

# Texas Law Review

## *See Also*

Response

### Of Geese, Ribbons, and Creative Destruction: Moral Rights and Its Consequences

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Moral rights have been the subject of persistent debate, with scholars addressing moral rights questions from a variety of interesting perspectives.<sup>1</sup> Indeed, the questions of whether and how moral rights should be enforced and protected has become scholarly catnip for legal academics.<sup>2</sup> Scholars comfortable in their respective fields extend their work toward moral rights questions.<sup>3</sup> Students regularly publish notes about moral rights,<sup>4</sup> and

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1. E.g., Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1877 (2011) (suggesting that private law can be understood as a means for individuals to seek compliance with their moral rights); Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 537, 538 (2011) (evaluating moral rights models in light of comments made by supernatural-fiction authors about their works); Irma Sirvinskaite, *Toward Copyright "Europeanification": European Union Moral Rights*, 3 J. INT'L MEDIA & ENT. L. 263, 265 (2010–2011) (supporting legislation to unify moral rights among European Union member states).

2. See, e.g., Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 4 (2007) (stressing that moral explanations of contract law have become catnip to relevant theorists).

3. E.g., Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 105 (1997) (positing that damage to an artist's right of integrity could impose harms on others with a pecuniary interest in the artist's work). I include myself in this category. My moral rights scholarship consists of merely two works. One is a piece that compares United States with United Kingdom legislation. Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213 (2006). The other examines the prospect of adapting European-style moral rights doctrine to American judicial sensibilities and preferences. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407 (2009) [hereinafter Bird, *Diagnosis and Rehabilitation*].

presumably these budding writers are not doing so because they perceive their work as a first step toward an art law practice. Like the stereotypical reclusive artist, moral rights attracts many admiring acquaintances but few close friends. Only a handful of writers offer moral rights long-term attention, with Roberta Rosenthal Kwall being its most effective and sustained advocate.<sup>5</sup>

One can never truly plumb the minds of the hundreds of authors who have chosen to contribute to moral rights jurisprudence, but there must be something special about the doctrine that attracts the academic mind. There is no recent opinion of the Supreme Court that attracts widespread disapproval.<sup>6</sup> No nagging circuit split exists upon which writers can take sides.<sup>7</sup> Indeed, there are so few moral rights cases in the United States that the number of scholarly works exceeds the number of published legal disputes.<sup>8</sup> Broad and immediate practical significance cannot explain the attraction.

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4. See, e.g., Brooke Bove, Note, *Moral Rights: The Moral of the Story Both for Authors and Publishers*, 32 WHITTIER L. REV. 335, 336–37 (2011) (arguing that the moral rights needs of publishers and authors can be fulfilled by negotiating “effective and comprehensive” contracts).

5. See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1983–91 (2006) (arguing that moral rights legislation can foster the objectives of the Copyright Clause); Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 883–98 (2007) (advocating for moral rights protection for only those works that satisfy a “heightened standard of originality”); Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times,”* 88 B.U. L. REV. 685, 703–04 (2008) (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007)) (elaborating on an understanding of “the colloquial author as a steward of her work,” and suggesting that this understanding is “consistent with the view that copyright ownership involves duties to the public as well as rights in the work”). Kwall’s work spans decades. E.g., Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985) (proposing legislative amendments to implement moral rights that would balance interests related to the rights of artistic creators). Her most recent endeavor is a book that I will review positively in Robert C. Bird, Book Review, 52 AM. J. LEGAL HIST. (forthcoming 2012) (reviewing ROBERTA ROSENTHAL Kwall, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010)).

6. A Supreme Court Justice most recently referred to *moral rights* nearly ten years ago. *Eldred v. Ashcroft*, 537 U.S. 186, 259 (2002) (Breyer, J., dissenting). In a 7–2 decision, the Court held that Congress did not violate the First Amendment or exceed the scope of the Copyright Clause by seeking to extend the duration of existing copyrights. *Id.* at 218, 218–19 (majority opinion); see also *id.* at 259–60 (Breyer, J., dissenting) (acknowledging moral rights in Europe and the lack of similar protections in the United States, and rejecting European-style efforts in the challenged legislation to create uniformity among copyrights and thus, strengthen moral rights protections).

7. Most recently, the Court resolved a split among the Second, Sixth, and Ninth Circuits as to the scope of a creator’s right of attribution. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2002); see also Teresa Laky, Comment, *Dastar Corp. v. Twentieth Century Fox Film Corp: Widening the Gap Between United States Intellectual Property Law and Berne Convention Requirements*, 14 SETON HALL J. SPORTS & ENT. L. 441, 455–461 (2004) (identifying the now-resolved circuit split).

8. A search of (“moral rights” & artist & (“VARA” “V.A.R.A.” “17 U.S.C. s 106a” “17 U.S.C. s 106(a)” “17 U.S.C.A. s 106a” “17 U.S.C.A. s 106(a)”) in Westlaw’s ALLCASES database yielded 44 results. The same search query yielded 703 results in Westlaw’s JLR database, which collects journals and law reviews.

Moral rights doctrine attracts attention because of its difference rather than its widespread relevance. Moral rights doctrine remains a foreign concept in American law.<sup>9</sup> The doctrine is significantly different than the utilitarian argument of incentives and greater good upon which much of our legal system is based.<sup>10</sup> The notion of discussing art and art-related things may be inherently interesting to law scholars or, at least, present a welcome diversion from less attractive topics that comprise an academic's scholarly life.

Perhaps moral rights doctrine generates so much attention because the professors who write about it see themselves as quasi-artists of their own. Law professors produce highly individualized works to which they may attach individual personalty and spirit.<sup>11</sup> Law student editors beware, as moral rights litigation over authorial disapproval of journal output is not entirely a fantasy.<sup>12</sup> As I explained in an earlier work, "When we scholars so readily defend the moral rights of artists, in their plight we may see our own strong desire for authorial control and dignity."<sup>13</sup>

Whatever the magnet might be, the doctrine holds unmistakable and perhaps unmatched staying power. Scholars in Greece and Rome "possessed the right to be recognized as authors" independent of any economic rights in their works.<sup>14</sup> No less than Michelangelo asserted the right against papal power.<sup>15</sup> Surely the academics and students of today cannot be faulted for exploring its contours and implications no matter how infrequently an actual legal dispute might manifest.

Moral rights doctrine receives much commentary and perspective,<sup>16</sup> with most scholarship refining an aspect of moral rights here or pruning the impact of moral rights there.<sup>17</sup> Lindsey A. Mills's work, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*,<sup>18</sup> the subject of

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9. See Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 414–15 (illustrating that most moral rights are unrecognized in the United States).

10. Compare *id.* at 416–17 (identifying broad moral rights protections in France), with *id.* at 417 (explaining that American copyright law emphasizes economic interests and is founded upon utilitarianism). American copyright law offers only weak protection of moral rights. See *supra* note 9.

11. Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 412 & n.31; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 816 n.116 (2001).

12. See, e.g., *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 47 (S.D.N.Y. 1995) (declining to recognize an author's moral rights to protect against alleged distortion of his written work by the Fordham International Law Journal), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

13. Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 413.

14. Kristen Riemenschneider, *Philosophy, Trade, and Aids: Current Failures to Obtain a Substantive Patent Law Treaty*, 11 VA. J.L. & TECH. 1, 7 (2006).

15. Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 407–08.

16. See *supra* note 1 and accompanying text.

17. See *supra* note 3 and accompanying text.

18. Lindsey A. Mills, Note, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, 90 TEXAS L. REV. 443 (2011).

this Response, will not suffer from any such claim of scholarly myopia. Ms. Mills takes unflinching aim at the heart of moral rights protection, the right of integrity.<sup>19</sup> Ms. Mills' note is as direct as it is critical of moral rights protections.<sup>20</sup> The note reviews common arguments in support of the right and then systematically dismantles each rationale one by one.<sup>21</sup> The note concludes that allowing artists to waive moral rights is unlikely to minimize social costs and inefficiencies.<sup>22</sup>

The note carefully concludes that moral rights doctrine invokes a “trade-off between artistic veneration and social welfare,” and policy makers must decide “whether the expressive value of integrity rights protection is worth the costs it inevitably imposes on artists and society.”<sup>23</sup> Yet, make no mistake, this note does not prune or tweak. The note advises us that the only redeeming quality of the integrity right, the heart of any moral rights protection, is a minimal signaling effect that society finds art and artworks valuable.<sup>24</sup> Moral rights appears to hold great cost, little benefit, and even less potential for development of a viable legal doctrine.

Yet, this note is not merely lashing out against a scholarly trend, setting itself up as a mere strawman for future scholars to contrast and respond. The author responds cogently and skillfully to the various arguments in favor of the right of integrity—an effective effort given the limited space that notes allow. Student notes receive their share of criticism as being shallow or unoriginal.<sup>25</sup> Ms. Mills's work does not fall into this category and is a worthy participant of any meaningful discussion.

Furthermore, merely because a paper largely dispatches moral rights as a useful doctrine does not make the work untenable. Too often scholars will ruminate on the various outgrowths of a legal doctrine without consideration of whether the underlying principles are rooted on firm ground. Although moral rights has been enthusiastically adopted in other countries<sup>26</sup> and has

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19. *See id.* at 448 (attacking integrity rights protection for its “absurd practical consequences”).

20. *See id.* at 445 (arguing that artwork should be treated like other commercial goods and that arguments to the contrary threaten artists and the public's interest in art).

21. *See generally id.* at 448–52 (summarizing common arguments in support of moral rights); *id.* at 452–63 (elucidating the “fundamental misconceptions” associated with broadly interpreted moral rights).

22. *Id.* at 461–63.

23. *Id.* at 445.

24. *Id.* at 464 (“[T]he only real value that integrity rights protection provides is purely expressive—sending a message to artists that they and their work are socially valuable.”).

25. *See* Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 *STAN. L. REV.* 1131, 1132 (bemoaning the quality of student notes in terms of topic selection, writing, and editing). *But see, e.g.*, Matthew T. Bodie, *Law Students and Legal Scholarship*, 1 *J.L.* 223, 227 (2011) (recognizing the well-written nature of student notes and the need for additional opportunities for students to contribute to the scholarly debate).

26. Mills, *supra* note 18, at 446.

remained in existence for millennia,<sup>27</sup> it has not been widely supported in the United States, and perhaps for good reason.<sup>28</sup> This Response compels all future moral rights scholars, dabblers and devotees, to address the note's arguments and advance appropriate debate. Moral rights doctrine might not need a removal, but it may need a retooling for American consumption. Insightful critiques like that of Ms. Mills enable discussion and debate.

This Response will not devolve into a point-by-point rebuke. Good scholarly work needs no such reproach. Rather, I will comment on selected discussions made by the author that touch on broader implications of moral rights or invoke discussions that go to the core of what moral rights intends to protect.

### I. The Geese that Shall Not Be Ribboned

In Canada, artist Michael Snow was commissioned to create a sculpture for a Toronto shopping mall, resulting in *Flight Stop*—a portrayal of sixty geese in flight over the mall's patrons.<sup>29</sup> The shopping mall hung ribbons around the geese's necks as part of a Christmas display.<sup>30</sup> The artist sued the shopping mall, claiming that the ribbons improperly modified the work, thus prejudicing the artist's honor and reputation.<sup>31</sup> The artist stated that the "naturalistic composition" was "made to look ridiculous by the addition of the ribbons."<sup>32</sup> The court ruled that the ribbons distorted or modified the plaintiff's work and his concern for his honor and reputation was reasonable under the circumstances.<sup>33</sup>

Ms. Mills cites this case as an example of the "absurd practical consequences of integrity rights protection" that "confirm the suspicions . . . invoked by cursory consideration of the right."<sup>34</sup> Mills does not dedicate much discussion to the case, perhaps because the silly conclusion is so apparently obvious. The criticism, however, is an important one worth examining further. A goose may just be a goose, and a ribbon may be nothing more than a decoration for the holidays. Yet it is arguably not for the scholar to brush aside an artist's challenge simply because she finds it absurd.

The artist, Michael Snow, is no neophyte. He has been a practicing musician, painter, and sculptor for decades and has received commissions for

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27. See text accompanying note 14.

28. See *supra* notes 9–10.

29. *Snow v. Eaton Centre Ltd.* (1982), 70 C.P.R. 2d 105, at 106 (Can. Ont. H.C.J.).

30. R.D. Gibbens, *The Moral Rights of Artists and the Copyright Act Amendments*, 15 CANADIAN BUS. L.J. 441, 442–43 (1989).

31. *Snow*, 70 C.P.R. 2d at 105–06.

32. *Id.* at 106.

33. *Id.*

34. Mills, *supra* note 18, at 448.

several public sculptures.<sup>35</sup> His work has been shown around the world, and Snow has received an honorary doctorate from the Université de Paris I Panthéon-Sorbonne.<sup>36</sup> He participates in every major exhibition exploring images in the modern world, and he is considered to be, according to one biography, “among Canada’s most important artists.”<sup>37</sup>

In spite of these numerous achievements, Snow underwent the time and expense to assert his moral right against the shopping mall, uncertain as the outcome might have been. Ribbons hung from the necks of sixty geese were apparently of no flippant importance to the artist, nor was the lawsuit a mere triviality. The judge did not consider the lawsuit frivolous either, ruling in favor of Snow and ordering the removal of the ribbons.<sup>38</sup>

Now, one may argue that there should be limits to such artist discretion, as the artist alone—no matter how prominent—cannot be the sole arbiter of prejudice. That would leave discretion virtually unlimited. At its broadest, unlimited discretion would grant artists a de facto approval right over every presentation of every artwork at any time or place.<sup>39</sup> For museum directors and exhibitors, for example, the risks of hosting an exhibition would be untenably high.<sup>40</sup> The practice would “sacrifice the importance of the public trust of art and creativity at the altar of total control by the creator.”<sup>41</sup>

Fortunately, a potential solution exists—the use of expert testimony to evaluate the artist, his or her work, and the existence of prejudice to honor and reputation. Expert testimony is widely used in a variety of legal contexts.<sup>42</sup> Trademark infringement and dilution cases, for example, regularly use expert testimony to determine whether actionable consumer confusion exists from an allegedly infringing mark.<sup>43</sup> As I discussed in an earlier work, experts could testify to the prominence of the artists, the value

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35. Michael Snow, *Michael Snow: Biography*, MAYA STENDHAL GALLERY, [http://www.mayastendhalgallery.com/vital\\_signs\\_bios\\_snow.html](http://www.mayastendhalgallery.com/vital_signs_bios_snow.html).

36. *Michael Snow*, LA FONDATION DANIEL LANGLOIS [THE DANIEL LANGLOIS FOUNDATION] (2011), <http://www.fondation-langlois.org/html/e/page.php?NumPage=94>.

37. *Id.*

38. *Snow v. Eaton Centre Ltd.* (1982), 70 C.P.R. 2d 105, at 106 (Can. Ont. H.C.J.).

39. Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 446.

40. *See id.* (explaining the scope of potential approvals that exhibitors would need from artists before displaying their work).

41. *Id.*

42. *See, e.g.*, Julie E. Bland, *Using Expert Witnesses in Employment Litigation*, 17 REV. LITIG. 27, 28 (1998) (arguing that expert testimony is often required in employment litigation due to the scientific and specialized information that experts can provide).

43. *See* David H. Bernstein & D. Peter Harvey, *Ethics and Privilege in the Digital Age*, 93 TRADEMARK REP. 1240, 1263 (2003) (“Expert witnesses, such as survey experts, design experts, marketing experts, damages experts, valuation experts, and computer experts, are common in trademark litigation.”); Richard J. Leighton, *Using Daubert-Kumho Gatekeeping to Admit and Exclude Surveys in Lanham Act Advertising and Trademark Cases*, 92 TRADEMARK REP. 743, 763–64 (2002) (identifying evidentiary standards for admissibility of expert testimony as to the likelihood of confusion or deception in trademark matters).

of the art, and the nature of the diminution, if any.<sup>44</sup> Inevitably, the defendant will produce her own expert noting the lack of infringement of moral rights. The result may be an inevitable “battle of the experts.”<sup>45</sup> This is an imperfect system no doubt, but one that is no less imperfect than any legal regime that uses expert witnesses. Indeed, Snow used expert testimony in the very dispute before the court. The judge noted that “[w]hile the matter is not undisputed, the plaintiff’s opinion is shared by a number of other well respected artists and people knowledgeable in his field.”<sup>46</sup> Snow, or most likely Snow’s lawyer, did his homework. The result was a decision in favor of the artist that, as far as one can tell, was based more on objectivity than whimsy.

## II. The Merits of Destruction

Another rationale worth examining regards the public interest argument related to art. The public interest argument is certainly a common one.<sup>47</sup> The rationale goes that art and its protection help safeguard the public interest in preserving artistic intention and cultural heritage.<sup>48</sup> Society benefits overall when its cultural hallmarks are preserved and maintained, and moral rights provides at least some protection against the destruction of national and cultural treasures.<sup>49</sup> Art presents ideas and references to history that inspire future generations and encourage the living to consider the achievements of the past.<sup>50</sup> The ideas and references become part of a community’s shared vocabulary.<sup>51</sup> Then-Professor Edward J. Damich spoke rightly of the important nature of this preservation when he commented that “[p]rotecting

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44. See Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 448–52 (noting that expert testimony can be used to understand economic and reputational harm in moral rights disputes).

45. See generally David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451 (2008) (outlining the difficulties of a system that relies on partisan, adversarial experts).

46. *Snow v. Eaton Centre Ltd.* (1982), 70 C.P.R. 2d 105, at 106 (Can. Ont. H.C.J.).

47. See, e.g., Hansmann & Santilli, *supra* note 3, at 106 (recognizing European protections of communities’ interest in preserving artistic heritage); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976) (observing that statutes in “a number of civil law nations” protect moral rights that are enforced in pursuit of perceived public interests).

48. Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 426; see also Cheryl Swack, *Safeguarding Artistic Creation and Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 404 (1998) (contending that the public interest in the preservation of “cultural property” is advanced by allowing art to be seen in unadulterated form).

49. See Merryman, *supra* note 47, at 1041 (arguing that law protects artwork “for public reasons,” and moral rights is one means by which the public interest is enforced).

50. *Id.*

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

irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection.”<sup>52</sup>

The argument is indeed compelling, and as far as I know, there have been few attempts to refute it in legal literature. Amy Adler’s *Against Moral Rights*, is perhaps the most scathing critique of moral rights law found in a law review.<sup>53</sup> It is also a source upon which this note heavily relies. Adler offers examples of a public interest in destruction. The controversial *Tilted Arc* attracted consternation from Manhattan office workers who were forced to circumvent its massive steel frame when crossing Federal Plaza.<sup>54</sup> In another instance, a critic’s removal of paint from an artist’s sculptures after the artist’s death and against the artist’s wishes, attracted significant interest—financial and otherwise—from the art world.<sup>55</sup> Adler offers other examples of destroyed art and concludes that “there are vital artistic interests, not merely social or political ones, in altering, vandalizing or even destroying unique works.”<sup>56</sup>

Mills takes up the mantle from Adler and highlights the existence of “vital artistic interests in transforming original works of art through alteration and destruction.”<sup>57</sup> The example given is Robert Rauschenberg’s transformation of a line drawing by erasing the lines of a work of a prior artist.<sup>58</sup> Mills writes that “Rauschenberg’s actions were intended to signal the ‘impotent rebellion’ of emerging artists against the ‘heroic past’ of abstract expressionism that de Kooning’s work represented.”<sup>59</sup> The conclusion from this example, and presumably the others that Adler has cited, is that creating new art through the destruction of prior art “has become an essential component of contemporary art.”<sup>60</sup>

The example leaves one wondering why Rauschenberg’s line erasure is a valid artistic endeavor while Snow’s quest to remove ribbons from geese is absurd. More importantly, however, the example does not carry much force

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52. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 950 (1990); see also Mills, *supra* note 18, at 455 (highlighting the intuitive claim that artwork represents social ideals that should be preserved for their own sake). Damich now serves on the United States Court of Federal Claims. Edward J. Damich, U.S. COURT OF FEDERAL CLAIMS, <http://www.uscfc.uscourts.gov/edward-j-damich>.

53. See generally Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (attacking “the most basic premise of moral rights law,” namely that the law should except art from “the normal rules of property and contract”).

54. See *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988) (summarizing complaints concerning *Tilted Arc*’s obstruction of previously open space in Federal Plaza).

55. Adler, *supra* note 53, at 275.

56. *Id.* at 281 (emphasis omitted).

57. Mills, *supra* note 18, at 455 (citing Adler, *supra* note 53, at 281).

58. *Id.* (citing Adler, *supra* note 53, at 283).

59. *Id.* (citing Adler, *supra* note 53, at 283).

60. *Id.* (citing Adler, *supra* note 53, at 284–87).

because the examples given of beneficial destruction are rare. There is little if any consensus in any of the aforementioned examples that the destruction of the work at issue created a benefit to the public or the art world in general.<sup>61</sup> Furthermore, even if such incidents represent a creative destruction beneficial to the art and art community, this benefit does not denigrate the importance of preserving cultural heritage.

Countless priceless artworks around the world are viewed by thousands of people each day. Such works are the subject of study and analysis, and continue to provide inspiration to modern artists. Stripping such treasures of moral rights protection or preventing such protection from emerging where it has never been granted could place numerous artworks in jeopardy.<sup>62</sup> Destruction of artwork may be a value, but it is an isolated and sporadic one—and infinitesimally small—compared to the benefit of protecting works from destruction. The exception cannot drive the rule.

### III. Some Pragmatism and Conclusion

At this point in a response, it is tempting to raise the “ticking time bomb”<sup>63</sup> of moral rights rhetoric. The moral rights bomb might sound something like this: A private company acquires Leonardo’s *Mona Lisa*, Picasso’s *Guernica*, or other priceless artistic work. Seeing opportunity for profit, the firm slices up the *Mona Lisa* or *Guernica* into bite-sized bits, frames them, and auctions them on eBay. The firm generates a windfall, as the pieces of each painting added together generate more revenue than the original. Under current moral rights law in the United States, the act might be perfectly legal.<sup>64</sup> Under a purely commercial view of moral rights, slicing

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61. Adler recognized that “[a]lthough there was by no means a public consensus about [*Tilted Arc*], it is fair to say that many, many people detested *Tilted Arc*.” Adler, *supra* note 53, at 274 (footnote omitted). However, Serra, the artist, received support from members of the art world, who testified on his behalf. *Id.* at 274 n.59 (citing *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988)). In the case of the paint-stripped statues, Adler also observed that critics of the original work “recognized the stripped work’s appeal.” *Id.* at 275 n.70. For Rauschenberg and his adherents, art resulted from its own destruction. *Id.* at 283–84. For this viewpoint, Rauschenberg has been characterized by some as a radical. *Id.* at 283 n.114.

62. See, e.g., Bird, *Diagnosis and Rehabilitation*, *supra* note 3, at 408 (recounting plans of the owners of a Picasso work, which they intended to slice into 500 parts to be sold for \$135 each).

63. The ticking time bomb is a hypothetical designed to consider the moral appropriateness of torture. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005) (arguing that public emphasis on the ticking time bomb in the national security context is misplaced). Typically told, a captured terrorist knows the location of a bomb that will kill thousands of people. *Id.* Torturing the terrorist will extract the information and save the lives of innocent victims. *Id.* Should the government torture the terrorist in order to save human lives? Adherents embrace the hypothetical for support of torture in this instance and arguably others. Margareth Etienne, *Making Sense of the Ethnic Profile Debate*, 80 MISS. L.J. 1523, 1536 (2011).

64. See John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 453 (1995) (recognizing that federal law does not protect artwork against cultural vandalism after the artist’s death).

*Mona Lisa* to bits might be welcome. Should we not protect, indeed even welcome, the chopping of the world's greatest artistic treasures, some thousands of years old, for the few extra bucks in the pockets of a philistine huckster who happens to get her hands on a masterpiece?

Although not entirely a worthless inquiry, thrusting such a scenario toward a detractor of moral rights offers more rhetorical flourish than genuine counterpoint. Whether due to market forces or public protection, the sliced-up masterpiece scenario simply has not happened.<sup>65</sup> Like the time bomb, such artistic doomsday rhetoric represents a “gotcha” moment like “getting the vegetarian to eat just one little oyster because it has no nervous system.”<sup>66</sup> It provokes more than enlightens.

Furthermore, costly consequences raised on both sides of the debate have failed to robustly manifest. Where moral rights offers protection, the potential for frivolous litigation—predicted by some—has not manifested.<sup>67</sup> In jurisdictions where moral rights doctrine is weak or absent, there has not been a widespread rush to profit from the classics through destruction.<sup>68</sup> Published judicial disputes remain rare indeed.<sup>69</sup> The stakes may not be as high as participants in the debate might think.<sup>70</sup>

None of this, however, necessarily implies that new scholarship in the field is without meaning. Scholarship that repeats itself adds little to the generation of new knowledge. A community of scholars that repeats itself in harmonious exchange risks forming an echo chamber of extreme or underdeveloped analysis. Mills's note breaks through that chamber and delivers a refreshing and insightful rationale against a cache of protections that many scholars hold near and dear.

Mills thoughtfully responds to four of the major rationales in support of the integrity right, the foundational protection of the moral rights suite of protections. These critiques should stimulate discussion about the propriety of moral rights in a modern age. With works like those by Mills and Adler, a scholar should no longer reflexively cite the usual canon justifying moral

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65. *See supra* note 62 and accompanying text.

66. Luban, *supra* note 63, at 1441.

67. *Cf.* Cambra E. Stern, Comment, *A Matter of Life and Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 855 n.36 (2004) (predicting that certain requirements and provisions of the VARA would eliminate frivolous claims).

68. *See* Julie Cromer Young, *Copyright in Memoriam*, 13 VAND. J. ENT. & TECH. L. 507, 528–29 (2011) (identifying drawbacks to extending moral rights protections to “all works of public significance,” including that such protections already exist under copyright law).

69. *See supra* note 8.

70. Yet, the possibility exists that the lack of moral rights claims is in part because most artists may not even be aware that moral rights protections exist. *See* RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-Up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 131–32 (2005) (conducting a survey of artists that revealed limited awareness of VARA). Chang remarked that a 1995 survey by the U.S. Copyright Office found similar results. *Id.* at 132.

rights and then move onward to whatever focus holds her particular interest. These basic questions about the propriety and effectiveness of moral rights need discussion. I do not believe that overall scholarly opinion will shift away from moral rights and future support will disappear. Instead, I hope that a more robust debate will emerge that ultimately solidifies rationales in favor of and against the doctrine. If the robust exchange of knowledge continues as a result of Mills's note and this Response, it is a state of affairs that both supporters and detractors will find favorable.