
CASE NOTE

THE SONNABEND ESTATE AND FAIR MARKET VALUATION OF *CANYON*

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INTRODUCTION

In late 2007, Ileana Sonnabend, a renowned gallerist and art-scene mainstay, passed away, leaving behind a massive collection of art worth hundreds of millions of dollars.¹ At the helm of two galleries in Paris and New York, Sonnabend worked for decades to promote and foster contemporary art and artists, and her galleries displayed the works of many well-known artists, such as Roy Lichtenstein and Robert Rauschenberg.² Among the artworks in Sonnabend's personal collection at her death was Rauschenberg's *Canyon*, a celebrated collage painting from the artist's *Combine* series.³ Rauschenberg

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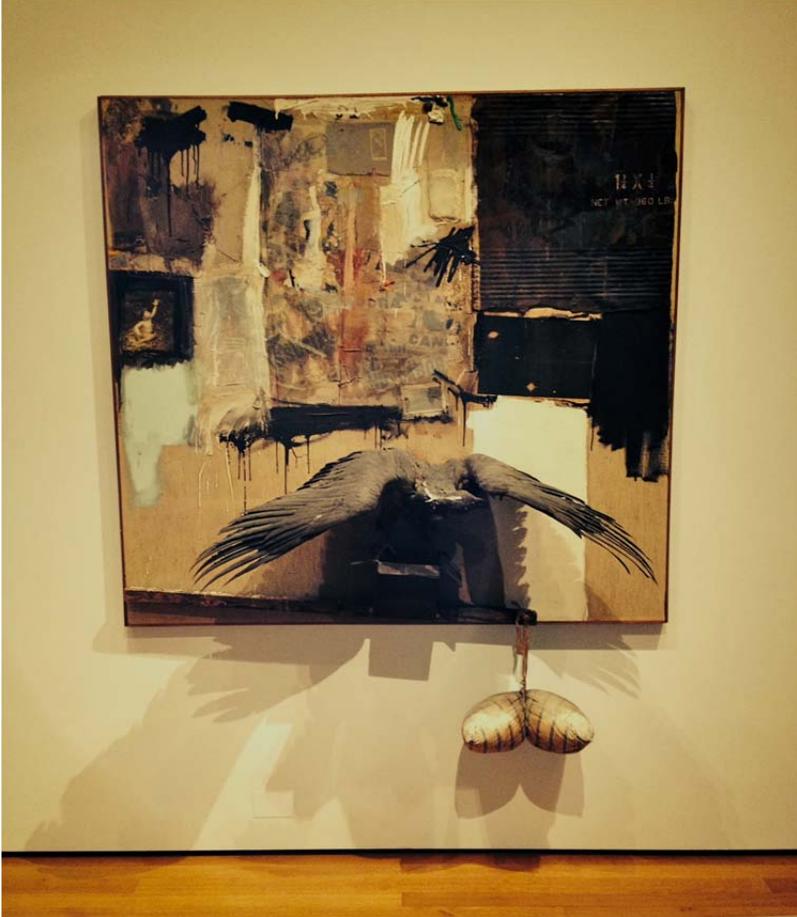
¹ See Kelly Crow, *An Art Impresario Gets Her Due*, WALL ST. J., Aug. 8, 2013, at D6, available at PROQUEST, File No. 1418626653 (reporting that Sonnabend's personal art collection was valued at nearly \$900 million); Charmaine Picard, *Sonnabend Estate Sold for \$600m*, ART NEWSPAPER (May 1, 2008), <http://theartnewspaper.com/articles/Sonnabend-estate-sold-for-600m/8510>, archived at <http://perma.cc/M6ST-WFSS> (reporting the Sonnabend heirs' sale of art valued at approximately \$600 million and estimating the remaining collection's value at \$300 million); Roberta Smith, *Ileana Sonnabend, Art World Figure, Dies at 92*, N.Y. TIMES (Oct. 24, 2007), http://www.nytimes.com/2007/10/24/arts/24sonnabend.html?pagewanted=all&_r=0, archived at <http://perma.cc/V4CK-S6V3> (eulogizing Sonnabend and recounting her achievements as an art dealer).

² See generally Crow, *supra* note 1 (describing notable exhibitions at Sonnabend's galleries and pieces set to appear at an exhibition in Sonnabend's honor that opened in December 2013).

³ See Julia Blaut, *Overview: Life and Art*, ROBERT RAUSCHENBERG FOUND., <http://www.rauschenbergfoundation.org/artist> (last visited Mar. 13, 2015), archived at <http://perma.cc/3LKF-KE5R> ("The celebrated Combines, begun in the mid-1950s, brought real-world images

created *Canyon* from an array of materials, including a stuffed American bald eagle.⁴ *Canyon*, already famous, gained notoriety when it came time to value Sonnabend's estate for federal estate tax purposes.

Figure 1: *Canyon*⁵

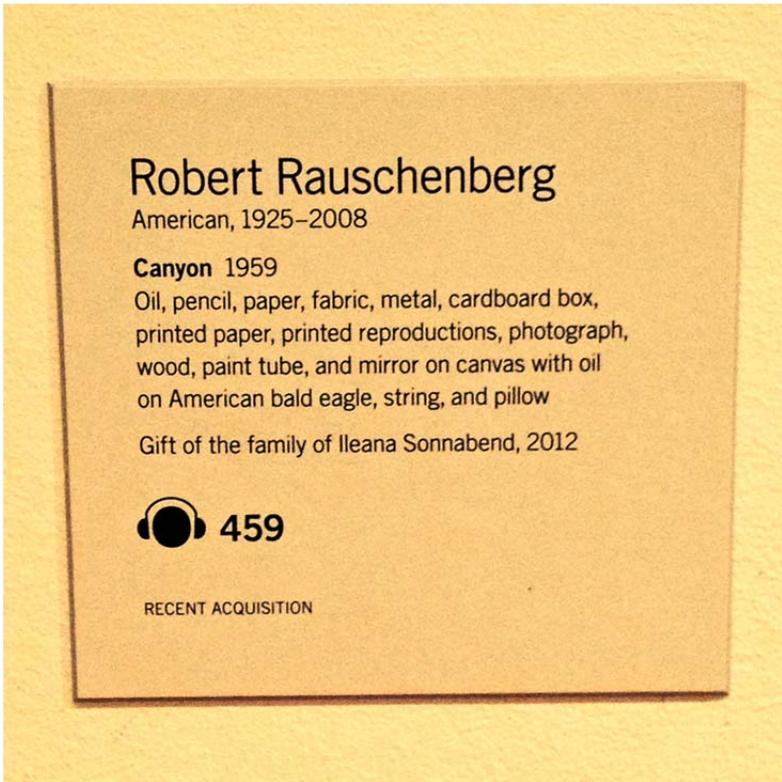


and objects into the realm of abstract painting and countered sanctioned divisions between painting and sculpture.”); Eileen Kinsella, *Rauschenberg Eagle Ruffles Feathers*, ARTNEWS (May 1, 2012), <http://www.artnews.com/2012/05/01/rauschenberg-eagle-ruffles-feathers>, archived at <http://perma.cc/YN2W-9G3E> (describing *Canyon* as “Robert Rauschenberg’s seminal 1959 ‘combine’ work”).

⁴ See *infra* fig.1 (displaying *Canyon*); *infra* fig.2 (listing the materials incorporated in the work); see also *infra* fig.3 (describing Raushenberg’s incorporation of the taxidermy eagle into *Canyon*).

⁵ Photograph by Charlotte Melbinger at the Museum of Modern Art (Nov. 1, 2013) (on file with author).

Figure 2: The Description Plaque Alongside *Canyon*
at the Museum of Modern Art⁶



⁶ Photograph by Charlotte Melbinger at the Museum of Modern Art (Nov. 1, 2013) (on file with author).

Figure 3: Robert Rauschenberg's Notarized Statement About Canyon⁷

Untitled Press Inc. 381 Lafayette St., New York, NY 10003

CANYON, 1959

Sari Dienes (a fellow artist, now deceased) lived and worked in the building above Carnegie Hall in New York during the 1950s. Among the tenants living in her building was a member of Teddy Roosevelt's Rough Riders (first US Volunteer Cavalry). In the course of his military career (1898--ca. 1935) this Rough Rider acquired, from the wild, a bald eagle which he had taxidermed prior to 1940. When he died in 1959, the eagle which he had the trash along with various other pieces of property not wanted by his family. Sari Dienes retrieved the taxidermed eagle, and asked if I would like it for possible inclusion in my art work; Sari was aware of the combine paintings I had made previously which incorporated taxidermed animals (ie. Untitled, ca. 1954, now in the collection of the Museum of Contemporary Art, Los Angeles, Satellite, 1955, now in the Whitney Museum of American Art, New York, Odalisk, 1955/1958, now in the Museum Ludwig, Cologne, and Monogram, 1955-59, now in the Moderna Museet, Stockholm). I replied yes and later that year incorporated the taxidermed eagle in the combine painting, Canyon.

Robert Rauschenberg
Robert Rauschenberg

May 27, 1998

COUNTY OF New York
STATE OF New York
SWORN TO BEFORE ME THIS 27 DAY OF May, 1998

Jan Green Marbit

JOAN GREEN MARBIT
Notary Public, State of New York
No. 31-30348-02
Qualified in New York County
License Filed in New York County
License Expires November 30, 1998



⁷ Robert Rauschenberg, Notarized Statement About Canyon (May 27, 1998) (unpublished statement) (on file with Withers Bergman LLP).

The legal restrictions of the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA) banned the sale or other disposition of *Canyon*, and therefore those administering Sonnabend's estate listed a value of zero for the painting when assessing Sonnabend's significant property interests.⁸ To reach its determination of zero fair market value, the estate consulted three professional appraisals, all in concurrence.⁹ The Internal Revenue Service (IRS) rejected this position and instead estimated *Canyon*'s fair market value at \$65 million.¹⁰ The IRS then notified the estate of a \$29.2 million tax liability deficiency on the painting, and because the Internal Revenue Code empowers the IRS to assign a penalty in the event that a taxpayer makes a "substantial valuation understatement,"¹¹ it also imposed an \$11.7 million penalty.¹²

This Note assesses the IRS's valuation of *Canyon* as an application of fair market valuation principles in federal taxation. The Note begins with a background of relevant tax rules, followed by a discussion of prior case law dealing with illegal and other restricted property and artwork. In light of this context, the Note then criticizes the IRS's analysis in its valuation of *Canyon*: The IRS's position is problematic, and it demonstrates some of the unique difficulties with applying fair market valuation principles to artwork. Both the IRS's and the estate's conclusions are imperfect, but the \$65 million valuation stands too many degrees removed from a realistic determination.

⁸ Interview with Ralph Lerner, Attorney, in N.Y.C., N.Y. (Oct. 28, 2013) (explaining, as counsel for the estate, the estate's valuation position).

⁹ See BSJ Fine Art, Fair Market Value Appraisal for Estate Tax Filing Purposes (Nov. 3, 2011) (unpublished appraisal) (on file with Withers Bergman LLP) (affirming its appraisal of zero value despite the IRS's valuation position); Jacqueline Silverman & Assocs., Rebuttal to the IRS Appraisal Review Report (June 6, 2011) [hereinafter Silverman & Associates Rebuttal] (unpublished appraisal) (on file with Withers Bergman LLP) (affirming the zero-value appraisal of *Canyon* and noting its agreement with the appraisal, done by Christie's, of Sonnabend's collection upon Sonnabend's death); see also Kinsella, *supra* note 3 (noting the estate's use of three qualified appraisers).

¹⁰ Daniel M. Beckerle, IRS, Appraisal Review Report and Fair Market Value Conclusion (Taxpayer's Copy) (June 6, 2011) [hereinafter Appraisal Review Report] (unpublished appraisal) (on file with Withers Bergman LLP).

¹¹ See I.R.C. § 6662(a), (e) (2012) (imposing a percentage penalty for understatements in estate valuations); Stephen C. Gara & Craig J. Langstraat, *Property Valuation for Transfer Taxes: Art, Science, or Arbitrary Decision?*, 12 AKRON TAX J. 125, 128 (1996) (providing background on § 6662, which generally levies a twenty percent penalty).

¹² See Kinsella, *supra* note 3 (listing the IRS's calculations of the estate's tax liabilities).

I. TAX LAW BACKGROUND

The conundrum encircling Sonnabend's estate took place against the backdrop of the federal transfer tax system.¹³ Proper administration of the Sonnabend estate required the determination of the estate tax payable by the executors of the estate, Sonnabend's children, Antonio Homen and Nina Sundell.¹⁴ The IRS levies the estate tax based on the value of the decedent's gross estate, which includes the value of property owned at death.¹⁵ The gross estate includes property items, such as artworks, valued at the pieces' fair market value at the time of death, not at the cost at which the decedent acquired the pieces.¹⁶ The guiding principle in this area of valuation,¹⁷ and an essential facet of the *Canyon* dispute, is the "willing buyer, willing seller" principle for fair market value.¹⁸ The relevant IRS regulations for calculating the fair market value of gross estate items provide that one derives the value of a property item from the price at which the item hypothetically "would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell

¹³ See I.R.C. § 2001(a) (2012) ("A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.").

¹⁴ See Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? \$29 Million.*, N.Y. TIMES (July 22, 2012), <http://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html?pagewanted=all>, archived at <http://perma.cc/3YDR-A9XP> (reporting the heirs' legal battles over taxation of the estate); see also Docket, Estate of Sonnabend v. Comm'r, No. 0649-12 (T.C. 2012) (listing Homen and Sundell as executors).

¹⁵ See I.R.C. § 2031(a) (2012) ("The value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."); *id.* § 2033 (2012) ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."); see also Treas. Reg. § 20.2033-1(a) (as amended in 1963) ("The gross estate of a decedent who was a citizen or resident of the United States at the time of his death includes under section 2033 [of the Internal Revenue Code] the value of all property . . . beneficially owned by the decedent at the time of his death.").

¹⁶ See Treas. Reg. § 20.2031-1(b) (as amended in 1965) ("The value of every item of property includible in a decedent's gross estate . . . is its fair market value at the time of the decedent's death . . .").

¹⁷ The executor of a decedent's estate may elect an alternate valuation method for calculating the estate's gross value. See Treas. Reg. § 20.2032-1 (as amended in 2005). The permitted alternate valuations include postmortem sales and delayed valuations. *Id.* § 20.2032-1(a)(1), (2). A qualification to this rule is that any alternate valuation must decrease both the value of the gross estate and the sum of the estate tax. *Id.* § 20.2032-1(b)(1).

Other methods also exist for deriving fair market value, such as cost and replacement-value valuations. See generally JOHN A. BOGDANSKI, FEDERAL TAX VALUATION ¶ 3.01 (2014), 1998 WL 1038931 (explaining six different approaches to appraising fair market value).

¹⁸ See generally John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335, 345 (1994) ("Fair market value is the price at which both a willing buyer and a willing seller would have traded.").

and both having reasonable knowledge of relevant facts.”¹⁹ When the item is unique, as in the case of an artwork, the “willing buyer, willing seller” paradigm becomes more complex.²⁰

When determining fair market value in disputes, the Tax Court will typically consult auction sales data and then appraisal data.²¹ For valuable art and other specific items of personal property, the IRS has established specialized groups to aid in valuation matters.²² The IRS’s Art Appraisal Services unit and its Art Advisory Panel work to determine the values of taxpayers’ art that has been appraised at \$50,000 or more;²³ experts and other experienced figures in the art world serve on the Art Advisory Panel and aid in valuation matters.²⁴ The Panel’s determinations, which are

¹⁹ Treas. Reg. § 20.2032-1(b); see also *Estate of Jelke v. Comm’r*, 507 F.3d 1317, 1321 n.11 (11th Cir. 2007) (“The buyer and seller are hypothetical, not actual persons, and each is a rational economic actor; that is, each seeks to maximize his advantage in the context of the market that exists on the valuation date.”); DALE S. ADAMS & ROBERT B. SMITH, *FEDERAL ESTATE & GIFT TAXATION* ¶ 4.02[2][a] (2014), 1999 WL 1031607, at *2 (emphasizing the hypothetical nature of the “willing buyer, willing seller” valuation calculation).

²⁰ See generally *Gara & Langstraat*, *supra* note 11, at 144 (“Artwork presents one of the most challenging and difficult areas of valuation. Unlike business interests, artwork is inherently qualitative and entirely subjective.”); Anne-Marie E. Rhodes, *Big Picture, Fine Print: The Intersection of Art and Tax*, 26 COLUM. J.L. & ARTS 179, 196 n.100 (2003) [hereinafter Rhodes 2003] (affirming the problems inherent in assigning market value to fine art and citing the famous example of two Rembrandt impressions, the value of which varied strikingly at auction despite being from the same etching); Steinkamp, *supra* note 18, at 338 (“[V]aluation of art is an inherently subjective process and experts’ opinions often vary dramatically.” (footnote omitted)).

²¹ See, e.g., *Estate of Scull v. Comm’r*, 67 T.C.M. (CCH) 2953 (T.C. 1994), 1994 WL 179764, at *15-16 (“We prefer evidence of actual sales of the property to be valued . . . rather than estimates or approximations of the price upon which a willing buyer and a willing seller *might* agree.”); *Gara & Langstraat*, *supra* note 11, at 146 (discussing *Scull* and its “emphasis on auction sales of the artwork shortly after the valuation date”); see also Anne-Marie Rhodes, *Valuing Art in an Estate: New Concerns*, 31 CARDOZO ARTS & ENT. L.J. 45, 55 (2012) [hereinafter Rhodes 2012] (“For original unique works by known established artists, the auction market is commonly used in valuation controversies in large measure because of the availability of public sales records.”).

²² See IRS, *Art Appraisal Services*, IRS.GOV, <http://www.irs.gov/Individuals/Art-Appraisal-Services> (last updated Feb. 10, 2015), archived at <http://perma.cc/X423-PZS2> (providing an overview of the Art Appraisal Services’s activities); IRS, *Valuation Assistance for Cases Involving Works of Art*, IRS.GOV (Oct. 1, 2012), http://www.irs.gov/irm/part4/irm_04-048-002.html [hereinafter IRS, *Valuation Assistance for Works of Art*], archived at <http://perma.cc/R9XK-UKD4> (same); see also ART ADVISORY PANEL OF THE COMM’R OF INTERNAL REVENUE, ANNUAL SUMMARY REPORT FOR FISCAL YEAR 2012, at 2-3 (n.d.) [hereinafter ANNUAL SUMMARY REPORT FY 2012], available at <http://www.irs.gov/pub/irs-utl/annrep2012.pdf>, archived at <http://perma.cc/67MX-UEDD> (describing the roles of the Art Appraisal Services unit and the Art Advisory Panel of the Commissioner of Internal Revenue).

²³ ANNUAL SUMMARY REPORT FY 2012, *supra* note 22, at 2.

²⁴ See *id.* at 5-6 (listing the Art Advisory Panel’s members for 2012); IRS, *Valuation Assistance for Works of Art*, *supra* note 22 (“The Commissioner maintains an Art Advisory Panel of nationally prominent art museum directors, curators, scholars, art dealers, auction representatives, and

structured to prevent the Panel from recognizing the identity of the specific owner-taxpayer, are advisory recommendations and are not binding on the IRS's ultimate determinations.²⁵

II. THE BGEPA AND MBTA

The federal legislation concerning eagle preservation threw a wrench into the administration and taxation of Sonnabend's estate. Both the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA) governed Sonnabend's use of *Canyon* by prohibiting a sale of the eagle and therefore of the painting.²⁶ Enacted in 1940, the BGEPA protects the national symbol and once-endangered species, and its provisions apply retroactively to eagles taken lawfully prior to enactment.²⁷ The taxidermy eagle in *Canyon* is one such specimen. According to Rauschenberg, he received the eagle from a colleague named Sari Dienes.²⁸ Dienes found the eagle abandoned along with other possessions of Dienes's deceased neighbor, and she gave it to Rauschenberg for inclusion in his artwork.²⁹ The neighbor was a former member of Theodore Roosevelt's "Rough Riders" during the Spanish-American War; in that capacity, he acquired the eagle before the BGEPA's enactment.³⁰ Rauschenberg then used the eagle to create *Canyon*, later acquired by Sonnabend.³¹ *Canyon* first came to the Fish and Wildlife Service's attention in 1981.³²

Had Rauschenberg created *Canyon* with an eagle taken from the wild after 1940, all of the BGEPA's prohibitions would have applied. In Sonnabend's situation, however, the eagle was taken before 1940, and thus the statute did not prohibit possessing or transporting *Canyon*. Rather, it only

appraisers . . ."). See generally Rhodes 2003, *supra* note 20, at 197-98 (describing the Panel's work and comparing statistics from 2000 and 2001 regarding the Panel's activity).

²⁵ ANNUAL SUMMARY REPORT FY 2012, *supra* note 22, at 3.

²⁶ See 16 U.S.C. §§ 668, 703-712 (2012) (restricting possession of bald and golden eagles and other migratory bird species, and prohibiting other enumerated acts).

²⁷ See *Andrus v. Allard*, 444 U.S. 51, 52-53, 55-58 (extending the BGEPA's application to eagles "lawfully taken before the effective date of federal protection"); see also Roberto Iraola, *The Bald and Golden Eagle Protection Act*, 68 ALB. L. REV. 973, 973-75 (2005) (explaining the statute's conservatory intent and implementation history); Rhodes 2012, *supra* note 21, at 47-49 (same).

²⁸ See *supra* fig.3 (explaining how Dienes obtained the eagle and offered it to Rauschenberg for his art).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; see also Kinsella, *supra* note 3 (reporting that Sonnabend acquired *Canyon* following a 1959 gallery show). But see Rhodes 2012, *supra* note 21, at 49 & n.24 (describing the unclear and disputed nature of Sonnabend's acquisition of *Canyon*).

³² Rhodes 2012, *supra* note 21, at 50-51; Silverman & Associates Rebuttal, *supra* note 9.

prohibited taking; selling; purchasing; bartering; offering to sell, purchase, or barter; and exporting or importing *Canyon*.³³ Although transportation of a lawful pre-1940 eagle is allowed, it requires an official permit from the Fish and Wildlife Service, which is only available for limited purposes, such as public exhibition.³⁴ The relevant regulations for these permits forbid any profit-motivated activity related to the eagle.³⁵ Courts have consistently upheld the constitutionality of both the BGEPA and the MBTA.³⁶

The Ninth Circuit considered the interaction between the BGEPA and federal taxation in *Sammons v. Commissioner*, a case on appeal from the Tax Court.³⁷ The *Sammons* taxpayers had sought a charitable deduction for their donation of Native American artifacts—including many pieces that incorporated feathers and other parts of eagles—to a museum.³⁸ The court considered valuation and appraisal disputes regarding the collection as a whole³⁹ before applying the BGEPA and MBTA to the “Eagle Artifacts” within the collection.⁴⁰ The IRS argued that the BGEPA rendered the taxpayers’ ownership of the Eagle Artifacts—and therefore, the corresponding tax deduction—void.⁴¹ It also argued that, given the taxpayers’ dubious ownership under the BGEPA’s prohibitions, public policy demanded disallowance of

³³ See 16 U.S.C. § 668(a) (2012) (“[N]othing herein shall be construed to prohibit the possession or transportation of any bald eagle, alive or dead, . . . lawfully taken prior to June 8, 1940 . . .”).

³⁴ See *id.* § 668a (2012) (noting that the Secretary of the Interior may determine that acts normally prohibited are “compatible with the preservation of the bald eagle” and “authorize the taking of such eagles pursuant to regulations”); 50 C.F.R. § 22.21 (2013) (“We may . . . issue a permit authorizing the taking, possession, transportation within the United States, or transportation into or out of the United States of lawfully possessed [eagles] . . . for the scientific or exhibition purposes of public museums, public scientific societies, or public zoological parks.”).

³⁵ See 50 C.F.R. § 22.3 (2013) (defining “[t]ransportation into or out of the United States” to require that the eagle “not change ownership at any time [and] . . . not [be] transferred from one person to another in the pursuit of gain or profit”).

³⁶ See generally Iraola, *supra* note 27, at 977-90 (recounting failed challenges to the BGEPA, including challenges asserting religious freedom, abrogation of treaty rights, invalid exercise of Congress’s Commerce Clause powers, Takings Clause violations, and the right to privacy). The BGEPA is often challenged under the Religious Freedom Restoration Act for restricting religious expression, due to the significance of eagles and eagle feathers in Native American ceremonial and religious practices. See *id.* at 980-84 (surveying federal case law dealing with permits issued for religious purposes); see also 16 U.S.C. § 668a (recognizing the religious significance of eagles to Native American tribes and granting the Secretary of the Interior discretion to permit the taking of bald and golden eagles “for the religious purposes of Indian tribes”).

³⁷ See generally *Sammons v. Comm’r*, 838 F.2d 330 (9th Cir. 1988) (concluding that items obtained and possessed in violation of the BGEPA may be donated to a museum for a tax deduction).

³⁸ *Id.* at 333.

³⁹ *Id.* at 333-34.

⁴⁰ *Id.* at 334-36.

⁴¹ *Id.*

the deduction for the Eagle Artifacts.⁴² The *Sammons* court rejected both arguments, allowed the charitable deduction, and concluded that such a deduction would not impede the conservation purposes of the statute.⁴³ The court also affirmed the Tax Court's use of purchase cost as the valuation method for the donated collection—a holding that has particularly interesting implications for Sonnabend's case.⁴⁴

III. THE IRS APPRAISAL REVIEW REPORT

A. *Robson v. Commissioner and Related Case Law*

The Sonnabend estate's legal counsel received an initial unsigned valuation report from the IRS that assigned a \$15 million value to *Canyon*.⁴⁵ Following the estate's rejection of that initial value, the IRS responded with a more formal "Appraisal Review Report and Fair Market Value Conclusion" that valued the work at \$65 million.⁴⁶ The IRS reached this figure by relying on a prior Tax Court decision, *Robson v. Commissioner*,⁴⁷ assessing sales figures from "comparable" works of art, and highlighting the availability of markets outside North America for *Canyon*.⁴⁸

The Tax Court's analysis in *Robson* influenced the IRS's rejection of a zero value for *Canyon*. On its face, the *Robson* fact pattern mirrors the *Canyon* predicament.⁴⁹ But key elements distinguish *Robson* from the Sonnabend dispute. In *Robson*, the court considered the fair market value of animal trophy mounts in the context of disputed income tax deductions for

⁴² *Id.* at 336.

⁴³ *See id.* ("No evidence was presented tending to prove that allowance of the deduction would encourage the killing or acquisition of protected bird species.")

⁴⁴ *See id.* at 333-34 (noting that "the Sammons offered no proof of sales prices for comparable items to establish either fair market value or an existing retail market for these types of Indian artifacts" so the court lacked "a definite and firm conviction that the Tax Court made a mistake in finding that the Sammons's cost was the best indicator of the value of the Sammons Collection" (internal quotation marks omitted)). The court affirmed the lower court's decision and held that cost appropriately tracked fair market value, given that the Sammons's own experts had testified that the collection did not increase in value between purchase and donation. *Id.* at 334.

⁴⁵ Interview with Ralph Lerner, *supra* note 8.

⁴⁶ Appraisal Review Report, *supra* note 10.

⁴⁷ *Robson v. Comm'r (Robson I)*, No. 23456-94 (T.C. Apr. 10, 1997), available at <https://www.ustaxcourt.gov/InOpHistoric/ROBSON.TCM.WPD.pdf#xml>, archived at <http://perma.cc/25GQ-RME6>.

⁴⁸ *See generally* Appraisal Review Report, *supra* note 10; Interview with Ralph Lerner, *supra* note 8.

⁴⁹ *See Robson I*, No. 23456-94, slip op. at 3-5 (recounting the tax valuation difficulties surrounding the taxpayers' mounted animal specimens, which California law made illegal to sell).

the taxpayers' charitable donations of the taxidermy game specimens.⁵⁰ California, where the donors lived, prohibited the specimens' sale, but a number of neighboring states allowed similar sales.⁵¹ The court consulted valid sales of comparable items and assigned fair market value to the California mounts.⁵² The court used expert testimony from a taxidermy seller and a Fish and Wildlife Service agent to establish "an active market" for the mounts.⁵³ The Ninth Circuit upheld the decision on appeal, and its opinion emphasized that the "willing buyer, willing seller" paradigm is an objective standard and applies without reference to the specific circumstances of a particular sale.⁵⁴ In its words, "there is no requirement that the taxpayers themselves actually be able to sell the donated goods."⁵⁵

Robson has instructive value about how legal restrictions affect market values. An item's illegal or contraband status does not and should not categorically render an item valueless. Such an immediate assumption would be unrealistic and perhaps naïve. California law, functioning like the BGEPA and the MBTA, prohibited the sale of the taxpayers' donations. However, the scope of California's restrictions was limited by other states' different laws controlling game mounts' sales.⁵⁶ The *Robson* taxpayers could not sell the mounts in California, but open markets existed elsewhere. As a result, the court could find a fair market value with relative ease—in fact, one of the expert witnesses ran a company that sold thousands of animal mounts.⁵⁷

Robson's readily available comparables distinguish *Robson* from the *Canyon* dispute. When identifying the market for the *Robson* donations, the court could look to industry professionals and across state lines. The donated mounts had counterparts in available market data about mounts sold in

⁵⁰ *Id.* at 2-5.

⁵¹ *Id.* at 4.

⁵² *Id.* at 8-9 (rejecting the taxpayers' argument that "there are no comparable sales, because residents in California are prohibited from selling game mounts" and citing expert testimony that "prices for game mounts in California are equivalent to prices in States that do not place restrictions on sales").

⁵³ *Id.* at 6-9.

⁵⁴ *Robson v. Comm'r (Robson II)*, 83 A.F.T.R.2d (RIA) 1880, 1881 (9th Cir. 1999); see also Rhodes 2012, *supra* note 21, at 58-59 (explaining the objective *Robson* test, but distinguishing *Robson* from the *Canyon* dispute).

⁵⁵ *Robson II*, 83 A.F.T.R.2d (RIA), at 1881.

⁵⁶ *Robson I*, No. 23456-94, slip op. at 4 ("[W]hile California has strict prohibitions on the sale of mounted wildlife, many of the Western States located near California, such as New Mexico, Arizona, Montana, and Washington, have relatively few restrictions on the sale of mounted game trophies.").

⁵⁷ See *id.* at 6 (describing the testimony of an expert witness whose company had sold "between 3,500 and 4,000 game items" since its inception in 1986).

other states, and expert testimony confirmed the existence of these comparable items.⁵⁸

By contrast, had the dispute between the IRS and the Sonnabend estate progressed into litigation, the Tax Court would have lacked information from neighboring markets for famous high-end art incorporating bald eagles. The BGEPA reaches further than California's restrictions on taxidermy sales: it not only eliminates the market for sales at a national level, but also sanctions the mere possession of bald eagles.⁵⁹ Furthermore, regardless of species, the game mounts at issue in *Robson* were likely more fungible. While game mounts are common decorative items, there is no equivalent for a globally renowned and one-of-a-kind work of art such as *Canyon*.⁶⁰ A court attempting to set a price for *Canyon* would have no comparable eagle artwork, or transactions involving such items, to reference. Had the taxpayers in *Robson* rejected the donee organizations and sold the trophy mounts, their items would have joined thousands of similar pieces in the markets documented by the *Robson* expert witnesses. But for the internationally renowned *Canyon*, no analogous group of comparables would surface.

Conflict between federal taxation and illegal conduct is not uncharted territory for the IRS. In both income and estate taxation, it is relatively settled that a conduct's illegal quality does not shelter its fruits from taxation.⁶¹ This concept carried the day in a federal estate tax dispute regarding the estate of Joseph Meador.⁶² Meador's case offers valuable

⁵⁸ See *id.* (“[One of the experts] believes that he would be able to assemble a collection comparable to petitioners’ by purchasing items on the open market. In fact, [he] currently has in his inventory many of the same type of game mounts as those donated by petitioners.”).

⁵⁹ See 16 U.S.C. § 668(a) (2012) (prohibiting both possession and sale of bald eagles).

⁶⁰ See Silverman & Associates Rebuttal, *supra* note 9, at 10-11 (distinguishing *Canyon* from *Robson*'s trophy mounts by citing the painting's unique and nonfungible nature as a famous work of art).

⁶¹ For the purposes of income taxation, the Code's definition of “income” is very broad and includes illegal income. See I.R.C. § 61(a) (2012) (“[G]ross income means all income from whatever source derived . . .”). Courts and academics have consistently supported the taxation of gains from illegal conduct. See, e.g., *United States v. Sullivan*, 274 U.S. 259, 263 (1927) (“We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.”); Boris I. Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130, 137-47 (1974) (arguing for taxation of gains from illegal conduct for policy reasons); William J. Turnier, *The Pink Panther Meets the Grim Reaper: Estate Taxation of the Fruits of Crime*, 72 N.C. L. REV. 163, 177-78 (1993) (“[T]he income tax treatment of income derived from illegal activities is now quite well established. . . . After struggling with the issue . . . , the Supreme Court determined . . . that income derived from an illegal activity . . . was to be included in the taxable income of the recipients of such income.”).

⁶² See IRS Tech. Adv. Mem. 91-52-005 (Aug. 30, 1991), 1991 WL 779966 [hereinafter Meador TAM] (“[F]or federal estate tax purposes, no distinction should be drawn between a decedent's property that has been obtained by theft and decedents' property that has been lawfully

comparisons to the *Canyon* dispute, given that the property items at issue were stolen art pieces placed on the underground market. The IRS produced a Technical Advice Memorandum (TAM)⁶³ for the particular facts of Meador's estate, resolving the issue of how to value the stolen items in the decedent's gross estate.⁶⁴ While serving in Europe during World War II, Meador stole several art objects from Quedlinburg, a medieval German town, and he returned to his home in Texas with the items.⁶⁵ After Meador's death, his family members, aware of their relative's questionable ownership of the art objects, attempted to sell some of the medieval manuscripts from the stolen collection.⁶⁶ Given that the objects' illegality was apparent to those who had appraised the items and refused to purchase them, neither Meador (while he was alive) nor his surviving family could access the legitimate market for sales of the Quedlinburg bounty.⁶⁷ Nevertheless, after obfuscating one manuscript's chain of title, Meador's siblings successfully sold it to a German rare book dealer for an initial value of \$3 million, subject to a further bonus if the dealer resold the manuscript for profit.⁶⁸

The IRS concluded that Meador's gross estate should include the stolen items, and it then considered case law to determine how to value those items.⁶⁹ Citing cases about the taxation of narcotics enterprises, the IRS found that relying on an illicit market to determine fair market value was

obtained."); see also Turnier, *supra* note 61, at 164-69 (narrating Meador's case); William H. Honan, *A Trove of Medieval Art Turns Up in Texas*, N.Y. TIMES (June 14, 1990), <http://www.nytimes.com/1990/06/14/arts/a-trove-of-medieval-art-turns-up-in-texas.html>, archived at <http://perma.cc/T54G-SDD3> (same).

⁶³ See IRS, *Technical Advice Memorandum*, IRS.GOV (Oct. 1, 2003), http://www.irs.gov/irm/part4/irm_04-002-003.html#doe307, archived at <http://perma.cc/2AZC-C7N9> ("A Technical Advice Memorandum is intended to establish the proper interpretation and application of the Internal Revenue laws to the facts of a specific case."). As a caveat, TAMs bear limited precedential value. See IRS, *Examining Process: Examination of Returns: Issue Resolution*, IRS.GOV (Jan. 1, 2006), http://www.irs.gov/irm/part4/irm_04-010-007.html, archived at <http://perma.cc/M32G-GY6H> ("[A] technical advice memorandum . . . should not be applied or relied upon as a precedent in the disposition of other cases. However, [it] provide[s] insight with regard to the [IRS]'s position on the law and serve[s] as a guide.").

⁶⁴ Meador TAM, *supra* note 62.

⁶⁵ *Id.*; Honan, *supra* note 62.

⁶⁶ Meador TAM, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The IRS's TAM considered the following cases: *Publicker v. Commissioner*, 206 F. 2d 250 (3d Cir. 1953) (valuing large diamonds); *Browning v. Commissioner*, 61 T.C.M. (CCH) 2053 (T.C. 1991), 1991 WL 25969 (valuing marijuana based on the wholesale street market value); *Jones v. Commissioner*, 61 T.C.M. (CCH) 1721 (T.C. 1991), 1991 WL 4982 (determining the fair market value of cocaine using the "retail street value" of "uncut" cocaine); and *Caffery v. Commissioner*, 60 T.C.M. (CCH) 807 (T.C. 1990), 1990 WL 134957 (valuing marijuana using the retail street market for low-quality marijuana).

routine.⁷⁰ However, the market paradigm applied to Meador's stolen items considered not only the illicit art market but also the legitimate art market: the IRS decided that Meador's estate should include the stolen property at fair market values based on "the discreet retail markets of the international network of traffickers in stolen art as well as the legitimate retail art markets consisting of international auction firms, advertised displays in antiques publications, and legitimate art and antiques dealers."⁷¹

While the IRS's inclusion of legitimate art markets appeared to depart from the case law's focus on illicit markets, the approach made sense: Narcotics like cocaine and marijuana, addressed in the IRS's cited precedents, could never enter a legitimate market. For Meador, by contrast, his property did enter a legitimate market for manuscripts and other art objects.⁷² The Quedlinburg items could appear in auctions and other legitimate sales venues, despite their criminal origins.

Notably, the IRS rejected an argument that the art objects, as items without a market, should hold zero value in Meador's estate.⁷³ Citing case law on the valuation of other illicit property, the IRS refused to ignore the black market when constructing its "willing buyer, willing seller" paradigm.⁷⁴ According to the IRS, "[i]n the case of property that can be sold only in an illicit market, the fact that the market is illicit does not obviate the existence of that market for estate tax valuation purposes."⁷⁵

Other evidence also bolstered the IRS's decision. Pointing to secondary sources confirming the existence and magnitude of the illicit art market, the IRS affirmed that sales of Meador's stolen property were not impossible.⁷⁶ Indeed, an actual transaction had gone forward in the \$3 million manuscript deal. In addition to this sale after Meador's death, the IRS inferred that

⁷⁰ See Meador TAM, *supra* note 62 (discussing *Browning, Jones, and Caffery*).

⁷¹ *Id.* The IRS also distilled the following valuation principle after completing its survey of valuation based on illicit markets:

with respect to property that can only be transferred illegally, 1) the fair market value of such property is based on the price that a willing buyer would pay in the relevant illicit market, and 2) the relevant illicit market is determined by the particular illicit market in which such property is generally sold

Id.

⁷² See, e.g., *Books and Manuscripts*, SOTHEBYS, <http://www.sothebys.com/en/departments/books-manuscripts.html> (last visited Mar. 13, 2015), *archived at* <http://perma.cc/HJ63-WKAM> (listing upcoming auctions and other information regarding Sotheby's sales of books and manuscripts).

⁷³ Meador TAM, *supra* note 62.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ The IRS cited multiple news articles and the transcript from a news program. See *id.*

multiple other sales had taken place during Meador's lifetime.⁷⁷ After considering Meador's employment, his income, and the fact that the decedent had maintained various costly recreational pursuits (such as constructing greenhouses to contain an orchid collection), the IRS concluded that Meador's legitimate assets could not have supported his hobbies.⁷⁸

As with the Quedlinburg treasures, selling *Canyon* would have been illegal for Sonnabend and her heirs. In both the Meador and *Canyon* disputes, the IRS considered illicit art markets relevant for valuation purposes. However, differences between Meador and Sonnabend's situations grow as one scrutinizes the cases more carefully by comparing the two to *Robson*. *Robson* and Meador's case support a broad valuation principle that federal taxes do not ignore illegal markets and conduct. In Meador's case, as in *Robson*, the IRS benefited from discrete evidence to help it identify market values to attach to estate items. However, the *Canyon* dispute lacks comparable data.

Past sales during Meador's lifetime supported the above-zero valuations of his remaining art objects. From both Meador's lifestyle expenditures and his siblings' attempts to sell the remaining items, the IRS could establish that the estate experienced taxable gains.⁷⁹ The Meador case's facts showed both the existence of a marketplace for his stolen items and the success of those items in the marketplace. Similarly, in *Robson*, like articles moving by the thousands through the American market for trophy mounts allowed the Tax Court to infer the value of the *Robson* taxpayers' donations.⁸⁰ By contrast, *Canyon* is an item devoid of a black-market paper trail, and no evidence exists that Sonnabend attempted to sell *Canyon* during her lifetime.⁸¹

Nevertheless, arguments regarding the unique status of *Canyon* as a famed artwork do not offer complete rescue from the influence of the TAM's analysis. In the Meador TAM, the IRS acknowledged complications regarding unique articles when it cited *Publicker*, a case in which the Third

⁷⁷ *Id.*

⁷⁸ *See id.* (“[I]t does not appear that the Decedent had any job or profession that would enable him to acquire a vast orchid collection, travel so extensively, or live so lavishly. It is a compelling inference that the Decedent successfully sold a substantial quantity of stolen art objects to finance his lifestyle.”). The IRS concluded from this information that Meador had “the unfettered ability” to sell the stolen art objects when he so chose. *Id.*

⁷⁹ *See* Turnier, *supra* note 61, at 168-69 (discussing the IRS's position and reasoning).

⁸⁰ *See supra* notes 52-59 and accompanying text.

⁸¹ *See, e.g.,* Calvin Tomkins, *An Eye for the New*, NEW YORKER, Jan. 17, 2000, at 54, 64 (quoting Sonnabend's response to any planned sale of *Canyon* as “[w]ell . . . , if they build a pyramid for me when I die, I would like it in there with me”).

Circuit determined the fair market value of massive diamonds.⁸² In *Publicker*, the taxpayer argued that valuing the diamonds based on retail markets was inappropriate because such large luxury items would not enter a retail market.⁸³ The court disagreed, reasoning that limited retail interest does not imply no interest, and therefore that both the diamonds' retail and wholesale values were appropriate considerations.⁸⁴ According to the court, the taxpayer's original purchase of the diamonds plainly demonstrated such market interest.⁸⁵

Although applying the Meador case's valuation principles to *Canyon* suffers from *Canyon*'s lack of relevant comparables, other facets of the Meador analysis do provide a framework for understanding how and when the IRS decides to include artworks in decedents' estates. In Meador's case, the IRS considered not only the stolen items' transaction history, but also Meador's effective ownership over the items, stemming from his length of control over them. Meador's decades of control over the objects, as well as his successful sales of the objects, assured the IRS of Meador's beneficial ownership over the pieces.⁸⁶ Meador's beneficial ownership further required the inclusion of the items in his gross estate.⁸⁷ Similarly, Sonnabend owned *Canyon* for decades, and during her lifetime she included the painting in exhibitions throughout the country and the world.⁸⁸ Because gross estate taxation tracks a decedent's extent of ownership, tying *Canyon* to Sonnabend is fitting: while she did not obtain economic benefits through a conventional sale (as Meador and his relatives did), she did gain intangible benefits, such as prestige and renown from her association with a famous work of art. Nevertheless, this analysis ignores how the Fish and Wildlife Service's

⁸² *Publicker v. Comm'r*, 206 F.2d 250 (3d Cir. 1953); see also Meador TAM, *supra* note 62 (explaining that, under *Publicker*, "for nearly every category of property there is at least one relevant market for determining fair market value").

⁸³ *Publicker*, 206 F.2d at 253.

⁸⁴ See *id.* at 253-54 ("Large diamonds may not exist to any appreciable extent in the retail market, but there remains a market, however limited, for any particular large diamond . . .").

⁸⁵ *Id.* at 253.

⁸⁶ The IRS also cited Meador's brother's ability to leverage some of the items as collateral when obtaining a loan. Meador TAM, *supra* note 62.

⁸⁷ See *id.* at 6-7 ("[Meador] was the substantive owner of the beneficial interest in [the art objects] at his death.").

⁸⁸ See, e.g., Silverman & Associates Rebuttal, *supra* note 9, at 2-5 (listing *Canyon*'s international exhibition history prior to 1998, when the Fish and Wildlife Service stopped granting Sonnabend exhibition permits for *Canyon*).

restrictions on Sonnabend's use of *Canyon* diluted Sonnabend's ownership of and control over the painting.⁸⁹

Threads of the dispute over *Canyon* thus resemble past conflicts about the income and estate taxation of certain controversial items. *Robson*, the Meador case, and the case law examined in the TAM establish contours for the analysis of how to tax the Sonnabend estate for *Canyon*. Although the *Robson* trophy mounts' fungibility distinguishes them from *Canyon*, the TAM's consideration of retail markets for rare diamonds in *Publicker* demonstrates the low bar for finding a market. If the *Publicker* taxpayer's initial purchase of the diamonds served as evidence of a market's existence,⁹⁰ then one could argue that Sonnabend's longtime interest in *Canyon* is proof that the painting had market value.

But owning and transporting the diamonds in *Publicker* did not require permits from any federal agency, and the California state law in *Robson* did not impose restrictions comparable to the BGEPA. Nevertheless, while no single case provides decisive guidance for *Canyon*'s valuation, the cases collectively provide clear valuation principles that create a framework for considering markets relevant to *Canyon*.

B. Reaching \$65 Million: Comparable Sales

The IRS's \$65 million valuation of *Canyon* stands on shaky ground. The IRS reached \$65 million by consulting the values of various other artworks that its Appraisal Report named as items comparable to *Canyon*.⁹¹ Even if *Canyon* boasts a sufficiently high fair market value on which to hang an estate tax, the \$65 million conclusion remains problematically oversimplified. According to the Appraisal Report, the IRS derived the \$65 million figure by examining various sales databases, such as auction histories and online auction sites like Artnet.com.⁹² The IRS's comparative analysis largely focused on sales of other Rauschenberg works and works by Andy Warhol and Jasper Johns.⁹³

To evaluate the value of Rauschenberg's pieces on the retail market, the Appraisal Report highlighted two of his pieces, *Overdrive* and *The Tower*,

⁸⁹ See Rhodes 2012, *supra* note 21, at 51-54, for further analysis of the BGEPA's implications on Sonnabend's ownership interests in *Canyon*. Rhodes analyzes Sonnabend's diluted ownership as a means of criticizing the \$65 million valuation and questioning the substantiality of Sonnabend's ownership of the painting.

⁹⁰ See *supra* notes 82-85 and accompanying text.

⁹¹ See *supra* notes 46-48 and accompanying text.

⁹² Appraisal Review Report, *supra* note 10, at 1-8; see also ARTNET, <http://www.artnet.com> (last visited Mar. 13, 2015), archived at <http://perma.cc/QB2H-KT45>.

⁹³ Appraisal Review Report, *supra* note 10, at 5-7.

each of which had recently entered the auction marketplace.⁹⁴ *Overdrive* sold at Sotheby's in 2008 for \$14,601,000, and *The Tower* was valued between \$12 million and \$18 million before its withdrawal from auction.⁹⁵ The Report used the *Overdrive* and *The Tower* prices to set a valuation floor for *Canyon*. The Appraisal Report argued that the value of *Canyon* exceeded the values of *Overdrive* and *The Tower* based on to the piece's greater novelty and artistic quality.⁹⁶

Figure 4: *Overdrive*, Robert Rauschenberg (1963)⁹⁷



⁹⁴ See *infra* figs.4-5 for images of these two pieces.

⁹⁵ Appraisal Review Report, *supra* note 10, at 5-7; see also *Art Market Watch: Sotheby's Contemporary Does \$362 Million*, ARTNET (May 15, 2008), <http://www.artnet.com/magazineus/news/artmarketwatch/artmarketwatch5-15-08.asp>, archived at <http://perma.cc/R8DF-JJ6N> ("A new auction record was set for Robert Rauschenberg, the much-loved Pop pioneer who died on Monday at age 82, when his high-Pop 1963 *Overdrive* . . . sold for \$14,601,000 . . . to a phone bidder.").

⁹⁶ Appraisal Review Report, *supra* note 10, at 7.

⁹⁷ Kelly Crow, *Rauschenberg's Death Could Affect Auction of Works by Sotheby's*, WALL ST. J. (May 13, 2008, 4:01 PM), <http://blogs.wsj.com/ontheblock/2008/05/13/rauschenbergs-death-could-affect-auction-of-works-by-sothebys>, archived at <http://perma.cc/LJK9-MKMA>.

Figure 5: *The Tower*, Robert Rauschenberg (1957)⁹⁸



The Appraisal Report grouped Rauschenberg's works with those by Warhol and Johns, but provided minimal reasoning for the grouping.⁹⁹ Naming a work by each of the other artists, the Appraisal Report noted the \$71,720,000 sale at auction of Warhol's *Green Car Crash* and the estimated

⁹⁸ Sara Krulwich, "The Tower" from "Robert Rauschenberg: Combines" at the Metropolitan Museum, N.Y. TIMES (2005), http://www.nytimes.com/slideshow/2005/12/22/arts/20051223_RAUS_SLIDE_SHOW_5.html, archived at <http://perma.cc/US6F-BGBM>.

⁹⁹ The three artists' works could collectively be characterized as "Pop Art" and "postwar contemporary art." Exhibitions have featured Rauschenberg and Johns's art together, and the Museum of Modern Art (MoMA) currently displays *Canyon* in the same gallery room as works by Johns. See generally Press Release, Christie's, Christie's Establishes Highest Post-War and Contemporary Art Sale Total in History at \$384,654,400 and Continues to Dominate the High End of the Market (May 16, 2007), available at <http://www.christies.com/presscenter/pdf/05172007/101952.pdf>, archived at <http://perma.cc/E29V-5G9H> (highlighting Johns and Warhol's works in a press release about a "Post-War and Contemporary Art" auction); *Art Market Watch: Sotheby's Contemporary Does \$362 Million*, supra note 95 (describing Rauschenberg as a "Pop pioneer" and discussing *Overdrive's* sale alongside sales of Andy Warhol's works); *Dancing around the Bride: Cage, Cunningham, Johns, Rauschenberg, and Duchamp*, PHILA. MUSEUM ART, <http://www.philamuseum.org/exhibitions/765.html>, archived at <http://perma.cc/5TXT-7N69> (describing an exhibition featuring "postwar avant-garde art" by both Johns and Rauschenberg); *Hide/Seek*, NAT'L PORTRAIT GALLERY, <http://npg.si.edu/exhibit/hideseek> (follow "Enter site" hyperlink; then follow "Consensus and Conflict" hyperlink; then follow "Enter gallery" hyperlink to view artworks included in the exhibit) (last visited Mar. 13, 2015), archived at <http://perma.cc/GY89-RSEC> (exhibiting Johns and Rauschenberg's works in the "Consensus and Conflict" gallery and explaining how, in the 1950s, "artists like Robert Rauschenberg and Jasper Johns coded their opposition to the prevailing political and cultural winds in their artworks").

auction value range for Johns's *Flag* of \$10–15 million.¹⁰⁰ The Report cited *Canyon*'s larger physical size compared to *Green Car Crash* and *Flag* as reason to increase *Canyon*'s value, resulting in a valuation range of \$30–70 million.¹⁰¹ The \$65 million conclusion, at the upper end of this range, derived from conditions in the art market in 2007, the year of Sonnabend's death.¹⁰²

The IRS's survey of market comparables for *Canyon* is flawed for several reasons. Although *Canyon* is among Rauschenberg's better-known works¹⁰³ and it is common to group Rauschenberg, Johns, and Warhol together as artists within a similar stylistic movement,¹⁰⁴ the IRS's analysis relies on outlier market behaviors, particularly in *Green Car Crash*'s case. The Christie's auction that included *Green Car Crash* was record-breaking overall, and the \$71.7 million sale was a personal record for Warhol.¹⁰⁵ To value another artist's work on the then-highest sale of a Warhol piece is imprudent.¹⁰⁶

Given the preferred "willing buyer, willing seller" valuation framework,¹⁰⁷ relying on sales histories of "comparable" works to establish fair market value is overbroad and inexact. Consider, for example, the valuation analyses in the illegal income cases, such as those involving marijuana and cocaine trafficking.¹⁰⁸ There, the courts valued the drugs based on their specific characteristics, such as the geographic location where the drugs were sold, or the wholesale value of marijuana of a certain quality.¹⁰⁹

Compare that level of specificity to the level in the IRS's comparables analysis. The IRS set a value range of \$30–70 million for *Canyon* after listing

¹⁰⁰ Appraisal Review Report, *supra* note 10, at 5-7.

¹⁰¹ *Id.* at 6-7.

¹⁰² *Id.* at 7.

¹⁰³ See *Robert Rauschenberg (1925)*, ARTPRICE (Mar. 30, 2009) <http://artprice.com/artmarket/insight/96/Robert+Rauschenberg+%281925%29>, archived at <http://perma.cc/D7AE-ERHB> ("[Rauschenberg's] most sought-after works are the Combine paintings of the 1950s, but they are also the hardest to find."); Carol Vogel, *Wall Power at the Spring Auctions*, N.Y. TIMES (Apr. 28, 2011), <http://www.nytimes.com/interactive/2011/05/01/arts/design/20110501-auction.html>, archived at <http://perma.cc/Q23H-W4WE> (noting how Rauschenberg's combines are "among his best-loved work").

¹⁰⁴ See sources cited *supra* note 99 for discussion of Rauschenberg's role as a Pop artist.

¹⁰⁵ See Press Release, *supra* note 99 ("The epicenter of the sale was [Warhol's] *Green Car Crash* . . . which achieved \$71.7 million and set a new record for the artist at auction.")

¹⁰⁶ The appraisal and rebuttal materials provided by BSJ Fine Art and Jacqueline Silverman & Associates echo these concerns. See BSJ Fine Art, *supra* note 9, at 42; Silverman & Associates Rebuttal, *supra* note 9, at 8; see also Rhodes 2012, *supra* note 21, at 70 ("The choice of Warhol, clearly and unquestionably one of the top twentieth century artists selling at auction, as a comparable for Robert Rauschenberg . . . is inappropriate and not defensible. Warhol is truly in a class by himself for auction sales.")

¹⁰⁷ See *supra* notes 18-19 and accompanying text.

¹⁰⁸ See, e.g., sources cited *supra* note 69.

¹⁰⁹ See *supra* note 69 (discussing the cases' valuation analyses).

sales values of four pieces from the New York auction market.¹¹⁰ But these markets were not open to *Canyon*.¹¹¹

Furthermore, the Department of Treasury's regulation specifies that the hypothetical willing buyer and willing seller should act without "any compulsion to buy or to sell" and that "both [should] hav[e] reasonable knowledge of relevant facts."¹¹² But one account of the IRS's *Canyon* valuation suggests that the IRS failed to follow the regulation's analytical presumption. According to a *New York Times* interview with a member of the IRS Art Advisory Panel (the body tasked with determining *Canyon*'s fair market value), the Panel ignored relevant facts that would unquestionably affect hypothetical market transactions for *Canyon*.¹¹³ As reported in the interview, "the group evaluated 'Canyon' solely on its artistic value, without reference to any accompanying restrictions or laws."¹¹⁴ For *Canyon*, however, market value and artistic value are not identical. The legal restrictions that the Fish and Wildlife Service imposed on Sonnabend affect *Canyon*'s market value but arguably not its artistic value. Valuing the painting at \$65 million solely with respect to the piece's artistic significance inappropriately disregards the how legal regulation affects its market value. Furthermore, by law, regulatory restrictions on property (including the BGEPA in this case) may affect federal tax appraisals of fair market value.¹¹⁵ These weaknesses in the IRS's comparables analysis cast significant doubt on the Appraisal Report's \$65 million valuation.

C. Canyon in a Hypothetical International Market

One of the more notorious aspects of the dispute between the IRS and Sonnabend's estate centered on whether markets for *Canyon* actually exist. As discussed above, the BGEPA prohibits *Canyon*'s sale in the United States.¹¹⁶ Yet Ralph Lerner, counsel for the estate, asserts that the existence

¹¹⁰ See *supra* notes 94-102 and accompanying text.

¹¹¹ See Silverman & Associates Rebuttal, *supra* note 9, at 8 (noting how the IRS used market data inapplicable to *Canyon*).

¹¹² Treas. Reg. § 20.2031-1(b) (as amended in 1965).

¹¹³ See Cohen, *supra* note 14 ("The ruling about the eagle is not something the Art Advisory Panel considered," [the Panel member] said, adding that the work's value is defined by its artistic worth."); see also RICHARD L. FOX, CHARITABLE GIVING ¶ B4.03 (2012), 2013 WL 4104656 (reporting the same quote about the Panel's analysis); Rhodes 2012, *supra* note 21, at 67-68 (describing the Art Advisory Panel's members and procedures, and highlighting the Panel's possible lack of objectivity when appraising *Canyon*).

¹¹⁴ Cohen, *supra* note 14.

¹¹⁵ See BOGDANSKI, *supra* note 17, ¶ 6.02 (explaining how appraisers may and should take legal restrictions, such as wartime government restrictions, into account in fair market valuations).

¹¹⁶ See *supra* notes 26-27 and accompanying text.

of markets outside the United States partly motivated the IRS's valuation decision.¹¹⁷ In a telephone call, Joseph Bothwell, then-head of the IRS's Art Advisory Panel, offered the example of a "secret Chinese billionaire" as a potential willing buyer for *Canyon*, despite the BGEPA restrictions.¹¹⁸ Imagining this international sale requires a return to the analysis of illicit markets introduced in the *Robson* case about trophy mounts and Joseph Meador's case about stolen Quedlinburg property.¹¹⁹ Analyzing the black market for art lessens the initial incredulity one might experience when thinking about this facet of the IRS's determination.¹²⁰

Selling *Canyon* to any international buyer—secret Chinese billionaire or otherwise—would first require transporting the work out of the country, which would itself render the transaction illicit.¹²¹ Prior to 1998, Sonnabend had successfully brought *Canyon* overseas for multiple exhibitions, with the express permission of the Fish and Wildlife Service.¹²² However, in 1998, Sonnabend received word from the Fish and Wildlife Service that they would no longer grant transportation permits.¹²³ Sonnabend managed to retain possession of *Canyon* only after providing a notarized statement from Rauschenberg confirming that the eagle died prior to the BGEPA's enactment.¹²⁴ Without permits allowing Sonnabend to bring *Canyon* abroad, the only activities allowed under the BGEPA were Sonnabend's possession and domestic transportation of *Canyon*.¹²⁵

¹¹⁷ Interview with Ralph Lerner, *supra* note 8.

¹¹⁸ *Id.*; see also Janet Novack, *Even Rich Heirs Deserve A Fair Shake From The IRS*, FORBES (Feb. 23, 2012, 6:30 PM) <http://www.forbes.com/sites/janetnovack/2012/02/23/even-rich-heirs-deserve-a-fair-shake-from-the-irs>, archived at <http://perma.cc/85FX-CA2V> (quoting Lerner as saying that "[Bothwell] told me there could be a market for the work, for example, a recluse billionaire in China might want to buy it and hide it").

¹¹⁹ See *supra* Section III.A.

¹²⁰ Anne-Marie Rhodes argues in her recent article discussing the *Canyon* controversy that policy considerations recommend against relying on illicit markets when calculating fair market value. See Rhodes 2012, *supra* note 21, at 55-60.

¹²¹ See 18 U.S.C. § 554(a) (2012) (penalizing actual or attempted exportation when the actor knows that it is "contrary to any law or regulation of the United States"). Exporting *Canyon* would violate the BGEPA and therefore violate 18 U.S.C. § 554(a) as well.

¹²² See Silverman & Associates Rebuttal, *supra* note 9 (detailing Sonnabend's ownership history and her relationship with the Fish and Wildlife Service after 1981, when it became aware of the painting's unique circumstances); see also Rhodes 2012, *supra* note 21, at 50-51 (same).

¹²³ See Silverman & Associates Rebuttal, *supra* note 9 (including a letter from Diane Pence of the Department of the Interior, notifying Sonnabend of the change).

¹²⁴ See *id.* (reporting the events); *supra* fig.3 (describing how Rauschenberg obtained the eagle from a colleague's deceased neighbor, who had obtained the eagle prior to 1940).

¹²⁵ See *supra* notes 33-34 and accompanying text.

But assessing a potential international market to which Sonnabend's estate¹²⁶ may have been able to smuggle *Canyon* requires reliance on sparse data about the illicit art market. Nearly all of the data and scholarship on this subject deal with stolen art and looted objects of cultural heritage. Although *Canyon* would not be stolen art in the same sense, transporting the piece out of the United States in contravention of the Fish and Wildlife Service's restrictions would give *Canyon* a compromised status and affect its access to legitimate markets. For tax valuation purposes, its compromised market value should be the one considered in a hypothetical international sale. To do so requires studying the illicit art market.

Limited information about the illicit art market exists. An initial review of the black market for art reveals the staggering magnitude of the industry, which by multiple accounts is a multibillion dollar enterprise.¹²⁷ Although illicit artworks do move through the black market for purchase, their trades take place perhaps more often as leverage for other illegal dealings.¹²⁸ One cannot deny the illicit market's existence, and so a work's value does not become zero solely because its sale would have questionable legality.

Various law enforcement bodies target the illicit art market and strive to curb illegal trade, and they provide valuable insight about how the illicit art market operates. Since 2004, the Federal Bureau of Investigation (FBI) has maintained an Art Crime Team dedicated to the recovery of stolen art objects.¹²⁹ The Italian Carabinieri operate an art theft group within their

¹²⁶ For simplicity's sake, this Note will not consider details regarding the actors in such a hypothetical situation.

¹²⁷ See Noah Charney, *Four Art Crimes and Their Effect on the Art Trade* ("[A]rt crime has evolved into the third highest-grossing annual criminal trade worldwide, behind only the drug and arms trades."), in *ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD* 107, 107 (Noah Charney ed., 2009); Rhodes 2003, *supra* note 20, at 183 n.19 (estimating the worldwide stolen art trade to be worth between \$6–7 billion annually); Ed Caesar, *What is the Value of Stolen Art?*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/17/magazine/what-is-the-value-of-stolen-art.html>, archived at <http://perma.cc/5FHN-BVM3> ("Billions of dollars' worth of art goes missing every year, according to the F.B.I. . . .").

¹²⁸ Charney, *supra* note 127, at 109 ("[C]riminals profit from art theft in a variety of ways that tend not to involve resale"); Amber J. Slattery, Comment, *To Catch an Art Thief: Using International and Domestic Laws to Paint Fraudulent Art Dealers into a Corner*, 19 VILL. SPORTS & ENT. L.J. 827, 834 (2012) ("Stolen art also becomes profitable when it is exchanged for ransom, rather than fair market value.").

¹²⁹ See *Art Crime Team*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/art-crime-team (last visited Mar. 13, 2015), archived at <http://perma.cc/QK99-S28A> (describing the Art Crime Team's inception in 2004, as well as its members, training, responsibilities, and successes); Caesar, *supra* note 127 (reporting how the FBI's Art Crime Team estimates that sale prices for artworks on the illegal art market are "a small fraction of the works' legitimate value").

police force, and Interpol also devotes time to policing illicit artwork.¹³⁰ Several online databases also catalogue and publicize stolen artworks.¹³¹ These groups' efforts have helped to shed light on the criminal world's interactions with art and hinder the activities of those in the black market.¹³²

To evaluate the hypothetical arrival of *Canyon* in the illicit art market, Robert Wittman, a founding member of the FBI Art Crime Team, provided critical assistance.¹³³ For the *Canyon* dispute, the IRS retained Wittman as an art theft expert and as a potential expert witness if the Sonnabend case continued into court.¹³⁴ An international sale of *Canyon* would inherently create an underlying United States Customs violation for transporting the painting outside of the United States without a permit.¹³⁵ A violator could

¹³⁰ Caesar, *supra* note 127 (explaining how the Carabinieri and Interpol managed computerized databases of stolen art); *Comando Carabinieri per la Tutela del Patrimonio Culturale*, ARMA DEI CARABINIERI, <http://www.carabinieri.it/internet/cittadino/informazioni/Tutela/Patrimonio+Culturale> (last visited Mar. 13, 2015), *archived at* <http://perma.cc/3W2Y-A37P> (explaining the origins and history of the Carabinieri for the Protection of Cultural Heritage); *Works of Art*, INTERPOL, <http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art> (last visited Mar. 13, 2015), *archived at* <http://perma.cc/H9B6-LBF5> (explaining how Interpol combats thefts of art pieces).

¹³¹ Interpol and the FBI publish such lists, as does the private-sector Art Loss Register. *See National Stolen Art File (NSAF)*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file (last visited Mar. 13, 2015), *archived at* <http://perma.cc/T4ME-XZZ2> ("The NSAF is a computerized index of stolen art and cultural property as reported to the FBI by law enforcement agencies throughout the United States and the world."); *Our Company*, ART LOSS REG., <http://www.artloss.com/about-us/our-company> (last visited Mar. 13, 2015), *archived at* <http://perma.cc/NNU2-2Y7X> ("The [Art Loss Register] is the world's largest private database of lost and stolen art, antiquities and collectables."); *Works of Art*, *supra* note 130 (explaining how Interpol serves as a central repository on stolen artwork data).

¹³² *See, e.g.*, Caesar, *supra* note 127 (interviewing a former art thief who noted the complicating effects of the art theft databases on what used to be simple illegal art transactions). According to the FBI, its Art Crime Team alone is responsible for recovering thousands of pieces. *See Art Crime Team*, *supra* note 129 ("Since its inception, the Art Crime Team has recovered more than 2,650 items . . .").

¹³³ Wittman served as Senior Investigator on the Art Crime Team for many years, and he currently operates a private service for art recovery. *See About Robert K. Wittman*, ROBERT WITTMAN INC., <http://www.robertwittmaninc.com/about.html> (last visited Mar. 13, 2015), *archived at* <http://perma.cc/P98Y-AGC6> (recounting Wittman's professional history); Randy Kennedy, *His Heart is in the Art of Sleuthing*, N.Y. TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/arts/design/07wittman.html>, *archived at* <http://perma.cc/J86R-HWCL> (detailing Wittman's career with the Art Crime Team). *See generally* ROBERT WITTMAN & JOHN SHIFFMAN, PRICELESS: HOW I WENT UNDERCOVER TO RESCUE THE WORLD'S STOLEN TREASURES (2010) (same).

¹³⁴ Telephone Interview with Robert Wittman, former Senior Investigator and Founder of the Art Crime Team, FBI (Nov. 4, 2013).

¹³⁵ *See supra* note 121 and accompanying text.

be punished with up to ten years in prison or a fine.¹³⁶ But according to Wittman, federal law and customs regulations do not result in complete deterrence. Emphasizing the magnitude of national customs activity that occurs in just one day, Wittman opined that taking *Canyon* out of the United States would not be terribly difficult.¹³⁷ Given the number of exit points out of the country and the volume of shipments moving through those points on any given day, *Canyon* could slip past notice with relative ease.¹³⁸

For a hypothetical artwork smuggled out of the United States, experts agree that the work would not have traction in illicit markets without a heavy price reduction.¹³⁹ Based on his experience as an undercover FBI agent structuring deals for stolen art, Wittman estimated that the value of artwork on the black market typically began at the floor price of ten percent of the item's legitimate value.¹⁴⁰ Wittman himself set similar floors while undercover.¹⁴¹ Therefore, Wittman's best estimate of *Canyon*'s black-market value was ten percent of the painting's legitimate value.¹⁴²

Thus even a hypothetical illicit international sale would rely on the existence of a legitimate market value, and so a fair market valuation of *Canyon* remains problematic. The BGEPA restrictions close off a legitimate sale, the price of which would inform the calculation of *Canyon*'s value on the black market.

The IRS's Appraisal Report reasoned that Sonnabend could have made a charitable gift of *Canyon* to a nonprofit organization.¹⁴³ But if Sonnabend had made such a gift, she would not have relieved the IRS of the valuation dilemma. As with estate tax valuation rules, the IRS derives the amount of a charitable donation—and, by extension, the amount of the donor's tax deduction—partly from the donated property's fair market value.¹⁴⁴

¹³⁶ 18 U.S.C. § 554(a) (2012).

¹³⁷ Telephone Interview with Robert Wittman, *supra* note 134.

¹³⁸ *Id.*

¹³⁹ *Id.*; see also Charney, *supra* note 127, at 109 (“[An artwork’s] value is marked at 7–10% of its legitimate auction value—the amount that criminals could sell it for, were they willing to run the risk of seeking a buyer.”); Caesar, *supra* note 127 (“Some estimates put the average [price for a stolen item] at 7 to 10 percent of perceived open-market value.”).

¹⁴⁰ Telephone Interview with Robert Wittman, *supra* note 134.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Appraisal Review Report, *supra* note 10.

¹⁴⁴ See I.R.C. § 170(a), (e) (2012) (allowing tax deductions for certain donations of tangible personal property and calculating the deductions with reference to “long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value”); see also Rhodes 2003, *supra* note 20, at 18–90 (“For a work of art that is capital gain property, satisfies the related use rule, and is donated to a public charity, the deduction is the full fair market value of the work of art.”).

Canyon's public visibility adds a further wrinkle to imagining its illicit disposition. Commentators on the illicit market in general and on the *Canyon* dispute in particular suggest that, once an artwork reaches a certain level of fame, it will not sell on the black market.¹⁴⁵ Wittman agreed that pieces with significant renown draw no illicit buyers willing to risk buying a work sure to garner attention.¹⁴⁶ It is unclear whether this would require adjusting the "willing buyer, willing seller" paradigm for *Canyon*'s valuation purposes.

A question that runs throughout the dispute is the level of generality at which one should judge *Canyon*'s valuation. The apparent impossibility of selling famous artwork illegally may create too narrow a focus. However, the errors of ignoring legal restrictions and considering inaccessible U.S. auction markets are more glaring.

CONCLUSION

Ultimately, the IRS settled its dispute with the estate in 2013 and required no penalty for *Canyon*.¹⁴⁷ The estate paid no estate tax and donated *Canyon* in November 2012 to the Museum of Modern Art (MoMA) in New York.¹⁴⁸ Consistent with its initial statement of intent and zero-value position, the estate claimed no charitable deduction for the painting.

Reflecting on the *Sonnabend* case, the relevant precedents supported casting a wide net in the taxation of property, including illegal property and fine art. This conclusion received support from the "willing buyer, willing seller" paradigm, from the TAM about Joseph Meador's estate, and from the Ninth Circuit's *Robson* opinion, which had emphasized the objective nature of the "willing buyer, willing seller" test. Despite legal restrictions, the *Robson* taxpayers and Meador's heirs managed to donate or sell illegally

¹⁴⁵ See Charney, *supra* note 127, at 109 ("For famous works [that have been stolen], there is basically no market, black or otherwise."); FOX, *supra* note 113 ("[T]here is apparently no black market for an iconic piece in any event."); Silverman & Associates Rebuttal, *supra* note 9, at 11 (noting that in the field of art theft, it is generally accepted that one cannot sell significantly recognizable pieces on the black market); Telephone Interview with Robert Wittman, *supra* note 134 (same).

¹⁴⁶ Telephone Interview with Robert Wittman, *supra* note 134.

¹⁴⁷ See Interview with Ralph Lerner, *supra* note 8 (recounting the case's formal settlement on May 7, 2013); see also IRS Appeals Office, Closing Agreement on Final Determination Covering Specific Matters (May 7, 2013) [hereinafter Closing Agreement] (unpublished settlement agreement) (on file with Withers Bergman LLP).

¹⁴⁸ Closing Agreement, *supra* note 147; see also Patricia Cohen, *MoMA Gains Treasure that Met Also Coveted*, N.Y. TIMES (Nov. 28, 2012), <http://www.nytimes.com/2012/11/28/arts/design/moma-gains-treasure-that-metropolitan-museum-of-art-also-coveted.html>, archived at <http://perma.cc/4HVH-2R4M> (reporting *Canyon*'s move to a permanent display at MoMA).

obtained property, and the IRS likewise managed to obtain dispositive evidence for valuation purposes.

The cases suggest that a fair market value for *Canyon* exists, a conclusion supported by the presence of illicit art markets and the alleged ease of smuggling artwork. The Fish and Wildlife Service forbade Sonnabend from selling or transporting *Canyon* internationally, but sales of art still happen despite such restrictions.

But relying on illegal conduct to find a price makes more sense when there is evidence of such conduct; here, there was no such evidence for Sonnabend. The difficulties of taxing *Canyon* arise from differences between the work's qualitative and quantitative value¹⁴⁹ and from the aversion to describing such a prominent work as worthless and therefore not taxable.¹⁵⁰ Indeed, *Canyon's* qualitative height may preclude even its illicit sale. If so, the IRS could not even consider the illicit market from the "willing buyer, willing seller" perspective, despite the emphasis on objectivity in *Robson's* appellate decision.

Had the case moved forward with litigation, perhaps the IRS would have pivoted its position, but as the situation stands now, the Sonnabend estate considers the settlement a victory.¹⁵¹ MoMA also considers the settlement a success: in December 2013, it opened a special exhibition dedicated to Sonnabend and titled "Ileana Sonnabend: Ambassador for the New."¹⁵² *Canyon's* prominent place in the exhibition was an alleged condition of MoMa acquiring the piece.¹⁵³

¹⁴⁹ See Silverman & Associates Rebuttal, *supra* note 9, at 11 (asserting no quantifiable value for *Canyon*).

¹⁵⁰ See, e.g., Cohen, *supra* note 14 (quoting a member of the IRS Art Advisory Panel evaluating *Canyon*, who said that the Panel members "all just cringed at the idea of saying that [*Canyon*] had zero value").

¹⁵¹ Interview with Ralph Lerner, *supra* note 8.

¹⁵² See *Ileana Sonnabend: Ambassador for the New*, MOMA EXHIBITIONS, <http://www.moma.org/visit/calendar/exhibitions/1440> (last visited Mar. 13, 2015), archived at <http://perma.cc/A54L-SHPU> (describing the exhibition and honoring Sonnabend's legacy). The exhibition prominently features *Canyon*. See Holland Cotter, *A Legendary Dealer's Eagle Eye: Ileana Sonnabend: Ambassador for the New' at MoMA*, N.Y. TIMES (Dec. 19, 2013), <http://www.nytimes.com/2013/12/20/arts/design/ileana-sonnabend-ambassador-for-the-new-at-moma.html>, archived at <http://perma.cc/G583-4YEQ> ("Rauschenberg's monumental 1959 assemblage or 'combine' titled 'Canyon' has pride of place just inside the gallery entrance, and for good reason. It was Sonnabend's favorite among the thousands of objects she acquired.")

¹⁵³ See Cohen, *supra* note 148 (reporting that the Sonnabend heirs wanted the "higher profile and greater context" that *Canyon* would receive at MoMA).

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