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Models of Integrity: Art and Law in Post-Sixties America

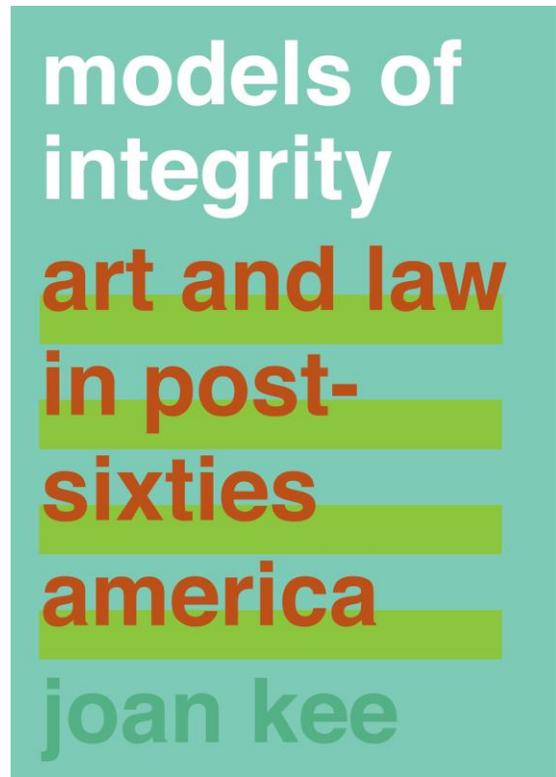
Joan Kee

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In the summer of 1976, the artists Christo and Jeanne-Claude were on the verge of completing *Running Fence*, a massive, temporary installation that extended twenty-four miles across California's Marin and Sonoma counties. The final segment of the project, which reached into the Pacific Ocean, stalled when the California Coastal Commission issued an injunction to halt the work. Frustrated at the delay and concerned that their window of opportunity was rapidly shrinking, the artists went forward without permission, installing the last segment into the ocean in violation of an anticipated injunction. In an interview with Calvin Tomkins published in the *New Yorker* the following year, Christo insisted that the artists' illegal act gave the work a greater resonance: "I completely work within [the] American system by being illegal, like everyone else—if there is no illegal part, the project is less reflective of the system."¹

Running Fence is one of six case studies that comprise Joan Kee's original and engaging new book, *Models of Integrity: Art and Law in Post-Sixties America*. As she observes, in the 1960s, emerging movements such as Conceptual art and land art raised issues that demanded new ways of interacting with the law, and artists began to make work that directly challenged existing legal frameworks. Each of Kee's chapters focuses on an artwork or project that, in her words, "messes with" the law in some way (37). In addition to *Running Fence*, these include: the model sales contract known as the Artists' Reserved Rights Transfer and Sale Agreement, published in 1971; Gordon Matta-Clark's interventions in public and private structures to question the authority of law and expose the inequities of the private property regime; the self-imposed "contracts" that governed the *One Year*



Performances of Taiwanese-born performance artist Tehching Hsieh; the controversies surrounding Sally Mann's *Immediate Family*, published against the backdrop of the culture wars of the 1990s; and the "certificates of authenticity and ownership" issued by Cuban-born installation artist Felix Gonzalez-Torres (and by his estate after his death). In each case study, Kee considers the actions of artists, dealers, collectors, politicians, and lawyers through a variety of legal and ethical frameworks, including property law, the tax code, copyright, risk management, constitutionality, and the debate over artists' "moral rights."²

Much of the legal scholarship concerning the visual arts focuses attention on outcomes and proposes changes in legislation or policy.³ In these narratives, while the law might foster or constrain creativity, it typically stands largely outside the world of art. Kee is a lawyer as well as an art historian, and she takes a different approach. Her book encourages us to understand the law "not as a set of paternalistic and forbiddingly esoteric rules imposed by a self-serving autocracy, but as a plastic, and even liquid, condition collectively shaped by turns of language, aesthetic decisions, and individual behavior" (5). While her legal training informs her analyses, her methodology remains largely art historical. Her approach falls within the realm of social art history, and she fully engages with the law as a constituent element of the creative process.

In the case of *Running Fence*, discussed in chapter two, Kee starts with the inventive corporate structure that lawyer Scott Hodes established to protect the artists and their investors from liability, and she examines in detail the delicate negotiations that the artists undertook to convince property owners and municipalities to support the project. And although Christo's remarks in the *New Yorker* imply that illegality was integral to the work, the well-documented history of the project suggests otherwise. Prior to their final, illegal act, Christo and Jeanne-Claude had spent years trying to acquire all necessary permits and permissions, even going so far as to commission a costly environmental impact report before they were legally required to do so. Moreover, they made deliberate choices that amplified the logistical and legal challenges the project faced when they bypassed possible locations where regulatory requirements would have been streamlined. Since they chose to erect the work in Northern California, on a heavily regulated stretch of land with numerous owners, the artists had to seek permits from multiple agencies, secure easements from private landowners skeptical of their idea of art, address liability issues and environmental concerns, and respond to protests. Kee therefore demonstrates that *Running Fence* was itself a kind of performance in which the law became the medium.

Where Christo and Jeanne-Claude embraced interaction with the legal system, Sally Mann sought to avoid it. *Immediate Family*, published in 1992, prominently featured photographs of Mann's children, sometimes nude, asleep, or injured. No legal challenge was brought against her or her publisher. Nonetheless, she faced an insidious rumor mill spewing out nebulous threats of possible legal action stemming from ideologically driven misreadings of her work that characterized it as pornographic, abusive, and exploitative. As Kee explains in chapter five, the scandalized response to these images was heightened by the controversies of the culture wars, when photographers such as Robert Mapplethorpe and Andres Serrano were vilified for producing work seen as obscene or sacrilegious. In 1990, when the *Wall Street Journal* reprinted a nude photograph of Mann's daughter Virginia, they censored the image by blocking out the child's eyes, chest, and genitals. The Visual Artists' Rights Act of 1990 (VARA) was enacted in the same year, and Kee provides an interesting analysis of the VARA claims that Mann might have filed against the newspaper. Instead of filing suit, Mann

responded to this and other challenges by adopting a strategy that Kee refers to as “strategic disengagement”: she withdrew and refused to participate in a legal and moral circus (165).

Kee’s account emphasizes Mann’s commitment to the integrity of her work and to her family over her potential rights as a legal claimant. As the title of her book suggests, integrity serves here as a frame through which to explore art-making in an era when artists began to make work that demanded “accountability [as] a systemic part of their creative process” (4). Integrity emerges in interesting ways as Kee examines artists reacting against scandals, corruption, and mismanagement by corporations, politicians, and government bodies, and struggling to maintain moral and artistic integrity in the face of legal and personal obstacles. For instance, discussed at length in chapter three are Gordon Matta-Clark’s physical cuts into the urban fabric that created dark voids on the exteriors of buildings and produced spectacular light effects on their interiors. But in doing so, he violated building codes and trespass laws. By damaging the structural integrity of these properties, Matta-Clark challenged the ethical behavior of the city managers by exposing their neglect of the public interest. Integrity likewise emerges as a personal challenge in chapter four, where Kee analyzes Tehching Hsieh’s *One Year Performances*. For each performance, the artist wrote onerous terms in the style of a legal contract that would govern his behavior for the year. He then meticulously documented his efforts to abide by those terms. On occasion, strict adherence placed the artist in legal and physical peril. For instance, during his *One Year Performance 1981–1982 (Outdoor Piece)*, he resisted arrest in a futile effort to avoid violating a contract term that required him to remain outside for a full year.

Like Hsieh’s personal contracts, Gonzalez-Torres’s “certificates of authenticity” were largely unenforceable by either the artist or his buyers.⁴ Despite their name, the certificates more closely resemble contracts that impose ongoing obligations on the buyer, rather than a traditional certificate guaranteeing authenticity of a completed work. In contrast to many artwork sales contracts, these certificates were permissive, rarely requiring the buyer to perform any specific act or to install the work according to a narrow set of strict instructions. Instead, terms that suggest ideal standards for an installation or indicate a work’s intention invite the buyer to willingly fulfill the bargain the certificates propose. For instance, installations involving stacks of paper include information on the suggested height that should be maintained; however, many certificates leave uncertain “just how literally owners were expected to abide by [their] terms” (213). Although this chapter presents a fascinating case study, its role within the book would be strengthened by a more direct discussion of how Kee understands the concept of integrity in relation to the artist’s work.

Kee addresses integrity as a moral right of the artist in chapter one, where she discusses the Artists’ Reserved Rights Transfer and Sale Agreement, the model sales contract published in 1971 by dealer Seth Siegelaub and lawyer Robert Projansky.⁵ America currently lags far behind many other countries in granting artists enforceable moral rights, and in the 1970s, artists enjoyed even fewer legal protections than they do today. In the absence of a contract, American laws tended to favor the buyer’s interests over those of the creator. Siegelaub and Projansky’s agreement attempted to counteract this trend by setting forth contractual terms that strongly protected the financial and creative interests of artists. It included a number of controversial provisions, such as a 15% resale royalty, a 50% share of exhibition fees, and the ability to veto the inclusion of the work in planned exhibitions. Kee situates the agreement within the context of the labor movement and the debate over artists’ rights. Its emphasis on economic and contractual concerns was distasteful to artists who saw the value of their work in noneconomic terms, and it was never widely adopted. Nonetheless, the

agreement shifted the discussion surrounding moral rights among artists, legislators, and the public, setting the stage for the subsequent enactment of later protections. For instance, California enacted the country's only resale royalty law (the California Resale Royalty Act) in 1977.⁶ VARA, enacted in 1990, includes the moral right of integrity, which largely protects the physical integrity of a subset of artworks and prohibits the “intentional distortion, mutilation, or other modification” of those works in a way that would prejudice the artist's honor or reputation.⁷

Kee's introduction discusses the political tumult of the 1960s, and throughout the book she harnesses an admirable range of historical events, laws, judicial decisions, and policies that set the stage for her case studies. Given the time period in focus, this reader wishes that she had included at least one detailed case study that engaged more directly with the aftermath of the Civil Rights Movement or the post-1960s experience of African American artists. In the epilogue of the book, she does tackle works that address race, such as Henry Taylor's *THE TIMES THEY AINT A CHANGING, FAST ENOUGH!* (2017). However, there are other works—such as Carrie Mae Weems's unauthorized appropriation of Louis Agassiz's slave daguerreotypes owned by Harvard University for her series *From Here I Saw What Happened and I Cried* (1995)—that would fit well with the book's themes and would benefit from Kee's thorough analysis. Another small point of criticism is that Kee occasionally stays within her chronological bounds so tightly that she underemphasizes important later changes in the laws and policies she addresses. To give two examples, a brief discussion of the Equal Rights Amendment “guaranteeing equal civil rights regardless of sex” notes Congress's 1971 passage of the amendment, but it ignores the fact that the ERA was never fully ratified by the states and is currently dormant (22). In her discussion of the California Resale Royalty Act, Kee relegates to the footnotes the current status of the law—namely, that it was undermined in 2012, and struck down in 2018 (255 n. 122).⁸ The omission of these details allows the narrative to flow uninterrupted, but it will also leave some readers uninformed about the current impact of certain laws and policies.

These quibbles are minor when considered in light of the overall achievements of the book. Meticulously researched and lucidly written, *Models of Integrity* demands that we take the law seriously as one of many structural factors that impact art in complex ways. Kee's interdisciplinary approach often yields a fresh perspective on her objects of study, assessing them through an underexplored lens and situating them firmly within an expanded social context. And while many people view the law as a dispassionate arbiter of clearly defined rules, Kee reminds us that ambiguity and inconsistency are deeply embedded in the American legal system. Although as a practical matter these uncertainties can chill what may in fact be perfectly legal creative acts, *Models of Integrity* provides an engaging account of a disparate group of artists who jumped wholeheartedly into the fray.

Notes

¹ Calvin Tomkins, “Running Fence,” *New Yorker* (March 28, 1977): 80.

² The term “moral rights,” derived from the French *droit moral*, refers to an artist's ongoing right to claim authorship, demand attribution, profit from sales, and protect the physical integrity of a work of art even after the work is sold. Protections and remedies vary from country to country.

³ See, for instance, Rebecca Tushnet's essay “Worth A Thousand Words: The Images of Copyright,” which proposes a radically simplified copyright standard that would protect visual art only from “exact or near-

exact copying,” in the *Harvard Law Review*, 125 no. 3 (2012): 684–759; Edward J. Eberle’s poignant call for greater First Amendment protections for art in “Art as Speech,” *University of Pennsylvania Journal of Law and Social Change* 11 (2009): 1–28; Andrew Glidden and Timothy Greene’s “Fair Use for the Rich and Fabulous,” which exposes the uneven enforcement of fair use standards based on the relative celebrity of the litigants in appropriation cases, in the *University of Chicago Law Review*, 80 (2013): 88–104; or Roberta Rosenthal Kwall’s *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford University Press: 2010), which challenges the economic paradigm that underlies our system of moral rights and advocates for an expansion of those rights.

⁴ Kee discusses the enforceability of the certificates more fully in Joan Kee, “Felix Gonzalez-Torres on Contracts,” *Cornell Journal of Law and Public Policy* 26 (2017): 517–31.

⁵ A copy of the Agreement can be found at <http://primaryinformation.org/files/english.pdf>.

⁶ California Civil Code section 986.

⁷ The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A.

⁸ *Estate of Graham v. Sotheby's, Inc.*, 860 F.Supp.2d 1117 (2012), and *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018).