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Making Sense of “Moral Rights”: Artists’ European-style Intellectual Property Protections Within the American System

I. 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 The United States Constitution’s explicit grant of power to Congress to regulate intellectual property is couched in those very terms: “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.”²

By contrast, European intellectual property laws are said to rest on radically different foundations—not merely economic incentives but also preserving the dignity and personhood of

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.”)

² U.S. Const. art. I, § 8, cl. 8.

creators by providing them with certain “Moral Rights.” The most distinctive of these rights, from an American perspective, is the “right of integrity,” which allows creators, even after they have sold a work, to prevent the purchaser from altering that work in ways that the creator finds objectionable.³

So the traditional account is one of radical distinction between the two approaches.⁴ Today, however, there is a clear exception to the tidiness of that account: The federal Visual Artists’ Rights Act (VARA) and the several state statutes that preceded it all explicitly establish European-style “Moral Rights” protections for a specific category of art.

One suggested explanation for this striking phenomenon is that these statutes, especially VARA, are simply a lamentable betrayal of the American tradition. George C. Smith denounced VARA as an “exotic legal import” that “represents an unprecedented incursion on property rights as Americans know them.”⁵ Stephen Carter inveighed against “such elitist and despotic doctrines

³ SCHECHTER & THOMAS, *supra* note 1, at 138–39.

⁴ 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.”).

⁵ George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, December 17, 1990, at 23.

as ‘moral right,’ lately incorporated by the Congress”⁶ One author has even argued that VARA is unconstitutional.⁷ But such attempts simply to stigmatize Moral Rights laws as dangerous alien incursions seem unconvincing in light of the number of U.S. jurisdictions that have enacted Moral Rights statutes. Dismissing all of these laws as mere aberrations is implausible. If indeed Moral Rights are aliens in America, the aliens are everywhere.

Another, common response is 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.⁸ That dismissive suggestion, however, is implausible as a general account of Moral Rights in the United States, since prior to VARA’s enactment, several states had enacted their own “Moral Rights” statutes for visual art. (The California Art Preservation

⁶ 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.

⁷ 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).

⁸ 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).

Act led the way in 1979.⁹) It would strain credulity to suggest that the motivation for these state statutes was to bring the United States more closely into conformity with an international agreement to which the country was not even a party at that time. And this response faces the added embarrassment that even VARA itself does not fully comply with Berne’s requirements.¹⁰

These Moral Rights statutes therefore pose a genuine challenge to our understanding of American intellectual property law. We need to identify the underlying principles that best make sense of these laws and consider what broader implications, if any, those principles have. That is this paper’s task.

I shall begin this discussion by surveying, in Part II, the relevant provisions of the various American Moral Rights statutes. I shall then turn to an analysis of various approaches to explaining these rights. In Part III I shall consider an attempt to domesticate Moral Rights laws by explaining them within a law-and-economics framework. Part IV takes up the major rivals to the economics-based account, accounts based on the connection between artworks and the personality of the artist. Part V discusses two other candidate accounts that have appeared in the literature. None of these accounts, I shall argue, provides a satisfactory explanation for the statutes in question.

⁹ 1979 Cal. Stat. 1501, codified as amended at CAL. CIV. CODE § 987 (West 2006). 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]).

¹⁰ 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.

In Part VI, therefore, I discuss two other possible accounts that have not received much attention in the literature. In so doing, I argue that one of the two, an account built upon a moral duty of respect, turns out to provide the best explanation for these statutes. Part VII offers an account of why the specific rights that these statutes provide are granted only to visual artists and not to creators of other works. Part VIII concludes by drawing some further implications from this discussion, specifically concerning the important role that non-consequentialist moral reasoning may have in our intellectual property regime, and pointing to an important further practical consequence of that role.

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 paper. 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.¹¹

II. STATUTORY LANDSCAPE

The “Moral Rights” law that we seek to explain is largely a creature of statute, with only very limited caselaw. So our discussion will necessarily have a statutory focus. The most prominent American Moral Rights statute is federal, the Visual Artists Rights Act (VARA),

¹¹ Charles R. Beitz, *The Moral Rights of Creators of Artistic & Literary Works*, 13 J. OF POLITICAL PHILOSOPHY 330, 330 n.5 (2005).

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 work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”¹² VARA prohibits transfer of these rights, but does allow artists to waive them.¹³ The rights expire when the artist dies (technically, at the end of the year in which the artist dies).¹⁴

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.¹⁵) These state statutes—from California¹⁶, Connecticut¹⁷, Louisiana¹⁸, Maine¹⁹, Massachusetts²⁰, Nevada²¹, New Jersey²², New Mexico²³, New York²⁴,

¹² 17 U.S.C.A. § 106A(a)(3)(A)-(B) (West 2006).

¹³ 17 U.S.C.A. § 106A(e)(1) (West 2006).

¹⁴ 17 U.S.C.A. § 106A(d)(1), (4) (West 2006). (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 10, 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”).

¹⁵ 1979 Cal. Stat. 1501, codified as amended at CAL. CIV. CODE § 987 (West 2006).

¹⁶ CAL. CIV. CODE § 987 (West 2006).

¹⁷ CONN. GEN. STAT. ANN. § 42-116s to -116t (West 2006).

¹⁸ LA. REV. STAT. ANN. § 51:2151–2156 (West 2006).

¹⁹ ME. REV. STAT. ANN. tit. 27, § 303 (2006).

²⁰ MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2006).

²¹ NEV. REV. STAT. ANN. § 587.720–760 (West 2006).

Pennsylvania²⁵, and Rhode Island²⁶—typically share many provisions and even specific language.²⁷ But they are not all identical 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.²⁸ 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.²⁹ Statutes in New Mexico³⁰ and Rhode Island³¹ are similar to the latter in this respect, but broader in giving

²² N.J. STAT. ANN. § 2A:24A-1 to -8 (West 2006).

²³ N.M. STAT. ANN. § 13-4B-1 to -3 (West 2006).

²⁴ N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2006)

²⁵ 73 PA. CONS. STAT. ANN. §§ 2101–2110 (West 2006).

²⁶ R.I. GEN. LAWS § 5-62-2 to -6 (2006).

²⁷ 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 2006). 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 (2006). 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 (2006).

²⁸ States providing this broad right include California, Connecticut, Massachusetts, and Pennsylvania. CAL. CIV. CODE § 987(c) (West 2006); CONN. GEN. STAT. ANN. § 42-116t(a) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2006); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2006).

²⁹ States offering only this narrower right are Louisiana, Maine, Nevada, New Jersey, and New York. LA. REV. STAT. ANN. § 51:2153 (West 2006); ME. REV. STAT. ANN. tit. 27, § 303(2) (2006); NEV. REV. STAT. ANN. § 597.740(1) (West 2006); N.J. STAT. ANN. § 2A:24A-4 (West 2006); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2006).

³⁰ N.M. STAT. ANN. § 13-4B-3(A) (West 2006).

the artist a right against public display of altered artwork irrespective of whether the display reasonably threatens to harm the 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.³²

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).³³ 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.³⁴ 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.

³¹ R.I. GEN. LAWS § 5-62-3 (2006).

³² LA. REV. STAT. ANN. § 51:2153(3) (West 2006).

³³ 17 U.S.C. § 106A(a)(3)(B) (West 2006); CAL. CIV. CODE § 987(c) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2006); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2006).

³⁴ California, Louisiana, Massachusetts, New Mexico, and Pennsylvania have a quality requirement. CAL. CIV. CODE § 987(b)(2) (West 2006); LA. REV. STAT. ANN. § 51:2152(7) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 2006); N.M. STAT. ANN. § 13-4B-2(B) (West 2006); 73 PA. CONS. STAT. ANN. § 2102 (West 2006).

4. Alienability

Like VARA, all 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,”³⁵ 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 acts prohibited by the state’s Moral Rights statute,³⁶ 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.”³⁷ (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.³⁸) No statute permits general transferability of the Moral Rights it grants.

5. Termination

Unlike VARA, none of the states 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.³⁹ 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.

³⁵ ME. REV. STAT. ANN. tit. 27, § 303(5) (2006).

³⁶ CAL. CIV. CODE § 989(b)-(c) (West 2007).

³⁷ MASS. GEN. LAWS ANN. ch. 231, § 85S(e) (West 2006); N.M. STAT. ANN. § 13-4B-3(C) (West 2006).

³⁸ MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West 2006); N.M. STAT. ANN. § 13-4B-3(E) (West 2006).

³⁹ Those “death plus fifty” states are California, Connecticut, Massachusetts, New Mexico, and Pennsylvania. CAL. CIV. CODE § 987(g)(1) (West 2006); CONN. GEN. STAT. ANN. § 42-116t(d)(1) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West 2006); N.M. STAT. ANN. § 13-4B-3(E) (West 2006); 73 PA. CONS. STAT. ANN. § 2107(1) (West 2006).

Since artists cannot grant permission from beyond the grave, these Moral Rights protections effectively are perpetual.⁴⁰

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

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

With those requirements in mind, let us now turn to considering the major candidate theoretical justifications for American Moral Rights laws.

III. ECONOMIC REDUCTION

The most prominent attempt to provide a comprehensive theoretical foundation for contemporary Moral Rights laws is Henry Hansmann and Marina Santilli's economic account. Hansmann and Santilli acknowledge that non-economic considerations may have provided some motivation for those laws, but suggest that “much of the incentive for adopting moral rights

⁴⁰ Those “implicitly perpetual” states are Louisiana, Maine, Nevada, New Jersey, New York, and Rhode Island. LA. REV. STAT. ANN. § 51:2153 (West 2006); ME. REV. STAT. ANN. tit. 27, § 303(2) (2006); NEV. REV. STAT. ANN. § 597.740(1) (West 2006); N.J. STAT. ANN. § 2A:24A-4 (West 2006); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2006); R.I. GEN. LAWS § 5-62-3 (2006).

legislation derives from other considerations,”⁴¹ primarily externality concerns familiar in law-and-economics analyses. If they are right, then the existence of these Moral Rights laws does not really pose a challenge to the traditional understanding of American intellectual property law as resting solely on economic motivations.

A. HANSMANN AND SANTILLI’S 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.”⁴² Tacit here seems to be an assumption, analogous to John Stuart Mill’s famously controversial “harm principle,” that the law should restrict someone’s actions only when those actions might harm somebody’s interests. I shall have occasion to return to that assumption later in this paper, but for now, let us simply assume that it is true.

What interests, if any, can current owners of an artwork can 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

⁴¹ Hansmann & Santilli, *supra* note 4, at 104.

⁴² *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).

that an owner does to one of an artist’s works decreases market demand for that artist’s future work.⁴³

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.⁴⁴

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.”⁴⁵

Hansmann and Santilli argue that because a current owner who decided to alter a work in his possession would personally bear only a small fraction of the costs to these interests, owners might make such alterations more frequently than is socially optimal. In law-and-economics jargon, these alterations give rise to substantial negative externalities. Moral Rights laws, on their view, promote efficiency by limiting those externalities. We saw that VARA, for example, prohibits both reputation-harming alterations and the destruction of visual artworks that are culturally significant.

B. HANSMANN AND SANTILLI’S GLOBAL ARGUMENT

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:

⁴³ Hansmann & Santilli, *supra* note 4, 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.

⁴⁴ *Id.* at 105.

⁴⁵ *Id.* at 106.

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.⁴⁶

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.⁴⁷ If anything those “downstream” alterations might perpetuate and enhance the original inventor’s reputation. (Marconi’s reputation, or Edison’s, would be

⁴⁶ *Id.* at 110.

⁴⁷ 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; we have workplace safety regulations and tort law 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 later when I turn to Radin’s account in more detail in Part IV.

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.⁴⁸)

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. And other explanations are possible. (I shall consider the simple reputation account in more detail in Part VI, and another alternative in Part VII.)

C. HOW GOOD A FIT?

Even though that global argument is unconvincing, the third-party-externalities account might still be persuasive if it fits well the actual contours of American Moral Rights law. So let us now consider how well the third-party externalities account can explain the distinctive features of those laws—waiveability, non-transferability, permission of destruction, and termination at or near the artist’s death.

1. Waiveability

If the motivation for giving artists a right of integrity really is a concern to limit harm to third parties, then we might expect to find restrictions on artists’ abilities to waive that right. Without such restrictions, the artist 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

⁴⁸ 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 4, at 110. We might just as plausibly say: It is beneficially important for Marconi’s reputation as inventor of radio that others develop and improve his work; hence no right of integrity.

Santilli suggest, a blanket prohibition on waiver could prevent some alterations that are socially beneficial.⁴⁹ 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.⁵⁰

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.⁵¹ 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.”⁵² 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

⁴⁹ *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.”).

⁵⁰ 17 U.S.C.A. § 106A(e)(1) (West 2006); *see also* statutes cited in Part II, Section 4, *infra*.

⁵¹ 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 4, at 126.

⁵² *Id.* at 121–22.

enforcement authority from the artist, since the former values the enforcement authority much more highly than the latter does.⁵³

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.”⁵⁴ 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.⁵⁵

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.”⁵⁶

Although the desirability of certainty *that* the right exists is hard to reconcile with the Moral

⁵³ 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 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.

⁵⁴ Hansmann & Santilli, *supra* note 4, at 125–26.

⁵⁵ 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.

⁵⁶ Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 411 (2002).

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 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.⁵⁷ 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.⁵⁸ 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.”⁵⁹ Most state statutes are even more liberal in allowing destruction.⁶⁰

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

⁵⁷ *Id.* at 395.

⁵⁸ 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 (January 2005), <http://www.copyright.gov/circs/circ1a.html>.

⁵⁹ 17 U.S.C.A. § 106A(a)(3)(B) (West 2006).

⁶⁰ *See* Part II, Section 2, *supra*.

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.”⁶¹ On the other hand, as Hansmann and Santilli also note, destruction of one of an artist’s works makes those works more scarce, and thus might actually increase the remaining works’ market value.⁶² 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.”⁶³

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.⁶⁴ Destruction of artworks straightforwardly thwarts that interest.

⁶¹ Hansmann & Santilli, *supra* note 4, 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.

⁶² *Id.* at 111.

⁶³ *Id.* at 112.

⁶⁴ *Id.* at 106.

4. Termination

Under VARA, an artist’s Moral Rights terminate when the artist dies.⁶⁵ Under several state statutes, those rights terminate fifty years after the artist dies.⁶⁶ 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.

Thus Hansmann and Santilli’s externalities account fits only awkwardly, at best, with the specific features of American Moral Rights law.

D. GENERAL OBJECTIONS

Moreover, there are several general concerns with the plausibility of any account based on reputational externalities.

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

⁶⁵ 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 2006).

⁶⁶ See state statutes cited *supra* note 39.

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 what changes to prevent or allow.) Yet, of course, giving artists such a right to make changes would be quite startling.⁶⁷ 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

⁶⁷ 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 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 is 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 justify this asymmetry as a penalty default.

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.⁶⁸

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

⁶⁸ 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 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).

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.⁶⁹

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

3. Alteration as Market-Value Enhancing

There is an inherent tension between Hansmann and Santilli’s arguments for the reputation-protection justification of Moral Rights laws and 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.⁷⁰

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

⁶⁹ 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 11, at 347.

⁷⁰ Hansmann & Santilli, *supra* note 4, at 106.

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 harm 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.

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 prohibiting 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).⁷¹ 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.⁷² Much more likely

⁷¹ 17 U.S.C.A. § 106A(a)(3)(A) (West 2006).

⁷² 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

would be alterations to bring the artwork more into line with community tastes, tastes which, after all, the owner is likely to share.

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.”⁷³ 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

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.”).

⁷³ Hansmann & Santilli, *supra* note 4, at 103.

justification” for those Moral Rights laws.⁷⁴ But, we shall soon see, that concession to the explanatory power of “personality”-based justifications was too generous.

IV. “PERSONALITY” THEORIES

“Personality”-based theories 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.

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.⁷⁵

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” (1982).⁷⁶

⁷⁴ *Id.* at 104.

⁷⁵ Roeder, *supra* note 4, at 557.

⁷⁶ Margaret Jane Radin, *Property & Personhood*, 34 STAN. L. REV. 957 (1982).

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.”⁷⁷ 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.”⁷⁸ 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.

“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.”⁷⁹

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

⁷⁷ *Id.* at 959.

⁷⁸ *Id.* at 959.

⁷⁹ *Id.* at 960.

personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”⁸⁰

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.⁸¹

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.

⁸⁰ *Id.* at 986.

⁸¹ 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.

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.⁸² 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.⁸³)

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 essential for enabling proper development of the artist’s personality. The inspiration for this view seems to be Radin’s suggestion that protecting

⁸² 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 4, 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.”).

⁸³ 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 82, at 339–44.

“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.”⁸⁴ 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.”⁸⁵

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

⁸⁴ Radin, *supra* note 76, at 968.

⁸⁵ Netanel, *supra* note 82, at 403. *See also* Hughes, *supra* note 82, at 330 (citing and discussing Radin’s suggestion in the context of intellectual property).

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 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.⁸⁶ 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.)

One merit of this account is that it can easily explain why American statutes exclude “works made for hire” from Moral Rights protections.⁸⁷ 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.⁸⁸ 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.

⁸⁶ 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*.

⁸⁷ 17 U.S.C.A. §§ 106A(c)(3), 101 (West 2006). *See also* state statutes cited *supra* notes 15 through 26.

⁸⁸ 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).

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.⁸⁹ 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 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.”⁹⁰ And six state statutes give artists the right to restrict alterations to works of “recognized quality.”⁹¹ But if protecting artists’ abilities to develop their personalities were the goal of these laws, then one would not expect to find these threshold 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 seems no reason to believe

⁸⁹ Only California, Massachusetts, and Pennsylvania prohibit destruction. CAL. CIV. CODE § 987(c) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 2006); 73 PA. CONS. STAT. ANN. § 2104(a) (West 2006).

⁹⁰ 17 U.S.C.A. § 106A(a)(3)(B) (West 2006).

⁹¹ CAL. CIV. CODE § 987(b)(2) (West 2006); LA. REV. STAT. ANN. § 51:2152(7) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 2006); N.M. STAT. ANN. § 13-4B-2(B) (West 2006); 73 PA. CONS. STAT. ANN. § 2102 (West 2006).

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.⁹² 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. The “imbued personality” view might explain 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 his personality that remain in his art; if anything, the artist’s death should make such alterations more worrisome, since the artist is no longer alive to replenish or replace those few manifestations of his personality that still exist.

⁹² For a nice example of this in a slightly different context, see the 1994 biographical film *Ed Wood* for a portrayal of a film auteur who was legendarily inept but nonetheless entirely sincere and wholly committed to his art. *ED WOOD* (Touchstone Pictures 1994).

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.⁹³ 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, 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.

V. OTHER THEORIES

Although the economic and the personality theories are the most prominent in the Moral Rights literature, two other general theories also attempt to explain or justify Moral Rights. One of these theories focuses on the laws’ expression of certain social values, the other on the importance of preservation.

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

⁹³ Hansmann & Santilli, *supra* note 4, at 110.

an economic system that, at present, may leave them little choice but to consent to the commodification and defilement of their work.⁹⁴

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 their works, but only the alteration of them. Since destruction seems the ultimate way of signaling that something is worthless, this provision is hard to square with the notion that the statute is seeking to send a message that artists’ contributions are highly valued. Moreover, this 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 “Hug 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

⁹⁴ 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)).

[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.⁹⁵

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 artists⁹⁶: “Other things the same, if moral 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.”⁹⁷ But Landes found insufficient evidence to support that hypothesis: “[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.”⁹⁸ Nevertheless, Landes did find in the evidence “some support for the ‘favorable social environment’ hypothesis,” in that “the per capita number of artists increased more rapidly in states that enacted moral rights laws in the

⁹⁵ William M. Landes, *What Has the Visual Artists’ Rights Act of 1990 Accomplished?*, 25 J. OF CULTURAL ECON. 293, 298 (2001).

⁹⁶ *Id.* at 298.

⁹⁷ *Id.* at 298.

⁹⁸ *Id.* at 299.

1979 to 1987 period, holding constant the other socio-economic variables in the regression and the lagged value of the dependent variable.”⁹⁹

Landes’s results are interesting, but they do not really suggest that expressing support for artists was a significant motivation behind the Moral Rights laws, for two reasons. First, even if everything Landes says is right, it shows only enacting those laws had the effect of creating a more favorable environment for artists. It does not show that that effect was the law’s *intended* effect, or even that it was not merely a contingent effect which happened to occur because of temporary circumstances and which might cease to occur at any time. Second, since Landes’ 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.”¹⁰⁰ Thus, the study shows, at most, only that the state Moral Rights statutes were effective in making artists want to live in those states, not that the law expressed anything about the value that the community as a whole places on art and artists. (Later I shall argue that an account based on respect might better explain the contours of existing Moral Rights laws. Such an account would also be 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 bring into the legal realm a pre-existing moral duty of respect that individuals have toward artists. And artists may prefer to live where that moral duty finds legal recognition.)

⁹⁹ *Id.* at 299.

¹⁰⁰ *Id.* at 299.

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.¹⁰¹

Legislative details do provide some support for a preservationist motivation. The pioneering California statute’s official title is “The California Art Preservation Act.”¹⁰² And 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.’”¹⁰³ The title of Pennsylvania’s statute is the “Fine Arts Preservation Act,”¹⁰⁴ 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.”¹⁰⁵ The section heading for the relevant portion of Maine’s code is “Preservation of Works of Art.”¹⁰⁶ Massachusetts’s statute has

¹⁰¹ Hughes, *supra* note 82, at 359–60, 363–64. *See also, e.g.*, Roeder, *supra* note 4, 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 10, 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.”).

¹⁰² 1979 Cal. Stat. 1501.

¹⁰³ 1988 Cal. Stat. ch. 34., § 1. [No page number stated.]

¹⁰⁴ 73 PA. CONS. STAT. ANN. §§ 2101 (West 2006).

¹⁰⁵ Pennsylvania Act 1986, Dec. 11, P.L. 1502, No. 161.

¹⁰⁶ ME. REV. STAT. ANN. tit. 27, § 303 (2006).

“Massachusetts Art Preservation Act”¹⁰⁷ as its popular name, and its findings section declares that “there is also a public interest in preserving the integrity of cultural and artistic creations.”¹⁰⁸

At the federal level, VARA makes no explicit mention of “preservation,” but Cambra Stern quotes Senator Edward Kennedy, in a hearing on VARA, as arguing on art-preservation grounds for enacting a federal law rather than relying purely on state laws: “[Y]ou get a greater understanding, greater sensitivity, and greater awareness by the population generally with a Federal statute. The result would be greater preservation of art.”¹⁰⁹ Stern further says that Kennedy “claimed that art preservation was a fundamental purpose of federal moral rights law,” and quotes Kennedy as saying that works “mutilated or destroyed” are “irreplaceable.”¹¹⁰

Although preservation concerns may have provided some motivation for some Moral Rights statutes, they seem at best only a small piece of the explanation, since existing Moral Rights laws are a strikingly poor way of preserving art, for several reasons: The right of integrity that these statutes provide is waivable.¹¹¹ Enforcement is at the artist’s discretion. Except in California, society does not have the standing to enforce the right, only the artist does.¹¹² And in

¹⁰⁷ Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 92 (D. Mass. 2003).

¹⁰⁸ MASS. GEN. LAWS ANN. ch. 231, § 85S(a) (West 2006).

¹⁰⁹ Stern, *supra* note 10, at 860 (citing Moral Rights in Our Copyright Laws: Hearing on S.1198 and S.1253 Before the Senate Subcomm. on Patents, Copyrights & Trademarks of the Senate Comm. on the Judiciary, 101st Cong. 138, 141 (1990) (statement of Sen. Edward Kennedy)).

¹¹⁰ *Id.* at 860 (citing 136 Cong. Rec. S17,574 (daily ed. Oct. 27, 1990) (statement of Sen. Edward Kennedy)).

¹¹¹ Charles Beitz also noticed this problem. Beitz, *supra* note 11, at 348 (“[T]he social interest in protecting the artistic heritage . . . argue[s] against allowing Moral Rights to be waived or transferred . . .”).

¹¹² 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 2007). 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

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.¹¹³

VI. TWO POSSIBLE SOLUTIONS

So far we have considered the existing literature’s economic, personality-based, expressivist, and preservationist explanations for Moral Rights laws, and found all of them wanting. Incompatibility with at least one, and sometimes several, of the specific features of American Moral Rights laws made each of those approaches implausible as a general account of those laws. I shall now discuss two other theories, neither of which has drawn much attention in the literature, but each of which might offer more hope of a comprehensive account of these statutes.

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 2006); N.M. STAT. ANN. § 13-4B-3(E) (West 2006).

¹¹³ 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 72, at 828. That protection from destruction ends when the artist dies seems to pose 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 seems unlikely that the expressive value of an artwork of recognized stature is exhausted over time. The value of such a work is often not in the specific idea that it expresses but in *how* it expresses that idea. That war and 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).

A. A SIMPLE REPUTATION THEORY

The first 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 themselves would suffer if purchasers’ alterations damaged the artists’ reputations.

The main reason in favor of this simple reputation theory is as straightforward as the theory itself: The language of the statutes suggests that the reputation of artists is at least an important concern, and perhaps the most important concern, that the statutes are designed to address. 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.”¹¹⁴ And among the state statutes, only in Rhode Island’s statute does explicit mention of harm to the artist’s reputation not appear either in preliminary “findings” or in the specification of conditions under which the right of integrity will apply.¹¹⁵

However, making this simple theory fit the actual contours of those statutes is not nearly so straightforward.

Certain features do fit nicely. For example, VARA’s termination of the artist’s rights at death makes sense if the statute’s concern is with the artist’s experiencing harm from damage to his reputation, since artists who have died are beyond all earthly experience. Those state statutes that terminate the right of integrity fifty years after the artist’s death pose more of an obstacle, but perhaps one surmountable by appeal to subjective harm that the artist’s close relatives

¹¹⁴ 17 U.S.C.A. § 106A(3)(a) (West 2006).

¹¹⁵ See state statutes cited *supra* notes 15–25.

suffer,¹¹⁶ or to Aristotle’s 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.¹¹⁷ Such a theory would, however, seem at a loss to explain those state statutes that make the right essentially perpetual.

The theory might also easily account for the frequent restriction of the right of integrity to artworks only of “recognized quality.” If reputation is the primary concern, then alterations to works that are *not* of high quality are unlikely to cause much harm, since it is difficult or impossible to make the works much worse than they already are.

And the simple reputation theory can easily explain simultaneously allowing waiver and prohibiting transfer. Allowing artists to waive their right to prevent alterations makes sense because 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. Since Moral Rights statutes’ aim, on this theory, is to protect artists from experiencing subjective harm, if an artist does not care much about alterations to a given work, then there is no reason not to let that artist waive the right to prevent those alterations. By the same token, prohibiting transfer of the right might 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.

¹¹⁶ See Roeder, *supra* note 4, 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.”)

¹¹⁷ ARISTOTLE, *NICOMACHEAN ETHICS* 1101a28–b9 (Terence Irwin trans., Hackett Publishing Co. 1985).

This theory might even be able to explain why the statutes typically allow artists to prevent only alteration and not destruction of a work, if we add a further assumption that alteration of an artist’s work typically hurts the artist’s reputation more than elimination of the work would. But while this assumption does have adherents,¹¹⁸ and perhaps even 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. So 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.

Moreover, a deep 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”). Five state statutes, admittedly, do in effect provide a negative right of attribution. 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. But New Mexico’s and Rhode Island’s statutes give a right against public display of altered work whether or not any harm to the artist’s reputation is reasonably expectable. And both VARA and state statutes in California, Connecticut, Massachusetts, and Pennsylvania permit the artist to prevent any alterations, not just to demand removal of the artist’s name from altered works.¹¹⁹ So the simple

¹¹⁸ See Stern, *supra* note 10, 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.”)

¹¹⁹ See statute provisions cited *supra* notes 12 & 28–31.

reputation theory leaves the motivation behind the central provision of a majority of Moral Rights statutes quite mysterious.

B. THE DUTY OF RESPECT THEORY

Alternatively, we might construct an account upon on the moral duty of respect. (Note the lower-case “m” in “moral.”)

1. *The priority of duty*

The general notion that one ought to be respectful of artists and their creations is not startling, nor is it novel. Justin Hughes suggests that Hegel finds that notion to be behind the requirement that purchasers pay artists for purchased work: “From the Hegelian perspective, payments from intellectual property users to the property creator are acts of recognition. These payments acknowledge the individual’s claim over the property, and it is through such acknowledgement that an individual is recognized by others as a person.”¹²⁰ Charles Beitz asserts that “any plausible explanation of the significance of this interest [in maintaining control over the communicative project begun by creation of the artwork, the interest which Beitz believes provides the strongest justification for 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.”¹²¹

¹²⁰ Hughes, *supra* note 82, at 349.

¹²¹ Beitz, *supra* note 11, 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.

The twist that focusing on owed respect places on standard theories is that, loosely speaking, it derives rights from the existence of duties, rather than deriving duties from the existence of rights. All of the theories that we have discussed thus far 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.¹²² The duties that people have to act in certain ways with regard to artworks and artists then are merely derivative from the existence of these interests and these rights. It is the interests and the rights that are really doing all the explanatory work.

Although this way of proceeding comes fairly naturally to contemporary theorists, it is not the only possible way. One could start instead by identifying responsibilities and other normative constraints that people have, determining which of those rise to the level of duties, and then attributing rights to other people as derivative from the existence of these duties. Here it is the responsibilities and duties that really do the explanatory work.¹²³ (Although Hughes and

¹²² For an uncommonly explicit discussion of this underlying analytical framework, see Beitz, *supra* note 11, 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.

¹²³ Joseph Raz’s *Right-Based Moralities* acknowledges this general approach: “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.” J. Raz, *Right-Based Moralities*, in *THEORIES OF RIGHTS* 182, 195 (Jeremy Waldron ed. 1984). See also 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

Beitz both mention respect as a relevant consideration, they seem to share this common approach of deriving duties from rights and interests rather than rights from duties and responsibilities, as I am proposing here.)

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,¹²⁴ 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.

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.”). 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 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. The reason is that 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 a meaning. . . . [E]veryone has a duty of respect towards the values which give meaning to human life One’s respect for values does to a degree consist in action expressing it. Where such action is particularly apt and urgent there may be a duty which is then an intrinsic duty.” Raz, *supra* at 197.

Although there are some formal similarities between Raz’s comments here and the Duty of Respect theory that I am proposing, the specific sorts of respect in the two theories differ significantly, and Raz’s (somewhat vague) formulation is at best an awkward fit for observed Moral Rights provisions such as the lack of a right to prevent destruction of (most) artworks.

¹²⁴ Some of these constraints are moral, and some are legal. With respect to *civil* laws governing dead bodies, it is plausible to understand the law as having concern only for effects on people who have standing to sue (i.e. on the living). However, such an understanding seems inapplicable to certain *criminal* laws, which apply even if the deceased had no living friends or relatives at the time of the prohibited act. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7052 (West 2007) (making corpse mutilation and disinterment felonies). Some of the moral issues with respect to the dead receive an analysis heavy in detail but uneven in quality in Brian Angelo Lee, *Moral Obligations to Past Generations* (June 1999) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

2. *Application to Moral Rights statutes*

In the case of Moral Rights, there are explanatory advantages to starting with a responsibility to act respectfully toward visual artists’ creative excellence rather than starting with interests and rights. But note that whether such a responsibility truly exists, and whether the law should care about such a responsibility if it does exist, are philosophical and policy questions that we need not delve into here. Our immediate goal is solely to account for the provisions of the Moral Rights laws that exist, whether or not those laws are misguided. So, let us consider how this theory fares when applied to specific provisions of existing Moral Rights laws.

One of the theory’s strengths is its ability to explain why the right of integrity is waivable but not transferable. The prohibition on transfer makes sense, because the right to be transferred depends for its existence on the existence of a duty by art owners to show respect to artists’ creative excellence. But that is a duty that can be owed only to the artists, who actually created the artworks. Since the artist cannot change the identity of the person who created the artwork—that identity is an unalterable historical fact—the artist cannot redirect the focus of the owners’ duty. Thus, transferring the right that arises out of that duty would simply be impossible.

Waiver, however, is a different matter. As Justin Hughes’ remark about recognition suggests, altering an artwork *with* the artist’s permission is not necessarily disrespectful to the artist, even (or especially) if the owner paid the artist to get that permission. In some circumstances, offering to pay for permission to alter the work might indeed be a sign of disrespect, depending on the changes envisioned—disrespectful perhaps in the way that offering to pay someone to have sex is disrespectful to that person. But there is no good reason to think that such would be the typical case, and indeed sometimes an offer to pay compensation is itself a sign of respect. James Gleick once wrote of people who distributed online copies of his

writings, without his permission, and who told him that he should be grateful to them for increasing his fame. The title of his article pithily captured his reply: “I’ll Take the Money, Thanks.”¹²⁵ Thus, the duty of respect theory implies no reason for a blanket prohibition against waiver, and thus fits comfortably with the fact that the statutes permit it.

That most statutes permit owners to destroy artworks might seem to pose a stiffer challenge, since destroying an artwork seems at least potentially quite disrespectful. The key to understanding why such permission makes sense on this theory is to note that the respect owed is *not* respect for *the artwork*, or even respect for *the artist*, but rather respect for *the artist’s creative excellence*. Thus, destruction is allowed, because normally an owner would be interested in destroying a work only if he found little or no value in it and no one else did either (thus making it impossible for the owner to sell the work).¹²⁶ 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 artist’s creative excellence, because there is no creative excellence involved to respect. This account fits especially neatly with VARA’s provisions, which give artists the right to prevent destruction only of works of “recognized stature.”¹²⁷

For similar reasons, the fact that most Moral Rights statutes apply only to works of recognized quality makes sense, since failing to satisfy the recognized quality standard plausibly indicates that there is little creative excellence involved, and thus little or no risk that an owner’s altering or destroying the work would fail to fulfill the duty of respect for the artist’s creative excellence.

¹²⁵ James Gleick, *I’ll Take the Money, Thanks*, N. Y. TIMES, August 4, 1996, § 6 (Magazine) at 16.

¹²⁶ Cf. Hansmann & Santilli, *supra* note 4, 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).

¹²⁷ 17 U.S.C.A. § 106A(a)(3)(B) (West 2006).

The theory also nicely fits 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 cursing them loudly in public is. Thus the public display clause may reasonably reflect a concern that the law step in only when the disrespect involved is sufficiently large.¹²⁸

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.

Where the respect theory faces its greatest difficulty is in explaining the termination provisions of those statutes that do not grant a perpetual right, especially VARA’s provision that

¹²⁸ 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 Amendment principles of free expression. (Henry Smith brought this issue to my attention.) A reputation-based justification of those prohibitions might seem less worrisome, since the interaction of reputation-based accounts with the First Amendment is already familiar from existing defamation law. However, such Constitutional considerations do not seem to favor one account over the other. At the level of specific laws that each theory could justify, Constitutional requirements would obviously trump contrary statutes, no matter which theory lay behind that statute. And at a more theoretical level, a respect-based approach seems quite compatible with prohibitions on restriction of expression; indeed, it can straightforwardly explain those prohibitions as arising (at least in part) from a duty to respect other people’s opinions, creativity, and expressive capacities. (For a related example of the Duty of Respect theory’s explanatory power, see the discussion of the Symmetry Thesis in Subsection VI.B.3, *infra*.)

the right of integrity terminates almost immediately upon the artist’s death. If rights and interests were fundamental, and duties derived from them, then this would be easy to explain, since the deceased rights-holder no longer exists. But now that we are taking duties and responsibilities to be primary, and the right of integrity to be derived from them, that easy explanation is no longer available. Even though the rights-holder (the artist) may no longer exist, the duty-holder (i.e. the artwork’s owner) certainly does, and as noted earlier, one can behave respectfully or disrespectfully toward the dead even though they are dead.

But this immediate termination provision is idiosyncratic to VARA, and also has a peculiar legislative history:

[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.¹²⁹

So there simply may be no general account possible for this one provision.

3. The Symmetry Thesis

The duty of respect theory has much less difficulty explaining provisions for Moral Rights to terminate fifty years after the artist dies, since the theory can appeal to a fundamental symmetry, one important enough that we might call it the Symmetry Thesis: Because the duty of respect is universal, adhering not only to art owners but also to artists, we must consider not only the obligations owed to creators (the “rights” of artists), but also the responsibilities or duties of

¹²⁹ Stern, *supra* note 10, at 867.

those creators. Thus, just as consumers’ fair-use rights might limit intellectual property-holders’ exploitation rights, artists’ duties to others may limit those others’ duties to the artists.

There are many different ways that this symmetry might apply in the present case, but one obvious possibility is that for artists to demand too much deference to their desires concerning an artwork that they freely sold would be disrespectful to the owners of those works, and that insisting on being able to veto alterations made more than fifty years after they had died would be an example of such an excessive demand. As would giving artists a right to modify, even without the owner’s permission, previously sold works, if those modifications would enhance the total market value of the artist’s oeuvre. By demanding to modify a work he has already sold, the artist has failed to respect his customer. Statutes that grant a perpetual right of integrity can receive a similar explanation—they simply differ from the death-plus-fifty statutes in their underlying assumptions about whether a perpetual veto enables artists to demand too much deference to be compatible with respectful treatment of owners. Indeed, the fact that the statutes differ in their termination provisions makes sense on this theory, because which demands of deference are “too much” is a difficult “policy” decision, about which we should not be surprised to find some disagreement.

So the Duty of Respect Theory, or some variant, seems a promising explanation for the Moral Rights statutes that actually appear within American law. It has an intrinsic intuitive appeal, and it seems to fit the contours of existing statutes better than its rivals. I shall turn in Part VIII to considering some further implications of this conclusion. First, however, I should address one remaining question: Why do these statutes limit their protections to visual art?

VII. WHY LIMITED TO VISUAL ARTS: THE AVAILABILITY OF IDENTICAL ORIGINALS AFTER ALTERATION

Many of the theories that we have been discussing, including the duty of respect theory, make general claims that would seem to apply to many areas of creative endeavor, not just to visual arts. So we need some explanation of why VARA and the state statutes confer a right of integrity only to works of visual art.

Hansmann and Santilli have a straightforward explanation for this limitation: The monetary value of visual art, they assert, is unusually dependent upon the reputation of the artist who made that art.¹³⁰ Thus, if Moral Rights laws really are aimed at addressing reputational externalities, limiting those laws to visual art makes perfect sense.

The other theories can plausibly explain the limitation by appealing to a distinctive feature of original visual artworks—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.

Thus, for example, an artist who wishes to vindicate his 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. In such circumstances, altering an instance of an artist’s work arguably expresses little or no disrespect to the artist’s creative excellence, since it does not eliminate the pure expression of that excellence, which remains in other instances. Alterations in such circumstances also have

¹³⁰ Hansmann & Santilli, *supra* note 4, at 108–09.

only limited effect on the artist’s reputation, arguably have minimal effect on the artist’s personality, and raise only limited preservation concerns. So whether perfectly identical duplicate versions of the original exist is a relevant consideration for many of the theories what we have discussed here. (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,¹³¹ and which those state statues typically define as works with a run of more than 300 instances.¹³²)

This criterion enables us accurately to sort the universe of creative works into those for which the law grants creators a right of integrity and those for which it doesn’t. To see that, consider other products of creative endeavor:

Paintings and sculptures can be reproduced after a fashion, but the technology to produce identical duplicates 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.

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 a original 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.)

¹³¹ 17 U.S.C.A. § 101 (West 2006) (definition of “work of visual art”).

¹³² See, e.g., LA. REV. STAT. ANN. § 51:2152(7) (West 2006); ME. REV. STAT. ANN. tit. 27, § 303(D) (2006); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2006).

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.¹³³ 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.¹³⁴ That such regulation seemed plausible might appear to argue against the availability of identical duplicates truly being the operative criterion here. However, this seeming exception actually may be an instance of the criterion at work, since at the time of that debate access to motion pictures, especially old motion pictures, was possible only through a small number of channels. Thus it

¹³³ 17 U.S.C.A. § 101 (West 2006) (definition of “work of visual art”); LA. REV. STAT. ANN. § 51:2152(7) (West 2006); ME. REV. STAT. ANN. tit. 27, § 303(D) (2006); N.J. STAT. ANN. § 2A:24A-3(e) (West 2006); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 2006); R.I. GEN. LAWS § 5-62-2(20) (2006). 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 2006); N.M. STAT. ANN. § 13-4B-2(B) (West 2006).

¹³⁴ 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.

was reasonable to worry that the altered, colorized motion pictures would displace the original versions in those channels, making the latter in effect inaccessible. If so, then for practical purposes, identical duplicates of the original film would *not* still be available after colorization, and Moral Rights protection could be appropriate.¹³⁵

Finally, this criterion might even provide an alternative explanation for why inferior visual art, art which fails to achieve recognized stature, often does not receive Moral Rights protection under these statutes. The rationale for that exclusion may be that 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.

If this analysis is correct, there is a further consequence for future works of visual art: As more and more pictorial art is done in digital media, by artists working on computers, the appropriateness of giving Moral Rights protection to that art becomes uncertain, since the

¹³⁵ 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*.

creation of perfectly identical duplicates of digital works is trivially easy. We may therefore expect to see future amendments limiting the right of integrity to works originally produced in non-digital media.

VIII. 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*¹³⁶

In this paper I have considered two broad types of explanation that might account for the existence and shape of Moral Rights laws in the United States. First I considered the attempt to assimilate those laws to the conventional characterization of American intellectual property regulation by giving them an economics-based account. We saw that such an account was unsatisfactory, providing a poor fit for the actual provisions of American statutes. And I suggested 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.

I then turned to the standard alternative accounts: accounts based on protecting the artist’s personality, accounts based on expression of society’s esteem for art, and accounts based on concerns for the preservation of art. Again, none seemed adequate to the phenomena. A simple theory based on protecting artists’ subjective interests in their reputations fared a bit better, but in the end also proved inadequate.

Notably more successful was an account built upon a duty of respect for artists’ creative excellence. That account could plausibly explain nearly all of the specific statutory provisions,

¹³⁶ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960).

and the one provision with which it struggled (VARA’s idiosyncratic termination provision) is arguably merely an outlier.

If, as I therefore suggest, this duty of respect account is the best way to understand the underpinnings of Moral Rights laws in the United States, two important further consequences follow.

First is that economics-based rationales do not seem adequate to account fully for American intellectual property law. Such rationales have an important role, but so too do non-consequentialist moral considerations. Which specific moral rationale, or set of rationales, plays this role in general remains an open question here, as is whether the moral rationales that do contribute to the foundations of our intellectual property law are the rationales that should do so. But that some moral analysis is necessary for fully understanding our intellectual property laws seems 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-consequentialist moral considerations help motivate the law of visual art, it is likely that similar considerations are at least implicitly at work throughout the American intellectual property system.

The second consequence of this account follows from the first. We noted it earlier as the Symmetry Thesis: In understanding and evaluating intellectual property laws, we must consider not only the obligations owed to creators (the “rights” of creators), but also the responsibilities or duties of those creators.¹³⁷

¹³⁷ For another instance of the Symmetry Thesis’s relevance, see the discussion of free-expression guarantees in note 128, *supra*.

This symmetry is an important and distinctive feature of accounts based on non-consequentialist moral beliefs, accounts of the sort that we have considered in Parts IV through VI, in contrast to economics-based accounts like Hansmann and Santilli's. Economic and consequentialist analysis abstracts away from persons, while non-consequentialist moral analysis critically locates moral concerns within individual people. Thus, on an economic or consequentialist picture, a conscientious and omnipotent social planner could distribute rights and duties in any way that produced the desired outcome — e.g., maximization of the production of valuable intellectual resources, or an equal distribution of those resources. So, in theory, just as long as the ultimate quantity and distribution of goods were optimal, some people in that planner's society could end up with all the rights while others ended up with only duties. That sort of segregation, however, is unacceptable on non-consequentialist moral views that recognize the moral equality of all people. If people are moral equals, then it matters quite a lot whether one class receives only rights while another class receives only obligations. Rights and obligations in fact go together.

Thus, our conclusion that non-consequentialist moral justifications play an essential role in our intellectual property system raises the possibility that just as there are rights of artists, so too may there be responsibilities of artists, and thus just as the law is mindful of the former, so too perhaps it should be mindful of the latter. Hence, for example, if a large animation company wishes Congress to extend the term of copyright so that others may not profit from old films starring the company's popular cartoon mouse, Congress may have good reason to consider not only what the public owes the company as the creator of this work, but also what the company owes the public.

Recognition of the foundations on which these Moral Rights laws rest therefore both reveals an important but sometimes overlooked dimension of the debate over the regulation of the use and production of creative works, and points to fruitful areas of further inquiry.