/hex-of-the-idol-steinhardt-christie-s-fight-heritage-claim [https://perma.cc/9KR9-DE5K].

2 Kelly Crow, *Hobby Lobby Scion Spent Millions on Biblical Relics - Then Came a Reckoning*, WALL ST. J. (Nov. 13, 2017, 11:10 AM), https://www.wsj.com/articles/hobby-lobby-scion-spent-millions-on-biblical-relicsthen-came-a-reckoning-1510589450 [https://perma.cc/E3QL-XQQ6].

I. Introduction

One of the concerns attending a cultural property transaction is the risk that the subject of the transaction is stolen property.[3] Whether a piece was looted from a site where it had rested since antiquity or was stolen from a more recent owner, trafficking in stolen property has serious potential consequences ranging from loss of value to criminal liability.

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3 One particularly well-explored manner in which art and artifacts have come to be stolen is as a result of Nazi looting during the Second World War. For a general overview of Nazi plunder and individual attempts to recover looted artwork, see generally Donald S. Burris, *Restoration of a Culture: A California Lawyer's Lengthy Quest to Restitute Nazi-Looted Art*, 45 N.C. J. INT'L L. 277 (2020) (providing an overview of Nazi looting and a chronology of American legal cases pertaining thereto); *see also generally* Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT'L L. 497 (2020) (discussing looted indigenous art and Nazi plunder, as well as the sociological implications thereof); Simon J. Frankel, *The HEAR Act & Laches After Three Years*, 45 N.C. J. INT'L L. 441 (2020) (discussing conflicting court decisions relating to Holocaust-era looted art, the 2016 HEAR Act, and the equitable doctrine of latches).

Another way in which cultural property comes to be stolen is from pillaging archaeologically-rich nations. For a discussion of the legal issues such pillaging raises, see generally Patty Gerstenblith, *Provenience & Provenance Intersecting with International Law in the Market for Antiquities*, 45 N.C. J. INT'L L. 457 (2020) (discussing the application of international laws and U.S. domestic laws on looted art to the context of plundered archaeological artifacts). For a discussion of the political calculus involved in the repatriation of such artifacts, see generally Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333 (2020) (discussing the repatriation of cultural heritage and the political calculations involved). Finally, for an overview of how the American civil asset forfeiture system can assist in such repatriations, see generally Stefan Cassella, *Recovering Stolen Art & Antiquities Under the Forfeiture Laws: Who Is Entitled to the Property When There Are Conflicting Claims*, 45 N.C. J. INT'L L. 393 (2020) (providing an overview of civil asset forfeiture laws and how they work to assist in the recovery of looted cultural patrimony).

Buyers and sellers seeking to avoid dealing in stolen property look to a piece's "provenance," its history of ownership over time.[4] Provenance records can be used to demonstrate the legality of one's ownership and possession of a cultural object.[5] However, given the lack of standardization or regulation of provenance in the art market, provenance records can also be easily falsified, making purchases of cultural property risky.[6] Some dishonest dealers simply add a false provenance sentence to their invoices, while others create forgeries with painstaking attention to detail.[7] Consider the efforts undertaken by Jonathan Tokeley Parry to cover up the fact that he and his co-conspirator, Frederick Schultz, were selling Egyptian antiquities that had been recently exported from Egypt.[8] First, Parry invented an old English collection named after his deceased great-uncle Thomas Alcock.[9] Then, he used tea bags to artificially age labels for objects included in the fake collection.[10] Parry even used 1920s restoration techniques, followed by a "phony restoration report describing what he purportedly did, as a modern restorer, to remove the old restoration."[11]

This Comment shifts the focus from the sellers to the buyers.

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4 *See Provenance Guide*, INT'L FOUND. FOR ART RES., https://www.ifar.org/Provenance_Guide.pdf [https://perma.cc/WC4U-47SY].

5 *See id.* at 2.

6 *Id.*

7 For example, in *United States v. Khouli*, the lead defendant allegedly laundered cultural property he acquired from others by listing his father's 1960s collection in the provenance. Memorandum of Law in Opposition to Defendants Alshdaifat's and Lewis's Omnibus Motions at 5–8, United States v. Khouli, No. 11-CR-340 (E.D.N.Y. 2012). Similarly, in *United States v. One Iraqi Assyrian Head*, the government alleged that when the shipper sent Iraqi and Egyptian cultural property to the United States, he listed Turkey as the country of origin, relying on unrelated Turkish import papers in his possession that he could produce to customs officials upon request. Complaint at 5, United States v. One Iraqi Assyrian Head, No. 13-CV-5015 (S.D.N.Y. 2013). Finally, in *United States v. One Triangular Fresco Fragment*, the shipper supplied a provenance to U.S. Customs & Border Protection that stated that the fresco was Macedonian in origin and was located in a private Swiss residence from 1959 through 2011. However, further investigation revealed that the fresco was Italian in origin and came from a site that was not discovered until 1969, 10 years after the false provenance placed the piece in Switzerland. Complaint at 7–10, United States v. One Triangular Fresco Fragment, No. 13-CV-6286 (E.D.N.Y. 2013).

8 *See* United States v. Schultz, 333 F.3d 393 (2d Cir. 2003); *see also* Brief by Appellee, United States v. Schultz, 333 F.3d 393 (2d Cir. 2003) (No. 02-1357).

9 Brief by Appellee, *supra* note 8, at 3.

10 *Id.* at 6.

11 *Id*. at 6–7 (citing trial transcript and exhibit).

When does a buyer of cultural property cross the line from taking a business risk to knowingly engaging in criminal conduct involving stolen property? Is taking a calculated risk by buying a piece with suspect provenance an act of business acumen, or—when it turns out to be stolen—knowing criminal conduct? To address these questions, this Comment will discuss legal and practical considerations surrounding these transactions and then apply the law to several hypothetical sales of cultural property. Part II examines areas where the law is more clearly established; it will identify U.S. laws available to combat illicit trafficking in stolen property, focusing on the National Stolen Property Act ("NSPA"), and discuss the doctrine of conscious avoidance. Part III explores areas where the law is not well fleshed out, including provenance and red flags in cultural property transactions. Finally, Part IV applies the NSPA and the conscious avoidance doctrine to potential red flags in hypothetical cultural property transactions.

II. Legal Background

A. U.S. Laws Used to Combat Cultural Property Trafficking

The United States is considered one of the top market countries for cultural property.[12] At the federal level, both criminal and civil laws restrict the movement of stolen cultural property. The laws and regulations that are commonly called upon to restrict or criminalize the movement of cultural property include the following: the Convention on Cultural Property Implementation Act ("CPIA"), a series of civil statutes that implement the 1970 UNESCO Convention;[13] import restrictions on cultural property based on bilateral agreements or emergency actions promulgated

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12 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-673, REPORT TO CONGRESSIONAL REQUESTERS: CULTURAL PROPERTY: PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES 11 (Aug. 2016), https://www.gao.gov/assets/680/679075.pdf [https://perma.cc/88XC-PVR2] (the United States is the largest "legal antiquities market" according to "agency officials and art market experts" consulted by the GAO); *see also* Lydia Deloumeaux, UNESCO Inst. for Statistics, The Globalization of Cultural Trade: A Shift in Consumption: International Flows of Cultural Goods and Services 2004–2013, at 34, 139, UNESCO Doc. UIS/2016/CUL/TD/1 (2016), http://dx.doi.org/10.15220/978-92-9189-185-6-en [https://perma.cc/QB66-YLLD] (showing the United States consistently ranked as the number one importer of cultural goods of cultural and natural heritage from 2004 through 2013).

13 19 U.S.C. §§ 2601–2613 (2012).

pursuant to the CPIA;[14] criminal laws prohibiting smuggling and false statements ;[15] customs regulations contained in the Code of Federal Regulations, such as those requiring truthful declarations to U.S. Customs & Border Protection ("CBP" or "Customs") and formal entry of goods valued at more than $2,500;[16] and the NSPA.[17] The United States also protects cultural property originating within its borders through the Archaeological Resources Protection Act ("ARPA")[18] and the Native American Graves Protection and Repatriation Act ("NAGPRA").[19] In addition to these laws, there are multiple laws granting the United States authority to forfeit smuggled or stolen cultural property.[20]

When cultural property originating in a foreign country is found in the United States under suspicious circumstances, U.S. law enforcement will look to the laws of the country of origin.[21] If a foreign country maintains and enforces a patrimony law—a law that vests ownership of cultural property in the state—removal of cultural property from that country without authorization is the legal

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14 19 C.F.R. §§ 12.104g, 12.104j, 12.104k (2019). *See generally Current Import Restrictions*, BUREAU OF EDUC. & CULTURAL AFF., https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions [https://perma.cc/B327-9UTC] (detailing a list of current U.S. international import restriction agreements on cultural property with various countries).

15 *See* 18 U.S.C. §§ 541–555 (2012).

16 19 C.F.R. § 145.12(a) (2019). *See generally* 19 C.F.R. §§ 141–145 (2019) (providing regulations on the entry of merchandise, the entry process, special entry procedures, warehouse and rewarehouse entries and withdrawals, and mail importations).

17 National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2012). Other more commonly charged federal criminal laws may also be implicated by the facts of a given case, including mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), false statements (18 U.S.C. § 1001), money laundering (18 U.S.C. § 1956), tax crimes (26 U.S.C. § 7201–7230), and conspiracy to violate the NSPA, customs laws, or any of the foregoing crimes (18 U.S.C. §§ 371, 1349, 1956(h)).

18 Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa–470mm (2012).

19 Native American Graves Protection Act, 25 U.S.C. §§ 3001–3012 (2012).

20 For example, 18 U.S.C. § 545 (2012) (criminal forfeiture of smuggled items); 19 U.S.C. § 1595a(c)(1)(A) (2012) (civil forfeiture of merchandise that has been "stolen, smuggled or clandestinely imported or introduced"); and 19 U.S.C. § 2609 (2012) (civil forfeiture of cultural property imported in violation of the CPIA).

21 United States v. An Antique Platter of Gold, 184 F.3d 131, 137 (2d Cir. 1999) (discussing Customs Directive No. 5230-15 which "advised customs officials to determine whether property was subject to a claim of foreign ownership" prior to seizing the property).

equivalent of stealing.[22] However, if the property was merely removed in violation of a foreign export law, it will not be considered "actionable" under U.S. law "for that reason alone."[23] Therefore, a valid provenance showing that cultural property was removed from a country at a time when it had no patrimony law in force provides a defense to a claim by the country for the property's return, forfeiture allegations based on importation of stolen property, or criminal charges based on dealing in stolen property.[24]

B. The Knowledge Element of the NSPA

The main criminal law that should concern art market participants, setting aside laws which criminalize conduct during importation, is the NSPA. The NSPA, codified at Sections 2314 and 2315 of Title 18 of the United States Code, criminalizes a broad swath of commercial activities.[25] Section 2314 criminalizes the movement of stolen property across a state or national border, while Section 2315 criminalizes its subsequent receipt, possession, concealment, storage, bartering, sale or disposition of stolen property.[26] Both statutes include, as an element of the crime, that the stolen property crossed interstate or international boundaries, an inevitability with foreign cultural property in the United States.[27]

This Comment considers how the *mens rea* element of the NSPA—knowledge—might be satisfied through a purchasing dealer or collector's conscious avoidance. The starting point of this inquiry is the language of the NSPA itself. The NSPA language applicable to cultural property is as follows:

> Title 18, United States Code, Section 2314
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> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise . . . of the value of

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22 *See* United States v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003) (holding that the NSPA applies to property stolen in violation of a foreign patrimony law whose language and enforcement shows that it was intended to assert true ownership over the property); *see also* United States v. McClain, 545 F.2d 988, 1000–01 (5th Cir. 1977) (holding "that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the [NSPA]").

23 *McClain*, 545 F.2d at 996.

24 *See Schultz*, 333 F.3d at 393.

25 National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2012).

26 *Id.*

27 *Id.*

> $5,000 or more, *knowing* the same to have been stolen, converted or taken by fraud . . . . Shall be fined under this title or imprisoned not more than ten years, or both . . . .[28]
>
> Title 18, United States Code, Section 2315
>
> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise . . . of the value of $5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, *knowing* the same to have been stolen, unlawfully converted, or taken . . . . Shall be fined under this title or imprisoned not more than ten years, or both . . . .[29]

The knowledge element of the NSPA relates to the actor's knowledge that the goods were stolen or unlawfully or fraudulently taken.[30] More specifically, Section 2314 provides that the perpetrator must know that the property has been "stolen, *converted or taken by fraud*."[31] Section 2315 contains similar but slightly different language: "stolen, *unlawfully converted, or taken*."[32] Courts interpreting the NSPA have found that despite these differences, both sections apply to "all felonious takings" that deprive an owner of her property "regardless of whether or not the theft constitutes common-law larceny."[33] Knowledge can be proven not only by evidence of actual awareness of certain facts, but through evidence that the defendant consciously avoided learning those facts.[34] The conscious avoidance theory will be discussed in more detail below.

In the context of cultural property, direct knowledge that

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28 *Id.* § 2314.

29 *Id.* § 2315.

30 United States v. Schultz, 333 F.3d 393, 411 (2d Cir. 2003).

31 National Stolen Property Act, 18 U.S.C. § 2314 (2012).

32 *Id.* § 2315.

33 *See* United States v. McClintic, 570 F.2d 685, 688 (8th Cir. 1978); *see also* United States v. Portrait of Wally, 663 F. Supp. 2d 232, 273 (S.D.N.Y. 2009) (defining conversion in Section 2314 as "the unauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with the rights of the owner").

34 *See* United States v. Jewell, 532 F.2d 697, 701 (9th Cir. 1976) (holding that deliberate ignorance or conscious purpose to avoid learning the truth is enough to prove an element of knowledge); United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000) ("[I]t is not inconsistent for a court to give a charge on both willful blindness and actual knowledge, for if the jury does not find the existence of actual knowledge, it might still find willful blindness.").

previously documented works were stolen may be available through stolen art databases, news reports, or other sources. Knowledge that undocumented property was stolen may be difficult to come by; market participants often look to circumstantial evidence to assess the legal status of a piece and the validity of a proffered provenance. For example, country-specific "red lists" of cultural objects at risk issued by the International Council of Museums ("ICOM") can raise awareness that a class of artifacts is likely to include stolen pieces.[35]

C. The Conscious Avoidance Doctrine

Conscious avoidance is often used interchangeably with "willful blindness" or "deliberate ignorance."[36] At its base, the doctrine stands for the proposition that "a defendant's affirmative efforts to 'see no evil' and 'hear no evil' do not somehow magically invest him with the ability to 'do no evil.'"[37]

As courts discussing conscious avoidance have not adopted a single articulation of the doctrine, for purposes of discussing its application to stolen cultural property, this Comment adopts the following model federal jury instruction:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with (or that the defendant's ignorance was solely and entirely the result of) a conscious purpose to avoid learning the truth (e.g., that the statement was false), then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.

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35 *Red Lists Database*, INT'L COUNCIL OF MUSEUMS, https://icom.museum/en/resources/red-lists/ [https://perma.cc/FH9T-RMPR] (providing drop-down filters for searching for red listed items and hosts copies of PDFs for various particular red lists, such as "Emergency Red List of Cultural Objects at Risk – Yemen").

36 KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 17:09 "Deliberate ignorance—Explained" (6th ed. 2019) ("This type of '*deliberate ignorance*' or '*conscious avoidance*' instruction, sometimes also called a '*Jewell*' or '*ostrich*' instruction should only be given 'when the defendant claims a lack of guilty knowledge and there are facts and evidence that support an inference of deliberate ignorance.'") (quoting United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829, 106 S.Ct. 92, 88 L.Ed.2d 76 (1985)).

37 United States v. DiTommaso, 817 F.2d 201, 218 n.26 (2d Cir. 1987).

> If you find that the defendant was aware of a high probability that (e.g., the statement was false) and that the defendant acted with deliberate disregard of the facts, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed that (e.g., the statement was true), he may not be convicted.[38]

To summarize, conscious avoidance may be found where a defendant (1) was aware of a high probability that the fact was true, *and* (2) acted with a conscious purpose of avoiding learning the truth.[39] Further, a defendant will not be found to have consciously avoided knowledge if a factfinder concludes that he actually believed that the fact was not true or that the defendant was merely negligent, foolish, or mistaken.[40]

In a criminal case charging a violation of the NSPA, the government must prove beyond a reasonable doubt that an object was stolen.[41] The defendant's knowledge that the object was stolen would be the subject of a conscious avoidance instruction.[42] A factfinder may decide that a defendant meets the knowledge standard if the government proves that the defendant was aware of the high probability that the property was stolen and deliberately disregarded available information or avoided learning facts that would have made the property's legal status obvious.[43] The defendant may counter evidence of conscious avoidance by arguing that either the defendant actually believed that the property was not stolen or "was merely negligent, foolish or mistaken."[44] The sophistication, experience and past practices of the defendant in the cultural property market, and whether the defendant sought and received advice, will be relevant to a factfinder's consideration of

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38 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL, ¶ 3A.01, Scienter, Instruction 3A-2 Conscious Avoidance: Deliberately Closing Eyes (Matthew Bender 2019) (citing Supreme Court and Circuit Court authorities) [hereinafter Scienter Instructions].

39 *Id.*

40 *Id.*

41 National Stolen Property Act, 18 U.S.C. § 2314 (2012).

42 *See* United States v. Schultz, 333 F.3d 393, 413–14 (2d Cir. 2003).

43 Whether or not the defendant's inquiry would have resulted in actual knowledge is not the relevant inquiry. United States v. Nektalov, 461 F.3d 309, 315 (2d Cir. 2006) ("[T]he applicability of the doctrine does not turn on the truth of the particular proposition in question, but on what the defendant does to avoid reaching subjective certainty (mistaken or not) about that proposition.").

44 *See* Scienter Instructions, *supra* note 38.

this defense.[45]

To warrant the conscious avoidance instruction at trial, "(a) the element of knowledge must be in dispute and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact."[46] The instruction may not be given if the "evidence alerting a defendant to the high probability of criminal activity"—here, theft—is "direct evidence of the illegality itself," as this would result in a defendant's actual knowledge of the theft.[47] If, on the other hand, the evidence of theft is circumstantial, the instruction can be given in the alternative as circumstantial evidence which "can be used to show both actual knowledge and conscious avoidance."[48]

III. Practical Considerations in Cultural Property Transactions: Provenance and Red Flags

A. Evolving Expectations Regarding Provenance

Provenances are not standardized in law or practice and are therefore inconsistent in appearance, contents, and level of detail.[49] A typical provenance takes the form of a typed entry on a seller's invoice or letterhead.[50] It may or may not be supported by

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45 *See* United States v. Lumiere, 249 F. Supp. 3d 748, 766 (S.D.N.Y. 2017) (stating that the knowledge element is subjective, not objective); *cf. Schultz*, 333 F.3d at 416 (taking into account Schultz's expertise "in the field of Egyptian antiquities [and] many years of experience" in determining whether he had actual knowledge of Egypt's patrimony law).

46 *Lumiere*, 249 F. Supp. 3d at 765 (S.D.N.Y. 2017), *appeal withdrawn*, No. 17-2010, 2017 WL 9732075 (2d Cir. Oct. 11, 2017).

47 *Nektalov*, 461 F.3d at 316 (noting that "a conscious avoidance instruction is 'not appropriate'" in such circumstances) (quoting United States v. Sanchez–Robles, 927 F.2d 1070, 1074 (9th Cir. 1991)).

48 United States v. Ferguson, 676 F.3d 260, 278 (2d Cir. 2011). *See* United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000).

49 Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART, TECH. & INTELL. PROP. L. 219, 229 (2009) (noting the lack of "accepted consensus surrounding the type of documentation and the nature of the evidence that buyers and sellers will accept as proof of ownership history").

50 *Id.* at 229; *see, e.g.*, De Sole v. Knoedler Gallery, LLC, 139 F. Supp. 3d 618, 628 (S.D.N.Y. 2015) (provenance included on gallery invoices); Duchossois Indus., Inc. v. Stelloh, No. 87 C 4132, 1988 WL 2794, at *1 (N.D. Ill. Jan. 13, 1988) (provenance written on the seller's stationery).

documentary evidence such as sales receipts, publications in museum, gallery or auction catalogs, customs declarations, and even family photographs.[51] The fact that provenances can be generated by anyone means they can be easily faked by the unscrupulous.[52] Moreover, many provenances are difficult to verify through due diligence, as collectors and dealers are traditionally secretive; a typical provenance lists prior owners as "private collectors" located in particular countries or cities.[53] These monikers could represent good-faith attempts to preserve the privacy of sellers and restrict access to the dealers' legitimate sources. On the other hand, they could be fraudulently invented to disguise an incomplete history that would dissuade a potential buyer or, worse, to cover up a known history that is problematic. For example, a buyer might not purchase a piece if the first recorded owner on the provenance was a dealer who is widely believed to have trafficked in looted artifacts.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 UNESCO Convention"), which addressed methods to prevent cultural property trafficking, return looted property, and foster international cooperation, marked a turning point in the treatment of provenance.[54] After the 1970 UNESCO Convention was promulgated, many professionals in the

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51 Levine, *supra* note 49, at 231.

52 *See Provenance Guide, supra* note 4. *See, e.g.*, Catherine Hickley, *Germany's $14 Million Art Forgers Jailed for Total 15 Years*, BLOOMBERG (Oct. 27, 2011, 9:07 AM) (reporting that the criminals "even forged family photographs from the 1930s, showing paintings hanging in the background, with [defendant] posing as her grandmother, to convince potential buyers that the provenance was authentic").

53 Multiple art market participants and academics have proposed registration systems for cultural property to address issues of both authenticity and ownership going forward. *See, e.g.*, Jennifer Anglim Kreder & Benjamin A. Bauer, *Protecting Property Rights and Unleashing Capital in Art*, 2011 UTAH L. REV. 881, 885 (2011) (proposing a Federal Bureau of Cultural Property Registration); Derek Fincham, *Assessing the Viability of Blockchain to Impact the Antiquities Trade*, 37 CARDOZO ARTS & ENT. L.J. 605, 622–24 (2019) (describing initiatives to integrate blockchain and the cultural property trade); William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 579 (2014) (proposing an electronic database in which insufficiently documented objects can be published anonymously and become "free and clear of any claims" if the country of origin does not claim the object within one year).

54 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

archaeological and ancient art market voluntarily adopted standards which recognize 1970 as an ethical line in the sand; objects for which there is no documentation showing they were removed from their source country before 1970 or legally exported after 1970 are subject to higher scrutiny.[55] In 1973, the Archaeological Institute of America ("AIA") adopted a resolution discouraging museums from acquiring pieces collected from that point forward "in violation of the laws obtaining in the countries of origin."[56] The AIA and its publication, the American Journal of Archaeology ("AJA"), also barred the use of the AIA annual meeting and AJA as fora for initial announcements or publication of research concerning objects that did not meet the AIA's antiquities policy.[57] In 2008, the American Alliance of Museums ("AAM") issued a guideline "recommend[ing] that museums require documentation that [an] object was out of its probable country of modern discovery by November 17, 1970."[58] Likewise, in 2013, the Association of Art Museum Directors ("AAMD") issued guidelines adopting 1970 "as a threshold for a more rigorous analysis of provenance information."[59] Over time, many market participants and observers began to view 1970 as a dividing line for ethical collecting, though empirical research suggests that the "1970 standard" has not had a clear impact on the sale of antiquities.[60]

While the 1970 UNESCO Convention impacted the treatment

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55 *See* Patty Gerstenblith, *The Meaning of 1970 for the Acquisition of Archaeological Objects*, 38 J. FIELD ARCHAEOLOGY 4, 364 (2013) (describing "the 1970 standard").

56 Resolution on the Acquisition of Antiquities by Museums, ARCHAEOLOGICAL INST. OF AM. (Dec. 19, 1973), https://www.archaeological.org/resolution-on-the-acquisition-of-antiquities-by-museums/ [https://perma.cc/MJB3-ZBCW].

57 *See* Gerstenblith, *supra* note 55, at 365 (discussing the use of the 1970 UNESECO Convention as an ethical guide by professional organizations).

58 *Archaeological Material and Ancient Art*, AM. ALL. OF MUSEUMS (July 2008), https://www.aam-us.org/programs/ethics-standards-and-professional-practices/archaeological-material-and-ancient-art/ [https://perma.cc/9TD2-SW7X].

59 *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, AM. ALL. OF MUSEUMS (2013) (discouraging members from acquiring an object "unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970," and allowing members to exercise their judgment with respect to pieces lacking complete provenances).

60 *See* Lauren Baker, *Controlling the Market: An Analysis of the 1970 UNESCO Rule on Acquisition and the Market for Unprovenanced Antiquities*, 52 STAN. J. INT'L L. 321, 332 (2016).

of provenance by the art and archaeology community after 1970, the market arguably had lower expectations about documenting ownership in connection with pre-1970 transactions.[61] Accordingly, the recorded history of prior owners and sellers, even for legally owned property, may trail off prior to that date, leading to the quandary of "orphaned" pieces.[62] Orphaned cultural property consists of art or artifacts with insufficient provenance to satisfy current ethical standards.[63] Between the risk that a seller of these antiquities is not passing along good title,[64] and the fact that a significant portion of the cultural property community has voluntarily agreed not to promote or engage in transactions involving such property, the market value of orphans can be reduced and their current owners may find it difficult to find new homes for these objects.[65] Nonetheless, the lack of a pre-1970 provenance alone does not render a transaction illegal and orphaned property continues to be purchased by those willing to assume some risk.[66]

B. Potential of Red Flags in Cultural Property Transactions

The following potential red flags in cultural property transactions have been identified by courts in New York, one of the largest and most significant art markets[67]:

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61 *See* Levine, *supra* note 49, at 229–30.

62 *See* William G. Pealstein, *White Paper: A proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 570 n.20 (2014) (estimating that "hundreds of thousands" or a "million or more" objects became "orphans" following the AAMD's adoption of the "1970 Rule").

63 *See* Richard M. Leventhal & Brian I. Daniels, *"Orphaned Objects," Ethical Standards, and the Acquisition of Antiquities*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 339, 347 (2013).

64 Some possessors of stolen property have argued that they acquired valid title by operation of foreign laws. *See, e.g.*, Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010) (possessor of disputed drawing argued that under Swiss law a prior purchaser acquired valid legal title after five years passed without a prior owner claiming the property). However, if a claim is lodged after the disputed property has been imported into the United States, U.S. courts choose to apply local laws which typically bar a thief's downstream purchasers from ever acquiring good title to the stolen property. *See, e.g.*, *id.* at 140–46 (holding that New York law preventing a thief from passing good title, rather than Swiss law, governed the ownership of Nazi-looted art); In re Newpower, 233 F.3d 922, 929 (6th Cir. 2000) (noting the "proposition, long established at common law, that a thief has no title in the property that he steals").

65 *See* Leventhal & Daniels, *supra* note 63, at 350.

66 *See id.* at 352.

67 *See, e.g.*, Biro v. Nast, No. 11 Civ. 4442 JPO, 2012 WL 3262770, at *7 (S.D.N.Y.

> (1) whether the sale price is obviously below market, (2) whether the negotiations or procedure of the sale differed from previous transactions between buyer and seller, (3) whether the buyer was aware of the seller's financial difficulties, or (4) whether the buyer would have reason to doubt the seller's ownership of the artwork.[68]

Additional red flags in the sale of art and artifacts could include the following: fresh chisel marks; a previously unknown hoard of cultural artifacts from a heavily looted region; the appearance at the start of a provenance chain of a person known for possessing or trafficking in stolen cultural property; use of a country of origin that would be unusual for the artifact and which does not have a longstanding patrimony law; existence of multiple, inconsistent versions of the provenance; the appearance of the type of cultural property on a "red list" for a country with longstanding patrimony laws; and concerning remarks made by the seller, such as discouraging further investigation.

IV. Applying the Conscious Avoidance Doctrine to Red Flags in Cultural Property Transactions

There is clear precedent for applying the conscious avoidance doctrine to the knowledge element of the NSPA in the context of stolen cultural property. *United States v. Schultz*, a leading case concerning cultural property and the NSPA, involved appellate review of a conscious avoidance instruction.[69] In *Schultz*, the issue was not whether Egyptian artifacts had been recently removed from Egypt; Schultz and Parry were well aware of the origin of their pieces and had created false provenances.[70] Instead, the fact at issue was whether Schultz was aware of an Egyptian patrimony law that vested ownership of these artifacts in the state.[71]

Another leading cultural property case involving the conscious avoidance doctrine and the NSPA is *United States v. Portrait of*

Aug. 10, 2012) (referencing "the centrality of New York City to the global art market").

68 Overton v. Art Fin. Partners LLC, 166 F. Supp. 3d 388, 401 (S.D.N.Y. 2016) (noting that these "possible red flags" have been identified by courts applying New York law as triggering a "duty of heightened inquiry in the art industry").

69 United States v. Schultz, 333 F.3d 393, 412–14 (2d Cir. 2003).

70 *Id.* at 396.

71 *Id.* at 416 ("Schultz's defense at trial was that he was unaware of the existence of Law 117 [Egypt's patrimony law].").

Wally, a civil forfeiture action involving Egon Schiele's painting of Valerie Neuzil.[72] Had *Portrait of Wally* proceeded to trial, an issue for the jury would have been whether one of the key figures in the case "knew, or consciously avoided knowing" that the painting was stolen based on his interactions with the victim.[73]

This Comment focuses on how a downstream purchaser who, unlike the actors in *Schultz* and *Portrait of Wally*, lacks direct knowledge of a piece's history would fare under a conscious avoidance standard. The buyer's awareness of an earlier theft—or conscious avoidance of that fact—would be based on information provided by the seller, the buyer's due diligence, and the buyer's interpretation of circumstantial evidence.

To explore how the conscious avoidance doctrine may be applied in the context of stolen cultural property, this Comment presents three hypothetical situations. As we proceed through the scenarios, keep in mind that red flags, or circumstantial evidence of theft, "can be used to show both actual knowledge and conscious avoidance."[74] In addition, as the charge under consideration is a violation of the National Stolen Property Act, the reader should assume that the government can prove that the subject of each proposed transaction was, in fact, stolen and then moved across state or international borders.

A. Scenario One: The Sale of Ancient Egyptian Artifacts

In this scenario, a seller offers a collection of hundreds of Egyptian scarabs and shabtis to a buyer. A scarab is a small carved stone or ceramic piece molded in the shape of a scarab beetle, an insect that had religious and cultural significance to ancient Egyptians.[75] The flat bottoms of scarabs were generally engraved so that they created a raised image when pressed into clay.[76] A shabti is a small figurine in the shape of a mummified person.[77]

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72 United States v. Portrait of Wally, 663 F. Supp. 2d 232, 232 (S.D.N.Y. 2009).

73 *Id.* at 269–71.

74 United States v. Ferguson, 676 F.3d 260, 278 (2d Cir. 2011).

75 Kierra Foley, *Scarabs*, JOHNS HOPKINS ARCHAEOLOGICAL MUSEUM, http://archaeologicalmuseum.jhu.edu/the-collection/object-stories/ancient-egyptian-amulets/scarabs/ [https://perma.cc/5RHW-MUZD].

76 *Id.*

77 Joshua J. Mark, *Shabti Dolls: The Workforce in the Afterlife*, ANCIENT HIST. ENCYC. (Jan. 18, 2012), https://www.ancient.eu/article/119/shabti-dolls-the-workforce-in-

Shabtis were buried with ancient Egyptians who believed that the figures would become their servants in the afterlife.[78] Shabtis were commonly made of glazed or painted ceramic, but were also fashioned from stone, wood, and other materials.[79] Shabtis are included in the ICOM Red List of Egyptian Cultural Objects at Risk.[80] Both artifacts—scarabs and shabtis—existed in large numbers in ancient Egypt and continue to be found in modern excavations. Egypt has a patrimony law recognized in U.S. courts,[81] but many excavation sites have nonetheless been looted since it went into effect, with evidence of looting dramatically increasing beginning in 2009.[82]

Upon the buyer's request, the seller provides a provenance indicating that the collection was established before 1970, outside of Egypt, by the current seller's father and grandfather. No documentation supporting this provenance is available besides the seller's statement. The artifacts have not been exhibited or mentioned in any catalogs or publications. The seller's price is on the low end for the type of artifact on a per item basis, which the seller explains is because the buyer is willing to purchase them in bulk. The total purchase price has six digits.

In our example, there are two key facts that should cause a buyer to be aware of a high probability that the artifacts are looted. First, shabtis are listed in the ICOM Red List of Egyptian Cultural Objects at Risk because they are among the "categories or types of [Egyptian] cultural items that are most likely to be illegally bought and sold."[83] Second, the sale involves a large group of small, common items.[84] Wary buyers may suspect that the offered

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the-afterlife/ [https://perma.cc/84JY-QH6V].

78 *Id.*

79 *Id.*

80 *Emergency Red List of Egyptian Cultural Objects at Risk,* INT'L COUNCIL OF MUSEUMS, https://icom.museum/wp-content/uploads/2018/07/120521_ERLE_EN-Pages.pdf [https://perma.cc/7PA7-3C73] [hereinafter ICOM Red List of Egyptian Cultural Objects at Risk].

81 *See, e.g.*, United States v. Schultz, 333 F.3d 393, 402 (2d Cir. 2003) (holding that Egyptian Law 117 clearly and unambiguously vests ownership of antiquities found in Egypt after 1983 in the Egyptian government and that Egypt actively enforced the law).

82 *See* Sarah Parcak, et al., *Satellite Evidence of Archaeological Site Looting in Egypt: 2002–2013*, 90 ANTIQUITY 349, 193 (2016).

83 ICOM Red List of Egyptian Cultural Objects at Risk, *supra* note 80, at 2, 4.

84 *See, e.g.*, Sarah Birnbaum, *Hobby Lobby Ignored 'Red Flags' About Stolen Iraqi*

property is a hoard of artifacts found together far more recently than 1970.[85] Arguably, the reference to "before 1970" in the provenance is also a red flag as the date conveniently meets the 1970 standard adopted by museum and archaeology professionals, despite the seller offering no evidence supporting an acquisition by this date.[86]

Would the buyer recognize these issues or be aware of the recent looting of Egyptian antiquities? The standard, after all, requires a subjective belief or awareness.[87] Perhaps the buyer is a novice,[88] but then why is the buyer purchasing so many similar objects for such a large sum of money? Why is the buyer interested in these items? What investigation has he or she done that might have informed the buyer of issues surrounding the illicit market in these artifacts? Has the buyer consulted with an expert in cultural property importation or in Egyptian artifacts in particular? What advice did the buyer receive? These are the types of facts that a factfinder would consider in determining whether the buyer was aware of the high probability that the artifacts were looted.

If the buyer's awareness of the potential looting is established, the next step is to determine whether the buyer took steps to avoid learning that the objects were, in fact, looted.[89] We start by considering what the buyer could have done in this scenario to investigate the seller's limited provenance. For example, the buyer could have asked the seller to speak with other members of the seller's family about the family's collecting history and ask if

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Artifacts, PUB. RADIO INT'L (July 6, 2017, 2:15 PM), https://www.pri.org/stories/2017-07-06/hobby-lobby-ignored-red-flags-about-stolen-iraqi-artifacts [https://perma.cc/YG7E-HDUR] ("[A] massive scale — over 5,000 antiquities. 'There's no place for it to come from in a legal way.'").

85 *See, e.g.*, *id.* ("[O]bjects that would have had to have left Iraq maybe 100 years ago for them to be fully legal. And there are just so few of those. So, if somebody comes up to you saying they have 3,000 Iraqi tablets to sell you and we didn't know about them beforehand, you should really expect that they're loot.").

86 *See Guidelines on the Acquisition of Archaeological Material and Ancient Art*, *supra* note 59; *see generally* Gerstenblith, *supra* note 55, at 364 (discussing "the 1970 Standard").

87 *See* United States v. Lumiere, 249 F. Supp. 3d 748, 766 (S.D.N.Y. 2017) (discussing the element of subjective awareness).

88 *See, e.g.*, United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003) (acknowledging that experts in the field are held to a higher standard of knowledge).

89 *See, e.g.*, United States v. Jewell, 532 F.2d 697, 701 (9th Cir. 1976); O'MALLEY, GRENIG, & LEE, *supra* note 36, § 17:09 (describing "deliberate ignorance").

anyone else recalled these objects.[90] Perhaps the buyer could have interrogated the seller on details of the collection—where had it been stored, what precautions were taken to prevent breakage, and who else has seen the pieces.[91]

B. Scenario Two: The Sale of a Painting by a Modern Artist

In this second scenario, we turn to a transaction involving documented cultural property whose history may be easier to trace. A buyer is considering the purchase of an oil-on-canvas painting by an artist who sold her works in Europe in the years between World Wars I and II through a gallery. The provenance lists only the immediate prior owner who is identified as an anonymous Swiss collector who acquired it on the Swiss art market in 1975. No prior owners are mentioned. The price is consistent with similar works by the artist. The painting is being offered by a well-regarded London gallery.

A wary buyer should be concerned by the limited and vague provenance provided for a modern piece. The natural concern, based on the sale of a piece prior to World War II, is that the artwork could have been stolen from or been the subject of a forced sale by persons persecuted by the Nazi regime.[92] If the buyer does not take

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90 *See, e.g.*, United States v. Portrait of Wally, 663 F. Supp. 2d 232, 264 (S.D.N.Y. 2009) ("Belvedere had cause to suspect that Wally did not belong to the Rieger heirs because when Garzarolli, Balke, Novotny, and Broda's secretary inspected the works restituted to the Rieger heirs to determine whether the Belvedere should acquire them, they described Wally as 'Portrait of a Woman,' while handwritten notes indicate they knew it depicted 'Wally Neuzil from Vienna.'").

91 *See, e.g.*, Porter v. Wertz, 68 A.D.2d 141, 146 (N.Y. App. Div. 1979) ("Had Ms. Drew-Bear done so much as call either of the telephone numbers Wertz had left, she would have learned that Wertz was employed by a delicatessen and was not an art dealer."); Complaint at ¶ 25 and Statement of Facts at ¶ 6, United States v. Approx. 540 Ancient Cuneiform Tablets, Docket no. 17-CV-3980 (LDH) (E.D.N.Y.) (despite the inclusion in the provenance of two telephone numbers for a person in Mississippi who purportedly stored the artifacts since the 1970s, Hobby Lobby did not attempt to contact the alleged custodian to confirm this provenance, which was, in fact, false).

92 *See Portrait of Wally*, 663 F. Supp. 2d at 242 (The court held that even if Bondi had sold Wally to Welz, it was a forced sale due to Nazi persecution). *See generally* Anne Rothfeld, *Nazi Looted Art: The Holocaust Records Preservation Project*, 34 PROLOGUE 2 (Summer 2002) (providing additional information regarding Nazi Art Confiscations); Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, 2019 U. ILL. L. REV. 363, 368 (2019) ("A provenance gap in a painting could indicate that it probably changed hands under the Nazis or was even just stolen by the Nazi regime.").

steps to check the artwork against a registry that would include Holocaust era items, a factfinder may well conclude that the buyer deliberately closed his or her eyes to learning that the painting was stolen.[93] Efforts to authenticate paintings through catalogues raisonnés or experts are also reasonable steps that can yield provenance information.[94] A failure to use these resources could be deemed suspect.

Querying public databases such as the Interpol Stolen Works of Art database[95] or inquiring with databases such as the Art Loss Register ("ALR")[96] or the Artive Database[97] can tell a prospective buyer if an object has been reported stolen. Visual searches for suspected stolen Italian cultural property can be conducted using the "iTPC" smartphone application provided by the Carabinieri Command for the Protection of Cultural Heritage (known by its Italian initials as the "TPC").[98] While these queries may be deemed

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93 *See Portrait of Wally*, 663 F. Supp. 2d at 272 (finding that the seller knew that Bondi owned Wally before prior to fleeing Nazi persecution and "never sought any sort of documentary confirmation or attempted to contact the Rieger heirs or question Bondi himself").

94 *See generally Provenance Guide*, *supra* note 4 *(*An artist's catalogue raisonné is a "detailed compilation of an artist's work and often includes some provenance information, exhibition history, publication references, attributions, current owners, and identifying features of the work, such as dimensions, inscriptions and condition.").

95 *Stolen Works of Art*, INTERPOL, https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database [https://perma.cc/NXU8-WYL9] (The Stolen Works of Art Database is an international database with descriptions and pictures of more than 50,000 stolen works of art provided by authorized authorities. It is Interpol's main tool to combat the trafficking of cultural property).

96 *The Art Loss Register*, INT'L ART & ANTIQUE LOSS REG. LTD., https://www.artloss.com/about-us [https://perma.cc/W4JP-9ARB] ("The [Art Loss Register] is the world's largest private database of lost and stolen art, antiques, and collectables.").

97 ARTIVE, https://www.artive.org [https://perma.cc/ZS3M-E8KT] (The Artive Database is used as a research platform to combat illicit activities by promoting due diligence).

98 *See Carabinieri for the Protection of Cultural Heritage and Anti-Counterfeiting*, MINISTERO DELLA DIFESA, https://www.carabinieri.it/multilingua/en/english/carabinieri-for-the-protection-of-cultural-heritage-and-anti-counterfeiting [https://perma.cc/U8JM-2RYL] (The Comando Carabinieri per la Tutela del Patrimonio Culturale (Carabinieri Command for the Protection of Cultural Heritage, in English) was created in 1969 to combat looting); Andrew Lokay, *Brigadier General Fabrizio Parrulli, Director of the Carabinieri Art Squad, Speaks at the Smithsonian*, ANTIQUITIES COALITION (Aug. 6, 2018), https://theantiquitiescoalition.org/brigadier-general-parrulli-smithsonian/ [https://perma.cc/YZ6V-L2DM] (The iTPC smartphone application allows users to "input

sufficient to support a good faith belief that a documented painting or modern artwork was not stolen, a factfinder may not be persuaded that the belief was actually held with respect to undocumented artifacts. Artifacts that have been looted from the ground without any record made of their discovery will not be listed in such databases.[99] At any rate, the conscious avoidance defense does not depend on whether a belief is reasonably held, but whether a factfinder concludes that, reasonable or not, it was actually held by the defendant.[100]

C. Scenario Three: The Sale of an Ancient Roman Statue

In this scenario, a seller presents a provenance for an ancient Roman statue that recounts that the statue has been held in an anonymous private collection for the past 80 years. The statue is not on display, but is crated at the time it is shown to the buyer. The buyer notices that there is sandy soil on the bottom of the crate and the statue's feet are missing. Italy has a 1909 law governing movable cultural property discovered pursuant to official government excavations, and a 1939 law which provides for state ownership of any discovered cultural property, regardless of how it is discovered.[101] These laws are actively enforced by the TPC.[102]

In this case, several facts should cause the buyer to be concerned about the provenance. First, a piece that has been privately held for 80 years is expected to be clean with no dirt clinging to it that might

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a photo of a work of art and search for a match in its database of stolen cultural property.").

99 *See* Derek Fincham, *Assessing the Viability of Blockchain to Impact the Antiquities Trade*, 37 CARDOZO ARTS & ENT. L.J. 605, 625 (2019) (noting the misuse of ALR certificates by dealers and noting that "for antiquities, the [ALR] would not be equipped to offer meaningful advice, as newly looted or forged antiquities would never be able to be flagged by their database").

100 *See, e.g.*, United States v. Quinones, 635 F.3d 590, 602 (2d Cir. 2011) ("[T]he belief held by the defendant need not be reasonable in order for it to defeat a conscious avoidance theory of actual knowledge."); United States v. Catano-Alzate, 62 F.3d 41, 43 (2d Cir. 1995) ("[T]he doctrine of conscious avoidance does not permit a finding of guilty knowledge if the defendant actually did not believe that he or she was involved in the transportation of drugs, however irrational that belief may have been.").

101 Legge 1 giguno 1939, n.1089(43)–(49), G.U. Aug. 8, 1939, n.184 (It.); Legge 20 giguno 1909, n.364(15), G.U. June 28, 1909, n. 150 (It.).

102 *See Carabinieri for the Protection of Cultural Heritage and Anti-Counterfeiting, supra* note 98 (containing websites describing TPC's efforts, successes, and leadership in combatting illicit cultural property trafficking in Italy and internationally).

fall off in transit.[103] A statue held this long is also more likely to have been made public by its owner through exhibition or publication. Second, a statue broken at a weak point such as the ankles or neck could indicate that the piece was severed from a larger piece; dissecting a statue is not the expected conduct of an owner looking to preserve the value of his property.[104] The buyer should, therefore, look to see if the break near the ankles appears new, or whether the statue was more likely broken in antiquity.[105] In addition, the assertion of private ownership for "80 years" is suspicious considering that at the time of the offer, the 1939 patrimony law was approximately 80 years old.

Depending on the overall facts of the case, a factfinder might conclude that these red flags are enough to find that the buyer actually knew the statue was stolen. Alternatively, the factfinder may conclude that these facts are sufficient to cause the buyer to be aware of a high probability that the statue was stolen. If the buyer deliberately makes no further inquiry to determine the legality of the sale, knowledge of the illegality may be established via conscious avoidance.

V. Conclusion

As the *Schultz* and *Portrait of Wally* cases show, the conscious avoidance doctrine applies to transactions involving cultural property that violate the National Stolen Property Act. While these

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103 *See, e.g.*, Georgi Kantchev, *Buyer Beware: Looted Antiquities Flood Online Sites Like Amazon and Facebook*, WALL ST. J. (Nov. 1, 2017, 4:46 AM) https://www.wsj.com/articles/the-online-bazaar-for-looted-antiquities-1509466087?mod=e2fb [https://perma.cc/HKM2-K26Q] (Coins being sold online as "uncleaned coins," or with what experts refer to such coins as having "desert patina," a mineral deposit similar to rust that often adheres to metal objects as they decay, is a "telltale sign they might have been recently excavated").

104 *See, e.g.*, Tom Mueller, *How Tomb Raiders Are Stealing Our History*, NAT'L GEOGRAPHIC (June 2016), https://www.nationalgeographic.com/magazine/2016/06/looting-ancient-blood-antiquities/#close [perma.cc/VU9B-SVR4] (In the *Khouli* case, an Egyptian sarcophagus was found in New York with "fresh cuts across [it's] upper thighs" where looters had made a transverse cut across the sarcophagus so that it could be transported to the United States in four pieces.); Complaint, United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12 Civ. 2600, 2012 WL 1120480 (S.D.N.Y. Apr. 4, 2012) (seeking forfeiture of a 10th century Khmer statue which had been "broken off at the ankles" from its pedestal outside a temple in Cambodia).

105 *See, e.g.*, Mueller, *supra* note 104 (fresh cuts on a wooden sarcophagus).

cases involved buyers with some direct knowledge of wrongdoing, the doctrine can be equally applied where the knowledge of a downstream buyer is placed in issue. As discussed in this Comment, buyers faced with red flags who choose not to investigate them cannot rely on deliberate ignorance as a defense to a charge that they knowingly transacted in or possessed stolen cultural property. To the contrary, if the government proves that a buyer intentionally looked the other way when purchasing stolen cultural property, a factfinder can conclude that the buyer knowingly violated the NSPA. In addition, courts may look unfavorably on buyers whose past experience has caused them to become familiar with the legal issues and red flags surrounding the cultural property that is the subject of the transaction.

The collectors quoted at the beginning of this Comment expressed a willingness to assume risk during the purchase of cultural property. To date, such collectors have considered their risk to be financial: the loss of the antiquities' value, the possibility of being sued by a theft victim or of the objects being seized and forfeited by law enforcement, and any legal fees expended in defending such litigation. However, it is time for participants in the cultural property market to recognize a more significant risk—criminal liability for dealing in or possessing stolen property. The penalty for violating the NSPA is a felony conviction punishable by up to ten years in prison.[106] The risk of criminal liability, including incarceration and the collateral consequences of having a felony conviction, rather than potential loss of portfolio value, should be the foremost risk on the minds of cultural property purchasers.

106 National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2012).