

Deconceptualizing Artists' Rights

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I. INTRODUCTION

After many years of effort, during the last twenty years artists and their supporters have convinced several states and the federal government to adopt European-style statutes protecting art from disfigurement, modification, or destruction. These so-called moral rights statutes give visual artists the legal right to protect their work against disfiguring attacks or, in some cases, total destruction. Moral rights statutes have been widely supported by members of the art community and their advocates in legislatures and legal academia. To the extent there has been opposition, it has come largely from the film and publishing industries, which have objected to giving writers, screenwriters, and directors moral rights in books and movies. For this reason, Congress limited the protections offered by the federal moral rights statute to the non-cinematic aspects of the visual arts such as painting, drawing, lithography, and so forth.¹

Recently, however, opposition to moral rights statutes has arisen from a new quarter—indeed, from someone whose academic work would probably locate her within the arts community itself. In a recent article in the *California Law Review*, Professor Amy Adler argued that moral rights statutes are not only unnecessary, they are actually inconsistent with the nature of contemporary art.² Professor Adler's arguments are therefore based not on the usual property rights or free market claims

1. 17 U.S.C. § 106A (2006); see Roberta Rosenthal Kwall, "Author-Stories": *Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 28 (2001) ("VARA was narrowly crafted in response to the vocal objections of the motion picture and publishing industries, which were strongly opposed to the enactment of moral rights protections. During the course of the hearings on VARA, Congress heard the testimony of artists and film directors speaking on behalf of a broader coverage for moral rights, and industry executives opposed to such an extension. As enacted, VARA reflects the voices of the publishers and studio executives from such powerhouses as Disney and Turner Entertainment who expressed concern about the ability of their industries to continue to derive profits and remain powerful in the face of expanded moral rights protections" (footnote omitted)).

2. See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009).

against moral rights statutes but rather on detailed claims about the nature of art and art theory. Specifically, Professor Adler argues that the nature of art has moved beyond the static, iconographic forms of visual representation that benefit from the enforcement of moral rights statutes. According to Professor Adler, protecting the integrity of artistic works through moral rights statutes “threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist.”³

This Article is a response to Professor Adler’s perspective on the value of moral rights statutes, the philosophical background that informs that perspective, and her argument that the nature of contemporary art and art theory undermines the case for such statutes. The argument here is that moral rights statutes are simply irrelevant to much of the transgressive art that Professor Adler uses as examples to bolster her arguments against moral rights statutes. Conversely, while moral rights statutes do little harm, they do a great deal of good. Specifically, moral rights statutes remain an extremely crucial tool in protecting the work of artists who work in nontransitory media such as painting, drawing, lithography, and sculpture.

It is certainly true that the art world has splintered badly since the days when the abstract expressionists and critics such as Harold Rosenberg and Clement Greenberg could take it upon themselves to decide for the entire society what was and was not art.⁴ This splintering has even led some in the world of art theory to pronounce the “end of art.”⁵ But despite this phenomenon, the destruction of art has hardly become the defining characteristic of the new art world. For art aficionados, this must be judged

3. *Id.* at 265.

4. Harold Rosenberg was the art critic for *The New Yorker* magazine and a prominent champion of abstract expressionism through books. *See, e.g.*, HAROLD ROSENBERG, *THE TRADITION OF THE NEW* (1959). Clement Greenberg was also an early supporter of abstract expressionism, especially the work of Jackson Pollock. In his later years, he denounced pop art, conceptual art, and almost all forms of postmodernism. His attitude toward the work that is being advanced by Professor Adler as embodying the essence of contemporary art might be intuited from his essay *Avant-Garde and Kitsch*, in *ART AND CULTURE: CRITICAL ESSAYS* 3 (1961). For a somewhat glib but entertaining critical assessment of Rosenberg’s and Greenberg’s influence on the art world during their heyday, see TOM WOLFE, *THE PAINTED WORD* 49–50 (1975), which states that “[o]ne secret of Greenberg’s and Rosenberg’s astounding success, then, was that they were not like uptown critics—they were not *mere* critics: they spoke as the voice of bohemia . . . and naturally *le monde* listened.”

5. *See infra* notes 78–104 and accompanying text.

a good thing. After all, it stands to reason that the destruction of art leads inevitably to less art. The protection of art, conversely, leads to the proliferation of art. This is the simple equation that Professor Adler must grapple with in arguing against the wisdom of moral rights statutes. Unless a diminished supply of art would be good for the country's cultural legacy, it seems logical to applaud legislative efforts to protect art.

Disputes over the protection of art can be viewed in various ways. On the one hand, these disputes could be viewed as being guided by a purely pragmatic calculus. Leaving aside ancillary issues such as the property rights of art purchasers, the question for proponents of art under the pragmatic conception should be whether a particular statutory scheme advances or inhibits the development of a culture that leads to the production of art. There is another way of addressing these disputes, however, which is to view them through the prism of competing notions about the nature of art. This sort of dispute forms the basis of Professor Adler's complaints about moral rights statutes. The real problem with such statutes, according to Professor Adler, is that they are predicated on an old-fashioned—and presumptively exclusionary and elitist—conception of the nature of art.⁶ Although Professor Adler's article seems to be the first full-length application of these ideas to moral rights statutes, it is probably inevitable that an argument such as this would be made sooner or later. After all, literary and artistic theory has for many years been characterized by variations on similar themes, which are often lumped together under the pliant term *postmodernism*. To anyone who has recently graduated from a graduate program that focuses on such matters, claims about the death of the author, the oppressiveness of an author-focused aesthetics, or the need to deconstruct or reinterpret original pieces of art in order to create more valid forums of art will seem quite familiar.⁷ What is different in this case is Professor Adler's use of related theories to critique statutes that are the primary sources of legal protection for art. Suddenly, highly abstract theory becomes quite concrete.

The question is not whether Professor Adler's observations about the nature of contemporary art are compelling. The question is: Even if these observations are compelling, does it matter? It may be that moral rights statutes can be defended even if we accept many of the premises of the theories discussed by Professor Adler. This Article will address these

6. Adler, *supra* note 2, at 265.

7. This is a cottage industry that probably has its origins in Roland Barthes's essay *Death of the Author*, which posits a radical disjunction between the author and his or her manuscript and suggests that meaning can be injected into a manuscript only by those who read and interpret that manuscript after it is created. See ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 147–48 (Stephen Heath trans., 1977).

issues by critiquing the—for lack of a better term—postmodern conceptions of art and how those conceptions illuminate the difficult issue of protecting art at a time when, according to Professor Adler, the destruction of art has come to define the very nature of art.

II. THE NEW CASE AGAINST MORAL RIGHTS STATUTES

The concept of moral rights took some time to catch on in the United States, although moral rights have been a fixture of the European legal landscape since the nineteenth century. In Europe, the effort to protect artists' rights in their work can be traced to the Renaissance, when society began to view the production of art less as a trade and more as a creative discipline.⁸ This, in turn, “paved the way for the idea of genius and to an appreciation of a work of art as a creation of the individual over tradition, science, or rule.”⁹ By the late eighteenth century in England and early nineteenth century in France, courts had begun to recognize the elements of what would become the legal concept of moral rights.¹⁰ In 1928, the legal recognition of an artist's moral rights was codified by the addition of Article *6bis* to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention or Convention).¹¹ Article *6bis* of the Convention provides that “even after the transfer of said rights, the author shall have the right to . . . object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”¹²

The concept of moral rights for artists caught on much more slowly in the United States than in Europe. The first moral rights statutes were enacted at the state level. California adopted its statute, the California Art Preservation Act, in 1979.¹³ After a notorious case in which Frank Stella was forced to sue a gallery that allegedly removed two discarded paintings from the landing outside Stella's studio and then displayed

8. See W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1143–45 (2005) (discussing early conceptions of art and artists).

9. *Id.* at 1144.

10. See *id.* at 1148–49.

11. Berne Convention for the Protection of Literary and Artistic Works art. *6bis*, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

12. *Id.*

13. CAL. CIV. CODE § 987 (West 2007).

them without Stella's permission,¹⁴ New York enacted its statute, the Artists Authorship Rights Act,¹⁵ in 1983. A handful of other states passed similar statutes.

At the federal level, the United States government did not even accede to the Berne Convention until March 1989.¹⁶ After acceding to the Convention, Congress initially concluded that no further legislation was necessary to implement Article 6*bis*.¹⁷ Within a year, however, Congress would join the eleven states that had adopted their own moral rights statutes by enacting the Visual Artists Rights Act of 1990 (VARA).¹⁸ This statute protects two of the most important aspects of the artist's moral rights: the right of attribution and the right of integrity. The right of attribution gives the artist the right to claim authorship in works that he or she created¹⁹ and to disclaim authorship to works that he or she did not create,²⁰ and prevents the use of an artist's name in conjunction with works that have been distorted, mutilated, or otherwise modified in a way that would be prejudicial to the artist's reputation.²¹ The right of integrity gives the artist the right to prevent the intentional distortion, mutilation, or other modification of an artistic work if the modification would damage the artist's reputation.²² It also gives the artist the right to prevent the intentional destruction of a "work of recognized stature."²³

A. *The Theory and Justification of Moral Rights Protection*

There is very little in the legislative materials supporting VARA that can be described as a sophisticated justification for the existence of moral rights laws.²⁴ Frankly, the same can be said of the early academic literature supporting the protection of moral rights in the United States. One of

14. See *Stella v. Mazoh*, No. 07585-82 (N.Y. Sup. Ct. Apr. 1, 1982), discussed in 2 RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 1266 (3d ed. 2005). The lawsuit was eventually settled out of court, and Stella recovered the paintings and destroyed them. LERNER & BRESLER, *supra*, at 1266.

15. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1984) (enacted 1983 and amended 1984).

16. See H.R. REP. NO. 101-514, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917.

17. *Id.*

18. *Id.*

19. 17 U.S.C. § 106A(a)(1)(A) (2006).

20. *Id.* § 106A(a)(1)(B).

21. *Id.* § 106A(a)(2).

22. *Id.* § 106A(a)(3)(A).

23. *Id.* § 106A(a)(3)(B).

24. See H.R. REP. NO. 101-514, at 5, reprinted in 1990 U.S.C.C.A.N. 6915, 6915 (containing a short, two-paragraph discussion of the statute's purpose, essentially reiterating the attribution and integrity portions of the statute itself).

the most basic questions, for example, is whether moral rights statutes are intended to protect the private interests of the individual artist or rather some broader social concern, such as the protection of culture and cultural artifacts. Many of the early proponents of moral rights protection in the United States tended to finesse this issue, but to the extent that they came down on one side or the other, they tended to favor the argument that moral rights should be protected in order to benefit the larger social interest in art and culture.

In Martin Roeder's influential early article supporting the legal protection of moral rights, for example, the author cited both the individual and the social rationales for protecting moral rights.²⁵ On the one hand, Roeder argued that moral rights should be protected in order to defend the sensitivities of the artists who produce the creative work. When an artist creates, Roeder noted, "he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones."²⁶ Roeder viewed the legal protection of this "right to create" as being one of the basic obligations of a liberal society. "By and large . . . modern liberal social philosophy and jurisprudence support the view that one of man's basic rights is the freedom to create."²⁷ By the same token, however, Roeder suggested that in the absence of moral rights protection, "the interest of society in the integrity of its cultural heritage" also goes unprotected.²⁸ Thus, we have the essential structure of the doctrine that Professor Adler later criticizes: the assumption that by protecting the private interests of the independent individual artist, we simultaneously will protect the cultural heritage of the nation.²⁹

This assumption is not as evident, however, in later academic efforts to support legal protection of moral rights. Twenty-six years after the publication of the Roeder article, in another highly influential article on the same subject, John H. Merryman subordinated the interests of the individual artist to the social interest in protecting and preserving art and culture.³⁰ Merryman argued that moral rights should be legally recognized

25. See Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558, 578 (1940).

26. *Id.* at 557.

27. *Id.* at 558.

28. *Id.* at 557.

29. See Adler, *supra* note 2, at 265.

30. See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

primarily to protect the rights of the viewers of art or to preserve the culture as a whole. As to the viewers of art, Merryman argued that they had a right in “seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted and ‘unimproved’ by the unilateral actions of others.”³¹ As to the interests of the rest of the culture, Merryman argued grandiosely that “[a]rt is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture.”³² According to Merryman, moral rights are not really about protecting an individual artist’s interest in his or her own work. Rather, “[w]e are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.”³³ Merryman would have us consider the artist as a kind of cultural private attorney general.

It is fair to say that Merryman’s article was fairly typical of arguments urging state and federal governments to adopt statutes protecting the moral rights of artists. At least some of this was an attempt by moral rights supporters to be politically astute. After all, while it is likely that few legislators have the slightest interest in protecting the interests of scruffy artists individually, a fair number of legislators would probably like to think of themselves as the saviors of our national culture.

In any event, Professor Adler rejects both the individual and the social arguments for protecting the moral rights of artists. As for protecting the artists’ individual interests in their own work, Professor Adler argues that moral rights legislation misconstrues the nature of art by assuming incorrectly that there is a strong connection between every artist and his or her work. In Professor Adler’s words, “This view overlooks that the child/artwork has grown up and left home—that works continue to evolve over time based on how they are presented and received. It overlooks that the child/artwork left home because the father sold him/it.”³⁴ But there is more going on in Professor Adler’s criticism than simply a recognition that much of the work protected by moral rights statutes has already been disposed of by the artist. Professor Adler goes on to attack the very nature of artistic authorship: “[M]oral rights law is premised on a transitory, albeit deeply powerful notion of artistic authorship: the romantic myth of the solo genius artist.”³⁵ Professor Adler expresses doubts whether the romantic vision of the artist was ever true and asserts

31. *Id.* at 1041.

32. *Id.* (footnote omitted).

33. *Id.*

34. Adler, *supra* note 2, at 271 (emphasis omitted).

35. *Id.*

that even if it were once true, “contemporary artists have been relentlessly attacking it for at least the last forty years.”³⁶

Professor Adler also rejects the traditional social rationales for moral rights protection of art, although most of her arguments regarding the social rationales are actually derived from her rejection of what she calls “the romantic myth of the solo genius artist.” Professor Adler’s basic claim with regard to social interest in art is that there is often a conflict between the social interest in preserving cultural objects and the individual artist’s interests that are specifically protected by statutes such as VARA. Professor Adler identifies various manifestations of this conflict. One such manifestation occurs when an artist destroys his or her work, thus denying society the benefit of viewing that work in the future.³⁷ Professor Adler notes that if the social interest in preserving cultural artifacts is the purpose of moral rights, then it is anomalous to give the individual artist the right in this situation since “the public interest is served by saving the paintings, contrary to the artist’s wishes.”³⁸ This and the other manifestations of the conflict between the public interest and the individual artist’s interests cited by Professor Adler are narrower and more pragmatic than her much more theoretical rejection of the traditional arguments favoring moral rights statutes in order to protect the artist’s individual interests. I will return in Part III to Professor Adler’s theoretical arguments regarding the nature of contemporary art and the individual artist’s interests after briefly discussing her other narrower, pragmatic objections to the general social interest in moral rights protection.

B. The Pragmatic Objections to Moral Rights

Professor Adler’s basic claim with regard to the social rationales for moral rights statutes is that such rationales do not justify the protections offered by the statutes because there is an inevitable conflict between the social interest in creating, displaying, or preserving art and the selfish individual interests of artists who are given complete control over their work by moral rights statutes. Leaving aside for the time being the example of the artist’s destroying his or her own work—which was

36. *Id.* at 271–72.

37. *See id.* at 273.

38. *Id.*

discussed briefly at the end of Part II.A³⁹—it is worth considering in greater detail each of Professor Adler’s other suggested manifestations of the conflict between individual artists and the social interest. Note again while reviewing these arguments that they do not depend on a postmodern or otherwise novel conception of artistic authorship. These are purely pragmatic arguments, which depend on the veracity of the claims that the social interest in creating and preserving artistic artifacts will be harmed if individual artists are given the legal right to protect the integrity of their work.

1. Society’s Interest in Destroying Art

Apart from the example of the artist’s destruction of his or her own work, the first manifestation of the conflict between society’s and the individual artist’s interest in art discussed by Professor Adler is society’s interest in destroying artwork that the artist wants to preserve.⁴⁰ The example she uses to illustrate this manifestation of the conflict is the case of Richard Serra’s *Tilted Arc*.⁴¹ This case provides critics of the protection of art under moral rights principles with an easy target. *Tilted Arc* was a sculpture installed outside a federal building in New York City. The work was large, abstract, and imposing—in both the sense that it was grand and stately and the sense that it aggressively thrust itself on observers. As Professor Adler notes, many people disliked the sculpture,⁴² and the federal government eventually decided to cut the sculpture up into large pieces before removing it to a storehouse in Brooklyn, far away from the space for which it was designed.⁴³

The reason that the *Tilted Arc* case is an easy target is because of the public and site-specific nature of the sculpture. To an average person, it is one thing to say that an artist has a right to protect work in the abstract, but it is quite another thing to say that the artist has the right to insist that the owner of an office building keep a 120-foot-long sculpture in place essentially indefinitely—even in the face of widespread discontent by the people who work in the building. But there are several problems with making *Tilted Arc* a representative case for the proposition that the law should recognize society’s occasional desire to destroy significant artwork. First of all, although the *Tilted Arc* case was litigated before VARA was

39. See *supra* notes 37–38 and accompanying text.

40. Adler, *supra* note 2, at 274.

41. *Id.*; see *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988).

42. Adler, *supra* note 2, at 274 (“[I]t is fair to say that many, many people detested *Tilted Arc*.”).

43. Richard Serra, *Tilted Arc Destroyed*, in WRITINGS, INTERVIEWS 193, 194 (1994) (describing the destruction of *Tilted Arc*).

enacted, that fact probably did not make any difference in the outcome of the case. As Professor Adler recognizes, it is highly unlikely that any of the moral rights statutes on the books today would have protected Serra's ability to force the government to keep *Tilted Arc* in the courtyard of the federal building.⁴⁴ As Professor Adler notes, Serra would likely lose either under cases that interpret the statutes as not covering relocation or under cases that decline to apply VARA to site-specific art.⁴⁵ So to the extent that we are debating moral rights in the context of the public's right to use public spaces unimpeded by massive pieces of site-specific, intrusive art, the courts have essentially already decided this matter against the artist.

But Professor Adler is asserting a much broader claim than is evident from her immediate focus on large, intrusive sculptures in public spaces, such as *Tilted Arc*. She is arguing much more broadly that "the public interest may sometimes lie in the destruction of art, even when the artist favors preservation."⁴⁶ On the assumption that the public interest will usually be represented by the government, which—in this country at least—often responds to lowest-common-denominator pressure from the population when it comes to controversial art,⁴⁷ Professor Adler's proposal would essentially enshrine in law a kind of officially enforced heckler's veto. Professor Adler's discussion of the artistic value of destroying art, which she at times subsumes into the public interest in destroying art, is addressed further in Part III. But if we leave aside for the moment particular artists' interest in destroying other artists' art⁴⁸ and focus rather on the interest of the general public and its political representatives, Professor Adler's proposal leaves us with several unsavory possibilities.

One possibility is that art could be destroyed at the behest of a general public that neither knows nor cares about the subject. The other is that art could be destroyed by politicians pursuing a religious or political agenda against contentious art. This is only a small step from the actions already taken by politicians such as Rudy Giuliani against cultural institutions⁴⁹ that had the temerity to display art that offended

44. See Adler, *supra* note 2, at 274 & n.62.

45. *Id.*

46. *Id.* at 274.

47. For several examples of this phenomenon, see *infra* note 49.

48. See *infra* notes 105–17 and accompanying text.

49. See *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 186 (E.D.N.Y. 1999) (issuing a preliminary injunction on the grounds that it would be unconstitutional for the Mayor and City of New York to withdraw funding and eject the

his—or his political supporters’—religious and political sensibilities.⁵⁰ The third and most unsavory possibility is that art could be destroyed by politicians seeking to use the art for ulterior purposes, in the way that the Nazis used shows of *Entartete Kunst*, or “degenerate art,” as a way of targeting Jews, leftists, and other political and cultural opponents.⁵¹ If we are concerned with the public interest in preserving and perpetuating a cultural legacy, it is difficult to see how the destruction of art will ever serve that interest, and it is equally easy to see how encouraging the destruction of art is likely to severely damage that interest.

One final point about Professor Adler’s arguments favoring the destruction of art as a social interest: Recall that Professor Adler’s first argument regarding what she calls “the conflict between artist and public”⁵² and the “myth of the artist”⁵³ that apparently perpetuates this conflict is that artists should not be allowed to destroy their own work because

Brooklyn Museum from its city-owned building after then-Mayor Rudy Giuliani found artwork in a museum show “sick,” “disgusting,” and offensive to Catholics and religion in general). This is hardly the only episode in which politicians have stooped to curry public favor by attacking a cultural institution or attempting to destroy art for political reasons. *See, e.g.*, *Nelson v. Streeter*, 16 F.3d 145, 148, 151 (7th Cir. 1994) (holding that several city aldermen violated the constitutional rights of an art student when the aldermen removed the student’s painting from the walls of the Art Institute of Chicago because they found offensive the painting’s depiction of Mayor Harold Washington); *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1125–26 (S.D. Fla. 1991) (holding unconstitutional Miami’s refusal to renew the lease for the Cuban Museum because of local opposition to the museum’s showing the work of artists who had not denounced Fidel Castro).

50. It should be noted that this is essentially Richard Serra’s interpretation of the government’s decision to destroy his sculpture. *See* Richard Serra, *Art and Censorship*, in WRITINGS, INTERVIEWS, *supra* note 43, at 215, 218 (“All of [former *New York Times* art critic Hilton] Kramer’s statements concerning my intentions and the effect of the sculpture are fabricated so that he can place the blame on me for having violated an equally fabricated standard of civility. *Tilted Arc* was not destroyed because the sculpture was uncivil but because the government wanted to set a precedent in which it could demonstrate its right to censor and destroy speech.”). Serra also notes that the *Tilted Arc* episode occurred during a period when other political attacks on art and the arts were rife, citing the attacks on the National Endowment for the Arts, Robert Mapplethorpe, and Andres Serrano. *See* Interview with Richard Serra, in WRITINGS, INTERVIEWS, *supra* note 43, at 263, 269.

51. *See* George L. Mosse, *Beauty Without Sensuality: The Exhibition Entartete Kunst*, in “DEGENERATE ART”: THE FATE OF THE AVANT-GARDE IN NAZI GERMANY 25, 25 (1991) (discussing the politicization of art in Nazi Germany, noting that the Nazis viewed Weimar culture as “‘Bolshevist’ culture, manipulated by the Jews,” and arguing that confiscating and displaying the “degenerate” art that represented Weimar provided “concrete evidence that the Nazis had saved German society from Weimar’s onslaught upon all the moral values that people held dear: marriage, the family, chastity, and a steady, harmonious life”).

52. Adler, *supra* note 2, at 273.

53. *Id.*

society may have an interest in preserving that artwork.⁵⁴ She then turns quickly to her primary argument, which is that artists should not be given the legal authority to preserve the integrity of their work because society may have an interest in destroying that work.⁵⁵ But if an artist lacks the absolute authority to destroy his or her work and also lacks the authority to preserve that work, then it is hard to know what to make of the social interest in overriding these decisions by the artist because there is apparently an equally strong social interest in both destroying and preserving art, depending on the whims of those enforcing the social interest.

What we must take away from this discussion is the uneasy recognition that under this scheme, control over art has suddenly shifted from artists to some collective entity other than artists. This is a disturbing shift because this approach gives us no way of controlling the aesthetic criteria—or lack thereof—employed by the collective entities that would now have the authority to exercise control over the preservation of art. Consider the possible representatives of the social interest: the government, which is systematically prone to viewing art through the lens of political or religious ideology; the general public, which is largely uneducated on matters of art and aesthetics and is prone to being guided in its approach to art by some variation on the proposition that “I know what I like”; or gallery owners and rich patrons, who have a vested economic interest that as often as not will deviate sharply from a purely abstract concern with artistic merit or the broader cultural heritage. Something will be preserved under this system, but it is unlikely to be the best art.

2. *Society's Interest in Favoring Curatorial Decisions About Art*

A second manifestation of the conflict between the individual artist's desires and the public interest cited by Professor Adler adds to the concern that in the absence of moral rights statutes artistic works will be vulnerable to every political and cultural fad and fixation. Professor Adler refers to this manifestation as “The Curator as Artist.”⁵⁶ Professor Adler's narrow point is to argue that curators of galleries and museums do—and should—manipulate the meaning of art through the display of that art, which

54. *Id.* (“[T]here are cases in which artists want to destroy work that the public arguably has an interest in preserving.”).

55. *See id.* at 274 (“[T]he public interest may sometimes lie in the destruction of art, even when the artist favors preservation.”).

56. *Id.* at 277.

individual artists should not be allowed to control. Professor Adler's larger point is that all art is capable of conveying multiple meanings, and the artist's intent about a particular work's meaning should not be allowed to "hold the work hostage from other meanings or interpretations."⁵⁷ This follows Professor Adler's general theme that the proponents of moral rights statutes are misguided when they seek to enshrine in law protection of the artist's own intentions about the meaning of his or her work.

The basic proposition that all works of art can convey multiple meanings is a perfectly respectable position; in fact, this proposition is so obviously true that it does not need defending. Every observer of a piece of art will take away from that art something different than what the artist saw in the same piece. This basic precept about the nature of art and observation is not really relevant to the subject of moral rights, however. In the context of moral rights statutes, we are not discussing the ability of multiple observers to view art and take away from that art different meanings. Rather, we are discussing the possibility of removing from the artist the power to attempt to convey his or her own artistic meaning and transferring that power to someone who may very well be hostile to the artist's own perspective.

The primary example that Professor Adler uses to illustrate this manifestation of the conflict between artists and society is a perfect case in point. The example involves a dispute between the artist Sol Lewitt and Elizabeth Broun, director of the National Museum of American Art, to which Lewitt had contributed a piece of art in conjunction with an exhibition centering on the work of photographer Eadweard Muybridge.⁵⁸ Lewitt's contribution included "a series of ten photographs of a fully nude woman advanc[ing] toward the viewer, who sees her through a series of circular apertures."⁵⁹ Broun was offended by Lewitt's work and decided to exclude it from the show on the ground that "peering through successive peep-holes and focusing increasingly on the pubic region invokes unequivocal references to a degrading pornographic experience."⁶⁰ Broun backed down from her threat to exclude Lewitt's work after the Addison Gallery of American Art, which had organized the original show, threatened to withdraw the show from the National Museum of American Art.⁶¹ Although she allowed Lewitt's work to remain

57. *Id.* at 278.

58. *Id.*

59. MICHAEL KAMMEN, VISUAL SHOCK: A HISTORY OF ART CONTROVERSIES IN AMERICAN CULTURE 83 (2006).

60. *Id.* (quoting Christine Temin, *Art Work Installed After Director Balks*, BOS. GLOBE, July 16, 1991, at 51, available at 1991 WLNR 1764313) (internal quotation marks omitted).

61. *Id.* at 83–84.

in the show, however, as Professor Adler notes, Broun “proposed to move it to a separate room with wall text explaining the issue and a blank book for visitors to record their thoughts.”⁶²

Although she disagrees with Broun’s prim reading of Lewitt’s work, Professor Adler defends Broun’s use of her curatorial prerogatives to display the work in a way that would fundamentally alter the message the artist intended to convey. To Professor Adler, this is a worthwhile example of a curator’s using existing art as the raw material with which to make new—and entirely different—art: “Rather than see such change as a violation of the spirit if not the letter of the law, we should see it as commitment to the vitality of art.”⁶³ But recall that Professor Adler’s larger point is that destruction of existing art is sometimes artistically and socially beneficial.⁶⁴ In light of that larger theme, the Sol Lewitt episode presents too easy a case. After all, although Lewitt was essentially called a pornographer in public and his work was labeled pornographic, the work was not harmed, much less destroyed.

But suppose the facts were changed slightly. Suppose the museum went beyond merely relegating the disfavored art into a separate room and having patrons comment on it. The Museum of Modern Art (MoMA) owns one of Picasso’s best and most important paintings—*Les Femmes d’Alger*.⁶⁵ The painting is a stylized depiction of five nude prostitutes in a brothel in Barcelona.⁶⁶ Suppose that at some point a MoMA curator in the vein of Elizabeth Broun concludes that the devil “invokes unequivocal references to a degrading pornographic experience.”⁶⁷ Suppose further that instead of relegating the painting to a side room, however, she decides to fix the offending portions of the painting by hiring a painter to paint clothes on the figures, paint smiles on their faces, and insert the figures of three small, happy children playing in the foreground. This example is far more apropos than the Sol Lewitt episode to Professor Adler’s overriding theme that artistic destruction should be encouraged to promote

62. Adler, *supra* note 2, at 278.

63. *Id.* at 278–79.

64. See *supra* notes 52–54 and accompanying text.

65. The MoMA’s catalog of its most important holdings describes this painting self-servingly—but also probably accurately—as “one of the most important works in the genesis of modern art.” THE MUSEUM OF MODERN ART, MOMA HIGHLIGHTS: 350 WORKS FROM THE MUSEUM OF MODERN ART NEW YORK 64 (Harriet Schoenholz Bee & Cassandra Heliczer eds., 2004).

66. *Id.*

67. KAMMEN, *supra* note 59, at 83.

artistic creation. One wonders, therefore, whether she would consider the hypothetical destruction of *Les Demoiselles* an example of our “commitment to the vitality of art.”⁶⁸

3. *Society’s Interest in Allowing Others To Modify an Artist’s Work*

Professor Adler’s last two manifestations of the conflict between the social interest and individual artists can be dealt with quickly. One of these manifestations involves situations in which an artist’s work may be improved by others who violate the artist’s interests by modifying the artist’s work.⁶⁹ Professor Adler cites the famous example of the critic Clement Greenberg’s destroying the painted surfaces of sculptures produced by David Smith.⁷⁰ Greenberg did this as the executor of Smith’s estate, and as Professor Adler notes, the actions were directly contrary to Smith’s desires, and Smith would almost certainly have disowned the sculptures if he were still alive.⁷¹ Professor Adler nevertheless argues that what could plausibly be construed as vandalism made Smith’s sculptures “better,” at least in the sense that collectors, museums, and galleries prefer the vandalized, unpainted sculptures to the original, painted ones.

In fact, the Greenberg/Smith episode proves much less than Professor Adler indicates. Instead of demonstrating that artists’ work should be freely subject to modifications by others in the interest of conforming an idiosyncratic individual artist’s vision to the contrary vision of society as a whole, all this example proves is that the high-profile modification of a prominent artist’s work will make the vandalized work notorious, which will have the bizarre effect of increasing that work’s value on the market and thereby make the work more precious to collectors and museums. As Professor Adler herself notes, the market value of a painting is no indicator of artistic merit.⁷² In the situation described by Professor Adler, there are only two possible outcomes: either the artist has the legal right to stop other persons from modifying the art, or those other persons have the legal right to modify art against the artist’s wishes. In a world in which the aesthetic values that inform the appellation *better* are at least debatable, there is no good reason to assume that persons other than the artist will have a better grasp on what is “better” than the artist herself.

68. Adler, *supra* note 2, at 279. The answer to this question is probably “yes,” given her approach to the Chapman brothers’ work, which is discussed *infra* notes 105–17 and accompanying text.

69. See Adler, *supra* note 2, at 275.

70. *Id.*

71. *Id.*

72. *Id.*

4. Society's Interest in Recognizing Multiple Authorship

Professor Adler's final manifestation of the conflict between the social interests in art and the interests of individual artists involves cases where multiple persons contribute to an artist's work.⁷³ Such situations actually have very little to do with issues pertaining to moral rights. While interesting questions of authorship might arise from the work of individuals such as Damien Hirst and Jeff Koons, who farm out to others the actual production of art that they then claim as their own,⁷⁴ in many cases artists actually produce their own work. Even artists who produce their own work, however, do not operate in a vacuum; influences from their training and personal experiences, as well as other people—including other artists—will all factor into the substance of their work. The fact that artists are influenced by the outside world and other artists says nothing about whether those artists should have the legal right to protect their work from desecration or destruction.

Many collaborations in the visual arts world are analogous to the Eliot/Pound collaboration in the literary arts. Probably the greatest example of extremely close artistic collaboration between visual artists in the modern art era is that between Pablo Picasso and George Braque during the heyday of analytic cubism.⁷⁵ Many of the paintings produced by the two men during that period are indistinguishable to the untrained eye. Much more so than the work of Eliot and Pound, Picasso's analytic cubist paintings were Braque's, and Braque's paintings were Picasso's. Yet both Picasso and Braque had very distinctive ideas about the nature of what they were doing, and ultimately they took the legacy of analytic cubism in very different directions. If Picasso's and Braque's analytic cubist works are viewed as merely small portions of two long, rich, and interesting—and

73. Professor Adler cites as an example from literary arts Ezra Pound's contributions to T.S. Eliot's poem *The Waste Land*. *Id.* at 276.

74. See Denis Dutton, *Has Conceptual Art Jumped the Shark Tank?*, N.Y. TIMES, Oct. 16, 2009, at A27 (discussing the fact that Hirst and Koons hire contractors who actually produce the art that the artists call their own). Unfortunately, the economic downturn has been hard on the artists behind the "artists." Damien Hirst, for example, recently dismissed several workers who make the pills for the medicine cabinets that Hirst markets as art. One such cabinet filled with pills sold for \$14.4 million in 2007. See Dave Itzkoff, *Hirst Studio Hard Times*, N.Y. TIMES, Nov. 25, 2008, at C2.

75. See Rosalind Krauss, *The Motivation of the Sign*, in PICASSO AND BRAQUE: A SYMPOSIUM 261, 270 (Lynn Zelevansky ed., 1992) (noting that although there were subtle stylistic differences between the two artists, there was a period during which "the work of the two [wa]s all but indistinguishable").

very different—careers, then paintings whose authorship is almost indecipherable look less like collaborations and more like the brief intersection of two paths going in very different directions. It seems self-evident, therefore, that both artists' work should be protected. Certainly one artist—much less the gallery owners and collectors—should not be given the right to modify or destroy the other artist's work in order to favor one version of the trajectory of analytic cubism over another. If society's interests and the need to preserve a cultural heritage are what we are worried about, then it has to be said that neither Braque nor Picasso had a more socially beneficial aesthetic, and the proper decision would be to preserve both of their legacies.

5. The Failure of Pragmatic Arguments Against Moral Rights

At the end of the day, pragmatic arguments such as the ones discussed above do not undercut the case for a social interest in providing moral rights protection to artists. None of the arguments Professor Adler musters in describing the four manifestations of the conflict between an individual artist and the larger social interest supports the existence of such a conflict, much less supports the existence of a conflict that should be resolved in favor of giving control over artwork to someone other than the artist. Moreover, the implicit proposals that can be found in this discussion—in particular, the eradication of moral rights protections—would almost certainly lead to a diminution in the overall amount of art available in the culture. After all, it seems logical to assume that less protection of art means that more art will be destroyed. Perhaps this is not something that would particularly bother Professor Adler; in fact, facilitating the destruction of art as an artistic enterprise is the very heart of her proposal.

But the key point is that despite her best efforts, Professor Adler has not demonstrated that there is any real pragmatic issue with moral rights statutes. There is something much deeper at issue here than pragmatic claims about the conflict between the social interest in art and the operation of moral rights statutes. Professor Adler's main target, rather, is the very concepts of art and the artist. Professor Adler is not particularly concerned that moral rights statutes do not always protect the art that is the justification for the statutes' existence because Professor Adler is not convinced that the art is worth protecting or, for that matter, that the thing being protected should even be called art. Professor Adler's claims against moral rights statutes are really claims about the nature of art that these statutes protect. This is why, despite paying lip service to the subject, Professor Adler is not really concerned with the social-interest justifications for moral rights statutes; the object of her focus instead is with the

individual artist's interests, the protection of which is a significant justification for the statutes. Professor Adler is concerned not so much that the statutory protection given to these individual artists is going to somehow undermine the social interest in art and culture but rather that the statutory protection of individual artists will perpetuate the recognition of entities—art and artists—that do not, or should not, exist. Professor Adler's main problem with these statutes, in other words, is that they are predicated on the vision of the individual Romantic artist—and the conception of art that attaches to such an artist.

Part III will delve into these different conceptions of art as they apply to moral rights statutes. The issues discussed in Part III can be phrased in various ways. First, if contemporary art theory effectively denies that art exists and therefore has killed off the artist, then why do we need art protection measures, such as moral rights statutes? On the other hand, coming at the same question from another direction, if we kill off legal measures to protect art, such as moral rights statutes, does that not send a message from the culture that art really does not exist—or is not at all important—and that artists should be advised to drop their brushes or their sculpting tools and focus on their day jobs? And finally, even if the world of contemporary art and art theory is exactly as Professor Adler describes, does it really matter with respect to the continuing viability of moral rights statutes? Even if something can no longer be called art, is it not perhaps still worthwhile to preserve aesthetically pleasing objects?

III. MORAL RIGHTS AND THE END OF ART: THE UNEASY RELATIONSHIP BETWEEN ART THEORY AND THE LAW REGARDING ART

Professor Adler views her criticism of moral rights statutes to be nothing less than an explicit challenge to the theoretical basis of these statutes, which Professor Adler believes is inconsistent with the nature of contemporary art and art theory.⁷⁶ Although Professor Adler casts her criticism of the theory underpinning moral rights statutes as an effort to advance the cause of art, acceptance of her criticism would in fact permit the destruction or desecration of some art and thus lead to at least a slight diminution in the quantum of art available to the culture. It would also, at least in some measure, distort the art world by favoring some forms of art—conceptual art, derivative art, performance art, and other

76. See Adler, *supra* note 2, at 265 (noting that her article “challenges the key assumptions of virtually all moral rights scholarship”).

art produced in nontraditional modes—over other forms of art, especially art produced in traditional media such as sculpture, painting, photography, and drawing. Acceptance of these concepts would also distort the art world through the adoption of a corrosive view of what constitutes art. According to this view, original art produced in a traditional medium by an individual artist would become the fodder for—and therefore become subordinated to—conceptual and other nontraditional forms of art. Although newer forms of art would receive society’s recognition, if not society’s protection, under this theory—legal protection would disappear because moral rights statutes would no longer be necessary—art that does not conform to these new notions of art would lose not only society’s protection but also society’s recognition.

In exchange for permitting this attack on art, the culture would receive little or nothing of artistic value—or at least little or nothing in addition to what society would already be provided by artists in the absence of de facto legal authorization of artistic destruction or desecration. Professor Adler is essentially proposing a tradeoff. The tradeoff would officially permit the destruction or desecration of some art, including some important art, in exchange for the production of new art that would be based—often physically—on the carcass of the old. It is the premise of this Article that the tradeoff suggested by Professor Adler is a bad one, both because her theory of art is flawed and because, pragmatically speaking, every piece of new art that she implicitly promises under her proposed regime will be delivered anyway regardless of whether moral rights statutes and other legal protections of existing art are in place. Part III will focus on Professor Adler’s theory of art, and Part IV will focus on the pragmatic consequences of that theory in terms of artistic productivity.

A. *The End of Art or the Proliferation of Art?*

The notion that moral rights statutes are incompatible with the dominant contemporary definition of art is central to Professor Adler’s argument.⁷⁷ According to Professor Adler, it is not just that traditional definitions of art are inconsistent with contemporary conceptions of art; rather, it seems that contemporary artistic practices have moved so far beyond the traditional definitions that any attempt to define art would be inconsistent with contemporary conceptions about the subject. Professor Adler highlights this fact at the very beginning of her article, when she provides the broad definition of art that she uses as the basis for her criticism of moral rights statutes and the types of art that those statutes protect:

77. *See id.*

I use the term “art” to describe work that critics, scholars, galleries, museums, and “artists” generally discuss as “art.” But I also use the term “art” to include works that make us ask the question “what is art?” in the first place. By using the term so broadly, I mean to illustrate a central point of this piece: attacks by “artists” on the category of “art” have at once constituted and begun to destroy the meaning of that term.⁷⁸

As this passage indicates, Professor Adler’s criticism of the statutory protection of art is predicated partly on the notion that there is no longer any such thing as art and therefore the protection of art is unnecessary. In her view, the exponential expansion of the category of art ultimately leads to the disintegration of that category. If everything is art, then nothing is art.

On the other hand, in other places Professor Adler reveals that her claims about the impending demise of art are not radical contentions about a vaunted historical category of intellectual endeavor but rather much more mundane and tendentious arguments in favor of one type of art and against another. After noting that contemporary art has been defined by “its attack on the coherence of ‘art’ as a category,”⁷⁹ for example, Professor Adler goes on to assert that “[i]n this light, physical attacks against art objects can be understood as particularly valuable forms of expression.”⁸⁰

These are, of course, very different claims. If indeed the category of “art” no longer makes any sense, the solution is simple: shut down the entire enterprise by refusing to recognize its legitimacy, close the art schools, stop trying to find patrons to populate the galleries in Chelsea on weekends, and let Roberta Smith—*The New York Times* chief art critic—move on to doing something productive with her time, such as reviewing movies. On the other hand, if the claim is that some contemporary artists attack the coherence of “art” because they prefer to use “physical attacks against art objects” as their métier, then the claim must be viewed as a much more contestable pitch for one type of art against another. Instead of an argument that art no longer exists, it is an argument that some types of art are better than others. It is an argument, in other words, in favor of art that is conceptual rather than visual, derivative or even parasitic rather than original (in the sense that it feeds off of other destroyed works), and impermanent—or faddish, depending

78. *Id.* at 266.

79. *Id.* at 287.

80. *Id.*

on the attitude one wants to take toward the work. A case can be made that some of the work produced in the conceptual genre is very good. It is also possible to attempt to make the case that art of this type is superior artistically to art that has been produced in a more traditional form. But the case for the artistic superiority of conceptual or postmodernist art or some variation of that theme will not logically support a frontal attack on a regime of legal protection for moral rights, nor will it support the claim that artists operating in category B have the right to advance their artistic ambitions by destroying the work of artists operating in category A.

Professor Adler is not alone in suggesting that art has become so unmoored from its origins that the term essentially has become meaningless. As she points out, there are numerous artists, critics, and art theorists who agree with her.⁸¹ There are many postmodernist critics and theorists who argue, like Professor Adler, that art no longer can be meaningfully defined and that we should abandon the category of art altogether. Take, for example, the philosopher and art critic Arthur Danto, whom Adler herself describes as “renowned.”⁸² Several years ago, Danto wrote a famous essay in which he proclaimed “the end of art.”⁸³ This essay provides a philosophic overlay for the claims being made by Professor Adler. Although Professor Danto has somewhat different emphases than Professor Adler, they are both talking about much of the same phenomenon: the end of art and what comes after.

Danto and Adler come at this question from the same angle. Like Adler—and for that matter Hegel, from whom Danto takes his cue—Danto argues that “the concept of art is internally exhausted” and that art has “lost any historical direction.”⁸⁴ But Danto goes far deeper into the subject of why this is so and therefore provides the back story to the various claims that Professor Adler makes in her article concerning the need to abandon the traditional definitions of art and society’s fixation on the romantic artist. The story Danto tells is quite straightforward. Put simply, in his view, the history of art is about what he calls the Western “pursuit of optical fidelity.”⁸⁵ In other words, until very recently art was an effort to achieve the exact replication of reality; it was thus largely indistinguishable from the natural sciences, in that both disciplines “could then be read as the progressive shrinking of the distance between

81. See, for example, *id.* at 285–86, for a selection of quotes from critics and artists supporting Professor Adler’s position.

82. *Id.* at 285.

83. See Arthur C. Danto, *The End of Art*, in *THE DEATH OF ART* 5 (Berel Lang ed., 1984).

84. *Id.* at 7.

85. *Id.* at 13.

representation and reality.”⁸⁶ Thus, for many years artists devoted much of their attention to developing techniques to mimic motion or distance.⁸⁷ With the discovery of perspective and the development of photography and, much later, motion pictures, each of which greatly advanced “[t]he cultural imperative to replace inference with direct perception,”⁸⁸ art may have in effect doomed itself, at least from the perspective of this particular view of art as a progressive, mimetic discipline. “When, for every perception range R, an equivalent could be technically generated, then art would be over with just as science would be over with when, as was thought to be a genuine possibility in the nineteenth century, everything was known.”⁸⁹

Danto argues that this progressive model of art has not prevailed for some time—probably since the early twentieth century, when cinema took over art’s representational obligations. But the alternative models of art that he suggests hold out no more hope than that the representational model of art can survive as a coherent intellectual phenomenon. The model that Danto argues gained prominence in the early twentieth century no longer was marked “by the artist’s mastery of illusionist technique, but rather consist[ed] in the externalization or objectification of the artist’s feelings toward what he shows.”⁹⁰ Thus, Danto argues, the art world moved from a regime focused on representation to a regime focused on expression.⁹¹ This transition altered the artistic landscape in a fundamental way. One consequence of such a transition, according to Danto, is the abandonment of the notion of artistic progression.⁹² Within the visually oriented representation model of art, there is a sense of constant progression as artists discovered increasingly sophisticated ways to depict reality accurately. The new expressive model of art, on the other hand, “makes possible a radically discontinuous view of the history of art, in which one style of art follows another, like an archipelago, and we might in principle imagine any sequence we choose.”⁹³

Unfortunately, according to Danto, this model also proved unsatisfactory, in large part because each new artistic movement in the twentieth century

86. *Id.* at 9.

87. *See id.* at 10.

88. *Id.* at 13.

89. *Id.* at 19.

90. *Id.* at 23.

91. *See id.*

92. *Id.* at 19.

93. *Id.* at 25.

“seemed to require some kind of *theoretical* understanding to which the language and the psychology of emotions seemed less and less adequate.”⁹⁴ So in place of the outdated representational model and the inadequate expressive model, Danto proposes to install a philosophical model of art.⁹⁵ Danto believes that this model will both explain the increasingly fractured forms that artistic objects take in the modern world and also explain why art as a subject has pretty much reached the end of its tether. The theme of the philosophical model draws again on Hegel and in particular on Hegel’s emphasis on self-realization through self-knowledge. In the context of art, this means that “[i]t is possible to read Hegel as claiming that art’s philosophical history consists in its being absorbed completely into its own philosophy.”⁹⁶ From this point it is not difficult to glimpse how the end of art comes about. “[I]f we look at the art of our recent past in these terms, grandiose as they are, what we see is something which depends more and more upon theory for its existence as art”⁹⁷ The culmination of the process is inevitable: “Virtually all there is at the end *is* theory, art having finally become vaporized in a dazzle of pure thought about itself.”⁹⁸

So here, according to Danto, is how art ends, and what the art world will look like after its demise:

Of course, there will go on being art-making. But art-makers, living in what I like to call the post-historical period of art, will bring into existence works which lack the historical importance or meaning we have for a very long time come to expect. The historical stage of art is done with when it is known what art is and means. The artists have made the way open for philosophy, and the moment has arrived at which the task must be transferred finally into the hands of philosophers.⁹⁹

This long digression into end-of-art theory has been necessary because the paragraph just quoted provides the nub of Professor Adler’s critique of moral rights statutes. Although Professor Adler may not agree with all of the finer points of Professor Danto’s critique of the history of art, her bottom line is certainly the same: art—at least art that focuses on exploring human perceptions and utilizes the visual media—is dead. In place of the now-dead visual art, we have only conceptual art, and in place of painters, sculptors, lithographers, and so forth, we have a new batch of conceptual artists, on whom Danto has generously bestowed the title *philosopher*.

94. *Id.* at 29.

95. *Id.* at 31.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

One of the many paradoxes of this account is that after the end of art, art, of some sort, will survive. Danto joins Hegel in asserting that art “is quite finished with as an historical moment,” but Danto emphasizes that after proclaiming art dead, Hegel “did not commit himself to the prediction that there would be no more works of art.”¹⁰⁰ This paradox is also at the heart of Professor Adler’s claims regarding contemporary art, insofar as she simultaneously claims, on the one hand, that the era of art and the individual artist is over and, on the other hand, that the destruction of art is necessary because it will lead to the creation of more art. Within the context of his philosophy, Hegel’s version of this argument at least has a certain internal logic because he was viewing art through a philosophical and historical lens that required art to serve a particular historical function. In the Hegelian system of thinking about these things, once art ceases to serve its designated historical function, art must be declared dead.

The problem with Professor Adler’s versions of this argument, however, is that she cannot resort to the overlay of Hegelian historical determinism. She is viewing the matter not through history but purely through the lens of art itself. Her claim is nothing less than that the art that will be produced in the new, post-art era will be better than the art produced in prior eras.¹⁰¹ This, in part, explains the logic of Professor Adler’s argument that the law should permit conceptual artists to destroy art from previous eras in order to create their new work.¹⁰² Unlike Hegel, therefore, Professor Adler is making a purely aesthetic claim. The problem is that on the way to making this claim she has effectively killed off aesthetics by announcing that art as a visual endeavor has been forced to cede the stage to conceptual art. After all, it is hard to find aesthetic criteria that will apply easily to art that as a matter of principle eschews the visual focus. Note that this abandonment of aesthetics is entirely consistent with the attitude adopted by the conceptualist hero Marcel Duchamp, who liked to claim that he produced work that could not be “‘looked at’ in an aesthetic sense.”¹⁰³ Duchamp also liked to describe himself as

100. *Id.* at 6.

101. This is what I assume Professor Adler means when she argues that “there are vital *artistic* interests, not merely social or political ones, in altering, vandalizing or even destroying unique works.” *See* Adler, *supra* note 2, at 281.

102. *See id.* at 281–82 (applying this theory to the defacing of rare Goya prints by the Chapman brothers).

103. PIERRE CABANNE, *DIALOGUES WITH MARCEL DUCHAMP* 43 (Ron Padgett trans., 1971).

having an “antiretinal attitude,” complaining that since at least the 1800s, painting had been addressed to the eye, thus abandoning painting’s other functions—religious, philosophical, and moral.¹⁰⁴

The end-of-art thesis ultimately suggests a large number of questions for which it provides very few answers. As it relates to Professor Adler’s argument against art-protection statutes, the two most important propositions of her theory are the following. First, both Professor Danto and Professor Adler assert (in Danto’s case) or suggest (in Adler’s case) that art as a purely visual medium has nothing more to contribute to our cultural life. For both Danto and Adler—and for that matter, Duchamp—the visual has been supplanted by the conceptual. The second proposition is that conceptual artists have something so vital to contribute to the culture that we should afford them the right to use, desecrate, or destroy cultural artifacts in the making of their own work. It is by no means obvious that either of these two propositions is true—first, that the visual arts are quaint anachronisms and, second, that conceptual art has become the only true and worthwhile art—much less that they are so incontrovertibly true that they should be used as the basis for undercutting statutes designed to protect visually oriented art from those who would destroy it. To investigate what merit can be found in these two central precepts of the end-of-art thesis, it is helpful to return to Professor Adler’s contention that destruction is critical to the creation of contemporary art.

B. The End of Art and Destruction-as-Artistic-Creation

So how does Professor Adler’s destruction-as-artistic-creation paradigm fit into the end-of-art thesis? Professor Adler devotes a great deal of time to arguing that there is an artistically distinct value in the destruction of original pieces of art.¹⁰⁵ Indeed, this is the core of her argument against VARA and other moral rights statutes. This is probably a logical necessity because without the notion that the destruction of art itself has intrinsic artistic value, it makes no sense—even under the most postmodernist conceptions of art—to remove legal protections from existing artwork. After all, even if some contemporary conceptions of art deny that the term *art* has any meaning vis-à-vis many of the objects—paintings, sculptures, drawings, et cetera—that in previous eras may have qualified as artwork, these objects may nevertheless continue to have value in the postmodern era as historical, sociological, or political artifacts—“historical

104. *Id.*

105. *See* Adler, *supra* note 2, at 280–84 (describing the artistic value of destroying art).

fossils,” in Danto’s view.¹⁰⁶ So given that these artifacts still have value of some sort even after the end of art, the only way to justify destroying those objects is to demonstrate that the destruction produces other social benefits, such as the production of new, more worthwhile artwork, probably in the form of conceptual pieces representing the advance of philosophy.

Unfortunately, the examples Professor Adler uses to bolster the artistic argument in favor of the destruction and desecration of art provide unconvincing support for this thesis. Professor Adler’s primary example is a notorious case from 2001 in which two British conceptual artists known as the Chapman brothers purchased a rare set of Francisco de Goya’s *Disaster of War* prints and proceeded to deface the images in those prints, thereby destroying the originals by superimposing pictures of puppy dogs and clown heads.¹⁰⁷ The defaced images were titled, appropriately enough, *Insult to Injury*, and the show at the Modern Art Oxford gallery in which the images were shown for the first time was called, even more appropriately, *The Rape of Creativity*.¹⁰⁸ Professor Adler seems to argue that the Chapman brothers’ defacement of the Goya prints is every bit as artistically significant as the original pieces:

Goya, as the Chapmans remind us, was a symbol of the “individuated Romantic artist.” Goya held out hope that art could address our deepest humanity. By attacking the ultimate expression of art’s moral voice, *Insult to Injury* becomes a meditation on the loss of that conception of art. The Chapmans’ work proclaims that the romantic idea of art as an exalted realm, expressive of our humanity and imbued with the creative spirit of the author, is over.¹⁰⁹

Perhaps art’s moral voice is lost—it certainly is lost on the Chapmans—but there are at least three other ways of viewing the Chapmans’ attack on work that, as Professor Adler herself recognizes, is revered and idolized in the art world. One alternative way of viewing the Chapmans’ work is through the lens of what they offer as a substitute for the ideal of art that they are attacking. They are attacking, to quote Professor Adler, the “idea of art as an exalted realm, expressive of our humanity and imbued with the creative spirit of the author.”¹¹⁰ Unfortunately, Professor Adler does

106. See Danto, *supra* note 83, at 7.

107. Adler, *supra* note 2, at 281–82.

108. Jonathan Jones, *Look What We Did*, *GUARDIAN* (London), Mar. 31, 2003, at G2, available at <http://www.guardian.co.uk/culture/2003/mar/31/artsfeatures.turner.prize2003>.

109. Adler, *supra* note 2, at 282 (footnotes omitted) (quoting JAKE CHAPMAN & DINOS CHAPMAN, *Introduction to INSULT TO INJURY* (2004)).

110. *Id.*

not discuss what they offer in exchange, which is basically an idea of art as a superficial and commercial enterprise, devoid of humanity, and imbued with the creative spirit of the dollar, the pound, and the euro.

They come by this approach naturally. The Chapmans are members of the Young British Artists, also known as the YBAs, a designation coined in the early 1990s by the British advertising magnate, Thatcherite minion, gallery owner, and new-art entrepreneur Charles Saatchi.¹¹¹ Other artists in Saatchi's stable include Damien Hirst, whose most famous work is probably still his shark in formaldehyde,¹¹² and Tracey Emin, who is best known for a piece called *My Bed*, which was comprised of exactly that—the artist's unmade bed “littered with blood-stained underwear, condoms and lubricant.”¹¹³ My point is not to highlight the contrast between the sublime Goya and the crass vandals who would destroy his work; my point is simply to point out that there are two very different conceptions of art competing here, and it is not at all clear that the Chapmans' conception of art is correct, much less that it should be allowed to achieve an aesthetic victory by exterminating its adversary.

A second way of viewing the Chapman brothers' work is through the lens of technical competence. The Chapmans' use of materials and technique is, to put it mildly, unconventional. In addition to the defaced Goya prints, they have produced works using materials such as mannequins, plastic models, cheap plastic toys, snakes and bugs, and sex dolls.¹¹⁴ There are many ways to explain the Chapman brothers' avoidance of traditional materials and techniques. One possible explanation is that the Chapman brothers simply do not paint or draw very well.¹¹⁵ Another

111. For a general discussion of Saatchi and his relationship with the YBAs and Margaret Thatcher, see Deborah Solomon, *The Collector*, N.Y. TIMES MAG., Sept. 26, 1999, at 44. See also *infra* notes 170–75 and accompanying text.

112. The shark was eventually sold to an American collector, providing Saatchi with a profit of nearly seven million pounds. Richard Brooks, *Hirst's Shark Is Sold to America*, SUNDAY TIMES (London), Jan. 16, 2005, at 1.

113. Eric Konigsberg, *Quite Big in Britain, Not Quite in the U.S.*, N.Y. TIMES, Nov. 14, 2009, at C1.

114. Works using these materials can be found on the Chapman brothers' portion of the White Cube Gallery website. See *Jake and Dinos Chapman*, WHITE CUBE, http://whitecube.com/artists/jake_dinos_chapman/ (last visited Dec. 28, 2011).

115. Credibility was recently added to the suspicion that conceptual artists may lack certain basic artistic skills by the overwhelmingly negative critical response to a show of new paintings by Damien Hirst, one of the Chapman brothers' fellow high-profile conceptual artists and Charles Saatchi stablemates. After spending his career marketing conceptual art and a few schematic paintings—most of which were actually produced by other people—Hirst responded to the increasing prevalence of traditional painting, see *infra* notes 165–87 and accompanying text, by trying to paint. The result was devastating. Some of the reviewers' comments about his work include: “[The paintings are] thoroughly derivative. Their handling is weak. They're extremely boring Hirst, as a painter, is at about the level of a not-very-promising, first-year art student.” Tom Lubbock, “*Are Hirst's Paintings Any Good? No, They're Not Worth Looking at,*”

possible explanation is that they prefer three-dimensional work to two-dimensional work. Yet another possible explanation is that they are participating in a competition between different styles of art by defacing prominent examples of the competing style. Whichever explanation is the true one, each leads to the conclusion that the destruction of works such as the Goya prints is not a terribly creative enterprise. At worst, such destruction simply reflects the artist's own lack of skill; at best, it is an effort to destroy a competing vision of art. Again, under this view of the Chapman brothers' work, the moral rights model's insistence on protecting existing art seems to be the preferable approach.

A third way of viewing the Chapman brothers' work is through the prism of artistic motivation. Professor Adler gives the Chapman brothers a lot of credit. She argues that the Chapman brothers' defacement of the Goya prints had the intent and effect of attacking the image of the idealized Romantic individual artist in order to pronounce dead the conception of art based on that Romantic ideal.¹¹⁶ The problem is that this does not really seem to be the case with the Chapman brothers. Even their supporters concede that they are somewhat juvenile characters.¹¹⁷ Perhaps their

INDEPENDENT (London), Oct. 14, 2009, <http://www.independent.co.uk/arts-entertainment/art/features/are-hirsts-paintings-any-good-no-theyre-not-worth-looking-at-1802080.html>. "At its worst, Hirst's drawing just looks amateurish and adolescent. His brushwork lacks that oomph and panache that makes you believe in the painter's lies. He can't yet carry it off. . . . [T]hese paintings are a memento mori for a reputation." Adrian Searle, *Damien Hirst's Paintings Are Deadly Dull*, GUARDIAN (London), Oct. 14, 2009, <http://www.guardian.co.uk/artanddesign/2009/oct/14/damien-hirst-paintings-wallace-collection>. "Although they have impact as a group, individually many of the paintings simply don't pass muster. Details are tentatively painted; compositions fall apart under scrutiny. . . . [A]nyone who first encountered Hirst through these works would be entirely justified in wondering what all the fuss had been about." Sarah Crompton, *Damien Hirst: The Blue Paintings at the Wallace Collection, Review*, TELEGRAPH (London), Oct. 13, 2009, <http://www.telegraph.co.uk/culture/art/art-reviews/6317313/Damien-Hirst-The-Blue-Paintings-at-the-Wallace-Collection-review.html>.

The paintings are dreadful. . . .

. . . .
These works are utterly derivative of Bacon (give or take a dash of Giacometti), but they completely lack his painterly skill. And their metaphors are as ham-fisted as the application of pigment.

. . . [T]he artist who has made his reputation with shock now produces works that are shockingly bad.

Rachel Campbell-Johnston, *Damien Hirst Abandons Shock of the New for Old-Fashioned Art—But It's Shockingly Bad*, TIMES (London), Oct. 14, 2009, at 4.

116. Adler, *supra* note 2, at 282.

117. As the *Daily Telegraph's* art critic once noted—in a generally favorable review of the Chapman brothers' show at the Modern Art Oxford—"I long ago reached

defacement of the Goya prints was a serious effort to make a serious point, or maybe it was the functional equivalent of a spoiled kid's standing on a coffee table and shouting "look at me" at the top of his voice. The fact is, it is more than a little strange for artists who are trying to denounce the concept of the heroic individual artist to draw so much attention to themselves by casting themselves in the roles of the heroic destroyers of the outdated Romantic ideal of the individual artist. The more plausible explanation is that the Chapman brothers are ambitious strivers who happened to hit on a perfect ploy to cultivate the publicity that is central to their artistic and commercial personas. They are not really destroying Goya; rather, they are feeding off him. If the Chapmans had published multiple pages of pictures depicting clowns and puppies on regular drawing paper, the world's response would likely have been embarrassed silence. But publish the same pictures of clowns and puppies pasted onto copies of rare Goya prints, and suddenly the Chapmans have generated for themselves a cause célèbre. After all, if the person who produced the Goyas is famous and world renowned, then the persons who destroyed the Goyas should be even more so.

The question here is not whether the Chapmans are good or bad artists, or whether their attack on the Goya prints served some higher artistic ideal or was simply a crass commercial ploy. The question is whether any of these possible interpretations of the Chapmans' work—which, like Professor Adler, I am using as a surrogate for the full range of conceptual and other nontraditional art—justifies the destruction of existing art. Almost everything that the Chapmans wanted to do by way of critiquing Romantic notions of art and artists—assuming that is what they wanted to do—could be achieved without destroying the original Goya prints. Pasting their puppy dogs and clown heads onto reproductions of the Goya prints would have served much the same purpose as defacing the originals. The only objective that would not be achieved by using reproductions is the one that has little or no connection to the making of art: that is, the craving for publicity that would be quenched by the public's vociferous response to the fact that the *les enfants terribles* have just destroyed an irreplaceable original work of art. Perhaps there is some argument for why generating publicity for the likes of the Chapman brothers is worth the loss of the Goyas, but I do not believe that Professor Adler has yet articulated one.

the conclusion that the Chapmans are genuinely strange people, two grown men arrested in early adolescence." Richard Dormant, *Inspired Vandalism*, DAILY TELEGRAPH (London), Apr. 30, 2003, at 17, available at 2003 WLNR 4187006.

C. Reconceptualizing Moral Rights Statutes

The Chapman brothers and similar conceptual artists highlight one of the unspoken consequences of the theories of art advanced by Professors Danto and Adler. The efforts of Professors Danto and Adler to reconcile art with contemporary art theory envision more than just the end of art; they also envision the end of the artist. Oddly enough, this leads them to glorify the likes of the Chapman brothers—who long ago abandoned any pretense of producing anything but the most conceptual of conceptual art, but who are not exactly shy about attracting attention to themselves in all the ways that are presumably characteristic of the typical Romantic artist. This seeming inconsistency aside, the notion that the individual artist is a useless anachronism who died along with art itself has special relevance for discussions of moral rights statutes. In Professor Adler's criticism of moral rights statutes such as VARA, she focuses on the most obvious, pragmatic objective of such statutes, which is to protect art on behalf of the entire culture.¹¹⁸ As she says, the theory of the statutes' proponents is that the artist will protect art from those who seek to destroy or deface it, thereby allowing the culture as a whole to benefit in perpetuity from the existence of that art.¹¹⁹ Professor Adler, on the other hand, registers serious doubts as to whether this is true.

Focusing on this pragmatic objective allows Professor Adler to make her strongest criticism of the moral rights regime. She notes, for example, that it is by no means a foregone conclusion that artists will be the best protectors of their work.¹²⁰ Artists are not always the best prospects to judge the quality of their own work, and they will have a tendency to overprotect bad work and underprotect good work.¹²¹ And in any event, as Professor Adler points out, nothing in the moral rights regime prohibits artists from destroying everything they have ever produced, thus undermining altogether the notion that artists are protecting art on behalf of

118. See *Adler, supra* note 2, at 272 (“VARA and most U.S. state moral rights laws are premised on the view that moral rights serve not only the interests of individual artists, but also a shared public interest in art.”).

119. See *id.* (“[The statutes operate] based on the assumption that there is an unproblematic convergence between the public interest and the interest of the artist who created the work. His decisions, according to the assumption, will inevitably be in the public interest.”).

120. See *id.* at 271–72.

121. See *id.* at 274 (discussing how “artists will sometimes want to preserve works that many if not most members of the public wish to destroy or modify”).

the culture as a whole.¹²² Therefore, the argument goes, not only is the individual Romantic artist a theoretical anachronism; individual artists do not serve the purposes assigned to them by moral rights statutes anyway.

Professor Adler is certainly right to point out that moral rights statutes depend on the individual artist to serve the cultural function of preserving art for future generations. And indeed, part of the statutory reliance on individual artists is predicated on eighteenth- and nineteenth-century theories glorifying the individual. As Raymond Sarraute has noted, the entire concept of moral rights is based on the Hegelian notion that an “intimate bond . . . exists between a literary or artistic work and its author’s personality.”¹²³ But although it is true that moral rights statutes use the individual artist as the agent responsible for the protection of art, it is not necessary to defend the statutes only on the grounds that they are protecting some mystical connection between artist and art. There are other ways of conceptualizing why these statutes rely on the artist to protect his or her work, some of which show the statutes in a light that makes them seem quite different from the exercise in artistic narcissism that Professor Adler describes. There are at least three alternative ways of conceptualizing why moral rights statutes allocate to individual artists the responsibility to protect art.

1. *Moral rights law as protection of the artist’s personality, which is externalized in works of art.* This is the most traditional way of conceptualizing moral rights statutes and the one on which Professor Adler focuses her criticism. Under this theory of moral rights, protecting art is almost secondary to protecting the reputation, dignity, and psychic peace of the artist.

When contemplating the theoretical framework of moral rights, it cannot be denied that the heart of a moral rights violation involves more than reputational damage. The essence of a moral rights injury lies in its assault upon the author’s personality, as that personality is embodied in the fruits of her creation.¹²⁴

This theory about moral rights legislation is advanced much more explicitly in European moral rights laws, especially the laws of France, and there are critics of American law, including Professor Kwall, who claim that this law is insufficiently sensitive to what Kwall calls “the author’s personality-based narrative of creation.”¹²⁵ Nevertheless, the generally individualistic tone of those supporting moral rights legislation in the United States—including Congress’s explanation of its support for

122. *See id.* at 273–74.

123. Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968).

124. Kwall, *supra* note 1, at 24.

125. *Id.* at 25.

VARA¹²⁶—is sufficiently strong evidence that Congress intended to rely on this rationale to justify Professor Adler's criticism. And much of this criticism may be warranted. Admittedly, this explanation for moral rights statutes is somewhat problematic in that it conceptualizes moral rights as a purely individualistic affair and takes into account only indirectly the broader public interest in art. Under this conception of moral rights, the interest of society as a whole is something of an afterthought. Society may benefit from the access to the art that is made available by the artist's protection of his or her own work, but that benefit is entirely beside the real point of the statute, which is to benefit the artist herself. But as noted, this is not the only possible justification for moral rights statutes.

2. *Moral rights as the formal embracing of the romantic artist paradigm.* A second possible rationale for moral rights statutes also embraces the individual artist but does so in a different way and for different reasons than the protections offered under rationale one. This second rationale would abandon any pretense that moral rights statutes are about the individual works of art at all. Instead, this rationale would offer the possibility that moral rights statutes are only about the (presumably selfish) interests of individual artists who continued to be productive and not at all about society's interest in the works that those artists have already produced. Under this conception, as in rationale one, art is protected because it is perceived to be the externalization of the artist's personality, but protecting art under moral rights statutes is secondary to protecting the atmosphere of artistic productivity generated by the protective cloak of moral rights. The key difference between rationale one and rationale two is that rationale one is focused on the past—artwork that has already been produced—and rationale two is focused on the future: work that has not yet seen the light of day.

Under this rationale for the protection of moral rights, we can once again suggest that society benefits just as much as the individual artist. The only difference is that instead of benefiting from access to the individual pieces of art that will be protected by moral rights, society will benefit from the cultivation and protection of an artistic community that includes a certain basic level of expressive protection for those working within it. The theory is that artists who know that their work will be protected against those who seek to desecrate or destroy it will be more

126. See H.R. REP. NO. 101-514, at 5 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6915 (describing the statute's purpose).

rather than less likely to produce art. Society's promise to protect an artist's future work is secured by society's demonstrated protection of the artist's past work. Admittedly, this is a leap of faith—faith that by protecting the artist today, the artist will see fit to produce notable works of art tomorrow.

It is difficult to say which rationale for the protection of moral rights Professor Adler would like less: rationale one or rationale two. Presumably, she would not like either rationale very much. Both rationales continue to rely for the protection of art on the will and self-interest of the individual artist. Both rationales assume that the categories of both our “artist” and “art” still exist and still have legal significance. Both rationales assume that the category of art still has meaning and will exclude some things that probably fall into the much more expansive definition of art proposed by Professor Adler in her article. And finally, both rationales assume—contra Professor Adler—that the destruction of art is a bad thing and should be stopped through the application of legal sanctions. These aspects of both rationales for moral rights statutes suggest the need for a third rationale that may satisfy some of Professor Adler's—and other postmodern or postaesthetic critics'—concerns.

3. *The skepticism rationale.* The third possible justification for moral rights statutes focuses on neither the individual artists' interests nor the social benefits that will come from protecting individual artists' rights. Indeed, this justification would not focus on any of the beneficiaries of the protection of art. This third justification focuses instead on the nature of the individuals and entities who would destroy or desecrate art in the absence of moral rights statutes. This third justification would base moral rights statutes on the same abiding skepticism of the impulse to censor or suppress expression that motivates much of First Amendment jurisprudence.¹²⁷

127. This deep skepticism originates in Oliver Wendell Holmes's opinions in cases such as *Gitlow v. New York* and *Abrams v. United States*, in which Holmes makes intellectual skepticism the cornerstone of the right of free speech. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .”). This skeptical impulse lives on in the Court's modern First Amendment jurisprudence in the form of rules strictly limiting the government's ability to regulate speech based on the viewpoint or content of the speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” (citations omitted)).

The three entities most likely to seek to destroy or desecrate existing artwork are the government, artistic institutions such as galleries and museums, and other artists. The argument here is that those who would most likely seek to silence artistic speech—either by destroying a specific piece of art or mangling it beyond all recognition—are not to be trusted. They are not to be trusted because they are all self-interested in various ways. The state is not to be trusted because it is as likely as not following a political or religious agenda that cares nothing whatsoever for aesthetics or art but rather for the perceived slights of the mainstream culture that art is seen to communicate.¹²⁸ Galleries, museums, and other artists have a more personal agenda. The likelihood is not—as Professor Adler would have it—that they are trying to provide something positive out of the destruction of an existing piece of art but rather that they are trying to achieve aesthetic victory for one type of art by destroying the competition. Artistic agendas can be just as fierce as political agendas, if somewhat more esoteric.¹²⁹ The point is that none of these actors is likely to be advancing the interests of the culture as a whole by destroying or desecrating pieces of art that he or she does not like.

Take as an example the Chapman brothers' desecration of the Goya prints discussed above.¹³⁰ A consideration of why the Chapmans desecrated the Goya prints leads to the conclusion that the Chapmans either used the destruction of the Goya prints purely as a publicity stunt or viewed themselves as being in some kind of aesthetic competition between the kind of art produced by the Chapmans and the kind of art produced by Goya. If the first interpretation of their actions is accurate, then there is no plausible rationale for why society should allow a couple of shallow grandstanders to destroy artistic works that most of society reveres. If the Chapmans intended to engage in a legitimate exercise of artistic and aesthetic criticism, on the other hand, then the nature of the attack on art in the style of Goya must be respected, but there is still no reason to respect the means by which they administered their attack. In other words, it is possible to mount a perfectly effective critique of original art without destroying original art.

128. *See supra* note 49.

129. For example, the nasty fight instigated by Ivan Massow's disparaging comments about the state of conceptual art, which led to his departure as chairman of London's Institute for Contemporary Arts. *See infra* notes 167–69 and accompanying text.

130. *See supra* notes 108–13 and accompanying text.

Admittedly, the attitude of skepticism toward those who destroy or desecrate art carries with it an implicit affirmative assertion of aesthetic value. Viewed through the prism of this third alternative justification, moral rights statutes can therefore be seen as social statements of artistic principle or ideology. These statutes are anticommercial, hostile to marketplace notions of artistic value, opposed to faddish conceptions of art, and antithetical to collectivist and institutional conceptions of what should be valued in the art world. These statutes also probably presume that anything falling into the category of “art” will be defined by its visual—as opposed to its conceptual—characteristics. Conceptual art can fall into the category of art, but only if the concept is accompanied by or embodied in some visual manifestation of a sort that can plausibly be deemed to have some aesthetic substance. Finally, almost by definition these statutes are predicated on the notion that art has a history, that both old and new art are worthwhile, and that the end of art has not yet arrived and probably never will—otherwise, why protect art for the future?

By contrast, the view of art advanced by Professor Adler and those such as Professor Danto who offer similar theories will tend to have the opposite implications. This conception of art is inherently more commercial and market based than the conception of art implicit in moral rights statutes, in the sense that the evaluation of the sorts of contemporary art to which Professor Adler appeals will tend to be subject to something that could be called the Saatchi effect. In other words, in the contemporary art world envisioned by Professor Adler, the gallery owners, their coterie of collectors, and institutions such as the Tate Modern in London and to a lesser extent American museums with a focus on contemporary art such as the Whitney in New York will have even more power than that possessed by predecessor institutions in previous artistic eras to anoint new artistic superstars. One reason is because of the type of work being produced today. There may be a point to the Chapman brothers’ clown-face-enhanced Goyas, but most people will have to be told by intermediaries such as museums or galleries what that meaning is and why the piece constitutes art.

Another reason for the increased power of artistic institutions in the world envisioned by Professor Adler involves simple logistics. Much conceptual art takes a form that cannot be marketed as a painting would be. The work is often large or otherwise unwieldy. For example, among the items that the domesticated¹³¹ British graffiti artist Banksy has included

131. Although much of Banksy’s cachet turns on his background as an illicit street artist, his paintings now command prices of more than £100,000 each. William Langley, *For the Gauguin of Graffiti It Was All About Tagging. Now He’s into Six-Figure Price Tags*, DAILY TELEGRAPH (London), Mar. 19, 2007, at 27, available at 2007 WLNR

in recent shows are a live thirty-seven-year-old full-grown Indian elephant named Rai “painted crimson and embossed with gold fleurs-de-lys”¹³² in a show in Los Angeles and a burnt-out ice cream truck¹³³ in a show in Bristol, England. Very few people will want a glass box with a shark stored in formaldehyde sitting in their living room, much less a live, fully grown Indian elephant. The logical market for such pieces therefore will be not a traditional market of individuals who purchase art in order to look at that art but rather individuals who purchase art as an investment, or galleries—who will stockpile the art in the hopes of making a profit in the future—and museums—who will often develop financial relationships with the galleries and collectors, thereby providing the imprimatur of legitimacy and status to the art in question.¹³⁴

The growing importance of galleries and institutions dovetails with the emphasis placed on new and unique concepts. Conceptual art depends largely on the shocking juxtaposition of or sudden insight into some aspect of the world. Novelty is key. If a piece of conceptual art is not novel or simply presents variations on another concept already familiar in the art world, then that piece of art is not likely to succeed, even by its own terms. In this context, fads are inevitable, and the new and unique will always be favored over the old and the been-done. Subtlety is not valued in conceptual art, nor is the incremental building on what has come before. Existing art is therefore endangered under such a system because contemporary art relies so heavily on the immediate impulse of those who would destroy what has come before for purposes of present glory. Finally, the view of art that contrasts with the view informing moral rights statutes inevitably treats art as transitory, ahistorical, and essentially unworthy of serious consideration beyond the momentary

5169346. According to the editor of London’s graffiti magazine *Bomb Alert*, “He has absolutely no respect in London’s graffiti community . . . His message is naïve.” *Id.*

132. *Id.*

133. Miranda Sawyer, *Take a Stuff: Old Institution. Remix. Add Wit. It’s Banksy v the Museum*, *GUARDIAN* (London), June 13, 2009, at 11, available at <http://www.guardian.co.uk/artanddesign/2009/jun/13/banksy-bristol-city-museum>.

134. Illustrative of this is the Brooklyn Museum’s questionable financial dealings in connection with the *Sensation* show, which was comprised entirely of work owned by Charles Saatchi. See David Barstow, *Brooklyn Museum Recruited Donors Who Stood To Gain*, *N.Y. TIMES*, Oct. 31, 1999, at 1. Saatchi and other self-interested gallery owners, auction houses, and collectors contributed to the Museum substantial funds to finance the show. As *The New York Times* summed up the situation, “[T]he ‘Sensation’ exhibition at the Brooklyn Museum of Art has been financed by companies and individuals with a direct commercial interest in the works of the British artists in the show.” *Id.*

impulse that produced it. Under this conception, art becomes merely a toy of the contemporary culture, which is why it is so easy for those who would oppose moral rights statutes on postmodernist grounds to give up something such as Goya's *Disasters of War* series.

At the end of the day, then, we have two completely different views of art that are apparently irreconcilable. One view asserts that art continues to grow as a discipline; the other view asserts that art is essentially dead. One asserts that the visual components of art are still valuable and significant; the other asserts that art focusing on the visual is essentially an anachronism and that this form of art has been superseded by art reconceived as concrete manifestations of philosophical concepts. One asserts that the individual artist is still the primary agent of all art, and the other asserts that collective institutions—galleries, museums, or groups of art workers—have taken over from the individual artist as the primary engine of creativity and that the individual artist should be relegated to the dustbin of history. Most importantly, one asserts that existing art is important in itself and should be protected and preserved, and the other asserts that we should allow examples of existing art to be used as fodder for new conceptual exercises. The question is whether we have to choose one set of presumptions over another to resolve the question of whether moral rights statutes deserve to survive.

In the next Part, I will argue that we do not. Specifically, I will argue that there are a series of pragmatic reasons for rejecting the attacks on moral rights statutes that do not involve challenging the basic theoretical assumptions that motivate those attacks. In the end, advocates for these different conceptions of art will continue to battle in the art magazines, museums, and studios of artists. The point here is simply that no conception of art should be allowed to win the theoretical battle over the meaning of art by changing the legal landscape in a way that allows that point of view to dominate. Also, no conception of art should be allowed to change the legal landscape in a way that removes from artists who take an alternative point of view the right to protect their work.

IV. WHY ART (AND ARTISTS) STILL MATTER: SEVERAL REASONS WHY ARTISTS SHOULD (STILL) BE ALLOWED TO PROTECT THE INTEGRITY OF THEIR ART

At the outset of the discussion in this Part, it should be acknowledged that, as a practical matter, VARA and its state-law equivalents have not had the broad effect that moral rights proponents may have hoped. Most courts have taken the approach of the district judge in one prominent VARA case, in which the judge concluded:

[A]s a broad matter, courts should be wary of attempts to invoke VARA where a violation of the explicitly recognized rights of attribution or integrity is difficult to discern. Expansive application of VARA's embodiment of "moral rights" was not contemplated by Congress and generally has not been countenanced by the courts.¹³⁵

Nonetheless, even if moral rights statutes are not applied by the courts to protect art in every single instance in which an artist alleges a violation of the statutes' attribution or integrity protections, the statutes still serve important purposes. In the first place, the statutes do protect some art some of the time. In the absence of the statutes, some art would be distorted or desecrated—especially in an art world defined to a certain extent by the likes of the Chapman brothers. But secondly, and possibly even more importantly, the statutes serve the expressive purpose of advancing society's view that art is important and that damaging or destructing art violates this key social value. In a country that is increasingly defined by commercial values, the statutes announce that art is so important that we have placed it even above commerce, in the sense that even a purchaser of a painting is not allowed to violate an artist's moral rights.

What follows is a series of arguments rebutting some of the claims made by Professor Adler against the regime of moral rights. With one or two exceptions, these arguments do not challenge her larger theoretical concept of art and its general meaning. For the most part, the claim here is that even if we accept Professor Adler's general critique of contemporary art, it still makes more sense to have moral rights statutes than not to have them.

A. The Death of the Individual Artist Is Not Dispositive

As noted above, one of Professor Adler's primary claims is that the concept of the Romantic, lone artist is now dead.¹³⁶ As a rhetorical device meant to emphasize the changing relationship of the artist to the larger culture, or as an assertion of the effect that history has on the individual artist, or as a description of the debt any artists owe to their predecessors and compatriots, this assertion is perfectly plausible. As a practical description of how art actually comes into being, however, the statement makes no sense. While it is true that some art comes into

135. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 565 F. Supp. 2d 245, 258 (D. Mass. 2008), *vacated in part on other grounds*, 593 F.3d 38 (1st Cir. 2010).

136. *See supra* notes 34–36 and accompanying text.

being as the result of collaboration between various individuals, most art is the product of one individual's execution of that same individual's artistic vision. Even if that individual artist is affected by history, and by artists who went before, and by compatriots working in the new studio next door, all of these influences still have to be absorbed, synthesized, and put to use in a way that generates new art. One does not have to accept Kirk Douglas's version of the artist¹³⁷ as in any way accurate to nevertheless recognize that the person who actually puts paint to canvas is in an entirely different position than another person standing in the same room and critiquing the painting.

This intuitive recognition that the person who actually does the work is going to be invested in that work at a different level of intensity than anyone else is the reason that moral rights statutes give to artists and artists alone the right to decide whether or not their work will be defaced. As Professor Adler periodically suggests, this is an overinclusive way of going about the protection of art since artists will be naturally inclined to protect most or all of their own work. But the overinclusiveness is intentional. It is part of the general perspective embodied in these statutes, which is that more art is better than less art.

In the end, we should be debating the validity of this perspective, rather than the ethereal and frankly academic question of whether we should continue to view artists through the misty lens of nineteenth-century Romanticism. When the debate is focused in the proper way, it is difficult to see how Professor Adler's position on moral rights statutes could prevail. After all, even if her description of the trends in contemporary art is correct, and even if much of the art that moral rights statutes will protect will be distinctly counter to that trend, there is still no good argument against letting that art survive. Even if we end up preserving a great deal of bad art, or anachronistic art, or art that runs against the grain of history, so what? No one is any worse off, except perhaps for those who want to take the art being preserved and destroy it for their own purposes. Whether we should recognize this as a legitimate claim against the preservation of moral rights statutes will be addressed below. But for present purposes, it is important simply to note that the death of the romantic artist does not automatically spell the death of moral rights statutes.

137. See *LUST FOR LIFE* (Metro-Goldwyn-Mayer 1956) (depicting the life of Vincent van Gogh, played by Kirk Douglas).

B. Destruction Is Destruction, Not Creation

One of the problems with Professor Adler's account of art theory and moral rights statutes is that she often moves back and forth between the abstract and the concrete in ways that muddle her critique. It is relatively easy to agree with most of her abstract propositions, until she takes those abstract propositions and tries to draw concrete conclusions about what should be done with regard to the protection of art under moral rights statutes. It is one thing for Professor Adler to argue as a theoretical matter, for example, that "'art' as a category has come to be about its own metaphorical destruction."¹³⁸ It is quite another thing, however, to argue immediately thereafter that "the physical destruction of works of art becomes a powerful expression of the metaphorical *essence* of art."¹³⁹ It is also quite another thing to assert that in the new world of art, it is impossible to produce new artistic creations without simultaneously destroying existing examples of art.¹⁴⁰

As noted above, one problem with equating destruction and creation is that it takes an abstract assertion about the nature of contemporary art and transfers that observation unchanged into the real world, where the concrete consequences of the principle's application are both harmful and unnecessary. In the real world, destruction and creation are two completely different activities. As the title of this subsection indicates, destruction is not creation; it is simply destruction. The harmful aspect of this proposition is that welcoming the destruction of art will have only one certain effect: some art that currently exists—including art that, like Goya's *Disasters of War* series, is both irreplaceable and, to quote one of the critics cited by Professor Adler, "a treasure"¹⁴¹—will be destroyed, never to be seen again.

From the perspective of Professor Adler, it should not matter that the Chapmans destroyed artwork of which there are few duplicates remaining in the world. If she is true to her theory that destruction is "a central quality of 'art' itself"¹⁴² and therefore that existing art is simply awaiting its own destruction, then the primary value of existing art is that it awaits

138. Adler, *supra* note 2, at 284.

139. *Id.*

140. *See id.* at 279 ("[T]here is an artistic value in modifying, defacing and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary-art making.").

141. *Id.* at 282 (quoting Jones, *supra* note 108).

142. *Id.* at 284.

being used as fodder for future art. Under this transitory notion of art, it should not matter whether the existing art/fodder is unique or important, nor should it matter whether the images contained within existing art could ever be replaced or replicated. Thus, it is odd that Professor Adler chides the Taliban for destroying the famous sculptures of the *Bamiyan Buddhas* in the Kazarajat region in central Afghanistan.¹⁴³ Admittedly, the Taliban was not doing so for artistic reasons. But would the magnitude of the cultural travesty that is represented by the destruction of the sculptures be any different if, instead of the Taliban, the Chapman brothers had somehow managed to purchase those sculptures, destroyed them, and then erected statues of clowns in their place? This may not be that far-fetched of a proposition, considering that Jake Chapman “has described the international opposition to the Taliban[’s] blowing up ancient Buddhist sculptures ‘strange,’ describing it with bland semi-admiration as the ‘live, vital religious opposition to something that has a direct and local meaning to them.’”¹⁴⁴ The simple reality is that the destruction of art is the destruction of art; the intentions of the destroyer really do not matter. Therefore, those who argue that moral rights statutes should be dispensed with because they inhibit the destruction of art have an obligation to explain why the destruction of art is, in and of itself, a good thing.

C. *The Production of New Art Does Not Require the Destruction of Old Art*

In the previous paragraph, I asserted that if existing art is destroyed in the name of producing new, contemporary art, then the only guaranteed consequence of this act will be the elimination of art and the robbing of future generations who might want to see that art. Although this is indisputably true, it must be acknowledged that we will receive something in exchange for the defaced existing artwork. What we will get in exchange is new work similar to the Chapmans’. Maybe there is a case to be made that it is a fair trade to exchange Goya for the Chapman brothers, although it is frankly difficult to see what the components of that case might be.

Fortunately, we do not have to make this difficult choice because even for artists like the Chapman brothers the destruction of preexisting works of art is not necessary to produce the artistic message they are attempting to communicate. The images that the Chapmans are putting forth, that is,

143. *See id.* at 290.

144. Johann Hari, *The Art of Subverting the Enlightenment*, INDEPENDENT (Feb. 5, 2007), <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-the-art-of-subverting-the-enlightenment-435131.html> (quoting *Jake Chapman on Georges Bataille: An Interview with Simon Baker*, PAPERS OF SURREALISM (Winter 2003), http://www.surrealismcentre.ac.uk/papersofsurrealism/journal1/acrobat_files/chapman_12.pdf).

images from Goya's *Disasters of War* doctored with pictures of clowns and such, could be produced just as effectively without destroying a single original Goya print. That is, instead of destroying original Goyas, they could use as the basis for their work reproductions of the Goya prints, which if produced professionally could be virtually indistinguishable from the originals. The resulting new artwork would be for all practical purposes exactly the same as the work the Chapman brothers have already given us—in the sense that the image presented to the viewer would be that of Goya prints defaced with clown faces. Of course, if the Chapmans took this tack, they would lose both the shock and the PR value of having destroyed actual copies of an irreplaceable piece of Spanish art. But so what? The shock and PR value in question have nothing to do with the aesthetic worth of the piece; they have to do only with the notoriety—and therefore, probably the commercial value—of the piece, which should not enter into our consideration when determining which art gets destroyed and which art gets created.

D. The Tendentiousness of Artists

Professor Adler repeatedly expresses her reluctance to give artists the right to decide whether their own work is preserved. Although she briefly expresses reluctance on the ground that artists will be underprotective—that artists will refuse to protect work that should be protected¹⁴⁵—by far her greater concern is that artists will be overprotective, in that they will protect a great deal of work that Professor Adler believes should not be protected.¹⁴⁶ But the very thing that Professor Adler fears is also at the very heart of moral rights statutes. The reason moral rights statutes give to artists the right to protect their work is precisely because we assume that artists will be overprotective of that work. One reason this is perceived as a good thing from society's perspective is because artistic value is often determined only long after art is produced. If an artist has protected work at a point when that work is unrecognized, then society will benefit from the fact that the work is still around when its value is belatedly acknowledged. It

145. See Adler, *supra* note 2, at 273 (discussing the phenomenon of artists' destroying artwork in which the public has an interest).

146. See *id.* at 269 (“[The artist] cares so deeply about the fate of his art because it is somehow his child and not just another object. Thus the artist feels personal anguish when someone else modifies his artwork/child. . . . even though the child has grown up and left home, and even though the father/artist has *sold* his child.” (footnote omitted)).

is precisely when artists and their work are unrecognized that they are most vulnerable to their work's being defaced, destroyed, or altered in ways that are contrary to the artist's intentions.

One must concede the validity of Professor Adler's criticism that this system has a logical basis. It is logical to assume that artists will, indeed, be likely to protect more work than an objective observer might find worthwhile. On the other hand, so what? There seems to be no downside to allowing artists to be overprotective and thereby preserve work that will ultimately be deemed artistically inferior. The worst that can happen is that some mediocre canvases or sculptures will remain undefaced. If anything, the preservation/destruction calculus runs in the opposite direction from that described by Professor Adler. The artists who would get the most benefit from Professor Adler's proposals are those who destroy existing artwork to create their own; these artists therefore logically have a vested interest in destroying artwork and in advancing the notion of artistic destruction as an aesthetically salubrious value. Just as artists operating under a moral rights regime have a predisposition to overprotect art, artists operating under a regime that abandons the concept of moral rights have an equally strong predisposition to destroy art. Furthermore, the art that is most likely to be destroyed is art that is well known, highly esteemed, and artistically notable. This is because any art based on existing art is likely to use the existing art in the same way the Chapman brothers do: to provide notoriety, publicity, and automatic gravitas. So the greater the existing art—and therefore the more valuable to society as a whole—the more likely it is to be used as new-art fodder.

All of what is said above about new artists is especially true of new artists who are not particularly good at what they do. Under Professor Adler's system, there is no quality control when it comes to vandalizing or destroying old art for the sake of creating new art. And so we have the Chapman brothers' destroying Goya prints. Maybe the Chapmans have as much talent as Goya, although I doubt anybody not financially connected to the Chapmans would seriously attempt to make that claim. But if we can agree that the Chapmans are not quite up to Goya's talent level, then society has suffered a net loss under Professor Adler's regime. It has given up great old art for new art that is substantially inferior or worse. Of course, Goya is long dead, and therefore the particular work produced by the Chapman brothers would not be protected under modern moral rights statutes. But the same calculus works with new work produced by living artists, which are protected by such statutes.

The only way of dealing with this uncomfortable truth from Professor Adler's perspective is to dispense altogether with evaluations of artistic quality. Professor Adler's scheme does not actually dispense with the

entire category of “art,” as she seems to intend;¹⁴⁷ it simply reduces all art to the lowest common denominator. The untalented artist manqué will no longer need to struggle to learn how to paint, draw, or sculpt; in order to become a renowned artist, the poser will simply have to find some talented artist’s painting or drawing and slap a clown face on it. Destruction thus becomes mistaken for creativity.

The question, then, is: Do we want a system that encourages the preservation of art, which will in no way inhibit the production of new art, or do we want a system that encourages the destruction of art, with no guarantees that the art we get in exchange will even come close to the quality of the art we are sacrificing? Given the fact that most of the art that is based on the destruction or desecration of existing art can be produced using reproductions or other methods, this question comes down to the fact that unless one is willing to argue that the destruction of art is always a good thing, in and of itself, then the current system of moral rights should be preserved.

*E. Be Careful About Asserting that Art Doesn't Exist, or that Art Is
Nothing More than Vandalism, Because Society
May Start To Believe You*

Although the focus of Professor Adler’s article is on the proposition that creative destruction is a defining feature of contemporary art, her more radical claim is that the entire category of art has become incoherent.¹⁴⁸ The two propositions are obviously connected because if art as a category has become incoherent, then all of the existing objects previously classified as art are instantaneously converted into simple cultural detritus, which may be destroyed at will. Professor Adler seems invigorated by this possibility. She really does seem to believe that a new and exciting creative spirit will be unleashed by renouncing the concept of art and permitting the new post-artists to destroy or vandalize what used to be art.

Professor Danto, on the other hand, drew very different conclusions from his pronouncement of the end of art. On the one hand, he drew the

147. *See id.* at 295 (“[D]oes visual art as a category merit this special treatment? I think the answer might be no. It once seemed obvious that there was a distinction between art and other objects. But that is no longer the case. Indeed, I would argue that the incoherence of the category of ‘art’ has become *the subject* of contemporary art.”).

148. *See id.* at 287.

very liberating conclusion that art would now be much more ecumenical and diversity would reign. On the other hand, the new diversity of art would be a diversity of the worthless, the trivial, and the inconsequential.

As Marx might say, you can be an abstractionist in the morning, a photorealist in the afternoon, a minimal minimalist in the evening. Or you can cut out paper dolls or do what you damned please. The age of pluralism is upon us. It does not matter any longer what you do, which is what pluralism means. When one direction is as good as another direction, there is no concept of direction any longer to apply. Decoration, self-expression, entertainment are, of course, abiding human needs. There will always be a service for art to perform, if artists are content with that.¹⁴⁹

After this depressing eulogy for art itself, Danto then goes on to note that “[t]he institutions of the art world—galleries, collectors, exhibitions, journalism—which are predicated upon history and hence marking what is new, will bit by bit wither away.”¹⁵⁰ To be replaced, presumably, by the home decorations department at Wal-Mart.

The problem with discussions such as this is that their intended audience is within the artistic community itself. Discussions over the nature of art have occurred at least since the ancient Greeks and probably before that. When these esoteric discussions of the danger of art slop over the wall and into the laps of policymakers, however, the discussions can do real damage. The notion that art no longer exists would be music to the ears of the Rudy Giuliani and latter-day Jesse Helmses of the world, who would prefer to eradicate a great deal of art that communicates messages with which they disagree. One reason modern bluenoses have not been successful in censoring art that they do not like is that courts treat art as high-value speech under the First Amendment,¹⁵¹ which can be suppressed by the government only upon a showing of the highest possible governmental interest. If the art community now takes the position that art is little more than empty decoration, then First Amendment protection will evaporate like the morning mist. Of course, this may be perfectly alright with Professor Adler; after all, if one form of legal protection of art—moral rights statutes—has outlived its purpose, then

149. Danto, *supra* note 83, at 34–35.

150. *Id.* at 35.

151. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting) (“It goes without saying that artistic expression lies within this First Amendment protection. The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected ‘speech’ extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our ‘cultural life,’ just like our native politics, ‘rest[s] upon [the] ideal’ of governmental viewpoint neutrality.” (alterations in original) (footnote omitted) (citations omitted) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994))).

perhaps the First Amendment protection of art has as well. Which is all well and good, until the first conceptual artist attempts to put a provocative piece of nonart in some public place and instigates the wrath of some politician seeking to make a name for himself. At that point, the category of art and all the legal protections that it brings with it might seem pretty inviting.

F. If Everything Is Art, Then Nothing Is Art

The notion that the destruction of art can itself be a creative, artistic act injects questions of intentionality into the question of whether acts of artistic vandalism should be permitted or rather prosecuted as criminal behavior. Professor Adler cites as a laudatory example of a recent destruction artist the case of Pierre Pinoncelli, a Frenchman who in 2006 attacked Marcel Duchamp's "readymade" sculpture *The Fountain*.¹⁵² Monsieur Pinoncelli fancies himself a performance artist, who "claimed upon his arrest that his vandalism was itself a work of art."¹⁵³ Actually, Pinoncelli attacked Duchamp's sculpture not once but twice—once in 1993, when the sculpture was displayed at the Carré d'Art in Nîmes, and once at a 2006 *Dada* exhibition at the Centre Pompidou in Paris.¹⁵⁴ A quote given to the press by Pinoncelli after the 1993 attack gives a slightly different slant on his objectives than Professor Adler's characterization of an artist's destroying old art to produce new art. At the time of the 1993 attack, Pinoncelli told the press that "he wanted to rescue the work from its inflated status and restore it to its original use as a urinal."¹⁵⁵ This makes the gesture seem much more like a crass and even philistine attack on art than like a noble effort to use one piece of art to create another.

If we view the world through the lens of Professor Adler's proposals, what are we to make of actions such as those of Mr. Pinoncelli? Does it matter whether he intended to destroy Duchamp's fountain in order to produce a new work of art or rather simply for the sake of the action itself? Assuming the vandal is attempting to be creatively destructive—as opposed to destructively destructive—is it necessary that the vandal produce a new work of art using the remains of the old? Does it matter that the

152. Adler, *supra* note 2, at 284.

153. *Id.*

154. Alan Riding, *Conceptual Artist as Vandal: Walk Tall and Carry a Little Hammer (or Ax)*, N.Y. TIMES, Jan. 7, 2006, at B7.

155. *Id.*

new work of art is presented as nothing more than the act of vandalism itself? And if the new work of art is nothing more than a simple act of vandalism, then that work of art could be produced by anyone because acts of vandalism do not usually require any special talents. Therefore, presumably any act of vandalism committed by anyone should be considered a legitimately expressive act by the theory of destruction-as-creation. So, for example, if Mr. Pinoncelli's active vandalism is deemed to be a creative act, what about Piero Cannata? In 1991, Cannata attacked Michelangelo's statue of David, damaging several toes on the sculpture's left foot.¹⁵⁶ Although Cannata was an artist, he was—in the gentle phrasing of *The New York Times*—“generally described as unbalanced.”¹⁵⁷

The Duchamp sculpture vandalized by Pierre Pinoncelli was one of Duchamp's most famous. *The Fountain* is, of course, little more than a urinal with the name *R. Mutt* painted on the side. This piece is now lauded as a major turning point in modern art. Professor Adler's descriptions of the piece are common. It is described in portentous terms as “a ritual desecration” of art and “an assault on the sacred boundary between art and everyday objects.”¹⁵⁸ What all of this high-toned praise for Duchamp's urinal sculpture misses is that the piece originated as a joke designed to test the “no-jury” entry policy of an art exhibition that Duchamp helped to organize. Duchamp and two friends purchased the urinal after a long lunch one day in 1917 from an iron works in New York City.¹⁵⁹ Duchamp took the urinal back to his studio, painted the name *R. Mutt* and the date *1917* on the side very high, then submitted the piece to a large art exhibition, titled the *1917 Independents*, along with the fictitious *R. Mutt*'s membership and application fee.¹⁶⁰ The piece was rejected.

No one knows what happened to this original version of *The Fountain*, and Duchamp himself told conflicting stories about the original *Fountain*'s ultimate destination.¹⁶¹ The versions of *The Fountain* that are in the museums today—including the one attacked by Pierre Pinoncelli—were created in 1964 by a Milanese ceramicist who made a commercial edition of eight *Fountains*, along with similar editions of other Duchamp readymades.¹⁶² What could be Duchamp's reason for authorizing multiple reproductions of perhaps his most famous sculpture almost fifty years after the original was lost? For all the grandiose claims about someone who is “ritually desecrating art,” the simple answer is that he needed the

156. Alan Cowell, *Assailant Damages David*, N.Y. TIMES, Sept. 15, 1991, at L3.

157. Riding, *supra* note 154.

158. Adler, *supra* note 2, at 285.

159. CALVIN TOMKINS, DUCHAMP: A BIOGRAPHY 181 (1996).

160. *Id.*

161. *Id.* at 182.

162. *Id.* at 427; Adler, *supra* note 2, at 285.

money.¹⁶³ More importantly for present purposes is the fact that Duchamp took great care with the quality of the 1964 reproductions and took great pride that the ceramicist had used contemporaneous photos made by Alfred Stieglitz to duplicate accurately every aspect of the 1917 *Fountain*.¹⁶⁴ This is not someone to whom the destruction of art would have come easily.

The great attraction of theories of art such as those proposed by Professors Danto and Adler is that they promise to loosen the definition of art and therefore broaden the scope of what may be considered art, thus freeing the artist to pursue whatever artistic vision he or she may have. At the very least, such theories would guarantee that never again will a jury representing some modern equivalent of the Academie des Beaux-Arts reject from a major show of contemporary art the modern equivalent of Manet's *Le déjeuner sur l'herbe* because it does not conform to the official rules governing how a painting should be painted.

But it is also possible to go too far in the other direction. There are major risks of opening up the definition of art to include anything to which anyone attaches that label, as Professor Adler suggests. It may seem terribly au courant to tear down the walls that separate art from nonart, but the practical reality is that if everything is art, then nothing is art. While recognizing that Danto and Adler both essentially embrace the notion that there is no longer any such thing as art, it is worthy of note that if they really believed that, they would not revere Duchamp to the extent that they do. They revere Duchamp precisely because he is distinctive *as an artist*, and there is something in the nature of his work that makes that work different in kind from the work product of the many other people who have occasion to work with plumbing supplies. Whether the definition of art—and therefore the protection of moral rights statutes—has been expanded to include conceptual art is by now unquestionable. However broad the definition of art has become in the contemporary era, that definition cannot completely dispense with the visual and expressive elements that Danto is so eager to relegate to a past age. Art still exists, and both Professors Danto and Adler implicitly recognize this fact through their own tastes. After all, if the situation were not so, we would have no way of distinguishing Duchamp from Piero Cannata.

163. TOMKINS, *supra* note 159, at 427.

164. *Id.*

V. WHY BASE THE LAW ON THE RIDICULOUS WHEN THE SUBLIME IS STILL FREELY AVAILABLE?

For all the extravagant statements about the end of art and the inevitable workings of history, the theory of art that is implicit in Professor Adler's contentions about moral rights statutes is not so much a theory as it is a special pleading in favor of one particular kind of art. Professor Adler—and Professor Danto, on whom Professor Adler strongly relies—argues that moral rights statutes are no longer necessary because such statutes are intertwined with a kind of art that, in Professor Adler's opinion, is now dead.

[W]hen dealing with contemporary artworks . . . we must consider the difference between what "art" means today and what it meant in the past. The word "art" used to invoke beauty, mastery and transcendence. But postmodern art, drawing on Dada and Pop, moved art from the realm of the beautiful, physical, or even visual to the realm of the conceptual.¹⁶⁵

For purposes of the current discussion, here is the capper: "Given this move of art from the physical to the conceptual realm, the value of preserving physical objects that artists make today is diminished."¹⁶⁶

This is stated very definitively, as should be expected from someone who has witnessed the end of history. Unfortunately, rumors of its death notwithstanding, history seems to have moved on. Indeed, history has moved on in ways that may undercut many of Professor Adler's art-world arguments against moral rights statutes. Professor Adler may have wedded her theory and her criticism of moral rights statutes to a type of art whose assumption of dominance is becoming passé. The rumblings of a shift away from the conceptual and back toward the visual have been heard for some time. As far back as 2002, there was an intense row regarding this very subject within London's Institute of Contemporary Arts (ICA), one of that city's most avant-garde art institutions, and one that is deeply committed to the conceptual art approach. The fracas was initiated by Ivan Massow, who was at the time chairman of the Institute. The specific cause of the dispute was an article written by Massow in *The New Statesman*, in which he derided the conceptual art that had become, in fact, "our official art."¹⁶⁷ Some of Massow's complaints were aesthetic: "Concept art is so firmly 'established,' it is no longer promoted through reference to any criteria of aesthetics, originality or intellectual challenge, but through spin and the clever exploitation of the fear of

165. Adler, *supra* note 2, at 292.

166. *Id.*

167. Ivan Massow, *Why I Hate Our Official Art*, NEW STATESMAN, Jan. 21, 2002, at 11.

'missing out.'"¹⁶⁸ But in a way Massow's most biting criticism was his description of the cultural matrix in which conceptual art thrives:

Totalitarian states have an official art, a chosen aesthetic that is authorised and promoted at the cost of other, competing styles. . . . In Britain, too, we have an official art—concept art—and it performs an equally valuable service. It is endorsed by Downing Street, sponsored by big business and selected and exhibited by cultural tsars such as the Tate's Nicholas Serota who dominate the arts scene from their crystal Kremlins. Together, they conspire both to protect their mutual investments and to defend the intellectual currency they've invested in this art.¹⁶⁹

This is the most damning indictment of the current crop of conceptual art and the artists who produce it. The most prominent contemporary conceptual artists—including almost all of those mentioned in Professor Adler's article—are for the most part corporate artists, in the sense that that they seem particularly interested in art not for its own sake but rather as something that can be turned into a marketable commodity by the likes of Charles Saatchi or, when it outgrows Saatchi, Sotheby's.¹⁷⁰

Needless to say, Ivan Massow's article in *The New Statesman* got him dismissed as the chairman of the ICA. But it turns out Massow was not the only one to see cracks in the conceptual art phalanx. Only two years after Massow's article, Sarah Kent, a former gallery director of the ICA, wrote in the same magazine that "the ICA would scarcely be missed if it closed down tomorrow."¹⁷¹ She reiterated Massow's criticism that galleries such as the ICA, which incessantly promoted conceptual art, made themselves "merely stooges of an arts establishment 'guilty of conspiring to make concept art synonymous with contemporary art.'"¹⁷² And in the deepest cut of all for an institution that prides itself on its avant-garde bona fides, she noted that "its mantle of radicalism is now distinctly threadbare."¹⁷³

But none of this signaled the failure of conceptual arts to achieve its historical destiny of supplanting the visual arts as much as a development

168. *Id.*

169. *Id.*

170. The reference in the text is to Damien Hirst's recent decision to bypass galleries altogether and market his work to the public directly through auction houses such as Sotheby's. See Colin Gleadell, *Damien Hirst Skips the Middleman . . .*, WALL ST. J., Sept. 17, 2008, at D7 (discussing Hirst's 2008 auction at Sotheby's, which grossed over \$200 million).

171. Sarah Kent, *Irrelevant Cautious Antique*, NEW STATESMAN, Sept. 20, 2004, at 38, 38.

172. *Id.* at 39.

173. *Id.*

that occurred only a few years later. Charles Saatchi is probably the most important figure in the conceptual art-centered contemporary art scene. In many ways he created that scene. After making his fortune at the advertising firm Saatchi & Saatchi—founded with his younger brother Maurice¹⁷⁴—he started collecting the work of mostly American artists. Then, in 1990, after divorcing his first wife, who was an American-born art writer, he sold virtually the entire collection and began to pursue the art that made him an art-world magnate: the conceptualist art-oriented YBAs, or Young British Artists. He collected this new art with the same kind of enthusiasm he expressed for Margaret Thatcher, whose advertising campaign for the 1979 British elections Saatchi masterminded. A fair number of critiques echoed this line from a glowing 1999 *New York Times* profile: “After helping to revive the moribund Conservatives, he single-handedly rehabilitated Britain’s desiccated art scene.”¹⁷⁵

All of this fits happily within the story being told by Professors Adler and Danto: that the visual arts, and especially painting, are dead and have been replaced by conceptual art of the sort with which Charles Saatchi is usually connected. Under this conception of the art world, the work of Damien Hirst (sharks in formaldehyde), Tracey Emin (condom-festooned dirty beds), and the Chapman brothers (clown-faced desecrated copies of Goya and “penis-nosed, vagina-mouthed child-mannequins”¹⁷⁶) defines the new art world. If this story were true, then the debate about the continuing viability of moral rights statutes at least would be a debate about statutes that served no contemporary function but rather were mere artifacts of a past era in art. Unfortunately for the proponents of this story, recent developments in the art world have made this account of the art world sound about ten years out of date. The man who allegedly rehabilitated Britain’s desiccated art scene has either sold or put into storage almost all of his conceptual art and turned to—of all things—painting. In early 2005, his “Saatchi Gallery opened the first installment of a three-part yearlong show called ‘The Triumph of Painting.’”¹⁷⁷ As if the show itself—as well as its title—were not enough of a finger in the eye of the conceptual art establishment, Saatchi drove the point home with a few pointed comments:

“People need to see some of the remarkable painting, produced and overlooked, in an age dominated by the attention given to video, installation and photographic art,” he said. He added, “For me, and for people with good eyes

174. See Deborah Solomon, *The Collector*, N.Y. TIMES MAG., Sept. 26, 1999, at 44.

175. *Id.* at 47.

176. Hari, *supra* note 144.

177. Alan Riding, *A Powerful Collector Changes Course*, N.Y. TIMES, Jan. 29, 2005, at B9.

who actually enjoy looking at art, nothing is as uplifting as standing before a great painting whether it was painted in 1505 or last Tuesday.”¹⁷⁸

As *The New York Times* concluded its article on the show, “[F]or the first time in 20 years, contemporary painting is back on London’s art agenda.”¹⁷⁹

Even in the United States, which tends to lag somewhat behind England in the art fad tournaments, painting, which never really left the scene to the same extent as it did in the United Kingdom, is making a strong comeback. John Currin, for example, is one of a new generation of younger figurative painters whose works now command high prices and serves as an example of artistic success for artists who continue to be interested in learning and practicing the sorts of visual technique and artistic craft in which the conceptual artists long ago lost interest. Professor Adler mentions Currin, but only in order to unsuccessfully attempt to shoehorn him into the conceptual vision of art. “[P]art of the point of his work is that he paints so masterfully after painting was pronounced dead. Currin paints as if there were quotation marks around the word ‘painter,’ marking it off as a sly conceptual move.”¹⁸⁰ With respect, this could be true only if one chooses to ignore both Currin’s work and everything the artist has ever said about his work.¹⁸¹ It is true that there are conceptual aspects to Currin’s work; the work certainly has a point of view, it shares with the conceptualists an ironic perspective toward its subjects, and there is an element in his work—especially the early work—that seems intended to shock its audience. But this is all encased within art that is heavily imbued with a sophisticated visual aesthetic. Currin clearly cares very deeply about aspects of art that are supposed to be anachronistic in this conceptual age—things such as brushwork, color, and composition. This aspect of Currin’s work does not comment on the proposition that painting is dead; it disproves it. As does the rise to prominence of the bevy of other American painters such as the young figurative artists Lisa Yuskavage, Elizabeth Peyton, and Jenny Saville and representational

178. *Id.* (quoting Charles Saatchi).

179. *Id.*

180. Adler, *supra* note 2, at 293.

181. In discussing his decision to pursue the unfashionable art of figurative painting, Currin notes that he did so in part “to stand out, to play it straight” from those who dominated the art scene at that time. Glenn O’Brien, *Interview with John Currin*, INTERVIEW MAG., <http://www.interviewmagazine.com/art/john-currin/print/> (last visited Dec. 28, 2011). He also noted that two of his significant influences were “Neue Sachlichkeit [the New Objectivity] and Christian Schad, this German realist from the ’20s and ’30s”—hardly icons of your typical conceptual artist. *Id.*

painters such as Vincent Desiderio, Bo Bartlett, Richard Maury, Odd Nerdrum, and Wade Schuman.¹⁸²

To be sure, for a time it may have appeared that conceptual art utilizing nontraditional media such as videos, installations, assemblages, fish tanks, and sculptural replicas of the artist and his paramour having sex¹⁸³ may have squeezed out the work of artists using traditional media such as painting. But that is how the art world works. The art world is faddish, clannish, ingrown, often superficial, seldom very intellectual, and defined much more by economics than by aesthetics. When Robert Hughes titled his history of twentieth-century art *The Shock of the New*,¹⁸⁴ little did he know that he was also aptly summarizing the twenty-first-century art gallery marketing ploy: Shocking! New! If conceptual art retreats from its perceived dominance, it will be because much of it had little to offer as art—and by *art*, I mean an expressive medium that relies first and foremost on the visual and the aesthetic and secondarily on an abstract and usually obvious and trite “concept.”

The main point of this diversion into an overview of the trends in contemporary art is to underscore that the anti-art attitudes and support of destruction-as-art, which form the basis of Professor Adler’s attack on moral rights statutes, are themselves components of an artistic pose. The category of art from which that pose is drawn has become increasingly frayed around the edges recently. It was probably impossible for conceptual art to dominate the art scene for very long because all conceptual art is based on easy irony, the inside joke, and a quick shock. But once the shock wears off, and the joke has been told, it is difficult to see what conceptual art can produce as a sequel. A friend of mine in college had a show in which the last piece was a Kellogg’s Pop-Tart, which my friend placed pretentiously on a stand, which in turn was placed on a linen-draped table. The title of the piece was *But Is It Tart?* Good enough for a chuckle, one must admit, but would anyone really go out of his or her way to see the Pop-Tart a second time?

182. These names are chosen because they have achieved sufficient distinction to be noticed by the mainstream press. See Mia Fineman, *Talk of the Town*, SLATE (Dec. 30, 2003), http://www.slate.com/articles/arts/art/2003/12/talk_of_the_town.html; *A Closer Look at John Currin*, SLATE, <http://web.archive.org/web/20100831160419/http://www.slate.com/id/2093020/slideshow/2093150/fs/0/entry/2093130/> (last visited Dec. 28, 2011).

183. The reference is to Jeff Koons, who in 1991 produced a series of paintings and sculptures titled *Made in Heaven*, which depicted Koons having sex with his then-wife La Cicciolina, the Hungarian porn star and former member of the Italian parliament. See Michael Kimmelman, *Art in Review*, N.Y. TIMES, Nov. 29, 1991, at C28 (reviewing the *Made in Heaven* show); Calvin Tomkins, *Koons at Fifty*, NEW YORKER, Feb. 7, 2005, at 33 (discussing the *Made in Heaven* show in the context of Koons’s other work).

184. ROBERT HUGHES, *THE SHOCK OF THE NEW* (2d ed. 1991).

In any event, even if the conceptualist-oriented art scene were as vibrant as it was over a decade ago, it would still raise the question why this type of art should be used as an excuse to undermine one of the few protections the law offers to artists who believe that art should be something more than a pile of bricks on a museum floor.¹⁸⁵ As noted above,¹⁸⁶ just as many pieces of conceptual art can be produced if moral rights statutes stay on the books as could be produced if those statutes were rescinded tomorrow. If, as a matter of theory, conceptual artists believe that all art—including their own—is ephemeral and should not be allowed to last, then there is nothing to prevent those artists from putting an expiration date on their own work, as apparently Damien Hirst did when he used for several of his famous installation pieces carcasses of animals that rot.¹⁸⁷ In contrast to this perspective of art, others believe that there is art that should be preserved and protected against destruction. It is probably true

185. The reference is to the Tate Museum's purchase of Carl Andre's piece *Equivalent VIII*—more commonly known as “a pile of bricks.” See *Archive Journeys: Tate History, The Bricks Controversy*, TATE ONLINE, http://www.tate.org.uk/archive/journeys/historyhtml/people_public.htm (last visited Dec. 28, 2011) (acknowledging that the museum was “ridiculed by many for . . . being conned into buying ‘a pile of bricks’”). The piece consists of 120 sand-lime bricks, arranged in a rectangle on the museum floor. See Carl Andre, *Tate Collection: Equivalent VIII*, TATE ONLINE, <http://www.tate.org.uk/servlet/ViewWork?workid=508> (last visited Dec. 28, 2011). The Tate piece is actually a reproduction. Andre had no place to store the bricks after the original piece was shown in a gallery, so he had to return them to the building supply company. When the Tate decided to buy the piece, the original building supply company had gone out of business, so he had to buy new bricks from another company. See CARL ANDRE, *CUTS: TEXTS 1959–2004*, at 47 (James Meyer ed., 2005).

186. See *supra* notes 144–45 and accompanying text.

187. After Charles Saatchi sold Damien Hirst's most famous piece to the American hedge fund broker Steve Cohen for over six million pounds, it was revealed that the shark that was the focal point of the piece had begun to rot. According to observers at the time, the liquid in which the shark floated was “now murky and the shark [was] showing considerable signs of wear and tear and ha[d] changed shape.” Nigel Reynolds, *Hirst's Pickled Shark Is Rotting and Needs To Be Replaced. Should It Still Be Worth 6.5M?*, DAILY TELEGRAPH (London), June 28, 2006, at 5, available at 2006 WLNR 11159348. Hirst's solution to this problem was simply to replace the old shark with a new one, which is a gesture oddly contrary to the conceptual emphasis on the impermanence of art. And apparently the problem does not stop with Hirst because the shark incident “highlights growing alarm over how to preserve the high-priced conceptual works, many made from organic materials, poor quality paint, junk and even blood and insects, produced by Hirst's Young British Artists movement.” *Id.* Nor does the problem with Hirst's work end with the shark because his other work includes “rotting cows [arranged] to simulate copulation, . . . sheep preserved in formaldehyde and maggots attacking a cow's head.” Carol Vogel, *Swimming with Famous Dead Sharks*, N.Y. TIMES, Oct. 1, 2006, at 28.

that one hundred years from now few people will be interested in seeing the Chapman brothers' clown faces. At the other end of the spectrum, it is an equally good bet that one hundred years from now people will still be interested in perusing Goya's *Disasters of War* since that work has already proved that it resonates with people beyond the century mark. So if moral rights statutes, as weak as they are, prove even modestly successful in protecting contemporary artwork that may have a similar resonance, then these statutes are worth preserving and defending, no matter how unpostmodern such an effort may seem.

VI. CONCLUSION

Professor Adler's approach to art and moral rights statutes seems better in the abstract than in practice. In the abstract, it seems like a good idea to bring to bear on the legal protection of art relevant recent developments in contemporary art and art theory. Also, in the hands of people such as Professor Danto, there seems to be a very good theoretical case to be made that the visual traditional art forms such as painting, drawing, and sculpture have been superseded by conceptual art, whose practitioners care little or not at all about traditional aesthetic concerns. In practice, however, the claims of conceptual dominance over the visual arts are overblown. The visual arts—especially painting—have witnessed a resurgence over the past decade, and this resurgence shows no signs of abating. Moreover, the approach to moral rights statutes that stemmed from the focus on conceptual art has the unfortunate side effect of transferring control over art to those whose primary interest in art is not in aesthetics but rather in matters of commerce, religion, or politics.

No one would argue that moral rights statutes are the ultimate legal protection of art. The federal and state statutes are narrow, there are a number of exclusions, and for any number of reasons the statutes are unlikely to provide the kind of protection that those who supported the statutes hoped and expected. Nevertheless, the statutes are important, if for no other reason than to represent the principle that the protection of art is an important social desideratum. Abandoning the concept of moral rights in order to reconcile the law regarding art with contemporary artists who believe that the destruction of art is itself art makes no sense, unless one believes in something akin to an aesthetic equivalent of the Vietnam War adage that we must destroy the village in order to save it.