

MAKING SENSE OF “MORAL RIGHTS”

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[WORK IN PROGRESS. PLEASE DO NOT QUOTE OR CITE.]

ABSTRACT:

This Article challenges the traditional understanding of American intellectual property law as springing exclusively from concerns about economic incentives. It develops this challenge through a detailed analysis of both federal and state Moral Rights laws, which give visual artists the right to prevent purchasers of their works from altering those works if the artist disapproves of the alteration. Examination of the central provisions of these laws shows that conventional assumptions about their nature and purpose are mistaken: The central provisions that the laws actually contain are incompatible with what we would expect to find if traditional accounts, which typically rely on either economic incentives or European rights-of-personality arguments, were correct. Consequently, this Article offers a novel account of American Moral Rights law’s analytical foundations, an account based on non-economic moral principles, specifically a duty of respect for artworks’ creative excellence. I argue that such an account both flows naturally from broader American cultural practices concerning respect for excellence and succeeds where existing theories have failed, by providing a coherent explanation for the central provisions that we in fact observe in American Moral Rights law. This framework also explains why the law gives Moral Rights protections only to visual artists and not to creators of other works, and I show how this analysis can inform debates about expanding creators’ legal rights of attribution. Drawing upon the considerable similarities between visual art and other products of human creativity, the Article also highlights the broader implications of its analysis for the role of non-economic moral principles in our intellectual property regime more generally.

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INTRODUCTION

American intellectual property law, the conventional story tells us, essentially springs from economic concerns about encouraging the production and dissemination of valuable non-tangible goods.¹ By contrast, European intellectual property laws are said to rest on radically different

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¹ See, e.g., *Sarl Louis Feraud Int’l v. Viewfinder Inc.*, 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005) (“Copyright and trademark law are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole.”); JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS*, 232 (3d ed. 1998) (“In US law, the basic position is that copyright is conferred on creators by the Constitution and statute for public ends: ‘to promote the progress of science and the useful arts.’ The civil law approach emphasizes protection of the inherent rights of the author; the US system encourages industry.”); ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS & TRADEMARKS*, 138 (2003) (“The U.S. copyright law traditionally has had a utilitarian focus. Protection of authors has not been seen as the ultimate purpose of copyright, but rather as a means to achieve the broader social goal of promoting expression.”) The United States Constitution’s grant of power to Congress to regulate intellectual property can be read as reflecting this economics-centered approach, provided that one has a purely economic conception of “progress”: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8.

foundations—a concern not merely for economic incentives but also for preserving the dignity and personhood of creators by providing them with certain “Moral Rights.” The most distinctive of these rights from an American perspective is the “right of integrity,” which gives artists the legal right to prevent purchasers of their works (and subsequent owners) from altering those purchased works, even after the purchase is complete, if the artist disapproves of the alteration.²

Although the traditional account is therefore one of radical distinction between the American and European approaches,³ in the United States the Visual Artists’ Rights Act of 1990 (“VARA”) and several state statutes that preceded VARA all give creators of certain types of visual art Moral Rights protections of a sort traditionally viewed as distinctively “European.” (The first of these statutes was the California Art Preservation Act, enacted in 1979.⁴)

² SCHECHTER & THOMAS, *supra* note 1, at 138–39.

³ See, e.g., Henry Hansmann & Marina Santilli, Article, *Authors’ & Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 102 (1997) (“It is frequently said that the interests protected by moral rights doctrine, and particularly by the right of integrity, are ‘personality’ interests that are fundamentally different from the ‘economic’ or ‘commercial’ interests that are protected by the copyright, trademark, and right of publicity doctrines that, until recently, were the principal bodies of law governing the interests of artists in the United States.”); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors & Creators*, 53 HARV. L. REV. 554, 557 (1940) (“Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts; in any event American legal doctrine has done so, and the paucity of material outside the copyright law on the rights of creators forms a vivid contrast to continental jurisprudence.”); PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX*, 138 (rev. ed. 2003) (“Commentators regularly cite the doctrine of an author’s moral right, and its rejection in the United States, as evidence of a profound and pervasive division separating two cultures of copyright The European culture of copyright places authors at its center, giving them as a matter of natural right control over every use of their works that may affect their interests. . . . By contrast, the American culture of copyright centers on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a calculus that leaves authors at the margins of its equation.”).

⁴ 1979 Cal. Stat. 1501, codified as amended at CAL. CIV. CODE § 987 (West 2009). California made fairly minor amendments to the Act in 1982 (1982 Cal. Stat. 5882; 1982 Cal. Stat. 6437), 1989 (1989 Cal. Stat. c. 482, § 1 [no page number given]), and 1994 (1994 Cal. Stat. c. 1010, § 30 [no page number given]).

Some commentators reacted to VARA’s passage by anathematizing it. Stephen Carter, for example, inveighed against “such elitist and despotic doctrines as ‘moral right,’ lately incorporated by the Congress”⁵ and George C. Smith denounced VARA as an “exotic legal import” that “represents an unprecedented incursion on property rights as Americans know them.”⁶ However, such attempts simply to stigmatize VARA as a dangerous alien incursion did not prevail, a result unsurprising in light of the number of U.S. jurisdictions that have enacted Moral Rights statutes. By expanding our gaze to encompass state law, and not just VARA, we see that such statutes are far too common to be dismissed as an “un-American” aberration.⁷

⁵ Stephen L. Carter, *Owning What Doesn’t Exist*, 13 HARV. J. L. & PUB. POL’Y 99, 100 (1990). Carter elaborated his charge:

The idea that the government should enable the artist to forbid the owner’s acts, or, as some suggest, should make the artist’s right to forbid inalienable, is worse than uncultured. It is classic special-interest legislation, regulating the ability of an owner to do with her property as she likes, not so much for the benefit of artists or filmmakers as such, but for the benefit of a minority who will feel better knowing that the owner is not allowed to act in an uncultured way.

Id. at 101.

⁶ George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, December 17, 1990, at 23. *See also* Eric E. Bensen, Note, *The Visual Artists’ Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996) (claiming that VARA is unconstitutional).

⁷ A few commentators have taken the opposite approach and tried to dismiss VARA as a largely inconsequential statute enacted merely for the limited purpose of bringing American intellectual property law more fully in compliance with the Berne Convention, which at the time of VARA’s enactment the United States had recently joined. *See, e.g.*, SCHECHTER & THOMAS, *supra* note 1, at 139. (“Doubts nevertheless persisted over whether the United States had fully met its Berne Convention obligations. Congress responded by enacting the Visual Artists Rights Act of 1990 (‘VARA’).”); Note, *Visual Artists’ Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1985 (1994). However, state law again shows the implausibility of this dismissal, since several state Moral Rights statutes had preceded VARA’s enactment. It is unlikely, to say the least, that the motivation for these various state statutes was to bring the United States into closer conformity with an international agreement to which the United States was not even a party when the states enacted those statutes. Moreover, this suggestion faces the added embarrassment that even

Indeed, these statutes continue to be a wellspring of litigation by visual artists. Recent prominent examples include a dispute over Yahoo’s re-landscaping a parking lot in a way that altered the context of an outdoor artwork which Yahoo had purchased for its corporate headquarters; a dispute over the Chicago Park District’s alteration of a field of wildflowers which had been installed as part of a commissioned work twenty years earlier; and a \$1.1 million settlement in an artist’s lawsuit over the destruction of the Los Angeles mural “Ed Ruscha Monument.”⁸

Likewise, Moral Rights laws continue to be a vibrant source of scholarly controversy. Some recent commentators have advocated expanding Moral Rights protections in American law.⁹ Others chafe at the

VARA itself does not fully comply with Berne’s requirements. *See* LEONARD D. DUBOFF & CHRISTY O. KING, *ART LAW IN A NUTSHELL*, 213 (2006) (asserting that VARA’s omission of “the right to anonymity or pseudonymity . . . are conspicuous departures from a growing worldwide compliance with Berne.”); Cambra Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 *UCLA L. REV.* 849, 871 (2004) (“While VARA created moral rights and acknowledged their importance during the artist’s life, in a state without moral rights, there is no protection from a moral rights statute once the artist is dead, despite Berne’s mandate for postmortem rights and the existence of postmortem rights in some parts of the country.”); *id.* at 876–77.

⁸ Kelly Crow, *It’s Yahoo’s Lawn, But This Artist Says Keep Off the Grass*, *WALL ST. J.*, October 1, 2007, at A1; Martha Lufkin, *Artist Chapman Kelley Launches Federal Appeal over Chicago Wildflower Work*, *ART NEWSPAPER*, June 4, 2009, <http://www.theartnewspaper.com/articles/Artist-Chapman-Kelley-launches-federal-appeal-over-Chicago-Wildflower-work/17459>; Andrew Herrmann, *Flower Power, To a Point*, *CHI. SUN-TIMES*, Oct. 1, 2008, § News, at 9; Diane Haithman, *New Coat is Costly*, *L.A. TIMES*, May 1, 2008, at E1.

⁹ *See, e.g.*, Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 *HOUS. L. REV.* 263 (2004) (arguing for a modification of copyright law to create a federal right of attribution); Ilhyung Lee, *Toward an American Moral Right in Copyright*, 58 *WASH. & LEE L. REV.* 799 (2001) (arguing, from dignity-based concerns, for an expansion of authors’ Moral Rights protections); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Examination*, 24 *RUTGERS L. J.* 347 (1993) (arguing for making certain copyright protections akin to Moral Rights protections by being inalienable); Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 *B.U. J. SCI. & TECH. L.* 34 (2009) (proposing that American law embrace a concept of “copyright dilution” as a means of providing Moral Rights protections). *See also* ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* xviii (2010) (arguing for supplementing current Moral Rights law to “incorporate authorship morality”).

restrictions that Moral Rights laws impose on creativity and advocate the scaling back of those Moral Rights protections that already exist.¹⁰

These debates have been shaped by a framework of conventional assumptions about the nature and purpose of these Moral Rights laws. This Article begins by arguing that careful examination of these laws’ principal provisions reveals that those assumptions are mistaken: The provisions that we actually observe in these laws are incompatible with the provisions that would exist if any of the traditional accounts of these laws were correct. The necessary consequence is a rejection of both purely economic-based accounts of American Moral Rights law and of alternative accounts based on rights of personality.

Making sense of American Moral Rights law, I argue, requires a theory based upon non-economic moral principles—specifically, a duty of respect for artworks’ creative excellence. This Article develops such a theory and shows that it not only flows naturally from broader American cultural practices concerning respect for excellence but also succeeds where existing theories have failed, by providing a coherent explanation for the central provisions that we in fact observe in American Moral Rights law. This account also explains why these Moral Rights protections are offered only to visual artists and not to creators of other works. The explanation, which involves the availability of perfectly identical duplicates of original artworks, additionally casts further light on debates about expanding legal rights of attribution.

The implications of this Article’s analysis extend beyond the law governing visual art. Because visual artistry is just one form of creativity, similar in kind to many other forms of creativity, the essential role of non-economic moral considerations in explaining the law of visual art strongly suggests that that similar considerations are important for fully understanding other areas of the American intellectual property system as

¹⁰ For example, see Amy M. Adler’s recent criticism in *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009). Adler starts from an assumption that the purpose of these Moral Rights statutes is to “protect art,” and then argues that the nature of contemporary art has fundamentally changed in ways that make these statutes obsolete. Whether Adler is correct that current Moral Rights statutes are harmful is a question that lies beyond the scope of this Article. However, if this Article’s account of the analytic foundations of those statutes is correct, then we must reject Adler’s initial assumption. Nevertheless, it remains an open question whether a conclusion similar to Adler’s might be possible within the general analytic framework that this Article presents.

well. The unique success of this theory thus challenges the conventional assumption that American intellectual property law arises within a purely economics-based analytic framework, and reveals an overlooked non-economic moral dimension in American intellectual property law.

A few initial remarks here about this Article’s analytical strategy might be useful. Although American Moral Rights law is largely a product of statute, with only very limited caselaw, this Article is not an exercise in legislative history. The extent to which legislative histories are informative even when available is famously controversial,¹¹ and this Article is agnostic about what “actually” motivated each of the various drafters, sponsors, and enactors of these laws—or whether a single determinate answer to that question even exists.¹² For purposes of our inquiry, it is immaterial whether the individuals who directly created these laws happened to differ in their motivations or lacked a conscious and well-developed theoretical motivation for their legislative act.

Instead, consistent with much of the existing academic literature in this area, this Article aims to identify the *analytical* underpinnings of American Moral Rights law by identifying the principle or combination of principles which best makes sense of the provisions that we actually observe in these laws, not least by being consistent with the most common and central of these provisions.¹³ This way of proceeding rests simply on

¹¹ See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 207-38 (1994) (recounting the history of this controversy and defending judicial use of legislative history); ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-37 (1997) (criticizing the use of legislative history in federal adjudication); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history when statutory language is unclear).

¹² Thus, this Article neither takes nor assumes any position on the controversial question of the existence and relevance of “legislative intent” in statutory interpretation. For a succinct criticism of the use of such “intent,” see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”). See also ESKRIDGE, *supra* note 11, at 14-25 (criticizing “intentionalism”). For a recent defense of referring to “legislative intent,” see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005).

¹³ This reference to consistency may call to mind theories of statutory interpretation that give a pivotal role to coherence, in some cases to a coherence that is

the unsurprising observation that if we are trying to make sense of a body of law, created in closely related jurisdictions at roughly similar times and treating similar matters, it is advisable to strive to offer an account that is at least consistent with the central shared features of those laws.¹⁴

Readers with a philosophical bent may notice the similarity between this familiar approach and what philosophers term “inference to the best explanation,” which loosely can be described as a practice of concluding that whatever principle best explains a given set of observed phenomena is to be deemed descriptively “correct.” In our case, the observed phenomena are the provisions of the various Moral Rights laws that have been enacted in American jurisdictions, and the best explanatory principle (I shall argue) is a concern that there be legal recognition of a moral duty of respect for artworks’ creative excellence.¹⁵

broad in scope and encompasses wide areas of the law, various policy concerns, and fundamental principles of law, morality, or political order. (Perhaps the most prominent contemporary example is Ronald Dworkin’s theory of “law as integrity.” *See, e.g.,* RONALD DWORKIN, *LAW’S EMPIRE* 216-75 (1986).) However, such theories of how judges ought to interpret and apply the law employ coherence in a context significantly different from that of the present inquiry, since judges, by virtue of their institutional role, must operate within constraints which do not limit non-governmental analysis. For example, the statutes and precedential case law of a state judge’s own jurisdiction are binding upon the judge, while similar materials from a neighboring state are, at most, merely persuasive authority. Non-governmental commentators, by contrast, are under no such limitation, and thus are free to analyze and evaluate each state’s laws on an equal footing and without any requirements of deference to the political branches or to academic precedent. Moreover, the question of what underlying principles provide the most accurate and intellectually fruitful understanding of American Moral Rights law is inherently distinct from the issue of how courts ought to interpret and apply that law when bringing the coercive power of the state to bear. Although the answer to the former might inform the answer to the latter, the two questions are separate, and it is the former question which this Article shall address.

¹⁴ There are echoes here of Dworkin’s notion of “fit” as a minimum threshold requirement for any appropriate judicial interpretation of law, but as noted above the context of Dworkin’s discussion is quite different from ours. *See* DWORKIN, *supra* note 13, at 255.

¹⁵ Note, however, that the typical philosophical use of the term “inference to the best explanation” is in the context of debates about the nature and reliability of scientific reasoning. Although legal reasoning and scientific reasoning may have some common features and share some common difficulties, this Article does not seek to offer a “scientific” account of Moral Rights law. For a succinct overview of philosophical debates about inference to the best explanation, see Peter Lipton, *Inference to the Best Explanation*,

Of course the “best” explanatory principle might not be a “perfect” explanatory principle, because no such perfect principle may exist. In fact, given the variety of influences which shape lawmaking, the existence of a principle which perfectly explained every feature of an area of law would be quite surprising.¹⁶ Thus, in the discussion that follows, the question will not be whether each candidate theory can satisfactorily explain *every* feature of American Moral Rights laws, but rather whether it can explain those laws’ *central* features, and whether some other theory can do so more successfully.¹⁷

Note that the conclusion of this inquiry therefore is not by itself normative. Whatever principle best makes sense of these statutes, it is a further question whether the law *ought* to pay heed to such a principle or

in A COMPANION TO THE PHILOSOPHY OF SCIENCE 184 (W.H. Newton-Smith ed., 2000). The phrase “inference to the best explanation” was introduced to the philosophical literature by Gilbert Harman, *The Inference to the Best Explanation*, 74 PHIL. REV. 88 (1965).

¹⁶ Discussion of such influences is common in the literature on the use of legislative history and legislative intent in statutory interpretation. *See, e.g.*, works cited *supra* in notes 11 and 12.

¹⁷ Although this Article ultimately rejects economic accounts of these Moral Rights laws, its analytical approach bears some similarity to an approach familiar from some positive law and economics scholarship. *See, e.g.*, ROBERT COOTER & THOAMS ULEN, LAW & ECONOMICS 195, 235-36, 293-94 (4th ed. 2004) (asserting that specific economic considerations lie behind various contract law doctrines); WERNER Z. HIRSCH, LAW & ECONOMICS: AN INTRODUCTORY ANALYSIS 17 (3d ed. 1999) (asserting that “[f]rom the economist’s point of view, a major role of contract law and property law is to reduce transaction costs”); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 26 (6th ed. 2003) (describing the “economic theory of law” as trying “to explain as many legal phenomena as possible through the use of economics”); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 514-17 (1961) (offering an economic account of certain features of tort law). There is, however, some debate over the extent to which such analyses are generally representative of the main trend in law-and-economics scholarship, especially in recent years. For example, Richard Craswell has asserted that “descriptive” analysis is largely peripheral in economic analyses of the law. Richard Craswell, *In That Case, What Is the Question?: Economics and the Demands of Contract Theory*, 112 YALE L.J. 903, 904-07 (2003). *See also*, Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 881-82 (2003). Eric Posner, by contrast, takes such accounts to be much more typical of economic analyses of law. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 832-34, 832 n.2 (2003).

whether these particular statutes do the best possible job of reflecting such a principle. Thus, even if one is convinced by this Article’s argument that the best way to make sense of these statutes is in terms of a particular duty of respect, one is free to question whether these specific laws do a good job of giving force to that duty, and whether the law ought to give force to that duty at all. Indeed, opening the door to such questions and laying the necessary analytic foundation for beginning to address them is one of this Article’s purposes.

As a result, the ultimate implications of this Article’s argument will depend in part upon each reader’s prior normative commitments. For readers who approach this issue already firmly committed to the proposition that intellectual property law should primarily promote efficiency, or should protect the “personalities” of artists, this Article will raise the question of whether current Moral Rights laws adequately reflect those goals and will provide a strong reason to think that they do not. For readers already committed to thinking that legal recognition of moral duties of respect is inherently objectionable, this Article will reveal that they have reason to seek repeal or modification of these laws. For other readers—perhaps a majority—who approach this issue without such pre-commitments, this Article will provide a clearer and more accurate understanding of the analytical principle which connects American Moral Rights laws, will lay the foundation for normative inquiry about that principle both in the Moral Rights context and more broadly in American intellectual property law, will provide a framework for evaluating arguments for and against the expansion or curtailment of Moral Rights protections, and will challenge conventional assumptions about the exclusively-economic foundations of American intellectual property law.

The discussion proceeds as follows. Part I sets the stage by surveying the relevant provisions of the various state and federal Moral Rights statutes. Part II critically examines the attempt to domesticate these Moral Rights laws by accounting for them within a law-and-economics framework, and argues that the attempt fails. Part III focuses on the major rival to the economics-based account—“European” accounts based on an asserted connection between artworks and the “personality” of the artist—and concludes that it too is unsuccessful. Part IV assesses expressivist, preservationist, and reputation-based accounts. Once again, each of the aforementioned accounts proves inadequate to explain the observed features of these Moral Rights statutes.

Part V, therefore, argues that a different sort of legal and moral framework is at work in American Moral Rights law, a non-economic framework based on moral duties of respect for artworks' creative excellence. Part VI then develops an explanation, based on the possibility of perfectly identical duplicates of a work, for why the specific rights that these statutes provide are granted only to visual artists and not to creators of other works. The Part also shows how this explanation can illuminate debates about expanding creators' legal rights of attribution. The Article concludes by drawing upon the considerable similarity between visual art and other products of human creativity to indicate this account's broader implications for the role of non-economic moral considerations in our intellectual property regime more generally.

One note about nomenclature. Philosophers sometimes talk about rights provided by morality. This notion of "moral rights" may be close to the ordinary conversational meaning of "moral rights," but we should not be quick to assume that it is the same notion that lies behind the legal rights that we shall be discussing here. In our context, "Moral Rights" is a term of art, and determining whether it makes sense to think of them primarily in terms of moral requirements is one of the aims of this Article. Therefore, to avoid confusion, I shall follow Charles Beitz in using "Moral Rights," with initial capital letters, to refer to these legal regulations, and "moral rights," in all lowercase, to refer to the non-legal notion.¹⁸

I. STATUTORY LANDSCAPE

American Moral Rights law is largely a product of statute, with only limited caselaw. This Part maps out that statutory landscape, so that we can have a clear idea of the laws which the various competing accounts seek to explain.

The most prominent American Moral Rights statute is federal, the Visual Artists Rights Act ("VARA"), which provides that the "author of a work of visual art" has a right, subject to certain limitations, to prevent any intentional alteration to that work "which would be prejudicial" to the artist's "honor or reputation," and further decrees that "any intentional distortion, mutilation, or modification of that work is a violation of that right." VARA also empowers those artists to prevent "any destruction of a

¹⁸ Charles R. Beitz, *The Moral Rights of Creators of Artistic & Literary Works*, 13 J. OF POLITICAL PHILOSOPHY 330, 330 n.5 (2005).

work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”¹⁹ VARA prohibits transfer of these rights, but does allow artists to waive them.²⁰ The rights expire when the artist dies (technically, at the end of the year in which the artist dies).²¹

Eleven states also have Moral Rights statutes for visual art, several of which preceded VARA. (The California Art Preservation Act, enacted in 1979, is generally credited as the first American Moral Rights statute.²²) These state statutes—from California²³, Connecticut²⁴, Louisiana²⁵, Maine²⁶, Massachusetts²⁷, Nevada²⁸, New Jersey²⁹, New Mexico³⁰, New York³¹, Pennsylvania³², and Rhode Island³³—typically share many

¹⁹ 17 U.S.C.A. § 106A(a)(3)(A)-(B) (West 2009).

²⁰ 17 U.S.C.A. § 106A(e)(1) (West 2009).

²¹ 17 U.S.C.A. § 106A(d)(1), (4) (West 2009). (Note that slightly different provisions apply to works that were created before VARA’s enactment.) Presumably, considerations of administrative convenience shaped this provision, which obviates the need for keeping track of the precise date upon which an artist dies, a date that may not even be known for certain. Knowing simply the year of death is sufficient for determining when the rights ceased to be in force. *But see* Cambra Stern, *supra* note 7, at 874 (suggesting that “[i]t is unclear why this [provision] would be the case unless VARA was intended to allow heirs to bring an action after the artist’s death”).

²² 1979 Cal. Stat. 1501, codified as amended at CAL. CIV. CODE § 987 (West 2009).

²³ CAL. CIV. CODE § 987 (West 2009).

²⁴ CONN. GEN. STAT. ANN. § 42-116s to -116t (West 2009).

²⁵ LA. REV. STAT. ANN. § 51:2151–2156 (West 2009).

²⁶ ME. REV. STAT. ANN. tit. 27, § 303 (2009).

²⁷ MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2009).

²⁸ NEV. REV. STAT. ANN. § 597.720–760 (West 2008).

²⁹ N.J. STAT. ANN. § 2A:24A-1 to -8 (West 2009).

³⁰ N.M. STAT. ANN. § 13-4B-1 to -3 (West 2009).

³¹ N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2009). In an unreported decision, a federal district court held that VARA’s explicit provision for preempting state statutes that provide “equivalent” rights applies to the New York statute. *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, No. 01 Civ.1226 DAB, 2003 WL 21403333, at *12, *15-16 (S.D.N.Y. June 17, 2003). Although the question of VARA

provisions and even specific language.³⁴ But there is variation in their specification of the sorts of alterations that artists may prohibit, the sorts of work that will receive protection, the rules governing transfer of the rights, and the conditions under which the rights terminate.

1. Alteration or Display of Alteration

The state statutes provide two distinct sorts of integrity right. Some states give a right similar to VARA's, allowing the artist to prohibit *any* alteration to a sold work.³⁵ Other state statutes provide only a more limited right against public display of artworks that have been altered in a way that reasonably might be expected to harm the artist's reputation.³⁶ Statutes in New Mexico³⁷ and Rhode Island³⁸ are similar to the latter in this respect, but broader in giving the artist a right against public display of altered artwork irrespective of whether the display reasonably threatens to harm the

preemption is interesting in its own right, it is immaterial to the discussion in this Article. At issue here is how we can analytically account for the provisions which these statutes contain, not whether the provisions subsequently have been preempted by the enactment of equivalent VARA provisions.

³² 73 PA. CONS. STAT. ANN. §§ 2101–2110 (West 2009).

³³ R.I. GEN. LAWS § 5-62-2 to -6 (2009).

³⁴ Three other states have statutes regulating some aspects of visual artists' rights but without providing a general right of integrity. Illinois's statute governs the relationship between artists and art dealers. 815 ILL. COMP. STAT. ANN. 320/0.01-8 (West 2009). South Dakota's statute does provide artists a right of integrity, but only against the state for art purchased by the state. S.D. CODIFIED LAWS § 1-22-16 (2009). Utah's statute applies only to art acquired in one particular state program and does not provide a standard right of integrity. UTAH CODE ANN. § 9-6-409 (2009).

³⁵ States providing this broad right include California, Connecticut, Massachusetts, and Pennsylvania. CAL. CIV. CODE § 987(c) (West 2009); CONN. GEN. STAT. ANN. § 42-116t(a) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2009); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2009).

³⁶ States offering only this narrower right are Louisiana, Maine, Nevada, New Jersey, and New York. LA. REV. STAT. ANN. § 51:2153 (West 2009); ME. REV. STAT. ANN. tit. 27, § 303(2) (2009); NEV. REV. STAT. ANN. § 597.740(1) (West 2008); N.J. STAT. ANN. § 2A:24A-4 (West 2009); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2009).

³⁷ N.M. STAT. ANN. § 13-4B-3(A) (West 2009).

³⁸ R.I. GEN. LAWS § 5-62-3 (2009).

artist’s reputation. Louisiana’s statute also adds an idiosyncratic provision prohibiting public display, without the artist’s consent, even of an *unaltered* artwork if such display would be “reasonably likely” to damage the artist’s reputation.³⁹

2. *Destruction*

VARA and the California, Massachusetts, and Pennsylvania statutes allow artists to prohibit destruction of works of recognized stature (but not of other works).⁴⁰ The other statutes are silent about destruction; presumably that silence would be construed as permission.

3. “*Recognized Stature*”

Approximately half of the state statutes require that a work be of “recognized quality” to receive any of the Moral Rights protections which those statutes grant.⁴¹ VARA, by contrast, makes an artwork’s “recognized stature” a precondition only for protection against destruction, but not for protection against alteration. And there is no “stature” or “quality” restriction at all in the remaining state statutes.

4. *Alienability*

Like VARA, all of the state statutes make the right of integrity waivable, and most at least implicitly prohibit transfer, since they grant standing to the artist alone to seek relief under those statutes. The only four exceptions are Maine, which grants a cause of action to the artist “or his personal representative,”⁴² California, which added a provision allowing public or private not-for-profit arts organizations to seek injunctions “to preserve or restore the integrity of a work of fine art” when threatened or damaged by

³⁹ LA. REV. STAT. ANN. § 51:2153(3) (West 2009).

⁴⁰ 17 U.S.C. § 106A(a)(3)(B) (West 2009); CAL. CIV. CODE § 987(c) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2009); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2009).

⁴¹ California, Louisiana, Massachusetts, New Mexico, and Pennsylvania have a quality requirement. CAL. CIV. CODE § 987(b)(2) (West 2009); LA. REV. STAT. ANN. § 51:2152(7) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 2009); N.M. STAT. ANN. § 13-4B-2(B) (West 2009); 73 PA. CONS. STAT. ANN. § 2102 (West 2009).

⁴² ME. REV. STAT. ANN. tit. 27, § 303(5) (2009).

acts prohibited by the state’s Moral Rights statute,⁴³ and Massachusetts and New Mexico, which use identical language to grant standing to the artist “or any bona fide union or other artists’ organization authorized in writing by the artist for such purpose.”⁴⁴ (Massachusetts and New Mexico also give their state attorneys general standing to sue, after an artist’s death, for injunctive relief on the artist’s behalf with respect to art placed on public view.⁴⁵) No statute permits general transferability of the Moral Rights it grants.

5. Termination

Unlike VARA, none of the state statutes terminate the right of integrity upon the artist’s death. Several states mimic pre-1998 copyright law by terminating the right on the fiftieth anniversary of the artist’s death.⁴⁶ The other states make the right implicitly perpetual, by phrasing their grant of Moral Rights as a prohibition against certain actions done without the artist’s permission. Since artists cannot grant permission from beyond the grave, these Moral Rights protections effectively are perpetual.⁴⁷

6. Summary

Sorting through these statutory provisions, we can identify certain general provisions shared by VARA and many of the state statutes, provisions that

⁴³ CAL. CIV. CODE § 989(b)-(c) (West 2009).

⁴⁴ MASS. GEN. LAWS ANN. ch. 231, § 85S(e) (West 2009); N.M. STAT. ANN. § 13-4B-3(C) (West 2009).

⁴⁵ MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West 2009); N.M. STAT. ANN. § 13-4B-3(E) (West 2009).

⁴⁶ Those “death plus fifty” states are California, Connecticut, Massachusetts, New Mexico, and Pennsylvania. CAL. CIV. CODE § 987(g)(1) (West 2009); CONN. GEN. STAT. ANN. § 42-116t(d)(1) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West 2009); N.M. STAT. ANN. § 13-4B-3(E) (West 2009); 73 PA. CONS. STAT. ANN. § 2107(1) (West 2009).

⁴⁷ Those “implicitly perpetual” states are Louisiana, Maine, Nevada, New Jersey, New York, and Rhode Island. LA. REV. STAT. ANN. § 51:2153 (West 2009); ME. REV. STAT. ANN. tit. 27, § 303(2) (2009); NEV. REV. STAT. ANN. § 597.740(1) (West 2008); N.J. STAT. ANN. § 2A:24A-4 (West 2009); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2009); R.I. GEN. LAWS § 5-62-3 (2009).

any successful account of the foundations of these Moral Rights laws will therefore need to be able to explain:

1. the rights are non-transferable
2. the rights are waivable
3. destruction of an artwork is (usually) allowed even though alteration is prohibited
4. some or all protections apply only to works of sufficiently exalted quality (in roughly half of the statutes)

A successful account should also be able to accommodate reasonably well the statutes' varied specifications of when, if ever, the Moral Right terminates after the artist dies.

With those requirements in mind, we can turn to examining the major attempts to provide a coherent theoretical account of these Moral Rights laws.

II. THE INADEQUACY OF ECONOMIC REDUCTION

American Moral Rights statutes will not pose a challenge to the conventional, purely economic, account of American intellectual property law if a satisfactory account of those statutes can be given based solely upon economic considerations. Providing such an account has been tried, most prominently in a thorough and rigorous paper by Henry Hansmann and Marina Santilli, who acknowledge that non-economic considerations may have provided some motivation for these laws, but suggest that “much of the incentive for adopting moral rights legislation derives from other considerations,”⁴⁸ primarily externality concerns familiar in law-and-economics analyses. This Part explains why, in light of the logic of the economic argument and the actual provisions that we observe in Moral Rights statutes, not only is Hansmann and Santilli's account inadequate, but any attempt at economic reduction of these statutes is unlikely to succeed.

⁴⁸ Hansmann & Santilli, *supra* note 3, at 104.

A. THE NEGATIVE REPUTATIONAL EXTERNALITIES THESIS

Hansmann and Santilli begin from the assertion that if the right to integrity is in fact a “reasonable exception” to property law’s general prohibition of servitudes to chattels, that must be because current owners “can seriously affect the interests of the artists who created those works or of other persons.”⁴⁹ What interests, if any, can current owners of an artwork seriously affect? Hansmann and Santilli identify three:

First is the artist’s own “pecuniary interest” in the sales price that his or her future works might bring. Because “each of an artist’s works is an advertisement for all of the others,” harm that an owner does to one of an artist’s works decreases market demand for that artist’s future work.⁵⁰

Second is the pecuniary interest of previous purchasers of the artist’s work. Diminishing the artist’s reputation by altering one of the artist’s existing works lowers not only the price that the artist can command for new works but also the price that collectors could get by reselling the artist’s already completed works.⁵¹

Third is the public-at-large’s non-pecuniary interest in preserving works intact as “important elements in a community’s culture” or as “the embodiment of an idea.”⁵²

Hansmann and Santilli argue that because a current owner who decided to alter a work in his or her possession would personally bear only a small fraction of the costs to these interests, owners might make such alterations more frequently that is socially optimal. In law-and-economics terminology, these alterations give rise to substantial negative externalities. Moral Rights laws, on their view, promote efficiency by limiting those

⁴⁹ *Id.* at 102. Hansmann and Santilli’s claim about a general prohibition of servitudes to chattels is somewhat controversial. *See* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004) (arguing that servitudes to personal property currently do exist, most notably in software licensing restrictions, and that the law should be less averse to such restrictions).

⁵⁰ Hansmann & Santilli, *supra* note 3, at 104–05. That an artist’s reputation has an important effect on the market value of the artist’s work is built into Hansmann and Santilli’s definition of the sort of fine “art” to which they intend their account to apply. *See id.* at 107–08.

⁵¹ *Id.* at 105.

⁵² *Id.* at 106.

externalities. We saw that VARA, for example, prohibits both reputation-harming alterations and the destruction of visual artworks that are culturally significant.

Hansmann and Santilli find confirmation for this third-party-externalities account in the fact that the law extends the right of integrity only to artists, not inventors:

In support of the view that reputational externalities are an important justification for the right of integrity, it is noteworthy that, in contrast to artists, inventors are generally not granted the right of integrity—even though inventors are highly creative and are otherwise given property rights in their inventions of a character [sic] similar to those given artists. A plausible justification for this distinction between inventors and artists is that the marketability of an invention has little relationship to the personal identity of the inventor and, in particular, to the other items that the inventor has patented.⁵³

This conclusion is too hasty, however, since plausible alternative explanations exist.

The simplest is that the law cares primarily about reputational harm to the creators themselves, and the creative acts characteristic of art and invention essentially differ: Inventors aim to create instrumental value, but visual artists aim to create intrinsic value. Because usefulness is the aim of invention, inventors’ reputations depend on upon their inventions’ usefulness. Therefore, since alterations made by owners of an invention are likely to be made in order to improve the invention or adapt it better to the owner’s own circumstances—i.e. to increase the invention’s usefulness—alterations made by purchasers of an invention are unlikely to harm the inventor’s reputation.⁵⁴ If anything those “downstream” alterations might

⁵³ *Id.* at 110.

⁵⁴ There are exceptions, if the owner decides to disable safety features in the invention or otherwise increase its negative externalities. But that sort of concern does not plausibly argue in favor of giving a right of integrity to inventors; workplace safety regulations and tort law exist to handle such problems. Margaret Radin’s account, which I shall discuss later, offers another straightforward alternative way of distinguishing here between visual artists and inventors. Since that alternative also is unconvincing, I shall defer my discussion of it until I turn to Radin’s account in more detail in Part III.

perpetuate and enhance the original inventor’s reputation. (Marconi’s reputation, or Edison’s, would be much less today—indeed, they might be wholly forgotten, rather than venerated—if other people had not altered and improved upon those inventors’ original inventions.)

So the fact that artists and inventors receive different treatment need not entail that reputational externalities are Moral Rights’ primary concern. A concern simply for the creator’s own reputation explains the difference equally well.⁵⁵ And other explanations are possible, including, we will later see, an explanation based upon respect for creative excellence. (I shall consider the simple reputation account in more detail in Part IV, and in Part V will examine respect for creative excellence.)

B. GENERAL OBJECTIONS

The inconclusiveness of that one argument in favor of the reputational externalities account does not, of course, by itself demonstrate that the account is incorrect. However, there are several general concerns with the plausibility of any account based on reputational externalities, and several specific concerns that arise when we consider how well the account matches the principal features that we actually observe in Moral Rights laws. Let us start by considering the general concerns.

1. Symmetry

If the aim of Moral Rights law really is to maximize the aggregate market value of an artist’s artworks by elevating the artist’s reputation, logical symmetry would suggest that just as artists are permitted to prevent alterations that owners would like, so too they should be permitted to *make* changes to their own artworks even after selling them, whether or not the owners approved, provided only that the changes increase the value of the artist’s reputation more than they inconvenience the owner. (Hansmann and Santilli’s tacit assumption is that artists are always the best judges of what effect alterations will have on their reputation; thus artists alone can decide

⁵⁵ Thus, a rebuttal to Hansmann and Santilli’s example argument: “[I]t is not important for the radio that Marconi invented it, hence no right of integrity.” Hansmann & Santilli, *supra* note 3, at 110. We might just as plausibly say: *It is* important for Marconi’s reputation as inventor of radio that others develop and improve his work; hence no right of integrity.

what changes to prevent or allow.) Yet, of course, giving artists such a right to make changes would be quite startling.⁵⁶ Such a right is not a standard element of “Moral Rights,” and no American law gives artists that right. (In fact, I am aware of no law anywhere in the world that gives artists such a right.)

2. *Value of Protecting Reputation*

Moreover, it is not clear why we would even care to protect the pecuniary interests of artists and art collectors if artworks’ market value depends largely on something of such uncertain merit as artistic “reputation,” or as some might say, on the fickle winds of mere artistic fashion. Note that every dollar of market value that a current owner loses in an artwork is a dollar that a future purchaser of that work saves. Why then should the law step in to freeze the distribution of benefits between current owners and future owners at whatever level the artist’s current “reputation” has set it? A price set by reputation might somehow seem “fair” and, thus, perhaps have some claim to “protection” from “market failure,” if reputation were an accurate proxy for intrinsic artistic excellence. But perhaps only in the world of fashion or popular music would it be *less* plausible to claim that reputation is an accurate measure of intrinsic value than it is in the world of collectible visual art.⁵⁷

⁵⁶ Could someone justify the asymmetry as a “penalty default” designed to provide incentives for artists to make full disclosure, at the time of sale, of all relevant information? (Henry E. Smith brought this possibility to my attention.) I doubt it. A penalty default makes sense if *at the time of the sale* the artist has better information than the purchaser about whether later changes to the work would improve its reputation. In that case, a penalty default would help bring this information out. However, much of what Moral Rights laws cover are situations in which beliefs and preferences change *after* the sale—e.g., the purchaser later decides that he is no longer so fond of the work in its present state and wishes to alter it. Since these changes are unpredictable—presumably if at the time of the sale the artist already knew how to “improve” the work, the artist would have already implemented those changes before putting the work on the market—that information doesn’t yet exist for anyone to disclose when negotiating the sale. Thus it is hard to make sense of this asymmetry as a penalty default.

⁵⁷ For concerns about the effect of faddishness and hype on the art market, see Robert Hughes, Speech at Burlington House (June 2, 2004) (transcript available at <http://arts.guardian.co.uk/features/story/0,,1230169,00.html>) (“But I have always been suspicious of the effects of speculation in art, and after 30 years in New York I have seen a lot of the damage it can do: the sudden puffing of reputations, the throwing of eggs in the

One explanation for this solicitude over artists’ and collectors’ pecuniary interests might arise out of concerns about incentives. Lower prices paid for art might cause the volume of art production to drop below the level that society would deem optimal. Of course, refraining from granting a right of integrity might not lead to less money being spent on art overall—pricked reputational bubbles would drive down prices for an individual artist’s work, but might lead to higher prices for another artist’s work as fashion’s favor shifted from the one to the other. However, even if the net result of not granting a right of integrity were to diminish the overall amount of money spent on art, it is not clear that the end result would be less art produced. The artistic impulse may not be particularly sensitive to monetary concerns. Indeed, Moral Rights laws are a very recent phenomenon in the history of civilization, and before their establishment there does not seem to have been any marked shortage of visual art or artists.⁵⁸

Moreover, there is a question of the *sort* of visual art that we are encouraging to be produced. If protection of artistic reputations is the primary function of Moral Rights law, and if establishing such protections really does generate incentives to produce, what it encourages is production of art whose value is especially dependent on the artist’s reputation—i.e. art

air to admire their short grace of flight, the tyranny of fashion.”); Melissa Viney, *A Working Life: The Art Consultant*, GUARDIAN, January 27, 2007 at 3 (quoting art consultant Spencer Ewen: “There’s a lot of artists who are very well celebrated in their lifetime and that’s because they play the game of art. The game being working with dealers, getting out there and publicising yourself. . . . There are some artists out there who you can happily pay £150,000 for and you try to sell it the next day and you’d be lucky to get £1,000. It’s all hype.”); see also John McCrone, *Art for Money’s Sake*, DOMINION POST (Wellington, N.Z.), January 23, 2007, § Business, at 2 (describing the effects that hype had on the New Zealand art market). For empirical evidence of the art market’s high volatility (which may suggest that hype and fads have considerable influence), see William N. Goetzmann, *Accounting for Taste: Art and the Financial Markets over Three Centuries*, 83 AM. ECON. REV., 3170, 1374 (1993) (finding from 1716 to 1986 a much higher standard deviation in art market returns than in financial market returns); Andrew C. Worthington & Helen Higgs, *Art as an Investment: Risk, Return and Portfolio Diversification in Major Painting Markets*, 44 ACCT. & FIN. 257, 264-65 (2004) (finding from 1976 to 2001 a much higher coefficient of variation in art market returns than in financial market returns).

⁵⁸ Charles Beitz makes a similar argument, noting “the apparent vigor of the world of visual art in the US before enactment of the VARA, or of French art before the mid-nineteenth century, when judicial notice was first taken of Moral Rights.” Beitz, *supra* note 18, at 347.

for which faddishness concerns are especially acute. It is less than obvious that we would want the law to encourage production of such art, much less want it to do so in a way that might encourage shifting of resources from the production of other art.

3. *Alteration as Market-Value Enhancing*

An additional general problem arises from the crucial assumption that an owner’s alterations are likely to be of a sort that would diminish the market value of the artist’s works. This problem is evident in the inherent tension between Hansmann and Santilli’s arguments for the reputation-protection justification of Moral Rights laws and their arguments for the cultural-protection justification. Discussing the “public interest in the integrity of a work of art . . . as the embodiment of an idea,” they say that the value to society of such a work

may not be well reflected in the value of the work to its private owner, . . . who may face a low market value for the work owing to the generally conservative tastes of the most prosperous collectors and museums. Consequently, the owner may not only have insufficient incentive to protect and display the work, but may even have an incentive to alter or destroy it.⁵⁹

The risk here is serious, and plausible: Owners may be tempted to alter works to conform to the limited tastes of those who spend money on art. But note that these alterations do not harm the artist’s reputation, at least not in any way that diminishes the resale value of the artist’s art. Quite the opposite: The changes of concern here *enhance* the art’s resale value; indeed, that is their very purpose. But the fundamental premise behind the reputational externalities argument was that owners’ changes would do the opposite, that they would harm the marketability of the artist’s works. So there is a tension, at the very least, between the argument that a right of integrity is necessary to protect artists from owners’ alterations, because those alterations will diminish the marketability of the artist’s work, and the argument that a right of integrity is necessary to protect the public from those same owners’ alterations, because those alterations will undermine the works’ artistic integrity in order to enhance marketability.

⁵⁹ Hansmann & Santilli, *supra* note 3, at 106.

This is but one instance of a more general concern about an account based on reputational externalities. VARA states that it is allowing artists to prohibit alterations that would harm their reputations, but then immediately adds that “*any* intentional distortion, mutilation, or modification of that work is a violation of that right” (emphasis added).⁶⁰ Therefore, for the reputational externalities argument to be plausible as an explanation of VARA, it must be the case that owners’ alterations usually hurt the artists’ reputations. We lack any empirical evidence one way or the other, but even armchair theorizing makes this assumption seem unlikely. Within a law-and-economics framework (the framework that Hansmann and Santilli use) we will tend to treat economic actors as rationally self-interested. And on that assumption, it seems unlikely that many owners would diminish the market value of the works that they own by making alterations that harm the artists’ reputation in the broad art-purchasing community.⁶¹ Much more likely would be alterations to bring the artwork more into line with community tastes, tastes which, after all, the owner is likely to share.

C. HOW GOOD A FIT?

Despite these general concerns, the third-party-externalities account might still be persuasive if it provided a good fit for the actual contours of American Moral Rights law. Unfortunately, examining the actual provisions of those laws only compounds the theory’s difficulties, for we quickly find that the theory fails to make sense of the statutes’ distinctive features—waivability, non-transferability, permission of destruction, and (in many cases) termination of rights at or near the artist’s death. We can consider each of these difficulties in turn.

1. *Waivability*

If the principle behind giving artists a right of integrity really is a wish to limit harm to third parties, then we would expect to find restrictions on artists’ abilities to waive that right. Without such restrictions, the artist

⁶⁰ 17 U.S.C.A. § 106A(a)(3)(A) (West 2009).

⁶¹ Cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794 (2005) (“There are . . . relatively few published opinions that squarely implicate an owner’s right to destroy his property. This fact should not be surprising. A new homeowner is more likely to want to exclude outsiders from his home than he is to want to raze it.”).

might waive the right for any purchaser willing to pay the artist enough to compensate for the artist’s own losses as a result of the alteration, even though the third-parties also affected by the alteration received nothing. Of course, as Hansmann and Santilli suggest, a blanket prohibition on waiver could prevent some alterations that are socially beneficial.⁶² But since a blanket permission of waiver would allow many alterations that are not socially beneficial, it is far from obvious that on balance a blanket permission would lead to an efficient outcome. So if third-party reputational effects really were a driving concern, we might expect to find at least some restrictions on waiver. Yet we find the opposite: All of the Moral Rights statutes simply permit waiver.⁶³

2. *Transferability*

VARA and the state laws prohibit transfer of an artist’s Moral Rights (i.e. of the authority to enforce those rights), a prohibition difficult to reconcile with an economics-based rationale.⁶⁴ Hansmann and Santilli themselves admit that these alienability restrictions “are not a perfect arrangement,” noting that an artist’s interests in a work can diverge from the interests of owners and the general public, especially late in the artist’s career when the artist expects not to sell many more works and thus “no longer has a significant financial interest in maintaining his reputation.”⁶⁵ Presumably in such circumstances it would be more efficient to permit third parties who would be harmed by damage to the artist’s reputation to cooperate to purchase the enforcement authority from the artist, since the former value the enforcement authority much more highly than the latter does.⁶⁶

⁶² *Id.* at 130 (“If . . . we interpret the right of integrity to extend to any alteration whatsoever of a work of art, then making the right unwaivable may well prevent many potentially efficient transactions.”).

⁶³ 17 U.S.C.A. § 106A(e)(1) (West 2009); *see also* statutes cited in Part I, Section 4, *supra*.

⁶⁴ In fact, according to Hansmann and Santilli, “all legal regimes that recognize the right of integrity apparently make that right (and other moral rights they recognize) nonassignable to third parties who lack a copyright in the work.” Hansmann & Santilli, *supra* note 3, at 126.

⁶⁵ *Id.* at 121–22.

⁶⁶ This argument presupposes that Hansmann and Santilli are correct about reputation as a primary component of the value of a work of art. Someone who thought that

Hansmann and Santilli defend such prohibitions of transfer as “evidently imposed to prevent a fragmentation of ownership rights in the work of art that, through high transaction costs and holdouts, could frustrate valuable uses of the work.”⁶⁷ But this explanation is obscure, since allowing the artist to retain a right of integrity after selling the work already has fragmented ownership rights, and transferring that retained right to someone else does not fragment those rights any further; it merely changes who owns the fragments.⁶⁸

In a later paper, Henry Hansmann and Reinier Kraakman offered an alternate defense based on “the ease of verifying the right” of integrity: “With inalienability, a prospective purchaser of a work of art knows with certainty that the right exists and who holds it.”⁶⁹ Although the desirability of certainty *that* the right exists is hard to reconcile with the Moral Rights statutes’ permitting artists to waive the right, Hansmann and Kraakman surely are correct both that it is important for owners to know *who* holds the right, and that prohibiting transfer of the right would facilitate that knowledge. However, the law could achieve the same benefits, without the

ownership interests of those who care about the artwork for its intrinsic artistic merit should count as more important than the ownership interests of those who care primarily about how others think of the artist might welcome an indifferent artist’s allowing harm to his reputation at the end of his career, harm that caused a drop in the market price of the artist’s works, since that drop would make the art more affordable for those who cared primarily about its intrinsic merit. On those assumptions, permitting purchase of the authority to enforce the right of integrity would not be optimal. Of course, assuming the existence of a qualitative hierarchy of interests, in which interest in the reputation of an artwork has a relatively low position, rejects the essential premise of Hansmann and Santilli’s framework.

⁶⁷ Hansmann & Santilli, *supra* note 3, at 125–26.

⁶⁸ Hansmann and Santilli also suggest that prohibiting transfer is at least not harmful, because it “seems unlikely to prevent arrangements that offer important efficiencies.” For example, “it would not seem to prevent a painter from transferring to a trustee both his copyright and his moral rights in paintings he has sold, to be exercised by the trustee for the combined benefit of both the artist (or his estate) and other owners of the artist’s works.” *Id.* at 126. However, it is not obvious that the statutes’ anti-transfer prohibitions would permit transfer to a trust of which the artist was only one beneficiary among many.

⁶⁹ Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 411 (2002).

inefficiencies attendant upon prohibiting transfer, by requiring instead that artists who wish to transfer their right of integrity register that transfer. Hansmann and Kraakman worry that a registration requirement would impose “relatively high costs” on society to create and maintain the registry, and on purchasers to search the registry.⁷⁰ That worry seems unfounded, however, since we have long had a well-established system for registering the ownership of regular copyright, and modestly expanding or copying that system for Moral Rights would seem to pose no special difficulties.⁷¹ Thus it seems unlikely that the transfer restrictions in VARA are best understood as seeking to limit the economic costs of determining ownership of the right of integrity.

3. Destruction

Although VARA allows artists to prohibit alteration of their works, it does not permit them to prohibit those works’ outright destruction, unless the works are of “a recognized stature.”⁷² Most state statutes are even more liberal in allowing destruction.⁷³

Hansmann and Santilli offer a plausible account of why destruction is allowed if the law’s primary concern is preserving the monetary value of art collectors’ works. Hansmann and Santilli acknowledge (in a different context) that to remove a work from “the artist’s oeuvre as a whole” is to “diminish the value of the other works that make up that oeuvre.”⁷⁴ On the other hand, as Hansmann and Santilli also note, destruction of one of an

⁷⁰ *Id.* at 395.

⁷¹ The first registered copyright in the United States was in 1790. The first dedicated Register of Copyrights was appointed in 1897. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 1A, UNITED STATES COPYRIGHT OFFICE: A BRIEF INTRODUCTION AND HISTORY (August 2009), <http://www.copyright.gov/circs/circ1a.html>.

⁷² 17 U.S.C.A. § 106A(a)(3)(B) (West 2009).

⁷³ *See* Part I, Section 2, *supra*.

⁷⁴ Hansmann & Santilli, *supra* note 3, at 132 (discussing “the right of the artist to insist that his name continue to be associated with a work that he has created”); *see also id.* at 111 (“[D]estruction of one of an artist’s works reduces the value of the others . . .”). Of course, if the eliminated work was markedly inferior to the other works in the artist’s oeuvre destruction of that work might not harm the artist’s reputation. But by the same token, in such a situation alteration would cause little or no harm. Since the statutes prohibit alteration, the underlying assumption must be that such situations are rare.

artist’s works makes those works more scarce, and thus might actually increase the remaining works’ market value.⁷⁵ Permitting destruction makes sense, Hansmann and Santilli conclude, because destruction is more likely to occur in the latter case than in the former: Owners are unlikely to destroy a work if they can sell it for more than the price of preserving it until delivery, and the fact that the original artist can himself repurchase the work if he wants to prevent its destruction “helps assure—though it does not guarantee—that works will be destroyed if and only if that is the efficient course.”⁷⁶

However, even if permitting destruction does not undermine collectors’ parochial economic interests, that permission is hard to square with Hansmann and Santilli’s assertion that the broader public has an interest in the fixity of cultural objects and in artworks as embodiments of ideas.⁷⁷ Destruction of artworks straightforwardly thwarts that interest.

4. Termination

Under VARA, an artist’s Moral Rights terminate when the artist dies.⁷⁸ Under several state statutes, those rights terminate fifty years after the artist dies.⁷⁹ These provisions are difficult to reconcile with the externalities account, since whether an artist is living or dead is irrelevant to the effect that altering one of the artist’s artworks would have on the artist’s reputation. Nor does the general public’s interest in cultural fixity and embodied ideas change when an artist dies. Thus, if concern for such externalities really did motivate Moral Rights statutes, we would have predicted that these statutes would have provided for infinite duration, rather than for termination at or not long after the artist’s death.

⁷⁵ *Id.* at 111.

⁷⁶ *Id.* at 112.

⁷⁷ *Id.* at 106. *See also* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 9 (1999) (“There are many owned objects in which a larger community has a legitimate stake because they embody ideas, or scientific and historic information, of importance.”)

⁷⁸ More precisely, they terminate at the end of the year in which the artist dies. 17 U.S.C.A. § 106A(d)(1), (4) (West 2009).

⁷⁹ *See* state statutes cited *supra* note 46.

E. INHERENT LIMITATIONS OF ECONOMICS-BASED ACCOUNTS

Economic analysis’s struggles here should not be a surprise. The good of art is paradigmatically non-instrumental: Creating and appreciating art is a good for its own sake, not because it is useful in helping us achieve some other goal. Thus, if the integrity of a work of art is important, that importance is likely to rest on something inherent in the artwork or the artist, not in any instrumental costs or benefits the work might also have—such as, e.g., its contribution to the market value of a collector’s art portfolio. Since economic analysis is primarily concerned with economic value, reaching non-instrumental value only indirectly, one might have suspected that artists’ Moral Rights would be an especially unpromising candidate for a comprehensive economic explanation.

Hansmann and Santilli are aware of this possibility. They suggest, at the start of their paper, that “because creators of those works we label ‘art,’ which are typically unique and highly individual works that require substantial skill and effort, commonly feel a peculiarly strong attachment” to those works, this attachment causes them to suffer acutely when their work is “mutilated or mocked.”⁸⁰ They further note that much of commentary on Moral Rights “focuses on the potential for this type of subjective nonpecuniary harm as the principal justification for the right of integrity.” And they concede that that such harm “perhaps” provides “an adequate justification” for those Moral Rights laws.⁸¹ But, as we shall see in the following Part, that concession to the explanatory power of “personality”-based justifications was too generous.

III. FAILURE OF “PERSONALITY” THEORIES

Since the purely economics-based account of these Moral Rights laws is inadequate, we need to find an alternative. The most prominent alternative accounts are “personality”-based theories, which seek to rest Moral Rights upon a relationship asserted to exist between the artwork and the artist’s personality. Although this sort of approach is commonly held to underwrite European intellectual property laws, until recently there were few explicit traces of it in American intellectual property theories.

⁸⁰ Hansmann & Santilli, *supra* note 3, at 103.

⁸¹ *Id.* at 104.

In 1940, a *Harvard Law Review* article by Martin Roeder provided one of the earliest American expressions of this theory. An unabashed booster of European-style Moral Rights, Roeder found existing American protections insufficient. In a passage that would often be quoted, but only decades later, he asserted that

[t]he copyright law, of course, protects the economic exploitation of the fruits of artistic creation; but the economic, exploitive aspect of the problem is only one of its many facets. . . . When an artist creates, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world a part of his personality and subjects it to the ravages of public use.⁸²

Roeder did not attempt to develop this “personality theory” in any depth—his concerns were more doctrinal—and for decades “personality” theories played little role in postwar American debates about intellectual property. The seminal event changing that debate seems to have been Margaret Radin’s publication of “Property and Personhood.”⁸³

Radin’s influential contribution was to distinguish between “personal property” and “fungible property.” (She described herself as thus giving a Hegelian analysis of property, but the extent to which Radin’s discussion tracks Hegel’s actual views is not of concern here.)

“Personal” property is property which its owners feel is “almost part of themselves,” objects that are “closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”⁸⁴ Radin both offers a few examples, including a wedding ring and a house, and a test for whether property is “personal”: “[A]n object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement.”⁸⁵ One’s family home is thus personal property, in Radin’s account, because the pain of losing the house in which one’s family grew up does not disappear even if one gains an equally nice house down the block.

⁸²Roeder, *supra* note 3, at 557.

⁸³ Margaret Jane Radin, *Property & Personhood*, 34 STAN. L. REV. 957 (1982).

⁸⁴ *Id.* at 959.

⁸⁵ *Id.* at 959.

“Fungible” property is the polar opposite of “personal” property. “Fungible” property consists of objects that are “perfectly replaceable with other goods of equal market value,” objects which people hold “for purely instrumental reasons.” Money is Radin’s paradigmatic example, but other examples include “the wedding ring in the hands of the jeweler” and “the apartment in the hands of the commercial landlord.”⁸⁶

Radin suggests that wholly “personal” and wholly “fungible” property mark out the two extremes of a continuum upon which we can place all sorts of property in the world, and that “those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be.” Thus, “the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”⁸⁷

It is straightforward to see how Radin’s view might gesture toward a justification of Moral Rights laws, if one adds a view, like Roeder’s, asserting an especially intimate connection between artworks and their creators’ personalities, a connection which makes artists care about their works for more than merely instrumental reasons. Such a connection would presumably place artworks close to the “personal” pole on the property continuum, and thus justify giving artists enhanced entitlements with respect to those works, entitlements greater than anyone else would enjoy.

The problem, of course, lies in shaping those vague assertions into a justification for anything like the specific legal protections which Moral Rights laws actually give. This task becomes especially tricky when we consider that purchasers of artworks might themselves have strong personal connections to those works—collectors often feel a special bond to objects in their collections—and thus that those works may be “personal” property for collectors as well as creators. Thus it is not obvious which party, if any, should have special legal entitlements against the other.⁸⁸

⁸⁶ *Id.* at 960.

⁸⁷ *Id.* at 986.

⁸⁸ Radin explicitly notes the possibility that one person’s rights to fungible property may impede another’s personal development by obstructing that second person’s acquisition of “personal” property. *Id.* at 990–91. However, she seems not to have noticed, or at least chose not to discuss, the possibility that the first person’s *personal* property rights might also create obstructions.

Radin herself does not explore the specific applicability of “personality” theories to Moral Rights laws, but others have, and the basic elements of such an analysis are fairly simple to lay out. For analytical convenience, we might divide “personality” accounts of Moral Rights into two different categories.

One category includes what we might call “imbued personality” accounts, according to which the act of creation somehow imbues an artwork with the artist’s personality, so that that personality has a real presence in the work even after the work has left the artist’s physical possession.⁸⁹ The artist’s personality is thus, it seems, spatially extended, existing not only where the artist is but also, at least in part, where the artist’s works are. (The merits or demerits of this view from a metaphysical standpoint need not detain us, since I shall argue that irrespective of those merits or demerits, the view is ill-suited to explain the contours of the Moral Rights laws that in fact exist.⁹⁰)

The other category includes what we might call “personality development” accounts, according to which allowing the artist to continue to exert some control over an artwork, even after its sale to someone else, is

⁸⁹ Justin Hughes attributes to Hegel a view of this sort about property in general. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 333–35 (1988). See also Edward Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988) (“The crucial link between the American right of personality and the concept of moral rights is that works of art are expressions of the creative personality of the author, and insofar as these works continue to embody the author’s personality, acts done to them that impair their ability accurately to reflect the author’s personality should be actionable.”); Neil Netanel, *Copyright Alienability Restrictions & the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 397, 363–64 (1993) (“[T]he Continental copyright doctrine . . . views copyright essentially as a means to protect the author’s individual character and spirit as expressed in his literary or artistic creation. . . . [T]he author’s work is seen, partially or wholly, as an extension of the author’s personality, the means by which he seeks to communicate to the public.”); Roeder, *supra* note 3, at 557 (“When an artist creates . . . he projects into the world a part of his personality and subjects it to the ravages of public use.”).

⁹⁰ Justin Hughes has criticized “Hegelian” views of this sort, arguing *inter alia* that it is hard to determine when someone has a personality stake in a given item, that it is unclear how legal protections should scale with the amount of personality imbued in an item, and that different types of intellectual property differ in their permeability to personality. Hughes, *supra* note 89, at 339–44.

essential for enabling proper development of the artist’s personality. The inspiration for this view seems to be Radin’s suggestion that protecting “people’s ‘expectations’ of continuing control over objects” can be important: “If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.”⁹¹ Although Radin may not have had intellectual property in mind when she made her argument, others have extended that reasoning to a Moral Rights context. Neil Netanel, for example, praises Moral Rights on the grounds that “continuing author control is vital to self-realization and autonomy. . . . The creation of an intellectual work is only the first step in an author’s assertion of self in the external world.”⁹²

But how the “personality development” theory justifies grants of Moral Rights is unclear. Even if we assume, with Radin, that part of what makes us persons are our plans for the future (an assumption which we may be unwise to grant, since it threatens to underestimate the personhood of the aged, the depressed, and the suicidal), it does not follow that the state should grant Moral Rights, or take any other steps, to help ensure that those plans come to fruition. Personhood, on this view, involves having plans for the future, but *plans* for the future are not the same as *realized* plans. If the world ends tomorrow, I am not any less of a person today even though my plans for the future will all be frustrated. So there is a gap in the argument here, and no obvious bridge to cross it.

Moreover, there is the straightforward, and compelling, objection that even if having some control over property is necessary for self-realization and autonomy, it is not at all clear that such necessity extends to the remarkable sort of control that Moral Rights give visual artists. We might think that there must be something particularly stunted about visual artists’ capacities for personality development if that development cannot proceed without giving those artists a veto over alterations to artworks that they have sold to others.

It is somewhat easier to see how an “imbued personality” account might justify the existence of Moral Rights, especially a right of integrity. If

⁹¹ Radin, *supra* note 83, at 968.

⁹² Netanel, *supra* note 89, at 403. *See also* Hughes, *supra* note 89, at 330 (citing and discussing Radin’s suggestion in the context of intellectual property).

an artwork really does contain part of its creator’s personality, then someone who alters that artwork without the artist’s permission distorts that portion of the artist’s personality—in effect mounts an assault upon the very person of the artist himself. Or, at least, so someone might argue. (If we take the philosophical issues here seriously, this conclusion is not at all obvious, even if we grant the initial assumptions.⁹³ But we can leave such subtleties to the philosophers, since in a moment I shall argue that this account, whatever its merits, is inadequate to existing legal practice.)

This account does have some appealing aspects. For example, it can easily explain why American statutes exclude “works made for hire” from Moral Rights protections.⁹⁴ Because creative control over a work made for hire lies in the hands of the institution which hired the artist to execute the work, not in the hands of the artist himself, the artist’s personality does not imbue such a work.⁹⁵ Hence, the artist has no personal vulnerability in the work, and thus no grounds for claiming a special right to prevent changes to that work.

Trouble arises, however, when we start to consider how well these personality accounts fit with other salient features of American Moral Rights law. One obvious difficulty is with the refusal of VARA and the majority of state statutes to give artists a right against the outright destruction of their works.⁹⁶ If protection against alteration of artworks is intended to prevent the unconsented alteration of part of an artist’s personality, as the “imbued personality” account suggests, it is hard to see why artists would

⁹³ Making this argument philosophically rigorous would require considering, *inter alia*: exactly how an artist’s personality imbues an artwork, and thus whether any change to the work necessarily reaches that personality; whether whatever effect does result to the artist’s personality differs in type or in magnitude from the sorts of effects that other sorts of actions in the daily world have on people’s personalities and which do not trigger legal protections; and the extent to which, if an artist’s “personality” can thus be extended beyond the boundaries of the artist’s physical person, these sort of effects on an artist’s personality really are affects on the artist’s *person*.

⁹⁴ 17 U.S.C.A. §§ 106A(c)(3), 101 (West 2009). *See also* state statutes cited *supra* notes 15 through 26.

⁹⁵ A similar idea appears in Justin Hughes, *The Personality Interest of Artists & Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 156–58 (1998).

⁹⁶ Only California, Massachusetts, and Pennsylvania prohibit destruction. CAL. CIV. CODE § 987(c) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2009); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2009).

not have an even stronger claim against the complete, unconsented, elimination of that part of the artist’s personality. Similarly, if protection against alteration is intended to help artists form plans in ways necessary for self-realization and autonomy, then we would again expect protection to extend to preventing destruction: Destroying their artworks would presumably frustrate their plans at least as much as altering those works would. And yet the statutes generally do not allow artists to prevent the destruction of their works.

VARA does give artists the right to prohibit the destruction of certain artworks, but limits that protection to works “of recognized stature.”⁹⁷ And six state statutes give artists the right to restrict alterations to works of “recognized quality.”⁹⁸ But if protecting artists’ abilities to develop their personalities were the goal of these laws, then one would not expect to find these threshold quality requirements, since there is no reason to think that personality development in mediocre and bad artists depends less on control over their sold artworks than personality development in outstandingly talented artists does. Moreover, there is no apparent reason to believe that only highly talented artists permeate artworks with their personalities. Even a dismal artist may “pour his soul” into a work; the end result just isn’t very good.⁹⁹ So if protecting artists’ “imbued personalities” really were the goal, those quality threshold requirements would be monstrously elitist exceptions to the law’s general commitment to protect all people equally against threats to their persons.

The statutes’ termination provisions also pose challenges for the two personality-based accounts. On the “personality development” view, it is hard to see why Moral Rights protections would extend past the artist’s death, since death presumably marks a complete end to the artist’s autonomy and personality development. Although VARA does terminate the rights in the year of the artist’s death, the state statutes all allow those rights to continue either for another fifty years or in perpetuity.

⁹⁷ 17 U.S.C.A. § 106A(a)(3)(B) (West 2009).

⁹⁸ CAL. CIV. CODE § 987(b)(2) (West 2009); LA. REV. STAT. ANN. § 51:2152(7) (West 2009); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 2009); N.M. STAT. ANN. § 13-4B-2(B) (West 2009); 73 PA. CONS. STAT. ANN. § 2102 (West 2009).

⁹⁹ For a nice example of this in a slightly different context, see the biographical film *Ed Wood*, about a motion picture auteur who was legendarily inept but nonetheless entirely sincere and wholly committed to his art. ED WOOD (Touchstone Pictures 1994).

The “imbued personality” view might explain postmortem persistence of the rights, if one thinks that the artist’s personality somehow persists in his artworks after his death. But then not only VARA’s near-immediate termination, but even state statutes which wait fifty years before termination, are hard to explain. Since it seems unlikely that an artist’s personality somehow leaks out of an artwork over time after the artist dies—at any rate such a speculative metaphysical hypothesis seems an unlikely candidate for explaining American intellectual property law—having the right not be perpetual would seem to be anathema. And the fact that the artist has been dead for a while cannot make it somehow less of concern if alterations are made to the scraps of personality that remain in his or her art; if anything, the artist’s death should make such alterations more worrisome, since he or she is no longer alive to replenish or replace those few manifestations of the artist’s personality that still exist.

One final concern about these “personality”-based accounts arises out of Hansmann and Santilli’s observation about the different legal treatment accorded visual art and inventions.¹⁰⁰ That we do not grant the right of integrity to inventors is hard to explain on those accounts: Inventors presumably invest much of their personality into their inventions as visual artists invest in their artworks,¹⁰¹ and it is hard to see why continuing control over their work would be any more important for the development of artists’ personalities than for the development of inventors’ personalities.

IV. EXPRESSIVISM, PRESERVATIONISM, REPUTATION

Although the economic and the personality theories are the most prominent accounts in the Moral Rights literature, three other general theories also attempt to explain or justify Moral Rights laws. One of these theories focuses on the laws’ expression of certain social values; the second focuses on the importance of preserving artworks; and the third focuses on artists’

¹⁰⁰ Hansmann & Santilli, *supra* note 3, at 110.

¹⁰¹ See, e.g., Evan Ratliff, *O, Engineers!*, WIRED, Dec. 2000, available at <http://www.wired.com/wired/archive/8.12/soul.html> (quoting computer hardware engineer Jim Guyer as saying “Look, I don’t have to get official recognition for anything I do. Ninety-eight percent of the thrill comes from knowing that the thing you designed works, and works almost the way you expected it would. If that happens, part of *you* is in that machine.”).

interests in their own reputations. However, just as the economic and personality theories were inadequate to explain the observed features of the Moral Rights statutes, these theories also turn out to be insufficient.

A. THE EXPRESSIVIST ARGUMENT

The expressivist argument is that giving artists special legal control over their artworks enables society to express its esteem for art and to foster an environment in which art and artists are valued highly. (A tacit assumption is that such expression and fostering are good things.) For example, Thomas Cotter:

[O]ne might argue that endowing artists with moral rights sends a message that art is not just a commodity, to be traded off against other commodities, but rather that artists' contributions to society are specially valued and appreciated. Moral rights therefore may be viewed as a means of alleviating the otherwise alienating conditions imposed upon artists by an economic system that, at present, may leave them little choice but to consent to the commodification and defilement of their work.¹⁰²

The difficulty with such an argument is that VARA, and almost all of the state statutes, do not empower artists to stop the complete destruction of

¹⁰² Thomas F. Cotter, *Pragmatism, Economics, & the Droit Moral*, 76 N.C. L. REV. 1, 43 (1997). See also *id.* at 83 ("[O]ne might argue that the recognition of moral rights expresses a community standard that, in light of the unique quality of art objects both to embody and to stimulate experience, these objects are entitled to some form of special protection. Allowing one to buy or sell the right to alter or destroy these works therefore may be viewed as inconsistent with the community's 'considered judgment' concerning the appropriate way to value them."); Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 303 (2003) ("It is submitted that the intrinsic value of integrity rights lies in their uniquely expressive character. The recognition of these rights in a manner which favors the artistic sensibilities of the artist over the competing interests of those who own the objects in which the artist's works are embodied, [sic] signals a measure of respect for the artist's position within the community. . . . By making available formal legal mechanisms through which an artist is able to preserve the authenticity of his artistic expression, integrity rights establish an atmosphere of respect within a community for the creative efforts of members of that community." (footnote references omitted)).

their works, but only the alteration of them. Since destruction seems the ultimate way of signaling that something is worthless, this limitation is hard to square with the notion that the statute is seeking to send a message that artists' contributions are highly valued. Moreover, the expressivist account has no obvious way to explain the statutes' prohibition against artists' transferring their Moral Rights, even as gifts to relatives. If expressing esteem for art and artists is the goal, such provisions seem wholly unmotivated. More generally, Moral Rights statutes simply seem to be a remarkably indirect and convoluted way of expressing society's appreciation for artists, when much more straightforward measures (like exempting them from sales tax for sales of their own works, or establishing awards and prizes for artists, or even decreeing that every June will be “Thank an Artist Month”) are available.

Nevertheless, William Landes has suggested that empirical data might support this expressivist argument. Asking why artists support Moral Rights laws, despite the likelihood that such laws cost them economically, Landes expressed doubt that artists are unaware of those costs, and suggested that

[a] more likely explanation relates to the expressive value of these laws. Suppose the rhetoric surrounding these laws and the prestige of the people supporting them signal to the community at large that art is a highly valued social enterprise. In turn, this creates greater interest in art and a more favorable social environment for artists. And if the non-monetary benefits of moral rights laws more than offset their economic harm, which [Landes' equations] suggest is insignificant, artists will desire to work and live in states with these laws.¹⁰³

Landes investigated this hypothesis by running regressions to determine how strongly changes in a state's number of artists per capita correlated to whether the state enacted Moral Rights laws. Landes took the number of artists per capita to be an approximate proxy for how “favorable” the state's “social environment” was for artists¹⁰⁴: “Other things the same, if moral

¹⁰³ William M. Landes, *What Has the Visual Artists' Rights Act of 1990 Accomplished?*, 25 J. OF CULTURAL ECON. 293, 298 (2001).

¹⁰⁴ *Id.* at 298.

rights laws enhance the artist’s social environment (even though his monetary income may fall), one should observe larger relative increases from 1980 to 1990 in the number of artists in states that passed moral rights laws in the 1980s compared to states that did not.”¹⁰⁵ Landes ultimately found insufficient evidence to confirm this hypothesis,¹⁰⁶ but he did see “some support” for the hypothesis in his finding that “the per capita number of artists increased more rapidly in states that enacted moral rights laws in the 1979 to 1987 period, holding constant the other socio-economic variables in the regression and the lagged value of the dependent variable.”¹⁰⁷

Landes’s results are interesting, but they do not really suggest that expressing support for artists is a central attribute of these Moral Rights laws. Since Landes’s study reduces the favorability of a state’s environment to the per capita number of artists in that state, what the study really suggests is that “artists prefer working and living in states that have these laws.”¹⁰⁸ Thus, the study shows, at most, only that the state Moral Rights statutes were effective in creating a legal environment that was more attractive to artists. It does not show that the is effect was the result of any expressive effect of the law rather than simply the result of artists’ preferring, all else being equal, to live in jurisdictions where they have more rights rather than in jurisdictions where they have fewer.¹⁰⁹

¹⁰⁵ *Id.* at 298.

¹⁰⁶ *Id.* at 299 (“[O]ne cannot reject the null hypothesis that the [number of artists] would have remained constant in a state in the 1980 to 1990 period, if the values of the other independent variables had remained constant.”).

¹⁰⁷ *Id.* at 299.

¹⁰⁸ *Id.* at 299.

¹⁰⁹ Later I shall argue that an account based on respect better explains the contours of existing Moral Rights laws. Such an account is compatible with Landes’s empirical findings. Even if the law does not itself express the overall culture’s respect for art, or encourage a higher social valuation of art and artists, it may provide legal recognition of a pre-existing moral duty of respect that individuals have toward artworks’ creative excellence. And artists may prefer to live where that legal recognition exists.

B. THE PRESERVATIONIST ARGUMENT

The preservationist argument is that Moral Rights laws aim, at least in significant part, to preserve art for the benefit of society as a whole. Justin Hughes offers a variant of this argument, asserting that protecting expressions from alteration is necessary to secure the benefits which freedom of expression provides to those who receive that expression.¹¹⁰

There are some textual reasons for drawing a connection between preservationist concerns and the existence of these statutes. The pioneering California statute’s official title is “The California Art Preservation Act.”¹¹¹ Nine years after enactment of that act, the California legislature passed a law requiring preservation of an underwater mural (by David Hockney) in the Hollywood Roosevelt Swimming Pool, finding that “[t]o allow needless destruction of this unique work of art would be a great tragedy and inconsistent with the intent of the California Art Preservation Act, which establishes ‘a public interest in preserving the integrity of cultural and artistic creations.’”¹¹² Turning to the east coast, the title of Pennsylvania’s statute is the “Fine Arts Preservation Act,”¹¹³ and the statute’s preamble includes a finding that “[t]he ongoing creation and preservation of fine art contributes to the cultural enrichment and, therefore, general welfare of the public.”¹¹⁴ The section heading for the relevant portion of Maine’s code is “Preservation of Works of Art.”¹¹⁵ Similarly, Massachusetts’s statute has “Massachusetts Art Preservation Act”¹¹⁶ as its popular name, and its

¹¹⁰ Hughes, *supra* note 89, at 359–60, 363–64. *See also, e.g.*, Roeder, *supra* note 3, at 575 (“The real reason, however, for protection of the moral right after the creator’s death lies in the need of society for protection of the integrity of its cultural heritage.”); Stern, *supra* note 7, at 880 (“The current system that relies on a variety of different sources for postmortem rights [i.e., state and federal Moral Rights statutes] fails to serve a foundational purpose of moral rights—art preservation.”). For a detailed discussion of the importance of art preservation in a more general context, see SAX, *supra* note 77.

¹¹¹ 1979 Cal. Stat. 1501.

¹¹² 1988 Cal. Stat. ch. 34., § 1. [No page number stated.]

¹¹³ 73 PA. CONS. STAT. ANN. §§ 2101 (West 2009).

¹¹⁴ Pennsylvania Act 1986, Dec. 11, P.L. 1502, No. 161.

¹¹⁵ ME. REV. STAT. ANN. tit. 27, § 303 (2009).

¹¹⁶ *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 92 (D. Mass. 2003).

findings section declares that “there is also a public interest in preserving the integrity of cultural and artistic creations.”¹¹⁷

However, although preservation concerns may have provided some motivation for some Moral Rights statutes, such concerns seem, at most, to be only a small piece of the best understanding of these statutes, since existing Moral Rights laws are a strikingly poor way of preserving art, for several reasons: First, the right of integrity that these statutes provide is waivable.¹¹⁸ Second, enforcement is at the artist’s discretion. Third, society does not have standing to enforce the right (except in California); only the artist does.¹¹⁹ And, fourth, in the case of VARA and several state statutes, the right vanishes altogether either in the year of the artist’s death or on the fiftieth anniversary of the death, even though there is no reason to believe that society’s interest in preserving the artist’s work ends so abruptly.¹²⁰

¹¹⁷ MASS. GEN. LAWS ANN. ch. 231, § 85S(a) (West 2009).

¹¹⁸ Charles Beitz also noticed this problem. Beitz, *supra* note 18, at 348 (“[T]he social interest in protecting the artistic heritage . . . argue[s] against allowing Moral Rights to be waived or transferred . . .”).

¹¹⁹ California gives public and not-for-profit private arts organizations standing to seek injunctions against violations of the state’s Moral Rights statute. CAL. CIV. CODE § 989(b)-(c) (West 2009). Massachusetts and New Mexico are two other minor exceptions. Both allow their state attorneys general to bring suit to enforce the right, but only on the artist’s behalf, only after the artist’s death, and only with respect to works that are on public view. And in both of those states, the right terminates on the fiftieth anniversary of the artist’s death. MASS. GEN. LAWS ANN. ch. 231, § 85S(g), (West 2009); N.M. STAT. ANN. § 13-4B-3(E) (West 2009).

¹²⁰ These concerns also explain why Lior Strahilevitz’s account of Moral Rights’ anti-destruction provisions is unconvincing. Strahilevitz argues that prohibiting destruction makes sense because expression of ideas is socially valuable, and “creation contributes to an idea whereas destruction of unique property attempts to wipe out an existing idea.” Strahilevitz, *supra* note 61, at 828. That protection from destruction ends when the artist dies poses a problem for Strahilevitz’s account, since the artist’s death presumably does not affect the social utility of the artist’s ideas. Strahilevitz attempts to explain this limitation by arguing, first, that “[a]fter the artist has died, there is little expressive interest to be balanced against the living destroyer’s expressive interest,” and, second, that “in the case of works exhibited well before the artist’s demise, the idea in question already has been voiced for a substantial period of time, so destruction may be justified on collectivist [i.e. social utility] grounds.” *Id.* at 829. However, it is unlikely that the expressive value of an artwork of recognized stature is exhausted over time. The value of such a work often lies not in the specific idea that it expresses but in *how* it expresses that idea. That war and

C. THE REPUTATION THEORY

The reputation theory is noteworthy for its straightforwardness: Moral Rights laws exist simply to protect artists’ reputations, not because of any concern about externalities involving society or other owners of the artist’s work, but merely in order to avoid the harm that artists would personally experience if purchasers’ alterations damaged those artists’ reputations.¹²¹

The main argument in favor of this simple reputation theory is a straightforward appeal to the language of the statutes. For example, VARA’s central provision gives each visual artist the right to prevent changes “which would be prejudicial to his or her honor or reputation.”¹²² And among the state statutes, only Rhode Island’s statute lacks explicit mention of harm to the artist’s reputation either in preliminary “findings” or in the specification of conditions under which the right of integrity will apply.¹²³

This theory might be able to make sense of Moral Rights laws’ allowing artists to waive their right to prevent alterations, by noting that some alterations will not harm the artist’s reputation, and sometimes the artist may not care what effect alterations to a given work may have on the artist’s reputation. Thus, if the aim of Moral Rights statutes is to protect artists from experiencing subjective harm, then if an artist does not care much about alterations to a given work, there is no reason not to let that artist waive the right to prevent those alterations. By the same token,

massacre is bad is a cliché; what *Guernica* does is cut through that cliché, making the underlying truth vivid and salient. Even though *Guernica* is decades old, the expressive collectivity would suffer if someone were allowed to destroy the painting in the mistaken belief that it had already said all that it had to say. Strahilevitz somewhat diffidently offers one final argument: “VARA’s default rule could be socially efficient if artists cared about preventing destruction but did not care enough about destruction to warrant the costs of formalizing antidestruction agreements.” *Id.* at 829 n.193. However, concerns about efficient contracting are an unlikely explanation for these provisions, since the statutes make protection against destruction the default only for *some* art, namely art of recognized stature (which moreover is likely to be a small minority of all art sold).

¹²¹ Joseph Sax appears to subscribe to this view, asserting that *droit moral* is “a sort of defamation law, under which protection of the objects that are the artist’s work is necessary to protect the artist’s reputation.” SAX, *supra* note 77, at 22.

¹²² 17 U.S.C.A. § 106A(3)(a) (West 2009).

¹²³ See state statutes cited *supra* notes 15–25.

prohibiting transfer of the right would also make sense, since forsaking one’s own right to prevent changes to a particular artwork tacitly admits one’s lack of concern about how such changes might affect one’s reputation. Thus, attempting to transfer the right would concede that, in that particular case, the subjective harm that the right was intended to protect against does not exist. Hence there would be no reason to allow the transferee to exercise that right.

However, the simple reputation theory quickly stumbles when faced with other central provisions of American Moral Rights statutes.

One basic problem for this theory is explaining why the specific Moral Right which many statutes grant is a right to prevent alterations rather than just a right to have the artist’s name’s dissociated from works that have been altered without the artist’s permission (i.e., a “negative right of attribution”). Although five state statutes do in effect provide a negative right of attribution,¹²⁴ a majority of the Moral Rights statutes either provide a right against public display of altered work whether or not any harm to the artist’s reputation is reasonably expectable, or permit the artist to prevent any alterations, not just to demand removal of the artist’s name from altered works.¹²⁵ So the simple reputation theory leaves the central provision of a majority of Moral Rights statutes quite mysterious.

Moreover, if we are to understand the statutes as concerned with the artist’s experiencing harm from damage to his or her reputation, then since artists who have died are beyond all earthly experience, such a theory would seem at a loss to explain those state statutes that extend the right for fifty years after the artist’s death, or, even more perplexingly, make the right essentially perpetual. (Only VARA terminates the artists’ rights at death.)¹²⁶

¹²⁴ As noted above, the statutes in Louisiana, Maine, Nevada, New Jersey, and New York give a right only against public display of artworks that have been altered in a way that one might reasonably expect would harm the artist’s reputation.

¹²⁵ New Mexico’s and Rhode Island’s statutes provide the former sort of right. VARA and statutes in California, Connecticut, Massachusetts, and Pennsylvania provide the latter sort. *See* statute provisions cited *supra* notes 19 & 35–38.

¹²⁶ Conceivably, a defender of the reputation theory might attempt to explain the statutes that allow the right to persist for fifty years after the artist’s death by appealing to subjective harm that the artist’s close relatives might suffer. *See* Roeder, *supra* note 3, at 575 (“On the other hand, it seems sounder to reason that, the creator being dead, he cannot be damaged by any injury to his honor or reputation. His family and descendants, however, can be and should, therefore, have some remedy.”) More adventurously, such a defender

Equally difficult for this theory is explaining why the statutes typically allow artists to prevent only alteration and not destruction of a work. Some have assumed that alteration of an artist’s work typically hurts the artist’s reputation more than elimination of the work would,¹²⁷ but even if that assumption is true, surely sometimes destruction would be quite harmful to an artist’s reputation, especially if the artist had made few works and the work destroyed was one of the artist’s best. Thus it is hard to understand why, if the simple reputation theory is true, the statutes did not include a destruction provision modeled on the alteration provision, allowing the artist to prevent destruction of a work when such destruction would harm the artist’s reputation.

V. AN ALTERNATIVE FRAMEWORK: RESPECT FOR ARTWORKS’ CREATIVE EXCELLENCE

Thus far we have considered economic, personality-based, expressivist, preservationist, and reputation-based accounts of Moral Rights laws, and found all of them wanting. Incompatibility with central features of American Moral Rights laws made each of those approaches implausible as a general account of those laws. In this Part, we shall see how making sense of American Moral Rights law nevertheless is possible by focusing on a moral duty of respect. (Note the lower-case “m” in “moral.”) However, simply invoking respect in general is not adequate. This account relies upon a very specific sort of respect—respect for artworks’ creative excellence.

1. Respect for Excellence in Broader Context

Our first step is to see why respect for artworks’ creative excellence is a plausible candidate for an analysis of Moral Rights statutes. To do that, we

might appeal to Aristotle’s famous notion that events after a person’s death, for a while at least, can have a limited effect on how well that person’s life went. ARISTOTLE, NICOMACHEAN ETHICS 1101a28–b9 (Terence Irwin trans., Hackett Publishing Co. 1985). However, even if such explanations might partially account for the persistence of the right for fifty postmortem years, they seem wholly inadequate to account for statutes that make the right effectively perpetual.

¹²⁷ See Stern, *supra* note 7, at 859 (asserting that the New York statute’s “[f]ailure to protect against destruction of the work is consistent with favoring the artist’s reputation under the argument that an artist’s reputation can no longer suffer adversely from a work that no longer exists.”)

can note both the account’s intuitive plausibility and its roots in a broader context of cultural attitudes toward respecting excellence.

Several scholars, with diverse theories of their own, have seen respect playing some role as a foundational principle for legal and moral rules concerning alteration or destruction of art. For example, Joseph Raz has offered arguments for artistic preservation based on general moral requirements of respect for “art.” Raz asserts that if I own a Van Gogh painting, I am under a duty not to destroy it, because “to destroy it and deny the duty is to do violence to art and to show oneself blind to one of the values which give life meaning. . . . [E]veryone has a duty of respect towards the values which give meaning to human life. . . .”¹²⁸ Charles Beitz has suggested that at least part of the justification of Moral Rights laws “will most likely have something to do with respect for the creator’s unforced, intentional creative effort, or as we might say, with the creator’s autonomy.”¹²⁹ And Roberta Kwall has suggested in passing that “[c]entral to moral rights is the idea of respect for the author’s meaning and message as embodied in a tangible commodity because these elements reflect the intrinsic creative process.”¹³⁰

¹²⁸ J. Raz, *Right-Based Moralities*, in THEORIES OF RIGHTS 182, 197 (Jeremy Waldron ed. 1984). As noted earlier, preservationist accounts will not be successful as analyses of American Moral Rights law, because those laws *permit* destruction. See Sect. II.2, *supra*.

¹²⁹ Beitz, *supra* note 18, at 351. Note that Beitz’s justification for Moral Rights does not work well as an explanation for the Moral Rights statutes that actually exist, for several reasons. First, because his account implies that alienation of the right should be permitted, *id.* at 357–58. Second, because it seems incompatible with permitting destruction of artworks. Third, because it seems incompatible with limiting protections to works of “recognized quality.” And, fourth, because much visual art may not be part of any “communicative project” in the first place. *But see* SAX, *supra* note 77, at 197–98 (asserting that certain cultural masterworks “belong in the public domain because they are basic building blocks of our common agenda: the acquisition and dissemination of knowledge, and the encouragement of genius”).

¹³⁰ KWALL, *supra* note 9, at 6. Kwall does not elaborate on the role of respect in her theory of Moral Rights law, which asserts that rights of attribution and integrity are protected in order to “safeguard the author’s meaning and message, and thus are designed to increase an author’s ability to safeguard the integrity of her texts.” *Id.* Although Kwall’s theory does not fit with what we actually observe in American Moral Rights laws—which, e.g., permit destruction without the creator’s consent—Kwall’s goal is not to offer an analysis of existing American Moral Rights law, but rather a critique of what she takes to

These commentators’ remarks about respect, although quite brief, reflect an important feature of American cultural practices, where respect for excellence, and notions about the appropriateness of such respect, have a prominent place. This sense of the importance of respect for excellence manifests itself in a wide range of contexts, encompassing many domains of human endeavor, not just art. These practices include the awarding of medals and prizes, the creation of “halls of fame,” the naming of public schools and roadways, the establishment of holidays and named days, and the dedication of monuments.

Consider, for example, American society’s pronounced tendency to celebrate—indeed, revere—athletic excellence. Championship athletes and professional sports teams routinely receive public awards (e.g., “keys to the city”) and parades, often attended by thousands or tens of thousands of supporters.¹³¹ At an individual level, the desire to associate with and pay tribute to an athlete’s excellence spurs purchases of replica sports jerseys and other memorabilia, and products endorsed by the successful athlete.¹³² Although the mere fact of association with a fan’s own hometown presumably accounts for some of this behavior—fans tend to root for the home team—the level of excellence displayed by the relevant athlete or team is also a significant factor. Athletes who lack skill rarely receive public accolades, and memorabilia sales are less brisk for losing teams and

be that law’s inadequacy in fulfilling the purposes which she believes Moral Rights law ought to fulfill. *Id.* at xv.

¹³¹ See, e.g., Jonathan Abrams & Catherine Skipp, *Cheers in Miami, Jeers in Ohio, And Knicks Just Try to Move On*, N.Y. TIMES, July 10, 2010, at D1 (star basketball players LeBron James and Chris Bosh awarded keys to Miami); *Champion Lakers Celebrate with Parade*, WASH. POST, June 22, 2010, at D2 (“[h]undreds of thousands” of fans attended parade saluting Los Angeles Lakers after the team won the 2010 NBA championship); George Vecsey, *Amid Celebrations And the Cheers, Cashman Reflects*, N.Y. TIMES, Nov. 7, 2009, at D1 (New York Yankees baseball team given ticker-tape parade and keys to the city after winning 2009 World Series).

¹³² Perhaps the most prominent example of this phenomenon is the success of Nike’s “Air Jordan” sneakers and apparel, associated with hall-of-fame professional basketball player Michael Jordan. The initial 1985 launch of the Air Jordan line generated approximately \$100 million in sales, and by 1999 sales had climbed to approximately \$500 million per year. Don Amerman, *Slow Growth Pinches Footwear Traders, Retailers*, J. COM., May 3, 1999, at 11A, available at 1999 WLNR 1043849; *David Beckham: Real Money*, ECONOMIST, March 12, 2004, at 98, available at 2004 WLNR 6532653;

players than for their winning counterparts.¹³³ Moreover, sports fan behavior recognizes a norm of respecting extraordinary excellence even when that excellence comes at the expense of one’s own favored athlete or team. For example, it is common for baseball fans to give a standing ovation to a visiting team’s pitcher who throws a no-hitter or achieves a significant career milestone, even though that pitcher’s excellence defeated the home team, for whom most of the fans in attendance came to root.¹³⁴

In a similar vein, debates over which athletes deserve admission to prominent sports halls of fame are frequent, detailed, and passionate.¹³⁵ In

¹³³ For examples of the connection between team success and sales of the team’s merchandise, see *NFL Licensed Merchandise Sales Up 25% Over Last Four Seasons*, AMUSEMENT BUS., June 3, 1989, at 14, available at 1989 WLNR 3277063 (noting that the Washington Redskins “Super Bowl victory in 1988 pushed team merchandise sales up from sixth in the league to second” in the subsequent year, while the San Francisco 49ers victory in Super Bowl XXIII “boosted sales up to a No. 4 ranking, from No. 7 the previous year”); *Sales at Both the NBA Store in New York and NBAStore.com Through March are Up 17% Compared to the Prior Year*, LICENSING LETTER, April 21, 2008, at 2, available at 2008 WLNR 25513341 (reporting that National Basketball Association officials attributed increased team merchandise sales in part to improved play by three league teams, “[p]roving yet again the truism that team merchandise sales levels mostly track oncourt success”).

¹³⁴ See, e.g., Greg Bishop, *On First Try, Johnson Earns Place in Elite Club*, N.Y. TIMES, June 5, 2009, at B11 (fans in Washington, D.C. gave standing ovation to San Francisco Giants pitcher who recorded his 300th career win by defeating Washington Nationals); Martin Frank, *Halladay: Simply Perfect*, NEWS J. (Wilmington, Del.), May 30, 2010, available at 2010 WLNR 11117619 (fans in Miami gave standing ovation to Philadelphia Phillies pitcher who threw a perfect game against Florida Marlins). See also Rob Biertempfel, *Polling the Pirates Clubhouse*, PITTSBURGH TRIBUNE REV., Apr. 5, 2009, available at 2009 WLNR 6388572 (reporting a Pittsburgh Pirates player’s observation that St. Louis baseball fans “really know baseball,” as evidenced by the fact that he “always see[s] them give standing ovations, even to opposing teams’ players, after great plays.”).

¹³⁵ A prominent recent example in professional football was the debate, extending over nearly a decade, about whether former Washington Redskins wide receiver Art Monk deserved induction into the NFL Hall of Fame. See, e.g., Michael Wilbon, *At Last, No Debating Their Hall Pass*, WASH. POST, Aug. 1, 2008, at E1 (criticizing the delay in electing Monk to the Hall of Fame and responding to arguments that statistical measures of Monk’s performance indicated that he should not be elected). These sorts of debates extend beyond players to include coaches and even owners. See, e.g., Tyler Duffy, *Does George Steinbrenner Belong in the Hall of Fame?*, THE BIG LEAD, July 19, 2010, 2:30 pm EDT,

recent years, these debates have taken on an additional dimension as the widespread use of performance enhancing drugs, including steroids, has raised questions about whether players who used such drugs merit honoring, since their records of accomplishment have arguably been tainted by their drug-produced unfair advantage.¹³⁶ The integrity of the process for determining and paying respect to athletic excellence has such popular appeal that even Congress has been motivated to investigate the extent of steroid use in baseball.¹³⁷

Showing respect for excellence is a part of America’s cultural fabric in other areas as well. The United States is the home to halls of fame for, e.g., inventors,¹³⁸ musicians,¹³⁹ aviators,¹⁴⁰ astronauts,¹⁴¹ automobile

<http://thebiglead.com/index.php/2010/07/19/does-george-steinbrenner-belong-in-the-baseball-hall-of-fame/> (offering arguments for and against Steinbrenner’s inclusion).

¹³⁶ See, e.g., Robert Schlesinger, *Steroids, Baseball and the Hall of Fame*, U.S. NEWS & WORLD REPORT POL. & POL’Y, July 26, 2009, <http://politics.usnews.com/opinion/blogs/robert-schlesinger/2009/07/26/steroids-baseball-and-the-hall-of-fame.html> (reporting four commentators diverse answers to the question of “how . . . [Major League Baseball Hall of Fame] voters should handle the steroid era”); Dave Sheinin, *Steroids Scandal on Deck for Baseball Hall Voters*, WASH. POST, July 30, 2006, at E1 (describing the debate as the first steroid-tainted baseball players became eligible for consideration for induction into the Major League Baseball Hall of Fame); *The Ins, Outs of Legacies*, TULSA WORLD, March 26, 2005, at B8, available at 2005 WLNR 24866252 (collecting diverse opinions about whether the baseball Hall of Fame should exclude Mark McGwire because of allegations that he used steroids).

¹³⁷ See, e.g., John Files, *Union Not Ready To Commit to Mandatory Steroid Tests*, N.Y. TIMES, June 19, 2002, at D5 (reporting on Major League Baseball union leader Donald Fehr’s testimony before a U.S. Senate subcommittee, quoting Democratic U.S. Senator Byron Dorgan as referring to steroid use as a “pressing social problem,” and quoting Republican U.S. Senator John McCain as saying that “[w]e must send a clear message that the use of all performance-enhancing drugs, including steroids, is wrong.”); Barry Svrluga, *Making His Pitch: In Attempt to Clear The Air, Hurler May Have Clouded Legacy*, WASH. POST, Feb. 14, 2008, at E1 (reporting on testimony by baseball player Roger Clemens before the House Oversight and Government Reform Committee).

¹³⁸ The National Inventors Hall of Fame and Museum is currently located in Alexandria, Virginia, in the headquarters building of the United States Patent and Trademark Office. National Inventors Hall of Fame Overview, http://www.invent.org/hall_of_fame/1_0_0_hall_of_fame.asp (last visited July 19, 2010).

¹³⁹ See, e.g., The Country Music Hall of Fame and Museum, <http://www.countrymusichalloffame.org/> (last visited July 19, 2010); The Rock and Roll Hall of Fame and Museum, <http://rockhall.com/> (last visited July 19, 2010).

makers,¹⁴² television professionals,¹⁴³ and—demonstrating that enthusiasm for honoring excellence may stretch sometimes to the point of absurdity—even costumed sports team mascots.¹⁴⁴ Meanwhile, famous prizes such as the Nobel Prize and the MacArthur Foundation “genius grants” pay tribute to excellence in academic inquiry and artistic creation. (Although the Nobel Prize is not an American award, it looms large in the American popular imagination, ranging from coverage of the awards in prominent news media outlets,¹⁴⁵ to Hollywood portrayals of its recipients.¹⁴⁶) Distinguished academics are also honored by membership in the National Academy of Sciences, and in the American Academy of Arts and Sciences. Successful explorers and inventors are accorded a wide range of honors as diverse as ticker-tape parades for Apollo astronauts returning from the moon,¹⁴⁷ a federal holiday honoring Christopher Columbus, and a national historic

¹⁴⁰ The National Aviation Hall of Fame, <http://www.nationalaviation.org/> (last visited July 19, 2010).

¹⁴¹ The United States Astronaut Hall of Fame, <http://www.kennedyspacecenter.com/astronaut-hall-of-fame.aspx> (last visited July 19, 2010).

¹⁴² Automotive Hall of Fame, <http://www.automotivehalloffame.org/> (last visited July 19, 2010).

¹⁴³ Academy of Television Arts and Sciences Hall of Fame, <http://www.emmys.tv/awards/hall-fame> (last visited July 19, 2010).

¹⁴⁴ Mascot Hall of Fame, <http://www.mascothalloffame.com/> (last visited July 19, 2010). This particular Hall appears to lack any physical presence, existing solely online.

¹⁴⁵ See, e.g., Nelson Hernandez, *3 Physicists Win Nobel Prize*, WASH. POST, Oct. 8, 2008, at A8; Don Lee, *Two U.S. Professors Share Nobel Prize*, L.A. TIMES, Oct. 13, 2009, at B1; Dennis Overbye, *Three Win Nobel Prize for Ribosome Research*, N.Y. TIMES, Oct. 8, 2009, at A25.

¹⁴⁶ See, e.g., *A BEAUTIFUL MIND* (Universal Pictures 2001) (based on the true story of economics Nobel Prize winner John Nash); *THE PRIZE* (Metro-Goldwyn Mayer 1963) (a fictional thriller centered around an author who has arrived in Stockholm to accept the Nobel Prize for literature).

¹⁴⁷ See, e.g., Murray Illson, *Parade this Morning Will Honor Apollo Astronauts*, N.Y. TIMES, Aug. 13, 1969, at 29 (ticker-tape parade in New York City for returning Apollo 11 astronauts); Bernard Weinraub, *A Jubilant Houston Parade Honors the Apollo 11 Astronauts at the Finale of Celebrations in Nation*, N.Y. TIMES, Aug. 17, 1969, at 22.

landmark designation for the garage where Bill Hewlett and Dave Packard developed their first product, sparking the creation of Silicon Valley.¹⁴⁸

Honoring and respecting creative excellence in the arts has a similarly prominent place in American cultural practices. The most obvious way in which this concern manifests itself is in the plethora of awards that are given for creative excellence, and in the debates and anticipation which accompany those awards, some of which have a very high profile in popular consciousness. Annual telecasts of events announcing the winners of awards such as the Oscars (for motion pictures), the Emmys (for television), and the Grammys (for music) draw millions of viewers and vigorous—sometimes heated—debate about the merits of each year’s contenders.¹⁴⁹ Myriad other awards honor works displaying creative excellence in a broad spectrum of mediums ranging from the popular to the esoteric. The Pulitzer Prize for Fiction, the Hugo Awards for science fiction and fantasy literature, the Edgar Awards for mystery fiction, the Pritzker Architecture Prize, the Caldecott Medal and Newberry Medal for children’s literature, and the Charles S. Roberts Awards for boardgames that simulate historical military conflicts are just a few examples.

Although most of these awards are privately administered, this practice of honoring excellence extends to public officials and institutions as well. Thus, for example, recipients of the Kennedy Center Honors for

¹⁴⁸ Therese Poletti, *This Garage: A Landmark Property where HP was Founded Now Listed on U.S. Historic Registry*, SAN JOSE MERCURY NEWS, May 18, 2007, at 1D, available at 2007 WLNR 9452678 (reporting the designation and quoting a historian with the National Register of Historic Places as saying that “[w]hat this building represents is entrepreneurship”).

¹⁴⁹ Approximately 41.7 million people watched the 2010 Academy Awards (“Oscars”). *Oscars are Gold for ABC*, L.A. TIMES, Mar. 12, 2010, at D23. Approximately 13.3 million people watched the 2009 Emmy Awards. Joe Flint, *The Emmy Awards: Ratings Slide is Reversed*, L.A. TIMES, Sept. 22, 2009, at D3. Nearly 26 million people watched the 2010 Grammy Awards. *Prime-Time TV Rankings*, L.A. TIMES, Feb. 3, 2010, at D12. Examples of debates about the worthiness of award nominees and winners are legion. See, e.g., Stephen King, *Analyzing Oscar*, ENT. WKLY., Mar. 17, 2006, available at <http://www.ew.com/article/0,,1170378,00.html> (criticizing the unexpected award of the 2006 Best Picture Oscar to *Crash* rather to *Brokeback Mountain* as a manifestation of Academy voters’ anti-gay bias rather than an accurate assessment of the two films’ relative merits); Erik Lundegaard, *Oscar Misfire: ‘Crash’ and Burn*, MSNBC, Mar. 6, 2006, <http://today.msnbc.msn.com/id/11700333> (criticizing *Crash* as “the worst best picture winner since ‘The Greatest Show on Earth’ in 1952.”).

artistic achievement traditionally receive a reception at the White House and a banquet at the State Department.¹⁵⁰ The Presidential Medal of Freedom is awarded annually to honor outstanding achievement in many walks of life, including the arts,¹⁵¹ and the Librarian of Congress annually appoints a Poet Laureate.¹⁵² (Forty-three states and the District of Columbia also designate their own poets laureate.¹⁵³)

Establishment of public monuments is another common manifestation of the felt imperative to honor excellence. Funding for these monuments may come from private sources, but public entities play a pivotal role in permitting use of public park space for the monument and in determining which monuments will be allowed to use that limited resource. Thus, for example, “Literary Walk” in New York City’s Central Park has only four monuments, one each honoring Shakespeare, Robert Burns, Sir Walter Scott, and the now-forgotten Fitz-Greene Halleck. Central Park’s monuments to artistic achievement are not limited to English literature; the park also is home to monuments to Schiller, Duke Ellington, and Beethoven, among others.¹⁵⁴

One more feature of this pervasive practice of honoring creative excellence is worth noting: Even when honors are bestowed and monuments raised to a person, rather than to a specific work or deed, it is the excellence of that person’s creations or actions that really is being honored. In some cases, of course, the primary focus on the creation rather

¹⁵⁰ About the Kennedy Center Honors, <http://www.kennedy-center.org/programs/specialevents/honors/about.cfm> (last visited July 23, 2010).

¹⁵¹ Presidential Medal of Freedom Recipients, http://www.senate.gov/pagelayout/reference/two_column_table/Presidential_Medal_of_Freedom_Recipients.htm (last visited July 23, 2010).

¹⁵² About the Position of Poet Laureate, http://www.loc.gov/poetry/about_laureate.html (last visited July 23, 2010).

¹⁵³ Current State Poets Laureate, <http://www.loc.gov/rr/main/poets/current.html> (last visited July 23, 2010). Indiana actually has two poets laureate, although one is only “unofficial” and bears the title “Premier Poet.” Indiana – State Poet Laureate, <http://www.loc.gov/rr/main/poets/indiana.html> (last visited July 23, 2010).

¹⁵⁴ Central Park Monuments, <http://www.nycgovparks.org/parks/centralpark/monuments> (last visited July 23, 2010). For a detailed study of New York City’s plethora of public monuments, see Donald Martin Reynolds, *MONUMENTS AND MASTERPIECES: HISTORIES AND VIEWS OF PUBLIC SCULPTURE IN NEW YORK CITY* (2d ed. 1997).

than on the creator is obvious. For example, in the world of film, Oscars are given for categories such as "Best Picture" and "Best Sound Editing." Even categories such as "Best Actress" or "Best Director," which might at first glance seem to depart from this practice, really are consistent with it, since the award is given for a specific performance by that actor or actress. An actress who turns in a lackadaisical and by-the-numbers performance in a given film is unlike to win an Oscar for that role even if she happened to have the most talent of any person who appeared in films that year, just as a bad book by an otherwise good novelist is unlikely to win the Pulitzer Prize for Fiction. Our judgments that, e.g., Vergil or Shakespeare were great writers are dependent wholly on judgments that the works they produced are great. Indeed, in Shakespeare's case almost nothing is known about him outside of his works, and debate continues to this day about who "Shakespeare" even was.¹⁵⁵ Thus, although respect for an artist's creative excellence and respect for the creative excellence of that artist's works are often intertwined, it is the latter which really accounts for our behavior in both cases, while the former is merely derivative from the latter. The principal object of honor and respect is the excellence of the artist's works.

In light of the prominent roles that public manifestations of respect for excellence play in American cultural practices, it would be remarkable if such attitudes bore no relation to laws which regulate interaction with the works of artistic creators. That is to say, Moral Rights law's reflecting a concern about moral duties of respect for artworks' creative excellence would be of a piece with a wide range of society's beliefs about respect for excellence in human endeavor. Therefore, it is unsurprising that a theory based on a duty of respect for artworks' creative excellence indeed does fit well with the central provisions that we actually observe in American Moral Rights laws. To see that this theory can successfully provide a plausible analysis of those central provisions, where the other theories we have discussed have failed, let us now reconsider those provisions in light of this new theory, examining each in turn.

¹⁵⁵ See, e.g., Jess Bravin, *Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays*, WALL ST. J., April 18, 2009, at A1 (briefly summarizing the history of the debate over authorship of Shakespeare's plays and discussing Justice John Paul Stevens's belief that the true author was Edward de Vere).

2. *Waiver and Transfer*

First, we can see that the theory makes sense of the right of integrity's being waivable but not transferable. Many artworks lack much creative excellence, and many changes are not disrespectful to whatever excellence a work does possess. Sometimes, therefore, suspending the right to prevent changes makes sense. The two dangers, of course, are in over-restriction and under-restriction—in making a rule so strict that change is prohibited even when disrespect for a work's creative excellence is not at stake, or too freely allowing alterations when disrespect for creative excellence is at stake. What is needed, therefore, is a custodian who will most effectively make those decisions.

Because artists necessarily stand in a unique relation to the works which they have created—non-creators are (at most) only consumers of those works—creators are the people who are most likely to be aware of their works' creative excellence, if for no other reason than that they have spent more time with them, and more time intensely engaged with them, than anyone else has. At the same time, the artist is also well situated to understand when a work is such that alterations would not manifest significant disrespect for the work's creative excellence or specific alterations are such that they would not be disrespectful. Therefore, from a perspective of trying to ensure that all and only disrespectful changes are prohibited, allowing artists to waive the right of integrity makes sense.

Moreover, the statutes' prohibiting transfer of the right makes equal sense, because third parties necessarily lack the special relationship which exists between an artist and the artist's work, the relationship which provides confidence that the legal right-holder's decisions about disrespect are most likely (on average) to be optimal. There is no particular reason to trust the relevant judgments of this other person any more than the judgments of the artwork's current owner, against whom the right would be enforced. And there is no evident moral reason why these third parties, who contributed no share of the creative excellence in the work, would have any claim to a special Moral Rights in that work.

3. *Destruction*

At first glance, the fact that most statutes permit owners to destroy artworks might seem to pose a challenge to this account, since destroying an artwork seems at least potentially quite disrespectful. The key to understanding why such permission makes sense is because the respect owed in this account is

not respect for the *artwork*, or even respect for the *artist*, but rather respect for the *artwork's creative excellence*. Thus, destruction is allowed, because normally an owner would be interested in destroying a work only if he or she found little or no value in it and no one else did either (thus making it impossible for the owner to sell the work).¹⁵⁶ In such cases, the amount of creative excellence involved in the given work is likely to be zero, or close to zero. Destruction of such works cannot be disrespectful to the artwork's creative excellence, because there is no creative excellence involved to respect.

This account fits especially neatly with provisions, such as in VARA, giving artists the right to prevent destruction only of works of “recognized stature.”¹⁵⁷ Most Moral Rights statutes apply only to works of recognized quality, which now makes sense, since failing to satisfy the recognized quality standard plausibly indicates that there is little creative excellence involved in the work, and thus little or no risk that an owner's altering or destroying that particular work would fail to fulfill the duty of respect for artworks' creative excellence.¹⁵⁸

4. Public Display, Reputation, and Termination

The duty-of-respect theory also nicely makes sense of those statutes that give artists the right, not to prohibit alterations in general, but only to prohibit public display of altered works when damage to the artist's reputation is reasonably likely to result. Even when altering an artwork is disrespectful, or when altering it in certain ways is disrespectful, the amount of disrespect involved and expressed is vastly greater when the altered work is displayed in public than when the altered work is secluded in a private collection, just as cursing someone under one's breath is markedly less disrespectful than is cursing them loudly in public. Thus the public display clause may reasonably reflect a concern that the law step in only when the disrespect involved is sufficiently large.¹⁵⁹

¹⁵⁶ Cf. Hansmann & Santilli, *supra* note 3, at 112 (noting economic incentives for owners not to destroy works that could be sold for more than the cost of preserving the work until sale).

¹⁵⁷ 17 U.S.C.A. § 106A(a)(3)(B) (West 2009).

¹⁵⁸ See Section I.3, *supra*, for a discussion of the recognized quality requirement.

¹⁵⁹ The respect-based theory's ability to justify prohibitions on public display of altered artworks might raise questions about the theory's compatibility with First

The limitation to alterations that carry a reasonably high risk of harm to the artist’s reputation also makes sense as a useful proxy for changes that would be disrespectful. Changes that enhance or have no effect on an artist’s reputation are unlikely to be disrespectful—for the same reason that praise is much less likely to be disrespectful than insults are—and the law is much more familiar with assessing reputations and effects on reputations than it is with assessing expressions of respect.¹⁶⁰

5. Termination

Almost all of the Moral Rights statutes provide for the right of integrity to continue even after the artists’ death.¹⁶¹ (Five of the statutes have the right terminate fifty years after the artist’s death, while six of the statutes make the right effectively perpetual.¹⁶²)

The post-mortem survival of these Moral Rights becomes comprehensible when we consider the implications of the fact that the duty-of-respect theory is based fundamentally on duties rather than on rights. Loosely speaking, our account derives rights from the existence of duties,

Amendment principles of free expression. (Henry E. Smith brought this issue to my attention.) Examining the Constitutional dimension of the issues brought to light by this paper’s account of Moral Rights laws is itself a substantial project, and thus necessarily lies outside the scope of our discussion here. That dimension may well, however, provide a fertile ground for future research. One question worth considering is whether the normative implications of respect-based theory are especially well suited to account for prohibitions on restriction of expression, straightforwardly explaining those prohibitions as arising (at least in part) from a duty to respect other people’s opinions, creativity, and expressive capacities.

¹⁶⁰ Assessing reputations and effects on reputation is, of course, a central consideration in defamation law. For a discussion of defamation law as providing a quasi-right of attribution, see KWALL, *supra* note 9, at 33.

¹⁶¹ VARA, the federal statute, is the one exception. It may not be a coincidence that this particular VARA provision has a peculiar legislative history, as Cambra Stern noted: “[T]he original federal moral rights bills (which ultimately became VARA) in both the House and Senate extended the grant of moral rights for the life of the artist plus fifty years. Just before VARA was passed as part of the Judicial Improvements Act of 1990, a massive amendment (which included mainly provisions relating to federal judgeships) changed the duration provision to only the life of the artist. Apparently, this change was at the urging of one of the members of the Senate Judiciary Committee.” Stern, *supra* note 7, at 867.

¹⁶² See Section I.5, *supra*.

rather than deriving duties from the existence of rights. This approach is distinctive. All of the other theories that we have discussed have started by identifying some interests to be protected—the monetary interests of art collectors, the personality interests of artists, the interests of the public in cultural preservation, and so forth—and then finished with a grant of “Moral Rights” to artists to protect those interests.¹⁶³ The duties that people have to act in certain ways with regard to artworks and artists then were merely derivative from the existence of these interests and these rights. It is the interests and the rights that were really doing all the explanatory work.

Although this way of proceeding comes fairly naturally to contemporary theorists, it is not the only possible way. The duty-of-respect theory starts instead by identifying duties that people have and then attributing rights to other people as derivative from the existence of these duties. Here it is the duties that really do the explanatory work.¹⁶⁴

¹⁶³ For an uncommonly explicit discussion of this underlying analytical framework, see Beitz, *supra* note 18, at 338 (“For in controversial cases, the claim that a particular legal right is required to protect some underlying moral right is likely to elicit further questions—e.g., why the moral right should be acknowledged at all, why the values it advances should be accorded precedence over competing concerns of others, or why it should be construed in whatever way is required to justify its enactment into law. It is hard to see how else these questions could be replied to informatively other than by considering the nature and significance of the full range of interests affected.”). Note that Beitz here is assuming the correctness of one common but not universal way of approaching moral questions. Kantians, for example, would likely have serious reservations about Beitz’s characterization of how we must analyze controversial cases.

¹⁶⁴ Oliver Wendell Holmes, Jr. endorsed a similar analytical approach. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 219-20 (photo. reprint 2005) (1881) (“Legal duties are logically antecedent to legal rights. . . . To put it more broadly, and avoid the word duty, which is open to objection, the direct working of the law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways; while the power of removing or enforcing this limitation which is generally confided to certain other private persons, or, in other words, a right corresponding to the burden, is not a necessary or universal correlative.”). Joseph Raz’s *Right-Based Moralities* stressed the independence of duties and rights: “The possibility that there are duties which do not correspond to any rights is allowed for by the definition of rights and is generally acknowledged by legal and political theorists.” Raz, *supra* note 128 at 195. One of Raz’s examples deals specifically with art:

“[I]magine that I own a Van Gogh painting. I therefore have the right to destroy it. . . . [M]any would derive great pleasure and enrichment if they could watch [sic] it. But no one has a right

In some cases, whether we say that rights are derivative from duties and responsibilities, or duties are derivative from rights and interests, may make little difference, and in those cases arguing that one approach is correct while the other is wrong is probably fruitless. But sometimes the choice makes a significant difference. For example, starting from duties and responsibilities can more easily explain some constraints that exist against desecrating tombs or other acts of disrespect to the dead, who no longer exist to have either interests or rights, and likewise may more readily explain moral constraints on actions that can affect people in future generations, who do not yet exist and thus cannot now have interests or rights.¹⁶⁵

By taking duties and responsibilities to be primary, and the right of integrity to be derived from them, we see that even though an artwork’s creator may no longer exist after his or her death, the duty-holder (i.e. the artwork’s owner) certainly does continue to exist, and as noted earlier, the death of the artist does not prevent subsequent acts from being disrespectful to an artwork’s creative excellence. Thus, the existence of post-mortem protections makes sense.

6. *Varying Lengths of Postmortem Restriction*

One may wonder whether it is also possible to account for the differing lengths of post-mortem protection. (Recall that in some states the right terminates fifty years after the artist’s death, while in other states the right is effectively perpetual.¹⁶⁶) On the duty-of-respect theory proposed here, the existence of such a disagreement is indeed unsurprising. The key to understanding why is to note that the amount of disrespect shown by an act

that I shall not destroy the painting. Nevertheless, while I owe
no one a duty to preserve the painting I am under such a duty.”
Raz, *supra* at 197.

(Raz’s simultaneous assertion that I have a right to destroy the painting and a yet also a duty to preserve the painting is perplexing, and unfortunately Raz offers no further explanation of that conjunction of assertions.)

¹⁶⁵ For a recent survey of debates about various possible examples of legal duties that exist without correlative rights-holders—examples including criminal law duties, civic duties, duties to comply with regulations, and duties to non-sentient entities—and also for an argument that “preconception torts” constitute another example, see Ronen Perry, *Correlativity*, 29 *LAW & PHIL.* 537 (2009).

¹⁶⁶ See Section I.5, *supra*.

depends upon the cost of doing otherwise—i.e. upon the costs that are incurred by not doing the act in question. For example, hanging up a phone in the middle of a conversation or walking on a country’s national flag is ordinarily disrespectful, but much less so (or not at all) if doing so is necessary to arrive at an emergency exit ahead of a fast-moving fire. The disrespectfulness of an act is mitigated or eliminated if the only alternative to committing that act is perishing in an inferno. (Less extreme costs might not wholly eliminate the disrespectfulness of an act but might nevertheless sharply decrease that disrespectfulness.)

Now note that the cumulative cost imposed on society by prohibiting desired alterations of artworks increases over time.¹⁶⁷ As the length of time during which alterations are prohibited expands, more instances of desired alteration are thwarted. Loosely speaking, a perpetual prohibition on alteration will burden more people than a prohibition that ends fifty years after the artist’s death will, and the latter prohibition will impose more of a burden than a prohibition which ends on or before an artist’s death will. Thus, the social cost of these restrictions will increase as the duration of the restrictions increases, and the question becomes at what point, if ever, the cost becomes so high that avoiding that cost ceases to be disrespectful. Such a question is, of course, impossible to answer *a priori*, so it is not surprising that the law in different jurisdictions would reflect different answers to that question. In some states, the law’s answer is fifty years after the artist’s death; in other states the answer is never.¹⁶⁸

¹⁶⁷ This is essentially an instance of the well-known “problem of dead-hand control,” familiar from real property law. For a recent discussion of the “dead hand” issue in trusts and estate law, see John H. Langbein, *Burn the Rembrandt?: Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 B.U. L. REV. 375 (2010). Concerns about dead-hand control appear in other areas of the law as well. See, e.g., Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

¹⁶⁸ That many states settled on fifty years as the appropriate postmortem length rather than on a wider variety of numbers of years may reflect legislators’ having looked to the copyright law of the time for inspiration in the absence of any obvious single right answer to the question of how long Moral Rights protection should extend. Between the Copyright Act’s revision in 1976 and the Sonny Bono Copyright Term Extension Act in 1998, the period of time during which these Moral Rights statutes were enacted, the term of copyright protection for newly created works was life of the author plus fifty years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2827 (1998) (amending 17 U.S.C. § 302); Copyright Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2541 2572-73 (1976).

In sum then, we have now seen that the duty-of-respect theory offers a compelling explanation for the observed features of Moral Rights statutes in American law. It has an intrinsic intuitive appeal, and it fits the contours of existing statutes better than its rivals. Before concluding, however, I should address one remaining question: Why do these statutes limit their protections to visual art?

VI. WHY LIMITED TO VISUAL ARTS: UNAVAILABILITY OF IDENTICAL DUPLICATES AFTER ALTERATION

The theories that we have been discussing, including the duty-of-respect theory, make general claims that would apply to many areas of creative endeavor, not just to visual arts. This fact naturally raises the question of why VARA and the state Moral Rights statutes confer a right of integrity only to works of visual art.¹⁶⁹

We can answer that question by first noting a distinctive feature of original visual artworks, namely the unavailability of identical duplicates if the original is altered. When perfectly identical duplicates of the original exist—i.e. when there are in essence multiple “originals”—then alterations to one instance of the work have limited effect. In a sense, those changes are reversible or irrelevant, since people who wish to have access to the intact original as the artist made it still can have that access; an “original” continues to exist in its original form even after the alteration. (Note that many Moral Rights statutes explicitly do not cover mass-produced artworks, which VARA defines as works with a run of more than 200 instances,¹⁷⁰ and which the relevant state statutes typically define as works

¹⁶⁹ For Hansmann and Santilli, this limitation is a natural consequence of their assertion that the monetary value of visual art is unusually dependent upon the reputation of the artist who made that art. Hansmann & Santilli, *supra* note 3, at 108–09. Since, on their view, the rationale for Moral Rights laws is the protection of market value from negative externalities caused by a decline in that reputation, limiting Moral Rights protections to visual art is understandable: Visual art receives special legal attention because its market value is especially vulnerable to such externalities. However, if Hansmann and Santilli’s reputational externalities account is (as I have argued) incorrect in general, then this specific application of their framework cannot be the answer we seek.

¹⁷⁰ 17 U.S.C.A. § 101 (West 2009) (definition of “work of visual art”).

with a run of more than 300 instances.¹⁷¹) In such circumstances, it is plausible to think that altering an instance of an artist’s work expresses little or no disrespect to the artwork’s creative excellence, since the alteration does not eliminate the pure expression of that excellence, which remains in the intact original.¹⁷²

The relevance of the existence of an intact original becomes evident when we observe that it enables us accurately to predict which types of creative works the law will protect with a right of integrity, and which types it will not.¹⁷³ To see this, let us consider some examples.

Paintings and sculptures can be reproduced after a fashion, but the technology to produce identical duplicates does not exist, and even if it did, the existence of only one original entails that if no one happened to make a copy before the purchaser made an alteration, the original would be lost forever. Hence we would expect to find a right of integrity granted here, and we do.¹⁷⁴

Music is either wholly evanescent, because it was an unrecorded live performance, in which case intellectual property issues are irrelevant, or recorded, in which case the relevant artwork is the recording. Because it is possible to make multiple copies identical in quality to an original

¹⁷¹ See, e.g., LA. REV. STAT. ANN. § 51:2152(7) (West 2009); ME. REV. STAT. ANN. tit. 27, § 303(D) (2009); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2009).

¹⁷² Whether perfectly identical duplicate versions of the original exist should, in fact, be a relevant consideration for many of the theories that we have discussed. For example, if an intact original exists, then an artist who wishes to vindicate his or her reputation after a purchaser has altered an instance of a given work can continue to do so by referring to the still-extant other versions. Such alterations also raise only limited preservation concerns and arguably have minimal effect on the artist’s personality.

¹⁷³ This criterion might also provide an additional explanation of why inferior visual art, art which fails to achieve recognized stature, often does not receive Moral Rights protection under these statutes: Perhaps inferior visual art is so lacking in originality that, for practical purposes, it is largely interchangeable with the great mass of other inferior visual art in existence. The availability of an intact original matters little when the work itself lacks originality.

¹⁷⁴ It may not have been a coincidence that, in remarks commending passage of VARA, Senator Edward Kennedy declared that “[v]isual artists create unique works. If those works are mutilated or destroyed, they are irreplaceable.” 136 CONG. REC. S17,570 (daily ed. Oct. 27, 1990) (statement of Sen. Edward Kennedy).

recording, we would expect the law not to give a right of integrity to musicians, and it does not. (Copyright law, of course, does give copyright holders in musical performances control over economic exploitation of “derivative works,” but that is quite different from a non-transferable Moral Right to prevent alterations altogether.)

Creators of written works, including books and musical compositions, also predictably do not receive a right of integrity, since identical reproduction of the texts and scores is easy and common.

Likewise with inventors, since the invention itself is an idea, which is impervious to alteration—any “changes” really just produce a different idea—and since identical duplicates of physical instances of the invention are possible. Indeed, since the advent of mass-production, inventions with any hope of success necessarily must be amenable to the creation of multiple, identical copies. Thus the lack of a right of integrity for inventors is unsurprising.

Motion pictures are an interestingly complicated case. VARA, and several state statutes, explicitly exclude motion pictures from their grant of Moral Rights.¹⁷⁵ Since multiple, identical prints are made from the original master film, this exclusion is not a surprise. However, there was at one time considerable debate over legal prohibition of the colorization of motion pictures, a legal regulation which would amount to a very narrow right of integrity.¹⁷⁶ At first glance, the fact that such regulation seemed plausible might appear to be an exception to the relevance of the identical-duplicate test. In fact, however, it is yet another illustration of its relevance, since at the time of that debate access to motion pictures, especially old motion

¹⁷⁵ 17 U.S.C.A. § 101 (West 2009) (definition of “work of visual art”); LA. REV. STAT. ANN. § 51:2152(7) (West 2009); ME. REV. STAT. ANN. tit. 27, § 303(D) (2009); N.J. STAT. ANN. § 2A:24A-3(e) (West 2009); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2009); R.I. GEN. LAWS § 5-62-2(20) (2009). Other statutes may exclude motion pictures by implication, by not including them in the list of artworks to which the statute does apply. However, two states—Massachusetts and New Mexico—explicitly *include* motion pictures (“film”) among the artworks covered by their Moral Rights statute. MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 2009); N.M. STAT. ANN. § 13-4B-2(B) (West 2009).

¹⁷⁶ See, e.g., Richard Corliss, *Raiders of the Lost Art*, TIME, October 20, 1986, at 98. William H. Honan, *Federal Report Criticizes the Coloring of Films*, N.Y. TIMES, March 16, 1989, at C22; Irvin Molotsky, *Council Opposes Coloring Old Films*, N.Y. TIMES, November 4, 1986, at C13.

pictures, was possible only through a very small number of channels. Thus it was reasonable to worry that the altered, colorized motion pictures would displace the original versions in those channels, making the latter in effect inaccessible.¹⁷⁷ If such a displacement did occur, then for practical purposes, identical duplicates of the original film would *not* still be available after colorization, and Moral Rights protection could be appropriate.

The debate over film colorization usefully demonstrates that it is not only the *existence* of a perfectly intact original that matters, but also the *availability* of that original to those who wish to see it instead of an altered copy. Availability itself has at least two distinct elements. The first is *accessibility*, i.e., the extent to which it is possible for someone who wishes to see the intact original to do so. As the growth of global computer network connectivity continues to expand the distribution channels available for creative works and to provide online repositories that archive older works,

¹⁷⁷ The founder of the American Film Institute raised such a concern: “Classic films are going to be principally accessible over television and in video cassette. People can’t go to the archive and see the original print. They’ll see the film the way it’s marketed, so therefore the films will be essentially inaccessible in black and white.” Leslie Bennetts, “Colorizing” *Film Classics: A Boon or a Bane?*, N.Y. TIMES, August 5, 1986, at A1. Others shared that worry. See, e.g., Vincent Canby, “Colorization” *Is Defacing Black and White Film Classics*, N.Y. TIMES, November 2, 1986, § 2, at 1 (“The ‘colorization’ proponents also argue that, even though tinted tape versions are made, the original black-and-white films will continue to exist, available for viewing by people who make the effort to find them. However, should the tinted versions catch on, the preservation of the black-and-white originals will certainly become even more difficult than it is today.”); Stephen Farber, *The Man Hollywood Loves to Hate: Film Buffs Don’t Want the Classics Colorized, but Frankly, Ted Turner Doesn’t Give a Damn*, L.A. TIMES, April 30, 1989, § Magazine at 9 (quoting director Joe Dante: “The argument that the original black-and-white negative still exists in a vault somewhere is nonsense. . . . How many people are going to go to the Library of Congress to see the negative or have several hundred dollars to pay for a new print to be struck in black and white? There are no revival theaters anymore, so there’s no way for most people to see those movies the way they were meant to be seen.”). Further evidence for the centrality of the concern about access to unmodified originals, and perhaps an explanation of why a general prohibition against colorization never passed, was the defense of colorization offered by a sales executive for a company that hoped to profit from colorization: “We’re not destroying the black-and-white print. . . . The classic picture lives on. If you turn the [television’s] color knob off, you’ll see it in perfect black and white. The option is there for anyone who doesn’t appreciate the color version to see it in black and white.” Bennetts, *supra*.

we may expect to see accessibility of identical duplicates of digital (or digitizable) works continue to increase.¹⁷⁸ And with that increase, we may also expect to see a corresponding increase in resistance to providing Moral Rights of integrity for such works.

The same would hold true if the reason for the inaccessibility is the voluntary choice of the work’s creator. For example, the owner of the rights to a film can choose whether or not to make the film publicly accessible, and in what format.¹⁷⁹ Because in general intellectual property law favors increasing the availability of creative works rather than decreasing it, allowing artists to enhance their claims for Moral Rights protection in a work by choosing to limit access to that work is unlikely to have much appeal. The inaccessibility of intact originals or identical duplicates might plausibly underwrite a claim for Moral Rights protections only to the extent that the inaccessibility is not a consequence of the voluntary actions of the party claiming the benefit of such protections.

The second element of availability is *discernibility*, i.e., the extent to which someone who interacts with an altered copy of the original is readily able to discern that the copy is not in fact the intact original, and thus has an opportunity to choose whether to seek out the intact original. (If the public is unaware that an altered copy is not in fact the original, or is unaware that that an intact original exists, the existence of that original will have little practical significance.)

The importance of discernibility highlights the central significance of artists’ having a right of attribution—and arguably a non-waivable right of attribution—so that accurate identification of originals and of altered copies is readily possible. VARA and the state Moral Law statutes focus on the right of integrity, not of attribution. Other areas of the law—such as

¹⁷⁸ Advancing computer technology has had effects not only on the accessibility of identical originals, but also on their very existence. To the extent that visual art today is increasingly made digitally, on computers rather than in natural media, the appropriateness of protecting such works with rights of integrity may be open to debate, since the creation of perfectly identical duplicates of digital works is trivially easy.

¹⁷⁹ Famously, George Lucas refused to release the original (“Han shoots first”) version of *Star Wars* on DVD until 2006, and then made the release available only for a few months, on the grounds that he viewed his later revised versions as the definitive versions. Douglas Hyde, *Five Major Changes in the ‘Star Wars’ DVD*, CNN.COM, Sept. 23, 2004, <http://www.cnn.com/2004/SHOWBIZ/Movies/09/20/star.changes/index.html>; Mike Snider, *‘Star Wars’ Goes Back to Basics*, USA TODAY, May 3, 2006, at 1D.

trademark law—may at least partially fill this gap. For example, in *Gilliam v. American Broadcasting Companies, Inc.*, the Second Circuit upheld a preliminary injunction against the ABC television network’s broadcast of altered versions of sketches by the comedy troupe Monty Python, in part on the grounds that “an allegation that a defendant has presented to the public a ‘garbled,’ distorted version of plaintiff’s work seeks to redress the very rights sought to be protected by the Lanham Act and should be recognized as stating a cause of action under that statute.”¹⁸⁰ However, the U.S. Supreme Court’s subsequent decision in *Dastar Corp. v. Twentieth Century Film Corp.* has been read to limit expansive use of the Lanham Act to approximate a right of attribution,¹⁸¹ and recent academic critics have argued that the patchwork of U.S. legal prohibitions which functionally approximate a right of attribution are inadequate.¹⁸² Therefore, to the extent that one takes current American Moral Rights law overall to be normatively well-founded, the significance of discernibility in the identical duplicates test may provide a reason to favor expanding American law’s provision of Moral Rights of attribution.¹⁸³

CONCLUSION

*“As Frank H. Knight has so often emphasized,
problems of welfare economics must ultimately
dissolve into a study of aesthetics and morals.”*

– Ronald Coase, *The Problem of Social Cost*¹⁸⁴

¹⁸⁰ *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 24-25 (2d Cir. 1976) (citations omitted).

¹⁸¹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (concluding that phrase “origin of goods” in the Lanham Act “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods”).

¹⁸² See Ginsburg, *supra* note 9; KWALL, *supra* note 9, at 30-33.

¹⁸³ A thorough evaluation of the implications of the identical-duplicates test for such proposals necessarily lies outside the scope of this Article. It does, however, suggest a potentially fruitful direction for future research.

¹⁸⁴ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960).

This Article’s discussion began by critically examining the two broad types of explanation that traditionally have been advanced to account for the existence and shape of Moral Rights laws in the United States. The economics-based account would assimilate these laws to the conventional economic characterization of American intellectual property law’s analytic foundations. We saw, however, that such an account was inadequate, providing a poor fit for the actual provisions of American Moral Rights statutes. And we noted that such a failure was not surprising, since economics is most adept at dealing with instrumental value, while art’s characteristic value is commonly thought to be intrinsic.

Our discussion then worked systematically through the standard alternatives to the economic account: accounts based on protecting the artist’s personality, accounts based on expression of society’s esteem for art, accounts based on concerns for the preservation of art, and accounts based on protecting artists’ subjective interests in their reputations. Again, none proved able to meet the challenge of making sense of the Moral Rights laws that we actually observe.

This Article then took up that challenge by proposing an alternative theory, one based not on economic incentives or rights of personality, but on duties of respect—specifically, duties of respect for artworks’ creative excellence. We saw that this account is of a piece with broader American cultural practices concerning respect for excellence and moreover succeeds in providing a coherent explanation for the main provisions that we in fact observe in American Moral Rights law, including its limitation of a right of integrity to works of visual art.

If then, as this Article has argued, the duty-of-respect account is the best way to understand the underpinnings of Moral Rights laws in the United States, an important further consequence follows: Contrary to traditional assumptions, purely economics-based frameworks are not adequate to account fully for American intellectual property law. Although economic rationales may have an important role, so too do non-economic moral considerations. Whether the specific non-economic moral rationales that play a role in our intellectual property law are the rationales that should do so is a question that, for the moment, remains open. But the conclusion that some moral analysis is necessary for fully understanding our intellectual property laws is a direct consequence of our discussion. And this conclusion is not confined to the law governing visual art. Visual artistry is just one form of creativity, not obviously different in kind from

many other forms of creativity. So if non-economic moral considerations help explain the law of visual art, it is likely that similar considerations are at least implicitly at work throughout the American intellectual property system. Exploring this moral dimension of American intellectual property law, and critically evaluating its core principles and implications, are significant tasks for future research.