

Looking Beyond the Easel: Artists' Contexts and Resale Payments

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INTRODUCTION

Writing in 1971, the art historian Linda Nochlin asked a question that remains uncomfortable: “Why Have There Been No Great Women Artists?”¹ Answering the question, Nochlin criticizes art historians’ failure to consider larger contextual factors, in particular “to take account of the unacknowledged value system,”² including the unstated role of institutions—of all sorts—in depriving artists who are women of the same footing as men. Thus, for artists in the nineteenth century, the fact that nude models were unavailable to women meant that only a few could succeed.³ Moving beyond the nineteenth century, narrative accounts of artistic greatness emphasized singularity: the “apparently miraculous, nondetermined, and asocial nature of artistic achievement”⁴ and embodied a “golden nugget” account of achievement.⁵ This Essay argues that Nochlin’s insights are salient to perennial debates in United States that concern whether visual artists should have rights to receive payment when collectors resell the artists’ earlier works. These debates can be daunted by unstated assumptions—about the creation of works of visual art, their critical and historical assessment, and their reception in art markets—that are problematic once Nochlin’s questions receive their due. Although this Essay focuses on women, Nochlin’s questions apply with equal force to the situation of other artists and, in particular, to artists who are African-American.

Visual artists’ resale or royalty rights, or *droit de suite*, were first implemented by statute in France in 1920.⁶ The underlying premise is that visual artists, in contrast with authors of other types of creative works, generally do not derive ongoing financial benefit from a work once it’s been sold.⁷ In particular, if a work

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1. LINDA NOCHLIN, *Why Have There Been No Great Women Artists?* (1971), reprinted in *WOMEN ARTISTS: THE LINDA NOCHLIN READER* 42, 42–68 (2015) [hereinafter NOCHLIN, *Why Have There Been No Great Women Artists?*].

2. *Id.* at 42.

3. *Id.* at 67.

4. *Id.* at 49.

5. *Id.* at 50.

6. U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 4 (2013) [hereinafter *COPYRIGHT OFFICE REPORT*], <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

7. *Id.* at 1–2. The limited prospect for income through reproductions of works of visual arts or through derivative works underlies one scholar’s argument for excluding works of visual art from

is resold at a higher price (as when a mostly-forgotten artist is rediscovered by art markets and critics), the artist receives no share of the sale proceeds or royalty. Almost one century later, close to eighty countries—but neither the United States nor China—had enacted resale-rights statutes.⁸ Typically, they assure visual artists of payment of some percentage (generally 3–5 percent) of either the sales price or the seller’s profit when a work is resold for a price that exceeds a stated minimum, capped at a stated maximum amount.⁹ While most countries that comprise the United States’ major art-market trading partners now require resale rights, statutory reciprocity provisions operate to deny royalty payments to artists based in the United States whose work is sold in other countries, placing artists based in the United States at a disadvantage relative to their counterparts in many other countries.¹⁰ Notwithstanding the long history of debate over resale rights, the present stakes are striking, as is the fact that the Register of Copyrights, following an extensive study, recommended in 2012 that Congress consider adopting a resale-rights system.¹¹

This Essay demonstrates that much scholarly opposition to resale rights in the United States is vulnerable to critique sparked by Nochlin’s insights, which help reveal the shaky factual underpinnings of assumptions that some legal scholars make about artists and art markets. By emphasizing the inescapable role of institutions, including markets, market intermediaries, critics, and art historians, Nochlin focuses attention on how artistic achievement is defined and recognized. The Essay argues that distinct institutions can reinforce each other’s effects to the disadvantage of artists who are women.

Separately, by underscoring the importance of the context (broadly defined) in which an artist works, Nochlin’s insights undermine claims grounded in the singularity or isolation of artistic achievement. Applied to the structure of resale rights, the Essay argues, a focus on context or the broader milieu in which an artist works implies that the duration of resale rights should account for the role that artists’ life partners play in their work. Unlike some scholarship, the Essay does not propose recasting the concept of authorship to emphasize the collective character of how particular works are realized.¹² But the fact that in most systems of resale rights the term of the right endures following the artist’s death, either for the full copyright term, or for a stated alternative, is consistent with acknowledging that partners can be crucial to the artist’s lifetime ability to realize work.

copyright protection. See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 330–37 (2018).

8. Herbert I. Lazerow, *Art Resale Royalty Options*, 63 J. COPYRIGHT SOC’Y 201, 204 (2016).

9. Allison Schten, *No More Starving Artists: Why the Art Market Needs a Visual Artist Resale Royalty*, 7 NOTRE DAME J. INT’L & COMP. L. 115, 118–19 (2017) (discussing artist resale law in the European Union). As discussed below, California was the sole exception in the United States. *Id.* at 124.

10. COPYRIGHT OFFICE REPORT, *supra* note 6, at 5.

11. For a thorough analysis of these debates and issues concerning the implementation of resale royalties in the United States, see COPYRIGHT OFFICE REPORT, *supra* note 6; Lazerow, *supra* note 8, at 201; Schten, *supra* note 9.

12. HOWARD S. BECKER, ART WORLDS 25, 38–39 (1982).

I. ARTISTIC GREATNESS, CONSTRUCTED AND REINFORCED

As Nochlin recounted several decades later, the title of her essay originated with a question an art dealer asked her 1970. He said, “I would love to show women artists, but I can’t find any good ones. Why are there no great women artists?”¹³ Nochlin was haunted by the implications: that there were no great women artists and that this absence constituted a “natural condition.”¹⁴ Not only does Nochlin show that any absence is not a naturally-occurring phenomenon, her essay re-frames artistic greatness as a construct that’s contingent on its time. And greatness is constructed—beginning with an artist’s work—by the practices of critics, art historians, art markets, museums, and private collectors and their distinct cohort of advisers. Linked together in reinforcing webs of assessment and esteem, these actors define and redefine artistic merit. Indeed, some scholarly commentators use the metaphor of an ecosystem to characterize this webbed reality. As discussed below, this usage can operate implicitly to legitimate the allocation to sellers of all gain that’s realized when a work is sold because it frames the allocation as a natural or necessary outcome or it repositions art collectors and transactional intermediaries as proximate to authorship of a work.¹⁵

Another implication of webbed institutional structures is that choices made at an earlier time can carry long-term consequences. As of 2019, major American art museums continue to acquire relatively low proportions of work by women and African-Americans, notwithstanding the general recognition that museum collections unjustifiably underrepresent their work. One reason is that, with limited funds to make purchases, museums depend on acquisitions that stem from collectors’ gifts of works, often works acquired at some point in the past, with all its biases.¹⁶ And practices in some museums can reflect wariness of purchasing work by women artists who lack strong track records at auction, as well as perhaps a perception that women are riskier prospects for accession into museum collections.¹⁷ These practices and assumptions are linked to the recognition or neglect of an artist’s work by art critics and—in longer-term perspective—by art historians, as well as linked to whether art markets include or exclude women.

New works of art typically enter the market through art dealers, in particular those active in the primary market through which works are first offered for sale.¹⁸ Accounts of primary-market dealing often celebrate male protagonists who

13. LINDA NOCHLIN, *A Dialogue with Linda Nochlin, the Maverick She*, in *WOMEN ARTISTS: THE LINDA NOCHLIN READER*, *supra* note 1, at 8, 15 [hereinafter NOCHLIN, *A Dialogue*].

14. *Id.*

15. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 *AM J. COMP. L.* 103, 105 (1993) (discussing the “ecology” of the art world); M. Elizabeth Petty, *Rauschenberg, Royalties, and Artists’ Rights: Potential Droit de Suite Legislation in the United States*, 22 *WM. & MARY BILL RTS. J.* 977, 1009 (2014) (emphasizing the interconnected roles of artists, collectors, dealers and others once a work is created).

16. Julia Jacobs, *Female Artists Made Little Progress in Museums Since 2008, Survey Finds*, *N.Y. TIMES* (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/arts/design/female-art-agency-partners-sothebys-artists-auction.html> (summarizing report on museum acquisitions from 2008–2018; 11 percent were works by women, for a total of 5,800 individual artists, of whom 190 or 3 percent were African-American).

17. *Id.*

18. Merryman, *supra* note 15, at 105.

recognize and support emerging talent and take substantial risks on behalf of an artistic avant-garde.¹⁹ Among dealers, the path for women can be riskier. The dealer Berthe Weill—who had a gallery in Paris from 1901 through 1939—was first to sell works by Pablo Picasso²⁰ and Henri Matisse in Paris.²¹ But artists sold first by Weill then turned to more established dealers with larger presences in the market; Weill was so destitute by 1946 that “her” painters mounted a charity auction on her behalf.²² To be sure, Weill’s business strategy made her representation risky for artists, operating as she did by buying works into inventory at low prices and selling them quickly. She lagged in paying her artists, a perennial point of dispute with Matisse,²³ whose work she championed.²⁴ Although some women succeed as art dealers, their work—like Weill’s—may be omitted in summary accounts of an era’s significant dealers. For example, among dealers in modern American art, Edith Halpert was instrumental to the success of notable artists, including Stuart Davis and Jacob Lawrence, but became invisible to histories of the era following her death in 1970 and the closure of her gallery.²⁵ Halpert’s gender made her an outsider within the “largely male art world,” in Rebecca Shaykin’s recent account;²⁶ “frequently underestimated and patronized” by her male counterparts, Halpert herself represented a diverse group of artists, consistent with her pluralistic vision of American art.²⁷ Among dealers in contemporary art in the United States, women’s situations require “clients willing

19. Three prominent examples are, for twentieth-century American artists, Leo Castelli, see Merryman, *supra* note 15, at 110; for Impressionists, Paul Durand-Ruel & Flavie Durand-Ruvel, see PAUL DURAND-RUEL: MEMOIRS OF THE FIRST IMPRESSIONIST ART DEALER (1831-1922) (2014); and for European modernists, Ambroise Vollard, see ANN DUMAS, *Ambroise Vollard, Patron of the Avant-Garde, in CÉZANNE TO PICASSO 2* (Rebecca Rabinow ed., 2006).

20. Weill was Picasso’s first dealer, a relationship that lasted for four years. See Verane Tasseau, *Index of Historic Collectors and Dealers of Cubism: Weill, Berthe*, METROPOLITAN MUSEUM OF ART, <https://www.metmuseum.org/art/libraries-and-research-centers/leonard-lauder-research-center/research/index-of-cubist-art-collectors/weill> (last visited Jan. 31, 2020). Picasso’s first sales in Paris were three pastels bought by Weill. HILARY SPURLING, *THE UNKNOWN MATISSE 232* (2006).

21. SPURLING, *supra* note 20, at 232.

22. See *Berthe Weill*, WIKIPEDIA, https://en.wikipedia.org/wiki/Berthe_Weill (last visited Dec. 7, 2019). When Weill published a memoir in 1933, the book’s frontispiece reproduced a work by Picasso. See Ezra Mendelsohn, *Should We Take Notice of Berthe Weill: Reflections on the Domain of Jewish History*, 1 JEWISH SOC. STUD. 22 n.1 (1994).

23. SPURLING, *supra* note 20, at 302.

24. *Id.* at 232 (with Weill in 1902, Matisse “had at last acquired both a gallery and a champion, who not only grasped what he was doing but asked nothing better than to fight for it”).

25. See Terry Teachout, *Edith Halpert, Forgotten Impresario*, WALL. ST. J. (Oct. 22, 2019), <https://www.wsj.com/articles/edith-halpert-forgotten-impresario-11571778913> (following her death, Halpert “vanished from the collective memory of the art establishment. . . and today her name is all but unknown”). Halpert did attract a biography, published in 2006; its author reports that she had not heard of Halpert prior to seeing her name on the wall label accompanying a work by Jacob Lawrence in the Whitney Museum’s retrospective of Lawrence in 2001. LINDSAY POLLOCK, *THE GIRL WITH THE GALLERY x* (2006).

26. REBECCA SHAYKIN, *EDITH HALPERT* 7 (2019).

27. *Id.* at 7, 16.

to buy from women entrepreneurs,” in Michael Shnayerson’s assessment.²⁸ Many more women than men who are prominent as art dealers have graduate degrees in art history, which Shnayerson suggests may be a precautionary move that recognizes gendered barriers to entering art dealing, in preparation for an alternative career in academia or an art museum.²⁹ Overall, with a few exceptions, from the 1990’s onward “[t]he mega dealers were a male cohort . . . fiercely competitive”³⁰

Many accounts of the careers of women artists describe difficulty in securing or retaining representation by a primary dealer. In one recent example, the painter Carmen Herrera received her first solo exhibition in a major New York museum in 2016, when she was one-hundred and one years old. At the time of the critically-acclaimed exhibition of canvases, their sharply-edged geometric forms tensed in contrasting colors, Herrera said: “If you wait for the bus, the bus will come. I waited ninety-eight years. Nobody cared what I did. Now they’ve accepted it.”³¹ Although Herrera was admired by her contemporaries, she attracted scant attention from critics and dealers. She reports that a dealer, acknowledging the superiority of her work, explicitly refused to show it on the basis of her gender.³² Separately, whether or not the risk of being dropped by a dealer is greater for women, some incidents are memorable in themselves. After the painter Françoise Gilot left Pablo Picasso in 1953, their two children in tow, the artists’ mutual dealer terminated his contract with Gilot. Recounting this episode in *Life with Picasso* in 1964, Gilot writes that “Occasionally—even today—a picture dealer will tell me that he would like to buy or exhibit my work, but that he doesn’t dare to, for fear of losing Pablo’s good will.”³³

More broadly, women who were initially admired as innovative painters in the 1950’s tended to fall from sight when newly aggressive dealers, for the most part, did not represent them. Fewer public exhibitions meant less presence in publications, including academic accounts of the period, with the consequence that the assumed prototype of an Abstract Expressionist painter became male.³⁴ Sometimes assumed prototypes warp accounts of an artist’s distinct significance and influence on others, leaving them misleading. After the painter Helen Frankenthaler married fellow artist Robert Motherwell, although some viewers at a 1959 gallery show saw vivid expressions of a singular and assured artist, critics emphasized Motherwell’s perceived influence.³⁵ Earlier, Frankenthaler devised a

28. MICHAEL SHNAYERSON, *BOOM: MAD MONEY, MEGA DEALERS, AND THE RISE OF CONTEMPORARY ART* 218 (2019). This would include collectors who are women.

29. *Id.* And barriers to finding positions of responsibility within established galleries made it attractive for entrepreneurial women to open their own galleries or to ally with husbands as business partners.

30. *Id.* at 201.

31. Natalia Korchina, *Carmen Herrera, “I Waited for Almost a Century for the Bus to Come. And It Came.”*, ARTHIVE, https://arthive.com/publications/2269~Carmen_Herrera_I_waited_for_almost_a_century_for_the_bus_to_come_And_it_came (last visited Jan. 22, 2020).

32. Nina Malkin, *Cuban Artist Carmen Herrera is 103 – and Proves That Persistence is Everything in Life*, NEXTTRIBE (Feb. 5, 2019), <https://nexttribe.com/artist-carmen-herrera/>.

33. FRANÇOISE GILOT & CARLTON LAKE, *LIFE WITH PICASSO* 335 (1962).

34. MARY GABRIEL, *NINTH STREET WOMEN* 677 (2019).

35. *Id.* at 687.

new way to paint by staining canvas, not just marking it, a tactic that by loosening shapes and heightening colors created intensely optical effects.³⁶ Having seen Frankenthaler's *Mountains and Sea* (1952) in New York, Morris Louis and Kenneth Noland returned to Washington to create poured paintings in their own Color Field style, a translation into their own idiom of Frankenthaler's style and process.³⁷ Louis and Noland acknowledged Frankenthaler's influence at the time, as did the era's dominant critic (Clement Greenberg) in the early 1960s.³⁸ But overall in accounts of the era's innovations, Frankenthaler's role became marginal, one of a "(mere) catalyst fueling the development of a future for painting as an art of pure opticality . . ." ³⁹ Situating Frankenthaler within a larger periodized narrative, as a bridge between Jackson Pollock and the Color Field school, overshadowed the distinct power of her works. Relatedly, when women collaborate with male artists, as in post-1960s works, their contributions may become submerged, an outcome that can be addressed by naming as authors all members of a team who participated in a work.⁴⁰

Finally, the situation of women artists may be worsened to the extent anecdotal detail about their lives dominates accounts and assessments of their work. In Mary Gabriel's recent assessment, journalistic accounts of Frankenthaler's lifestyle accompanied her erasure from "the avant-garde honor role . . . based not on what she did in her studio but on how she lived her life"⁴¹ including her marriages and her romantic relationship with Clement Greenberg that preceded them. The painter Jane Freilicher termed this situation "anthropological art criticism" in 1961 in response to a critic's article about the painter Joan Mitchell.⁴² A prominent focus on an artist's gender can undermine, if not subvert, a robust assessment of the merits and stature of her work. In turn, a sympathetic (and entrepreneurial) dealer may recast how an artist is understood. Georgia O'Keefe was reluctant to agree to representation by Edith Halpert; O'Keefe had long been represented by her mentor and husband, Alfred Stieglitz,

36. Anne Wagner, *Passages: Helen Frankenthaler 1928-2011*, 50 *ARTFORUM INT'L* 51, 51-52 (2012).

37. As the Guggenheim museum's catalogue entry acknowledges for Morris Louis's *Saraband* (1959), see *Morris Louis, Saraband*, GUGGENHEIM, <https://www.guggenheim.org/artwork/2554> (last visited Jan. 31, 2020).

38. GABRIEL, *supra* note 34, at 478-79.

39. Anne M. Wagner, *Pollock's Nature, Frankenthaler's Culture*, in JACKSON POLLOCK 181, 182 (Kirk Varnedoe & Pepe Karmel eds., 1999).

40. JOAN KEE, *MODELS OF INTEGRITY: ART AND LAW IN POST-SIXTIES AMERICA* 157 (2019). Artists' practices and preferences may outrun the law. For copyright-law purposes, joint authorship is determined by authors' intentions at the time of creation. 17 U.S.C. § 101 (2018). But some artists retroactively change sole authorship to co-authorship, as did Christo and Jeanne-Claude in 1994 for outdoor works and large-scale installations. See William Grimes, *Jeanne-Claude, Christo's Collaborator on Environmental Canvas, Dies at 74*, N.Y. TIMES (Nov. 20, 2009), <https://www.nytimes.com/2009/11/20/arts/design/20jeanne-claude.html>; see also *Most Common Errors*, CHRISTO AND JEANNE-CLAUDE, <https://www.christojeanneclaude.net/common-errors> (last visited Dec. 31, 2019) (detailing artists' stance on many matters, including 1994 change in name to "Christo and Jeanne-Claude"). Museum practice, unlike copyright law, defers to artists' desired attributions. See Roxanne Degens, *Joint Authorship and Museum Practice* 22-23 (Dec. 23, 2019) (unpublished manuscript) (on file with author).

41. GABRIEL, *supra* note 34, at 713.

42. *Id.* at 712. Or, in an art historian's later assessment, "life-styles prattle" that amounts to "drivel" that "could make anyone a formalist." Wagner, *supra* note 39, at 185.

and following his death, she had no pressing need to sell work.⁴³ By emphasizing O'Keefe's stylized landscapes, and not her magnified images of flowers for which Stieglitz initiated sexualized interpretations, Halpert enabled O'Keefe to recast herself apart from her relationship with Stieglitz.⁴⁴

Might "woman artist" itself be problematic as a category? Reviewing a recent monographic museum exhibit of works by Berthe Morisot, Kathleen Adler singles out the show's subtitle: "Woman Impressionist."⁴⁵ To be sure, Morisot *was* both an Impressionist painter and a woman but Adler wonders whether by so prominently featuring her gender the exhibition's curators "weakened her place in the history of Impressionism."⁴⁶ Many factors help explain why the exhibition was Morisot's first in North America since 1987, including the fact that much of her work remained in her family's collection. Situating her in the "woman" subcategory of Impressionist painters may, of course, encourage museums to display her work, given awareness of gender imbalances in their collections, but it may also shape how histories address Morisot's distinctiveness as an artist. Placing an artist in a gender-specified category can distort how an artist's distinct contributions are understood relative to the works of others. In general, as Nochlin observes, many women artists and writers "would seem to be closer to other artists and writers of their own period and outlook than they are to each other."⁴⁷

II. ARTISTS AND MARKETS OVER TIME

Summarizing her essay's argument, Nochlin stressed its emphasis on "the *institutional* . . . rather than the *individual*, or private, pre-conditions for achievement or the lack of it in the arts."⁴⁸ The fact that some women succeeded as artists notwithstanding institutional obstacles does not refute the overall significance of institutional and intellectual conditions for the recognition of artistic achievement. Acknowledging the power of these conditions is crucial to evaluating arguments supporting and opposing resale rights. Nochlin's emphasis on institutions and their consequences undermines the persuasiveness of arguments that function as intellectual linchpins for the opposition to resale royalty rights. In particular, Nochlin undermines the force of arguments that define artistic achievement in acontextual and atemporal terms. Separately, some critics of resale rights rely on factual suppositions and on theoretically-derived projected impacts stemming from adopting resale royalty rights that are not supported by observed experience on the ground.

Opponents of resale royalties often stress the roles of primary dealers and collectors in finding new talent. Writing in this tradition in 2014, M. Elizabeth Petty emphasizes the constant search by players in the art market "for young, raw talent."⁴⁹ Purchasing new work constitutes a risky investment for collectors and

43. SHAYKIN, *supra* note 26, at 155.

44. *Id.* at 155–56.

45. Kathleen Adler, Review, *Berthe Morisot: Musée d'Orsay, Paris*, 161 BURLINGTON MAG. 511, 511 (2019).

46. *Id.* at 445.

47. NOCHLIN, *Why Have There Been No Great Women Artists?*, *supra* note 1, at 44.

48. *Id.* at 67.

49. Petty, *supra* note 15, at 1007.

primary dealers; by diminishing the prospect of investment return, a resale royalty might dissuade collectors from undertaking the risk.⁵⁰ In 1993, the prominent art-law scholar John Merryman asserted that the constant search for fresh talent to be promoted and collected constituted a “scouting system” that leaves “no undiscovered geniuses.”⁵¹ However, this focus overemphasizes the moment and mechanisms of initial discovery, ignoring or understating the impact of the subsequent interlinked roles assumed by institutions in assessing and positioning an artist’s relative stature. On this point, another dimension of Nochlin’s body of work is informative: the 1977 museum exhibition *Women Artists: 1550–1950*, which evoked from one critic the assessment that “[t]he history of Western art will never be the same again.”⁵² Research for the exhibition excavated museums’ storage to uncover art by women—once “discovered” but since forgotten—that merited display. The focus on institutions urged by Nochlin can counter the impulse to characterize the results of rediscovery projects as collections of singular anomalies among artists who were women. Moreover, the claim that there are “no undiscovered geniuses” ignores artists like Carmen Herrera and others who confronted gendered barriers to entering the scouting system when they could not obtain representation by a primary dealer, or were arguably more vulnerable than their male counterparts to expulsion from the system in one way or another. And the claim can seem circular because it implies that the work of any “undiscovered” (or forgotten) artist lacked merit.

By urging that artistic achievement be understood in contextual terms, Nochlin’s account is congenial to acknowledging the role of power and its imbalanced allocation. Indeed, understanding the world of art as a multi-component ecosystem in which all play essential roles is consistent with recognizing that some components, in some respects, possess more power than do others. The bargaining power of not-yet-successful artists in relation to primary dealers is acknowledged to be weak.⁵³ Public displays of power occur; the two major auction houses—a duopoly in the United States—staunchly mounted opposition to proposed federal legislation to mandate resale royalties, reportedly spending annual six-figure amounts lobbying against the proposed statute.⁵⁴

Moreover, within the ecosystem, the motivations of some players are complex. Individual collectors often acquire works of art because they find aesthetic merit in them and regard their collections as essential buffers against

50. *Id.*

51. Merryman, *supra* note 15, at 109. This argument assumes either that collectors anticipate holding works for a relatively short time or that they are acutely sensitive to the discounted present value of a relatively small amount to be determined at an indeterminate time in the future. *See infra* text and accompanying notes 54–55.

52. NOCHLIN, *A Dialogue*, *supra* note 13, at 16–18 (quoting John Perrault).

53. Mara Grumbo, *Accepting Droit de Suite as an Equal and Fair Measure Under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive*, 31 HASTINGS COMM. & ENT. L.J. 357, 359 (2008) (characterizing the art market in United States as “strongly weighted toward dealers”); COPYRIGHT OFFICE REPORT, *supra* note 6, at 78 (noting the imbalance of bargaining power as between artists and art-market intermediaries).

54. Jillian Steinhauer, *Auction Houses Lobby Against Artist Resale Royalty Act*, HYPERALLERGIC (Mar. 24, 2014), <https://hyperallergic.com/116238/auction-houses-lobby-against-resale-royalty-act/>.

other dimensions of life,⁵⁵ deaccessioning works only on aesthetic criteria or under urgent economic pressures. Other collectors, though, regard their art as another asset class and their collections as comparable in some respects to a venture capital fund, its individual holdings to be sold when financially advantageous.⁵⁶ As a consequence, it's less plausible to see their position in the ecosystem as proximate to authorship or as committed champions of any artist in particular. Separately, prominent critics of resale royalties characterize their operation as "one-sided" because they position artists only to benefit from sales and not to bear any of a collector's ongoing costs⁵⁷ or to share in the loss if the collector sells a work for less than the purchase price.⁵⁸ To be sure, many art collectors do not analogize their collections to venture-capital funds, jettisoning assets whenever prompted by auction prices; but some who do are prominent in high-dollar transactions in contemporary art.

Ongoing ties between an artist and a work made by the artist are integral to the work's identity and value. A federal statute—the Visual Artists Rights Act of 1990—acknowledges an ongoing tie between an artist and individual works, conferring on the artist a moral right of integrity to prevent modifications to a work that would be detrimental to the artist's reputation plus a right of attribution to be named as the author of works by the same artist. The correct association of an artist's name with a work connects the artist with the work over time by assuring its authenticity, which is crucial to the work's market value. That value can also reflect the assessment of other works by that artist, making the artist's ongoing development of a metaphorical "brand" integral to any particular work's value and situating the artist as an ongoing presence within the larger ecosystem that determines value.⁵⁹ Thus, an artist's role or presence within the "ecosystem" is not extinguished when the artist no longer owns a particular work.

Overall, some opponents of resale royalties rely on factual conjectures that are belied by experience in other countries, discrepancies noted in 2012 by the Register of Copyrights.⁶⁰ In particular, scholars assumed that with resale royalties, initial purchasers would pay less for a work to discount for the anticipated amount of future royalty payments due the artist.⁶¹ Noting that it's notoriously difficult to parse out effects in primary markets—due in part to blurry lines among dealers, many of whom are active in secondary markets as well—the Register found little evidence of harm in primary markets following the imposition of resale royalties in other countries.⁶² Nor does the experience in other countries support predictions

55. COPYRIGHT OFFICE REPORT, *supra* note 6, at 43.

56. Petty, *supra* note 15, at 1005 (characterizing individual collectors as "stakeholders who determine who and what is 'hot' in the art world, often racing to find the newest trend in which to invest both their time and money"). See also COPYRIGHT OFFICE REPORT, *supra* note 6, at 10 n.57 (elaborating on asset-class orientation of some collectors).

57. Stephen E. Weil, *Resale Royalties: Nobody Benefits*, in BEAUTY AND THE BEASTS 210, 215–16 (1983).

58. Merryman, *supra* note 15, at 112.

59. Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 235 (2012).

60. See generally COPYRIGHT OFFICE REPORT, *supra* note 6.

61. Henry Hansmann & Marina Santilli, *Royalties for Artists versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259, 262 (2001).

62. COPYRIGHT OFFICE REPORT, *supra* note 6, at 45.

that activity in secondary art markets shifts to jurisdictions without resale rights.⁶³ Likewise, some scholars assumed that artists would retain works as a hedge against future market developments to sell when market prices warranted,⁶⁴ or noted that an artist could by contract negotiate a right to share in future resale proceeds.⁶⁵ However explained, these practices have not emerged; the hedging strategy represents a risky gamble for many artists,⁶⁶ while the contract route is limited in legal force to the initial purchaser.⁶⁷

Finally, opponents of resale royalties stress that the largest amounts would go to already-successful artists,⁶⁸ which is a likely outcome but also one not likely to dissuade less successful artists from working.⁶⁹ A study commissioned by the UK's Intellectual Property Office in 2008, two years after the UK's implemented resale rights, found that although most artists received relatively small amounts, they typically reinvested them in their art, purchasing materials and equipment; a UK society that collects royalty payments on behalf of artists reported they place symbolic value on the payments as recognition and validation of their work.⁷⁰ Indeed, if payments to most artists are in relatively small amounts, it's not evident how (or why) that prospect would shape the prices collectors are willing to pay in the primary market. To the extent that artists who are successful in their lifetimes create charitable foundations to operate posthumously, resale rights that survive the artist would fund artists' foundations; many (like the Andy Warhol Foundation) support living artists.⁷¹

63. *Id.* at 51–52.

64. Hansmann & Santilli, *supra* note 61, at 265 (noting cost and difficulty of this tactic).

65. Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1357 (1968) (acknowledging weight of custom to the contrary).

66. COPYRIGHT OFFICE REPORT, *supra* note 6, at 40.

67. For the leading precedent for the underlying proposition that covenants running against personal property are not enforceable against subsequent purchasers, even those with notice of the provision, see *Pratte v. Balatsos*, 99 N.H. 430 (1955) (explaining that the successor of a previous business owner, who was aware of a contract requiring a juke box to remain in place, was not bound by that requirement). A provision requiring that a purchaser insert a comparable resale-rights provision in any contract of sale (with the artist named as a third-party beneficiary) would give the artist a right to damages against the initial purchaser. Its practical utility is limited by the fact that the statute of limitations is likely to have expired before the artist discovers a breach. The U.C.C. limitations period for sales of goods is four years from the date of delivery or for future promises, four years from the time the promised action should have taken place. U.C.C. §2-725 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

68. Merryman, *supra* note 15, at 117–18. This provokes the rejoinder, “Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn't they get richer just like anyone else?” Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L. J. 249, 259 (1989).

69. COPYRIGHT OFFICE REPORT, *supra* note 6, at 39.

70. *Id.* at 69.

71. See WARHOL FOUND., <https://warholfoundation.org> (last visited Dec. 7, 2019).

III. ARTISTS' LIVES AND LEGACIES

Nochlin's critique is grounded in the insight that any artist works in a context or milieu. Invisible in legal scholars' accounts of art-world ecosystems, artists' life partners and families can be crucial to an artist's ability to realize work. Artists often depict their partners and children, incorporating them into a work; many partners serve as models,⁷² as Françoise Gilot did for Picasso.⁷³ It's telling that an artist's prototypical muse—source of inspiration—is female. Once again, Berthe Morisot furnishes a counter-example. There's no settled vocabulary for her recurrent male model, her husband, Eugène Manet, who figures in several of her paintings. Inverting gendered assumptions evident in some Impressionist paintings, in *In England* (1876), Eugène sits astride a chair in a domestic interior, a lace curtain by his side, looking out over potted plants toward a woman and child and onward to a harbor.⁷⁴ In another, Eugène cares for their young daughter, Julie, a reversal in roles unique for paintings of its time.⁷⁵

For twentieth-century American artists, life partners' roles can extend beyond service as muse to studio management and to paid employment outside the artist's studio to earn income to support the family and the artist's practice. For example, Phyllis Diebenkorn, married to the painter Richard Diebenkorn, always "understood that she would share her husband's priorities" and that their family's life would "revolve around his work."⁷⁶ Modeling frequently for her husband, Phyllis Diebenkorn worked as a teacher and research assistant; she also "assumed responsibility for the practical side of their lives together,"⁷⁷ including interfacing with dealers following her husband's death in her role as the representative of his estate.⁷⁸

Consistent with recognizing the lifetime contributions of life partners to an artist's ability to work, plus the economic significance of the artist's work for her or his family, the right to resale royalties should not terminate with the artist's death. Terminating the right upon the artist's death—as the Register of Copyrights recommends, at least as an initial matter⁷⁹—treats the resale right as uniquely personal to the artist,⁸⁰ and thereby denies the significance of the artist's life partner. The ongoing economic impact of a partner's contributions can be severe. The actor Anjelica Huston—widow of sculptor Robert Graham—reports that at age sixty-seven she still needs to work.⁸¹ Notwithstanding his success as a sculptor,

72. Famously, the mates and eventual wives of Paul Cézanne, Claude Monet, and Auguste Rodin modeled for them. See RUTH BUTLER, *HIDDEN IN THE SHADOW OF THE MASTER: THE MODEL-WIVES OF CÉZANNE, MONET, AND RODIN* (2008).

73. On the best known, *La Femme-Fleur* (1946), see GILOT & LAKE, *supra* note 33, at 108–09.

74. Adler, *supra* note 45, at 512–13.

75. *Id.* at 513.

76. ARTISTS' ESTATES: REPUTATIONS IN TRUST 52 (Magda Salvesen & Diane Cousineau eds., 2005).

77. *Id.* at 51.

78. *Id.* at 54–57.

79. COPYRIGHT OFFICE REPORT, *supra* note 6, at 77.

80. Lazerow, *supra* note 8, at 243.

81. Andrew Goldman, *In Conversation: Anjelica Huston*, VULTURE (May 1, 2019), <https://www.vulture.com/2019/05/anjelica-huston-in-conversation.html>.

Graham did not have health insurance; Huston paid his extensive medical and hospital bills, leaving her with “less than no money.”⁸²

As it happens, California is the sole state in the United States to mandate resale royalty payments, with a term that extended to twenty years following the artist’s death. Robert Graham’s estate was among the plaintiffs who sued Christie’s and Sotheby’s, alleging failures to collect and remit royalty payments as required by the Resale Royalty Act.⁸³ Sitting en banc, the Ninth Circuit held that the portion of the statute applicable to sales conducted outside California by California residents or agents acting on their behalf was an unconstitutional assertion of state power to regulate conduct outside the state. A later opinion held that the other portion of the statute—applicable only to in-state transactions—was preempted by the federal 1976 Copyright Act because it granted rights equivalent to the Act’s distribution right.⁸⁴ Known as the “first sale” doctrine, a copyright holder’s exclusive right over distribution is limited to the first sale of a copyrighted work.⁸⁵ Thus, statutory reform at the federal level is the sole solution.

Placing an artist’s family within the milieu or general context in which the artist works also casts in fresh perspective another perennial question: whether the right to receive resale royalties should be waivable by the artist. To make the right inalienable—as it is in most jurisdictions—seems paternalistic⁸⁶ and potentially undercuts the value of waivability to an artist who would prefer to receive a higher present price in exchange, believing that resale is unlikely.⁸⁷ But if the right survives the artist, waiving it implicates the interests of the artist’s heirs and may reflect power imbalances between artists and art-market intermediaries.

CONCLUSION

Nochlin’s insistence on “the unacknowledged value system” and on the impact of the interlocking institutions that comprise the art world can explain much about an artist’s situation, including those of artists who are women. This Essay has argued that Nochlin’s insights are salient to ongoing debates about artists’ rights to resale royalties, in which much that’s been assumed to follow as a necessary consequence in an immutable natural order appears on reflection to reflect the operation of institutions of all sorts. To be sure, earlier omissions in the art world’s linked webs of recognition and esteem can later be addressed, just as “the bus” of a retrospective exhibition in a major New York museum finally arrived for Carmen Herrera, aged one-hundred and one. In 2019, a museum exhibition documented Edith Halpert’s crucial role for her era’s artistic

82. *Id.* at 16.

83. *Sam Francis Foundation v. Christie’s, Inc.*, 784 F.3d 1320 (9th Cir. 2015), cert. den., 136 S. Ct. 795 (2016). For the Resale Royalty Act, see CAL. CIV. CODE § 986(a) (West 2014).

84. *Close v. Sotheby’s, Inc.*, 894 F.3d 1061 (9th Cir. 2018), cert. den., 139 S. Ct. 1469 (2019).

85. 17 U.S.C. § 106(3) (2018) (the exclusive distribution right), as limited by 17 U.S.C. § 109(a) (2018) (the first sale doctrine).

86. Hansmann & Santilli, *supra* note 61, at 275–76.

87. COPYRIGHT OFFICE REPORT, *supra* note 6, at 78–79. The Report recommends inalienability so as not to undercut American artists’ claims to reciprocal treatment for sales in foreign jurisdictions. *Id.* at 79.

movements.⁸⁸ Likewise, Helen Frankenthaler's *Mountains and Sea* is now acknowledged as a distinctive masterpiece—and not a mere bridge between other artists' accomplishments—that continues to herald the potential of painting as an art medium.⁸⁹ Albeit encouraging, developments like these do not undermine the case for resale rights. If anything, they underscore just how vulnerable to error interlocked institutions can be.

88. SHAYKIN, *supra* note 26, at 7.

89. Among other things, Frankenthaler made the unpainted ground part of her medium, judging when (and where) to stop painting. For a curator's account, see *Mountains and Sea, Frankenthaler*, NAT'L GALLERY OF ART (Sept. 30, 2016), <https://www.nga.gov/audio-video/audio/collection-highlights-east-building-english/mountains-and-sea-frankenthaler.html>.