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Toward an American Moral Rights in Copyright

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Introduction

Indiana University's newly adopted code of conduct for all participants in its athletic programs includes the requirement that all players, coaches, faculty, and staff "treat one another and all other people with *dignity* and respect."[1] Widely seen as a response to the actions of its former basketball

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1. INDIANA UNIVERSITY, OFFICE OF COMMUNICATIONS AND MARKETING, STATEMENT OF PRINCIPLES ON THE CONDUCT OF PARTICIPANTS IN STUDENT ATHLETIC PROGRAMS ¶¶ 2.1, 3.1,

coach,[2] the university's new policy became the latest example of an institutional recognition and demand for personal dignity. The university's action follows the course of private organizations,[3] various states,[4] Congress,[5] executive agencies,[6] individual nation states,[7] and the collective member nations of the United Nations[8] that refer formally to some sense of individual dignity in their governing pronouncements.[9] Interestingly, none of the propounded materials with explicit references to "dignity" offer any guidance as to what the term means, and only the Indiana code of conduct provides for sanctions in response to actions that violate the requirement of treatment with dignity.[10]

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available at http:/www.indiana.edu/~athlweb/graphic/conduct.html (last visited Oct. 1, 2001) (emphasis added) [hereinafter STATEMENT OF PRINCIPLES]; *see also id.* ¶ 3.1.4 (stating that "[t]he obligation of coaches to treat others with dignity and respect . . . shall apply to their treatment of . . . other coaches, faculty, staff, and administrators; the athletes and personnel of other teams; officials and referees; members of the news media; and the public"); ¶ 3.4.2 (requiring that "[w]hen speaking to the news media and in other public statements and settings, coaches . . . shall conduct themselves with respect and dignity").

2. After the public revelation of the alleged choking of a former player by Coach Robert M. Knight, university president Myles Brand appointed a commission "to develop firm, clear guidelines that spell out what is acceptable for coaches, student-athletes, and Athletics Department personnel." INDIANA UNIVERSITY, OFFICE OF COMMUNICATIONS AND MARKETING, IU CODE OF CONDUCT COMMISSION PRESENTS RECOMMENDATIONS FOR ATHLETICS CODE OF CONDUCT TO IU PRESIDENT AND TRUSTEES, Sept. 15, 2000 (copy on file with author). At the conclusion of a four-month study, the commission recommended to the Trustees of Indiana University guidelines governing conduct for all participants in its athletic programs. The trustees unanimously approved the code of conduct. Minutes of the Trustees of Indiana University, Indiana University Southeast, Sept. 15, 2000, *available at* http://www.indiana.edu/~trustees/m000915.html. How and whether the guidelines might have applied to Coach Knight became moot when his employment with the university was terminated a week before the commission made its recommendations. For a press account, see *IU Athletics Gets a Code of Conduct: New Rules Put in Place in Wake of Knight Departure*, CHI. TRIB., Sept. 16, 2000, at 9, *available at* 2000 WL 3709574.

3. *See infra* note 192 (stating formal demands for "dignity" by private organizations).

4. *See infra* notes 200, 206-07 (providing references to "dignity" in state statutes and constitutions).

5. *See infra* notes 193-98, 203 (describing use of "dignity" in United States Code).

6. *See infra* note 199 (referring to"dignity" provisions in CFR regulations).

7. *See infra* note 184 (providing for right of dignity in national constitutions).

8. *See infra* notes 146, 148-150, 152 (referring to definition of "dignity" in U.N. documents).

9. Interestingly, Indiana University's code of conduct appears to be among the few provisions containing the dignity reference that require enumerated persons to treat *others* with dignity. STATEMENT OF PRINCIPLES, *supra* note 1, ¶¶ 2.1, 3.1. The other materials state generally that certain persons are entitled to dignity.

10. Under the Indiana policy, sanctions for minor violations include warning, increased monitoring, probation, and University or community service. *Id.* ¶ 5.1.8. Sanctions for "re-

Yet despite the lack of a consensus on the meaning of the term, and the view expressed by some that the term is so amorphous that it escapes a precise definition,[11] dignity offers simplicity, a presumed understanding, and universal appeal.[12] Although American courts have yet to announce a judicial recognition of a dignity right,[13] the many references to individual dignity in both state and federal law,[14] as well as the demand for it by private groups, suggest a nascent dignity movement afoot in American law and policy.

Dignity may also have a part in American copyright and the law governing the works of authors,[15] an idea that has been alluded to cursorily by commentators,[16] and the elaboration of which this Article provides explicitly.

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peated or deliberate noncompliance" include suspension or expulsion from the University, termination of employment, and referral for criminal prosecution. *Id.* ¶ 5.1.9.

11. *See infra* note 154 (noting that definition of dignity lacks consensus).

12. That is, few could be opposed to the requirement of treating persons with dignity.

13. *See infra* text accompanying notes 188-90.

14. *See infra* text accompanying notes 193-213.

15. Following the practice of several commentators, the term "author" herein refers not only to authors of written text, but to a broad category of creators of various forms of art. *E.g.*, Phyllis Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 32 n.5 (1983) ("I use the terms *artist, author*, and *creator* interchangeably, except when a particular art form is being discussed."); Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1, 4 n.12 (1997) ("I shall use the terms 'author,' 'artist,' and 'creator' interchangeably to refer to any person who creates a literary work, musical composition, motion picture or other 'work of authorship' as that term is defined under the Copyright Act." (citing 17 U.S.C. § 102(a) (1994))); Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law – A Proposal*, 24 S. CAL. L. REV. 375, 375 n.2 (1951) ("[T]he term 'author' is intended to refer to creators of all forms of art . . . .").

16. *See* H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925 (quoting following statement of John B. Koegel, Esq.: "It is a rebuke to the dignity of the visual artist that our copyright law allows distortion, modification and even outright permanent destruction of such efforts."); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[D][4], at 8D-26 n.106 (1999) ("The issue of moral rights implicates fundamental concerns about human dignity."); Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 324 n.197 (1999) ("A moral right, in the context of intellectual property, is the right of a creator to control his creation so that it will not be changed or distorted in a way that may injure his dignity." (citing Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 44 (1998))); *see also* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 997 (1990) [hereinafter Damich, *The Visual Artists Rights Act of 1990*] ("Moral rights are akin to the dignitary torts . . . ."); Robert G. Howell, *Publicity Rights in the Common Law Provinces of Canada*, 18 LOY. L.A. ENT. L.J. 487, 505-06 (1998) (noting that under Canadian law, "moral rights . . . by their nature present elements that can be compared with rights in defamation being partially directed to the dignity of an author"); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 13, 14 (1994) (noting Continental law's assimilation of copyright within, among others, "personality

Traditionally, the focus of American copyright law has been on the distribution and allocation of the pecuniary or property rights that flow from a created work.[17] Such a scheme would likely have little room for consideration of the individual dignity of the creator. In more recent years, American law has moved away from a solely proprietary approach to copyright and toward a system that provides for some recognition of an author's personal rights in her creations, even after the full panoply of proprietary interests transfers into another's hands. This latter approach leaves open the possibility that the author's dignity can and should be considered and respected. In 1990, Congress enacted the Visual Artists Rights Act (VARA), which provides certain artists the rights of attribution (the right to have the artist's name attributed to her work) and the right of integrity (the right to protection from certain mutilation, deformation, or distortion of the work).[18] Though far removed from the comprehensive protections given to authors in civil law jurisdictions,[19] the federal statute, along with similar state statutes and selected case law, places the United States in the ranks of those jurisdictions that recognize, at least to some limited degree, the author's moral rights. This branch of copyright law has been much discussed[20] and continues to be controversial. Advocates of moral rights point to the very limited number of authors entitled to protection under VARA and the sporadic case law that applies to situations not covered by the statute, and complain that moral rights protections under American law are inadequate. Notably, what emerges from the commentary, from both those who advocate more elaborate moral rights and those who are skeptical that such rights could co-exist with already established law and practice, is the need for a construct, a rationale or a basis, for a moral rights system that is more adaptable to the established American socio-legal culture and copyright

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rights (rights of reputation, privacy, and other personal dignity interests)"); Dan Rosen & Chikako Usui, *The Social Structure of Japanese Intellectual Property Law*, 13 UCLA PAC. BASIN L.J. 32, 34 n.8 (1994) (citing Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983)) (noting that under French law, intellectual property rights serve "not as an incentive but rather as a recognition of the creator's dignity"); Vera Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM. - VLA J.L. & ARTS 201, 213-14 (1999) (noting that under Russian law, moral rights include right "to protect the work from any distortion that might injure the honor and dignity of the author").

17. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985) [hereinafter Kwall, *Copyright and the Moral Right*]; Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59 (1994) [hereinafter Kwall, *The Right of Publicity*].

18. 17 U.S.C. § 106A(a) (1994). The rights of attribution and integrity are discussed in more detail at *infra* text accompanying notes 34-39.

19. A discussion of the French *droit moral* follows at *infra* text accompanying notes 43-52.

20. For a recommended partial bibliography, see *infra* note 25.

history.[21] It is precisely this situation in which the moral rights system based on the dignity of the author could help to fill a void.

Simply, this Article invites consideration of authorial dignity as a basis for the development of an American moral rights doctrine. More likely to occur through legislative initiative rather than judge-made rule, the proposed plan would recognize the dignity of the author, which would require respect for the author's role as a creator and for the created product as a reflection of the author's personality.[22] The dignity-based right of integrity, which is at heart of the moral rights doctrine,[23] would then extend procedural devices of prior notice of another's alteration or use of the author's work and the author's opportunity to object, and the principal substantive right to challenge such alteration or use. The proposed approach contemplates a balancing of the author's right of integrity with the interests of the party seeking unconsented alteration or use. This approach to moral rights would likely lead to more substantial protections than those currently available under U.S. law, but still short of that seen in civil law countries. Importantly, enhanced moral rights protections would be effected not by transplanting the system of another jurisdiction's rule or "slavish copying"[24] thereof, but by an American system of moral rights that is based on an American sense of dignity.

The discussion herein is divided into two main parts. Part II provides a brief background of moral rights in the international setting, and the development of moral rights stateside (especially the right of integrity). This Part capitalizes on the considerable bibliography on the subject,[25] and where

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21. *See infra* text accompanying notes 106-15, 137. One court aptly phrased the question thus: "[T]here arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be?" Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 579 (N.Y. Spec. Term 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949).

22. The case for an American right of personality toward moral rights protection is made most directly in Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988) [hereinafter Damich, *The Right of Personality*]. The personality interest in moral rights is further discussed and questioned in Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998) [hereinafter Hughes, *The Personality Interest of Artists and Inventors*], and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350-54 (1988) [hereinafter Hughes, *The Philosophy of Intellectual Property*].

23. *See infra* note 38 (noting commentators' view that right of integrity is central to moral rights doctrine).

24. Damich, *The Right of Personality*, *supra* note 22, at 5.

25. Although an exhaustive bibliography of moral rights is not offered herein, there are highly recommended works toward an informed study of the subject. An early piece, and a capable introduction of the subject, is Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940). Additional helpful

appropriate, includes a critical analysis of the discussion to date. It summarizes the limited moral rights protections that American authors have under the federal statute, which applies to only one category of authors, and the melange of legal theories in the scattered case law that is purportedly applicable to the rest. Part III begins with an introduction of the concept of dignity, as understood by significant mention in state and federal law, then proposes a system in which moral rights, specifically, the right of integrity, would be implemented by giving due regard for the author's dignity. The result of the proposed dignity-based right of integrity would be to broaden the scope of authors who could seek protection of the right, so as to include more of those whose works contribute to the arts, and to provide more elaborate protections for authors' personal rights. Although this undoubtedly would require some adjustment in the current law and some accommodation, much of the copyright laws would be left intact.[26] In the end, what is proposed for consideration is a development of a moral rights doctrine that would demand respect for the author's work under an evolving American copyright system that originally was implemented with different priorities than one with moral rights of the author at the center.

II. Moral Rights and the American Analogue

A. Moral Rights International

The doctrine of moral rights recognizes that an author has certain personal rights that stem from being the creator of a work; such rights are independent of pecuniary or economic interests in the tangible work product and remain with the author even after any transfer of ownership.[27] Moral rights pre-

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background sources are Amarnick, *supra* note 15; Russell J. DaSilva, Droit Moral *and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); and James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968). Thorough and informative among more recent literature are Damich, *The Right of Personality*, *supra* note 22, and Kwall, *Copyright and the Moral Right*, *supra* note 17. A third, Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988), is one of the leading pieces skeptical of the virtues of moral rights protection. Lastly, recommended post-VARA works include Cotter, *supra* note 15; Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65 (1997); and Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1 (1997) [hereinafter Kwall, *How Fine Art Fares Post VARA*].

26. For example, the proposed dignity-based right of integrity would be subject to the fair use doctrine. *See infra* text accompanying notes 259-61.

27. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (noting that moral rights protect artists from change or mutilation of their work even after transfer). Although the

sume that the author's creative process not only results in a tangible product that is subject to the demands of, and mobility within, the marketplace, but also reflects the personality[28] and "self"[29] of the author, indeed, her creative soul.[30] The specific substantive protections under the moral rights rubric differ from jurisdiction to jurisdiction,[31] but such protections are generally understood to include, chiefly and most simply, the rights of disclosure, attribution, and integrity.[32] The disclosure right provides that, as the master of the work, only the author can determine when her work is complete and

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commentary often describes moral rights as non-economic rights, *see, e.g.*, Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 1, some have stated that moral rights are related to an author's economic rights, *see, e.g.*, Amarnick, *supra* note 15, at 31. For an examination of the economic aspects of author's moral rights, see generally Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997); Laura A. Pitta, *Economic and Moral Rights Under U.S. Copyright Law: Protecting Authors and Producers in the Motion Picture Industry*, ENT. & SPORTS LAW. Winter 1995, at 3.

28. *See* 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 145 (1987) ("The primary justification for the protection of moral rights is the idea that the work of art is an extension of artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality."); Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 955 ("Moral rights derive from the fact that a work is an expression of the artist's personality."); Katz, *supra* note 15, at 388 ("An author's interests of personality are much more a part of the fabric of his creation than are those of an inventor of an industrial or commercial process . . . ."); Roeder, *supra* note 25, at 557 ("[W]hen an artist creates . . . he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality."); Sarraute, *supra* note 25, at 465 ("[The moral right] includes non-property attributes . . . [that] give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality.").

29. *See* Katz, *supra* note 15, at 380-81, 401-02 ("[I]s not literary property the outward manifestation of the creator's inner-self?"); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 402-03 (1993) (naming this "self defining expression" or "self-realization").

30. *See* Halpern, *supra* note 25, at 65 ("[T]he soul of the 'artist[ ]' creat[es] a unity between the creator and the creation.").

31. There appears to be no universal consensus on the proper extent of the substantive moral rights. For an excellent discussion of the extent of moral rights protections in various civil law countries, see Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995).

32. *See* Kwall, *Copyright and the Moral Right*, *supra* note 17, at 5; Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 1; Netanel, *supra* note 29, at 383; Sidney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 244 (1978); *see also* William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 507 (1955) (noting that Berne Convention encompasses both paternity right and right to integrity of works). Some jurisdictions provide for additional rights. *See infra* text accompanying notes 46-49.

when it is ready for publication and public review.[33] Once the work is published, the right of attribution[34] ensures that the author (and no one else) will receive attribution as its creator. Related to the right of attribution is the protection from misattribution,[35] which protects authors against attribution to works they did not create, and the right to demand anonymous or pseudonymous authorship.[36] Lastly, the right of integrity, which most underscores the personality interest of the author[37] and is the focus of this Article's proposal,[38] protects against significant alteration of the work or such derogatory use of it that is contrary to the author's intentions.[39] Important in any discussion of

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33. *See* Damich, *The Right of Personality*, *supra* note 22, at 7; Kwall, *Copyright and the Moral Right*, *supra* note 17, at 5-6; Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 1.

34. The commentary suggests that "right of attribution" is gaining popularity as the preferred term over "right of paternity," the original term and one that commentators in significant number still use. A leading authority on copyright notes the "sexist underpinnings" of the latter term, "not to mention its confusion over when gestation occurs." NIMMER, *supra* note 16, § 8D.01[A], at 8D-5 n.8.

35. *See* Cotter, *supra* note 15, at 12 (noting types of attribution rights).

36. *See id.*; Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 1. Perhaps few authors could be stronger advocates of the right of attribution than law professors, whose desire for attribution and citation is fueled by the belief that "large numbers of citations to a publication are strong evidence of its scholarly influence." Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1543 (1985). Professor Herma Hill Kay added the following (in light fare):

> If you're cited, that means you're identified as a player in the game: a scholar of significance. Your academic stock goes up, and you're sure to get an invitation to visit – yes, maybe even as a scholar-in-residence – at leading law schools. The more you're cited, the more likely it becomes that a bidding war will break out over you. If you're not cited, that means you're a know-nothing upstart . . . .

Herma Hill Kay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419, 426 (1990). Thus, few legal scholars are likely to decline attribution for authored articles. The exceptions to this are extraordinary and truly understandable. *See, e.g.*, Cato Tonic, *The Last Refuge of Scoundrels: Selective Literalism in Constitutional Interpretation*, 78 B.U. L. REV. 67 (1998) ("[An] affirmative constitutional grant of power, seemingly addressed to Mr. Clinton individually, is that 'Bill . . . shall . . . lay any . . . Imports' – language that arguably reaches interns brought in from California.") (citation omitted).

37. *See supra* note 28 and accompanying text (discussing personality interest of author).

38. Of the multiple rights included within moral rights protections, it is the integrity right that has been described as the "most dramatic," Roeder, *supra* note 25, at 565, "most controversial," Arthur L. Stevenson, Jr., *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. (ASCAP) 89, 101 (1955), "most important," MERRYMAN & ELSEN, *supra* note 28, at 143, "the central tenet of moral rights jurisprudence," Netanel, *supra* note 29, at 387, lying "at the heart of the moral rights doctrine," Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 1, and indeed, "often deemed to constitute the whole doctrine," Roeder, *supra* note 25, at 565.

39. NIMMER, *supra* note 16, § 8D.04[A][1], at 8D-49; Damich, *The Right of Personality*, *supra* note 22, at 15.

moral rights is the alienability and duration of such rights.[40] Jurisdictions with the most advanced moral rights protection provide that moral rights are inalienable (and thus not subject to the author's transfer or waiver)[41] and are perpetual, thereby surviving the author (to the author's heirs) as well as the duration of copyright term.[42]

Within the international community, France is the undisputed champion of authors' moral rights, *ou en français, le droit moral*.[43] Art is "one of the glories of France."[44] The *droit moral* commands respect for the *auteur*, the artist's work, and the creative process,[45] and French authors receive the full panoply of moral rights. In addition to the rights of disclosure, attribution, and integrity, French law recognizes the right to create and not to create,[46] and the right to withdraw the work from the public;[47] the jurisdiction also provides for protection from excessive criticism,[48] and less frequently, protection

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40. *See* Netanel, *supra* note 29 (discussing copyright alienability and author autonomy).

41. *See* Damich, *The Right of Personality*, *supra* note 22, at 7 (using France as example); DaSilva, *supra* note 25, at 16-17 (same).

42. *See* Cotter, *supra* note 15, at 12 (discussing moral rights doctrine in France); Damich, *The Right of Personality*, *supra* note 22, at 7 (same).

43. Diamond, *supra* note 32, at 245; Halpern, *supra* note 25, at 71 n.30. On the French *droit moral* generally, see DaSilva, *supra* note 25; Jane Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHTS SOC'Y 269 (1989); Sarraute, *supra* note 25.

44. Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 447 (1927) (Holmes, J., dissenting).

45. *See* Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 40 (1997) ("The French legislature has characterized the attribution right as the artist's right to 'respect for his name, his authorship.'" (quoting Law No. 57-298 of March 11, 1957, art. 19, p. 2723, amended by Law No. 85-660 of July 3, 1985, J.O., July 4, 1985, p. 7495, translated in United Nations Educ, Scientific and Cultural Org., Copyright Laws and Treaties of the World, France section, item 1, art. 6 (1992))); Cotter, *supra* note 15, at 11 & n.43 (noting French courts' recognition of "the *droit au respect de l'oeuvre*, literally 'the right to respect of the work'").

46. The right *not* to create stems from the French understanding of the "artisan." Strauss, *supra* note 32, at 511 & n.24; Tal Vigderson, Comment, *Hamlet II: The Sequel? The Rights of Authors vs. Computer-Generated "Read-Alike" Works*, 28 LOY. L.A. L. REV. 401, 436 & n.224 (1994). This right would have been germane in a rather bizarre alleged incident of compulsory artistic service involving Jong Il Kim, the current head of North Korea. Years before assuming his current position, Kim, a movie buff, reportedly ordered the kidnapping of a South Korean movie director and his actress wife, for the purpose of having on his staff one who could produce movies to Kim's liking. After making a series of propaganda films for Kim, the director and his wife escaped. For a press account, see Michael S. Serrill, *All the Makings of a Great Movie (South Korean Actress and Director Escape North Korean Kidnappers)*, TIME, May 26, 1986, at 35, *available at* 1986 WL 2336259.

47. Some question the usefulness of this right. *See, e.g.*, Sarraute, *supra* note 25, at 477.

48. *See* Beyer, *supra* note 25, at 1023; Roeder, *supra* note 25, at 556.

against destruction of the created work.[49] Moral rights in France are inalienable and perpetual.[50] Interestingly, although France is regarded as a civil law jurisdiction with legal norms declared by the civil code rather than judge-made rules seen in common law jurisdictions, the *droit moral* originated from the French courts in the nineteenth century,[51] and have since been codified.[52]

Authors' moral rights gained international acceptance in 1928, when the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) added to its provisions the rights of attribution and integrity.[53] Still the most influential international copyright treaty, article *6bis* of the current Berne Convention provides:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and 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.[54]

The United States had declined to join the original Berne Convention when it was formed in 1886, and the treaty's inclusion of moral rights further discouraged American acquiescence.[55] The convention as a whole was seen

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49. Professor Cotter notes that although the French Code does not explicitly provide for protection against destruction, some courts have extended such protection. Cotter, *supra* note 15, at 13 n.60. Commentators have argued that although alteration might affect the author's right of integrity, destruction would be less of an infringement of her personality. *See* Kwall, *Copyright and the Moral Right*, *supra* note 17, at 9 & nn.33-34.

50. *See* Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 967-68 & n.113 (noting inalienability of moral rights in France); Jane C. Ginsburg, *Ownership of Electronic Rights and the Private International Law of Copyright*, 22 COLUM.-VLA J.L. & ARTS 165, 173 & n.33 (1998) (same); Netanel, *supra* note 29, at 381 & n.156 (stating that moral rights in France are inalienable and perpetual).

51. *See* Merryman, *supra* note 25, at 1026 ("It is interesting to note that the moral right of the artists in French law is entirely judicial in origin."); Sarraute, *supra* note 25, at 466 ("[T]he real credit . . . belongs to the courts, who played a more important role than did the academic theorists.").

52. *See* Dietz, *supra* note 31, at 201-02; *see also* Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 967-68; Jane C. Ginsburg, *supra* note 50, at 173; Netanel, *supra* note 29, at 381.

53. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. *6bis*, as last revised, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235 [hereinafter Berne Convention]. The Berne Convention was initially adopted in 1886. Moral rights protections were adopted as part of the Rome Amendments in 1928. The right of disclosure was not included; apparently such right was thought to be "too delicate and controversial a matter to be within the province of the Convention." Stevenson, *supra* note 38, at 108.

54. Berne Convention, *supra* note 53, art. *6bis*(1). The specifics of remedies and enforcement, like several other matters under the convention, are left to the member nations. *Id.* art. *6bis*(3).

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

as incompatible with the U.S. copyright scheme, and article *6bis* became a "major new obstacle" to American approval.[56] It is a fair statement that those who commercially exploit the works of authors (e.g., publishers and motion picture producers and distributors), all of whom would be economically disadvantaged by enforcement of extensive moral rights protections, were successful in their lobbying efforts. It was not until 1988 that the United States, under some international pressure and seeking to protect American authors' interests abroad, agreed to join the international treaty, initially through the Berne Convention Implementation Act of 1988 (BCIA).[57] Two years later, Congress enacted VARA, the first federal legislation recognizing the personal rights of artists, though limited to certain authors.[58]

B. American Judicial Response to Droit Moral

Before the enactments in BCIA and VARA, American courts had ample opportunity to address the matter of authors' non-economic rights in a number of cases. The case law clearly reflects two judicial positions: the refusal to adopt the moral rights doctrine seen in civil law jurisdiction[59] and reliance on

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56. Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 175 (1989); *see id.* at 184 ("At the outset of the 100th Congress, the 'moral rights' obstacle remained in the path of legislation to implement the [Berne] Convention.").

57. Pub. L. No. 100-568, § 2(3), 102 Stat. 2853 (1988) (published in notes following 17 U.S.C. § 101 (1994)). For commentaries by members of Congress on the activity leading up to the enactment, see Hatch, *supra* note 56; Carlos J. Moorehead, *H.R. 2962: The Berne Convention Implementation Act of 1987*, 3 J.L. & TECH. 187 (1988); Charles McC. Mathias, Jr., *S. 2904 and the Berne Convention*, 3 J.L. & TECH. 197 (1988).

58. As Professor Halpern summarized, it was the decade of the 1980s that saw unprecedented discussion of moral rights, and action in the legislatures. Halpern, *supra* note 25, at 66. High profile celebrities, like directors John Huston and Woody Allen among others, made passionate pleas for protection against the "colorization" of black and white movies. *See infra* text accompanying notes 292-303. This spawned substantial interest and discussion in the law reviews, *see generally* Beyer, *supra* note 25, often by student authors. *See generally* Anne Marie Cook, Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309 (1988); Michael C. Penn, Comment, *Colorization of Films: Painting a Moustache on the "Mona Lisa"?*, 58 U. CIN. L. REV. 1023 (1990); Dan Renberg, Comment, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM. & ENT. L.J. 391 (1989); Michael Sissine Wantuck, Note, *Artistic Integrity, Public Policy and Copyright: Colorization Reduced to Black and White*, 50 OHIO ST. L.J. 1013 (1989); Anna S. White, Comment, *The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform*, 38 EMORY L.J. 237 (1989); Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628 (1989).

59. *E.g.*, Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of

American analogues to provide for equivalent rights.[60] As to the former, some courts characterize the plaintiff's moral rights claim as one under *foreign* law, and reject its applicability stateside. Illustrative is the decision in *Vargas v. Esquire, Inc.*,[61] one of the earlier cases involving authors' moral rights. There, the court stated that "what are called 'moral rights' of the author, said to be those necessary for the protection of his honor and integrity" is "the law of foreign countries."[62] Quoting from the very treatise relied on by the plaintiff, the court stated that "[t]he conception of 'moral rights' of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States."[63]

Yet as Nimmer notes, pronouncements such as those in *Vargas* might give the false impression that authors have no protections of non-economic personal rights, when in fact, "stirrings of moral rights can be discerned in American judicial decisions and statutes."[64] Of the various rights that Amer-

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action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."); Miller v. Commissioner of Internal Revenue, 299 F.2d 706, 709 n.5 (2d Cir. 1962) ("[T]he moral right, as such, is not recognized in this country."); Crimi v. Rutgers Presb. Church, 89 N.Y.S.2d 813, 819 (1949) ("[T]he claim . . . that an artist retains rights in his work after it has been unconditionally sold, where such rights are related to the protection of his artistic reputation, is not supported by the decision of our courts.").

60. *E.g.*, Johnson v. Tuff-N-Rumble Mgmt., Inc., No. 99-1374, 2000 WL 1808486, at *4 n.1 (E.D. La. Dec. 8, 2000) (citing NIMMER, *supra* note 16, at § 8D.01[A]); Edison v. Viva Int'l Ltd., 70 A.D.2d 379, 384, 421 N.Y.S.2d 203, 206 (1979) (citing Seroff v. Simon & Schuster, 162 N.Y.S.2d 770, 774 (N.Y. App. Div. 1957), *aff'd*, 210 N.Y.S.2d 479 (1960)).

61. 164 F.2d 522 (7th Cir. 1947).

62. *Id.* at 526. As Professor Merryman noted, "Since the notion of moral right is foreign in origin, it seems reasonable to ask whether it is in some basic sense alien to American ideals and experiences." Merryman, *supra* note 25, at 1043. One commentator suggests a xenophobic tendency in the case opinions, since the "moral doctrine is itself foreign and inappropriate for a common law country." Amarnick, *supra* note 15, at 73.

63. *Vargas*, 164 F.2d at 526 (quoting 2 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY § 367, 802 (1938)). Indeed, the Ladas text stated, "No such right is referred to by legislation, court decisions or writers." LADAS, *supra*, at 802. The difference in the law led to diametrically different results in actions resulting from the same facts. A group of Russian composers protesting the use of their music and their names in the credit line of a film with anti-Soviet themes prevailed on their moral rights claim in France after New York courts rejected that same claim.. *Compare* Soc. Le Chant du Monde v. Soc. Fox Europe, [1953] Recueil Dalloz [[D. Jur.] 16, 80 (Cour d'appel, Paris), *with* Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (1948), *aff'd*, 87 N.Y.S.2d 430 (1949). Movie director John Huston failed in his attempts to lobby Congress to enact legislation prohibiting the "colorization" of his films made in black and white, but his heirs succeeded in convincing the French courts to award damages for the showing of Huston's *The Asphalt Jungle* on French television, on *droit moral* grounds. *See* Halpern, *supra* note 25, at 69.

64. NIMMER, *supra* note 16, § 8D.02[A], at 8D-10. The description of the development of moral rights in American case law occasionally invites vinous references. *See id.* ("The time-honored judicial practice of distilling new wine in old bottles has resulted in an increasing ac-

ican law purportedly protects, it is the integrity right – the focus of this Article – that is the "source of the greatest concern in American discussion on the moral right."[65] Commentators have pointed out that an author's right of integrity receives protection under American analogues of unfair competition (including Section 43(a) of the Lanham Act), contract, defamation, and privacy.[66] In practice, the most successful claims for the author appear to be in contract or unfair competition. At least in theory, the right of integrity may be best secured by contract, following Zechariah Chafee's advice: "[A]ny copyright owner who really cares about his moral rights can always protect them by inserting appropriate clauses in his contracts with publishers and producers, for example, by expressly forbidding any alterations or omissions made without his consent."[67] Any breach of the provision resulting in impairment of integrity can then be left to the courts for contractual interpretation. Yet as commentators have alerted, this approach assumes equal bargaining power, when in practice, many authors are not in the position to negotiate inclusion of a term for the right of integrity.[68]

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cretion of case law in some degree according to the substance of moral rights . . . ."); Stevenson, *supra* note 38, at 111 ("It might be that in the fullness of time we would develop enough cases so that bringing moral right into our law would be simply a matter of putting the old wine in new bottles.").

65. Amarnick, *supra* note 15, at 32.

66. NIMMER, *supra* note 16, § 8D.02, at 8D-10; Damich, *The Right of Personality, supra* note 22, at 38-71; Kwall, *Copyright and the Moral Right, supra* note 17, at 18-23. Some commentators have confidently stated that American analogues provide for moral rights protections *equal* to those of the French *droit moral*. The most direct case for this view was by the Attorney Advisor of the Copyright Office of the Library of Congress who wrote in 1955: "There is a considerable body of precedent in the American decisions to afford to our courts ample foundations in the common law for the protection of the personal rights of authors to the *same* extent that such protection is given abroad under the doctrine of moral right." Strauss, *supra* note 32, at 538 (emphasis added). The commentary includes similar views. *See* Stevenson, *supra* note 38, at 110 ("Our law . . . has recognized moral rights of creators within the scope of the doctrine of libel, unfair competition, right of privacy, and general principles of equity jurisprudence."); Treece, *supra* note 25, at 505 ("There are American law analogues of the French moral right;" "[q]uite clearly a right to the integrity of an artistic work is evolving in the United States."). For a more current analysis of the various common law theories and how moral rights claims fared under them, see Damich, *The Right of Personality, supra* note 22, at 38-71; Kwall, *Copyright and the Moral Right, supra* note 17, at 18-23.

67. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 729 (1945). The statement was from one whose view on the relative urgency of moral rights protections is evident from the following observation: "For the time being, we had better concentrate our energies on the pecuniary aspects of copyright. We have enough trouble there. After we get the issues of dollars and cents settled satisfactorily, we can go on to moral rights." *Id.*

68. Cotter, *supra* note 15, at 80; DaSilva, *supra* note 25, at 56; Kwall, *Copyright and the Moral Right, supra* note 17, at 26-27; Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 843 (1992).

Whether or not included in the contract, Nimmer cites to "certain early decisions that an author has the right to prevent distortion or truncation of his work,"[69] which right "matured to full copyright status in the landmark case of *Gilliam v. American Broadcasting Companies*."[70] There, members of the British comedy group Monty Python brought an action against the American Broadcasting Company (ABC), seeking to enjoin the network's airing of an edited version of the group's program,[71] which omitted 24 minutes of the original 90-minute show.[72] The court of appeals reversed the district court's order denying the motion for preliminary injunction, but not on moral rights grounds.[73] The court declared that "American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal rights of authors."[74] Nevertheless, the court of appeals ruled that since ABC's editing had indeed impaired the integrity of the authors' work,[75] the plaintiffs were entitled to injunctive relief on the independent ground that the heavily edited

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69. NIMMER, *supra* note 16, § 8D.04[A][1], at 8D-49 (citing Granz v. Harris, 198 F.2d 585, 589 (2d Cir. 1952) (Frank, J., concurring); Autry v. Republic Prods., Inc., 213 F.2d 667 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954); Harms, Inc. v Tops Music Enters., Inc., 160 F. Supp. 77 (S.D. Cal. 1958); Chelser v. Avon Book Div., Hearst Pubs., Inc., 352 N.Y.S.2d 552 (1973); Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (N.Y. Sup. Ct.), *aff'd*, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659 (1966); Stevens v. Nat'l Broad. Co., 148 U.S.P.Q. 755 (Cal. Super. Ct. 1966)).

70. 538 F.2d 14 (2d Cir. 1976). For a contemporary discussion of the case, see Note, *Protection of Artistic Integrity*: Gilliam v. American Broadcasting Companies, 90 HARV. L. REV. 473 (1976).

71. ABC had already broadcast one of the shows. Plaintiffs later saw the program and "were allegedly 'appalled' at the discontinuity and 'mutilation' that had resulted from the editing." *Gilliam*, 538 F.2d at 18.

72. In their motion for a preliminary injunction, the plaintiffs advanced two grounds, one on copyright infringement under the copyright statute and the other under the Lanham Act. *Id.* at 19, 24.

73. The district court denied the motion for the preliminary injunction on the grounds:

> that it was unclear who owned the copyright in the programs produced by BBC from the scripts written by Monty Python; that there was a question of whether Time-Life and BBC were indispensable parties to the litigation; that ABC would suffer significant financial loss if it were enjoined a week before the scheduled broadcast; and that Monty Python had displayed a "somewhat disturbing casualness" in their pursuance of the matter.

Id. at 18. The Court of Appeals reversed because it disagreed with the district court's findings. *Id.* at 19, 22, 25.

74. *Id.* at 24.

75. *Id.* at 25. The district court found that the plaintiffs established "an impairment of the integrity of their work," which caused the program "to lose its iconoclastic verve." *Id.* at 18 (quoting Judge Lasker).

version of the show constituted "an actionable mutilation of [their] work"[76] under Section 43(a) of the Lanham Act, which protects against a representation of a product that creates a false impression of the product's origin.[77] Essentially, *Gilliam* has been regarded as the most celebrated victory for authors, the pinnacle of moral rights protections,[78] though under Lanham Act clothing. The plaintiffs' averment of being "appalled" at ABC's mutilation[79] and their general allegation that "defendant ha[d] presented to the public a 'garbled' . . . distorted version of plaintiff's work,"[80] are protestations commonly seen in an author's claim of a violation of the integrity right.[81] The court's characterization of the defendant's editing, without consent, "into a form that departs substantially from the original work,"[82] and its decision in favor of the plaintiffs appear to be recognition of the central moral right of integrity.[83]

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76. *Id.* at 23-24.

77. *Id.* at 24 (citing Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975)). Another ground for the decision was copyright infringement, in light of the contractual prohibition on editing. *Id.* at 19. The contents of the show were originally written for broadcast by the BBC. Monty Python and the BBC's arrangement allowed BBC to make minor changes in the script, but nothing in the arrangement entitled BBC to alter a program once recorded. *Id.* at 17. BBC was permitted, under the same agreement, to license the shows to other countries, subject to the editing prohibition. *Id.* BBC's agreement with Time-Life for the distibution of the Monty Python shows allowed Time-Life to edit the program only "for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements." *Id.* at 18.

78. *See* Amarnick, *supra* note 15, at 62 (describing *Gilliam* as "[t]he fullest exposition of the use of the Lanaham Act to protect an artist against distorting the editing of a work"); Kwall, *Copyright and the Moral Right*, *supra* note 17, at 20-21 (describing *Gilliam* as "an extremely favorable decision for creators"); *see also* Seshadri v. Kasraian, 130 F.3d 798, 803 (7th Cir. 1997) (including *Gilliam* in authorities that support "glimmers of the moral-rights doctrine in contemporary American copyright law").

79. *Gilliam*, 538 F.2d at 18.

80. *Id.* at 24-25. The court opinion notes that the three members of the court separately viewed the edited version and the original versions. *Id.* "We find that the truncated version at times omitted the climax of the skits to which [plaintiffs'] rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line." *Id.* at 25.

81. "'To deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done.'" *Id.* at 24 (quoting Roeder, *supra* note 25, at 569).

82. *Id.* The court noted that the defendant "represented to the public as the product of [the plaintiffs] what was actually a mere caricature of their talents." *Id.* at 25.

83. Results in cases like *Gilliam* became part of the legal mix on which Congress relied in 1988 to declare that American law was sufficient to protect authors' non-economic rights. S. REP. NO. 100-352, at 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15. This resolved the major obstacle to American ratification of the Berne Convention, namely, the concern over the impact of the convention's Article 6*bis* on American law. Yet, the conclusion that

Nevertheless, there have been serious questions about the impact that *Gilliam* would have on American law,[84] and those questions appear to remain today. One commentator noted that *Gilliam* "has not been widely followed," and that subsequent judicial references to it are "not for the proposition that a cause of action can be based on violation of the author's moral rights."[85] *Gilliam* also set a high standard. As Professor Roberta Kwall observed, an integrity right is not enforced unless the mutilation is substantial,[86] and subsequent cases support this view.[87] *Gilliam* proved to fall short of expectations, and dimensions of the author's right of integrity continued to be uncertain.[88]

American law up to 1988 adequately protected the moral rights of authors is troublesome. *See* Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 945-46. & n.5 (describing Congressional position as "dubious" and citing contrary testimony).

Confidence in 1988 in the American analogues of civil law moral rights protections did not prevent enactment of the first federal moral rights statute shortly thereafter; the same cannot be said for previous statements of confidence in U.S. law, which may have led to delay in, or halt of, the development of authors' moral rights. For example, in 1955, William Strauss, Attorney Advisor of the Copyright Office wrote, "There is a considerable body of precedent in the American decisions to afford to our courts ample foundations in the common law for the protection of the personal rights of authors to the same extent that such protection is given abroad under the doctrine of moral right." Strauss, *supra* note 32, at 538. Strauss explained that "the contention of some writers that the author's rights of personality are not sufficiently protected in the United States . . . seem to be dispelled by close scrutiny of the court decisions." *Id.* Strauss' views were sharply criticized, occasionally drawing comments that they deserved partial blame for Congressional inaction on explicit moral rights protections. Amarnick, *supra* note 15, at 67; Diamond, *supra* note 32, at 280; Merryman, *supra* note 25, at 1037-39.

84. *See* Diamond, *supra* note 32, at 269 (referring to "marked differences of opinion among commentators, the strong dissent" and prior Second Circuit case law).

85. Damich, *The Right of Personality*, *supra* note 22, at 3 n.7.

86. Kwall, *Copyright and the Moral Right*, *supra* note 17, at 21.

87. *See* Playboy Enters., v. Dumas, 831 F. Supp. 295, 316-17 (S.D.N.Y. 1993), *modified on other grounds*, 840 F. Supp. 256 (S.D.N.Y. 1993), *aff'd in part, rev'd in part*, 53 F.3d 549 (2d Cir. 1995) (dismissing copyright owner's counterclaim under Section 43(a) where defendant failed to show magazine's alterations to four of ten posters "converted or 'garbled' [the artist's] works into something new" or were "substantial enough to mislead the public as to the posters' origins"); Considine v. Penguin, U.S.A., No. 91 Civ. 4405, 1992 WL 183762, at *5-6 (S.D.N.Y. July 20, 1992) (granting summary judgment against author on Section 43(a) claim alleging errors in edited excerpt of author's book, where "the distortion of the work is minimal compared with *Gilliam*"); Lish v. Harper's Mag. Found., 807 F. Supp. 1090, 1105-06 (S.D.N.Y. 1992) (dismissing writer's Section 43(a) claim where plaintiff failed to show that magazine's edited version of writer's letter, deleting nearly half of original text, "substantially distorted the original").

88. Perhaps this is evident from the manner in which the court that decided *Gilliam* resolved the appeal of *Choe v. Fordham Univ. Sch. of Law*, 81 F.3d 319 (2d Cir. 1996) (per curiam), *aff'g*, 920 F. Supp. 44 (S.D.N.Y. 1995). Five years after enactment of VARA and twenty years after *Gilliam*, the district court in *Choe* had before it an action brought by the author of a law journal comment who alleged that the journal's editors had distorted and

Thus, presently, unless an author's right of integrity falls within the narrow strictures of VARA, or within contract terms that give the author significant protection against alteration without consent, the author must mold her allegation of a violation of integrity into some recognizable claim within the melange[89] or patchwork[90] of theories. Unfair competition claims, which provide varying levels of protection,[91] all far less favorable to authors than protective measures seen in civil law countries, are probably the most common such attempts.[92]

C. American Skepticism and Suspicion

Undoubtedly contributing to the limited moral rights protection under U.S. law (and perhaps to the view that American protections of authors' non-economic rights are sufficient) is the view by some that moral rights are simply not desirable in the American legal system.[93] Professor Robert Gorman's declaration provides an encapsulated statement of the multiple concerns of adopting an expanded moral rights plan, and is probably the most damning:

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mutilated his work. *Choe*, 920 F. Supp. at 45. In dismissing the action, the court stated, "There is no federal claim for violation of plaintiff's alleged 'moral rights.'" *Id.* at 49. The Court of Appeals affirmed in a per curiam opinion:

> Jerry Choe appeals from a grant of summary judgment by Judge Mukasey dismissing his complaint against Fordham University School of Law and the *Fordham International Law Journal*. The complaint alleges a "mangling" of his student comment by the *Journal's* editors so severe as to constitute a false designation of origin under the Lanham Act and a violation of Choe's "droit moral." It further alleges various state law torts.
>
> We affirm for substantially the reasons stated by the district court, *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44 (S.D.N.Y.1995).

81 F.3d at 319.

89. Amarnick, *supra* note 15, at 61.

90. *Id.* at 36; Kwall, *Copyright and the Moral Right*, *supra* note 17, at 18; Netanel, *supra* note 29, at 393.

91. Kwall, *Copyright and the Moral Right*, *supra* note 17, at 23.

92. *See* Damich, *The Right of Personality*, *supra* note 22, at 74-75 (comparing French and American law); Kwall, *Copyright and the Moral Right*, *supra* note 17, at 23 (comparing protection afforded by countries with strong moral rights regimes with American law).

93. Perhaps the most skeptical of the virtues of adopting the moral rights doctrine is Beyer, *supra* note 25, at 1110-11 (stating that "[t]he initial appeal of the concept of artists' 'moral rights' evaporates under careful scrutiny" and describing integrity right as "a stirring rhetorical wrapper for an expandable bundle of basically unnecessary and unjustified interest group preferences"). *See also* John A. Baumgarten, *On the Case Against Moral Rights*, *in* MORAL RIGHTS PROTECTION IN A COPYRIGHT SYSTEM 87 (Peter Anderson & David Saunders eds., 1992); Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 101-02 (1990); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1773 n.494 (1988).

> [C]omprehensive [moral rights] legislation is likely to be ill-advised. It is likely to be impracticable in its application, to be unsettling in its impact upon longstanding contractual and business arrangements, to threaten investment in and public dissemination of the arts, to sharply conflict with fundamental United States legal principles of copyright, contract, property and even constitutional law, and ultimately to stifle much artistic creativity while resulting in only the most speculative incentives to such creativity.[94]

Professor Gorman's statement, similar to that of other authors, reflects the grave concerns of the consequences of the American adoption of the French *droit moral*.[95] Gorman's points deserve attention, not only for the substance of his cautions, but also in the search for a meaningful moral rights system that would avoid the ominous results that commentators portend. The concern for the unsettling impact on longstanding business and commercial arrangements that a new system would bring appears to speak more to the virtues of the status quo and to the great force of inertia that has continued to keep the authors' personal rights a low priority. This argument will only gain strength with each passing year. With regard to the negative impact that a moral rights doctrine would have on the arts, some commentators join Gorman in his view that the rule would stifle creativity,[96] but another strongly disagrees, taking the diametrically opposite view.[97] In any event, it is fair to say that the stifling effect would be greatly lessened if the duration of the moral rights of authors (primarily, the right of integrity) were reduced from a perpetual duration to a finite time period.[98]

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94. Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 422 (1990).

95. Likewise, Judge Leval would "oppose converting our copyright law, by a wave of a judicial magic wand, into an American *droit moral*," because "to do so would generate much unintended mischief." Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990). He points out that American copyright law has served a very different purpose than the civil counterpart "with rules and consequences that are incompatible with the *droit moral*." *Id.*; *see also* Beyer, *supra* note 25, at 1085-88 (criticizing notion of personal rights in copyright system).

96. *See* Beyer, *supra* note 25, at 1049 ("[B]ecause reputation is a product of others' interpretations, and because creativity requires the freedom to interpret existing entities innovatively, broad personality-based protections for auteurs' reputations would require not only impossible, but also undesirable, constraints upon others' creativity."); Cotter, *supra* note 15, at 85 ("Moral rights . . . may serve to impose the dead hand of the past on the desires of present and future generations to forge new experience from existing reality.").

97. *E.g.*, Kwall, *Copyright and the Moral Right*, *supra* note 17, at 91 (stating that "federal recognition for the personal rights of creators would foster creativity [and] protect our cultural heritage").

98. Germany, for example, is one jurisdiction that provides for authors' moral rights protections for a limited duration. Cotter, *supra* note 15, at 12.

The conflict between a moral rights system and other bodies of law deserves most careful scrutiny because an author's personal rights must co-exist with the rights of others. Within the law of copyright itself, there is the question of the impact of the moral rights rule on other established rules of copyright law – those relating to derivative works and works made for hire, for example. Would personal rights supersede all else in copyright, perhaps eliminating much of the copyright scheme when the moral rights of an author are implicated, or is there opportunity for co-existence? With respect to the relationship between moral rights and contract law, Professor Gorman does not elaborate on the warning that adoption of the former would conflict with the fundamental principles of the latter. If this statement refers to the concerns of the inalienability of the *droit moral* imposed on the American setting, then it highlights the French prohibition on transfer and waiver of the right, which, if applied stateside, would interfere with the American practice of allowing the parties in contract (the author and another) to negotiate the terms they wish. Thus, the moral rights rule would effectively cancel a negotiable term from the parties' deliberations. Indeed, the traditional rule under U.S. law is that the author does not retain moral rights in her work unless specifically provided for in the contract.[99] Textual silence on the matter of moral rights favored the party opposing the author. It is this rule that the American *droit moral* would disrupt.

Of all the concerns about the adoption of an elaborate moral rights system, the conflict that it would create between the personal rights of the cre-

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99. De Bekker v. Frederick A. Stokes Co., 153 N.Y.S. 1066, 1068-69 (N.Y. App. Div. 1915), *modified*, 157 N.Y.S. 576 (N.Y. App. Div.), *aff'd*, 114 N.E. 1064 (N.Y. 1916); Jones v. Am. Law Book Co., 109 N.Y.S. 706, 710 (N.Y. App. Div. 1908); *see* Clemens v. Press Publ'g Co., 122 N.Y.S. 206, 207 (N.Y. App. Term 1910) (holding that upon completion of sale and delivery of manuscript, author retained no right to compel or prevent publication of article when publisher wanted to exclude author's name); Robert L. Gordon, Note, *Giving the Devil Its Due: Actors' and Performers' Right to Receive Attribution for Cinematic Roles*, 4 CARDOZO ARTS & ENT. L.J. 299, 313 (1985) (stating that "the predominant view is that artists must expressly reserve rights to receive credit, because *droit moral* is not recognized in this country").

The contrary view is that a purchaser of literary property cannot do with it what she wishes, in the absence of contractual language that permits it. *Clemens*, 122 N.Y.S. at 207-08 (Seabury, J., concurring). In an oft-quoted opinion, Judge Seabury distinguished the nature of literary property versus that of a barrel of pork, and urged that although "[t]he rights of the parties are to be determined primarily by the contract which they make, . . . the interpretation of the contract is for the court." *Id.* at 208. He further wrote:

> If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled, not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.

Id.

ative author and the constitutionally-based rights of those who alter or use the creations should give the most pause. Limitations on traditionally protected actions based on constitutional law strike at the heart of what is most American. Perhaps most jarring to the American psyche is the idea of an author's moral right taking precedence over another's property right. The notion that an artist may, in the name of the *personal* interests in the work, prevent the purchaser and holder of title in the work from doing with it what she wishes may run contrary to the American socio-legal culture and border on the heretical.[100] Indeed, such a rule applied to existing works might be attacked as an unconstitutional taking.[101] But the standards of determining when a constitutional taking is present are unclear,[102] and with VARA, there is already precedent for American recognition of having the rights of one in possession of property be subject to the right of integrity of such property's creator. Thus, there already have been inroads in resolving the conflict between the author's moral rights and the property holder's rights.

Another example of the potential conflict between moral rights and constitutional protections is the author who objects to the alteration or use of her work by another who, in turn, claims that such alteration or use is parody or criticism, permitted under the doctrine of fair use.[103] Here, implementation of the traditional *droit moral* may result in prohibiting actions based on the First Amendment's right of free expression.[104] VARA addressed this situation by making moral rights subject to the provision allowing for fair use.[105]

Many of the concerns raised against adoption of an American *droit moral* indicate that an implementation of a moral rights system is a question of a fit between legal rules and a socio-legal cultural base. France is a culture with

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100. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *cf. id.* (no person shall "be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). Note the response of Ted Turner, when asked about the opposition to the colorization of movies by their original directors: "The last time I checked, I own those films." William H. Honan, *Artists, Newly Militant, Fight for Their Rights*, N.Y. TIMES, Mar. 3, 1988, at C29.

101. Beyer, *supra* note 25, at 1071-77.

102. Professor Kwall notes that moral rights protections may be implemented without running afoul of constitutional requirements. Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 16-29.

103. 17 U.S.C. § 107 (1994) (codification of fair use doctrine).

104. The relationship between fair use and First Amendment is addressed in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985), and explored in James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 989-92 (1990), and James Hall, Comment, *Bare-Faced Mess: Fair Use and the First Amendment*, 70 OR. L. REV. 211 (1991).

105. 17 U.S.C. § 106A(a) (1994).

such appreciation for the arts and respect for the *auteur* that its legal system demands the various protections provided in *le droit moral*,[106] whereas the American copyright scheme continues to focus on the division of proprietary interests stemming from created works.[107] As Professor Sheldon Halpern alluded, a jurisdiction's plan of protecting authors' rights depends on the culture upon which it is based.[108] By all accounts, the French *droit moral* (on the one hand) and the American social, legal, and copyright culture (on the other) are not compatible suitors.[109] The forced fitting of the former onto the latter might well result in "culture shock and aftershock."[110]

With the concerns of an American *droit moral* well expressed, two points are often overlooked or given scant mention. First, as with Professor Gorman's sweeping statement,[111] little is made of the author's personality interest in the creative process – the sheer agony of an author seeing her work altered or used without regard to her intentions or meaning.[112] Second, often not addressed is whether a less comprehensive moral rights system that provides for

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106. *See* Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 20 (1997) ("In France, . . . where moral rights protections are among the strongest, a cultural tradition exists in which artists are elevated as a special class of laborers who possess almost spiritual qualities, and their works are treated as a special category of property."); Halpern, *supra* note 25, at 69 (referring to "the French solicitude" for work's *auteur*).

107. *See* Kwall, *Copyright and the Moral Right*, *supra* note 17, at 2 (referring to "this country's tradition of safeguarding only the *pecuniary* rights of a copyright owner"); Kwall, *The Right of Publicity*, *supra* note 17, at 59 (stating that "copyright law in this country is inordinately preoccupied with pecuniary, as opposed to personal, interests").

108. Halpern, *supra* note 25, at 65; *see also* Damich, *The Right of Personality*, *supra* note 22, at 5 (stating that "different value systems" explain differences in moral rights regimes of United States and France).

109. Professor Goldstein describes the differences between the U.S. and European copyright cultures thus:

> The European culture of copyright places authors at its center, giving them as a matter of natural right control over every use of their works that may affect their interests . . . By contrast, the American culture of copyright centers on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a calculus that appears to leave authors at the margins in the equation

PAUL GOLDSTEIN, COPYRIGHT HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 168-69 (1994).

110. Halpern, *supra* note 25, at 65.

111. *See supra* text accompanying note 94.

112. *See* Cotter, *supra* note 15, at 2 (reporting correspondence between composer Igor Stravinsky and conductor Ernest Ansermet regarding latter's plan to delete certain portions of former's *Jeu de Cartes*; Stravinsky objected, stating, "better not to play it at all than to do so reluctantly"). The strong and emotional protests of movie directors against the colorization of their movies are discussed *infra* text accompanying notes 292-303.

meaningful moral rights protections for authors would be more practicable, less unsettling, and less in conflict with other fields of law.[113] A moral rights system that does not equal the protections provided by the *droit moral* may not be so jarring to the rest of the copyright structure. Any examination of a jurisdiction's adoption of a moral rights system requires consideration of both (i) the particulars of the legal rules that would descend on a jurisdiction and (ii) the social and legal culture that the receiving jurisdiction embodies. Much of the early fervor toward adoption of authors' moral rights emphasized the virtues of such rights and paid little attention to the cultural base.[114] More recent commentary takes into account the need for cultural base, the question of an accommodating fit, and considerations of balance.[115]

With these lessons in mind, consideration of American moral rights requires the creation of a system of moral rights (short of the comprehensive French *droit moral*) amenable to the socio-legal culture prevalent in the United States. Likely, there must be some accommodation on each side. The challenge for moral rights advocates is to propose a system that would seriously protect the author's right of integrity, or the interest in preserving the personality interests in the created work, in such a way that does not uproot or disrupt the entire legal culture.[116]

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113. In a jurisdiction that sees its courts immersed in a "collage of judicial attempts to come to grips with the problem of moral right in American law," Halpern, *supra* note 25, at 78, much of the commentary seems to indicate that the only available American alternatives are either the adoption of the French *droit moral* or the current state of moral rights protections. Before enacting VARA, Congress considered and declined various moral rights proposals. *See* Amarnick, *supra* note 15, at 77 (discussing 1905 proposal); Katz, *supra* note 15, at 419 (discussing 1940 proposal); Kwall, *Copyright and the Moral Right*, *supra* note 17, at 29 n.107 (discussing 1979 proposal by Congressman Drinan).

114. *E.g.*, Katz, *supra* note 15.

115. *See* Amarnick, *supra* note 15, at 35 (encouraging conception of moral rights as "conglomeration" of several interests in addition to author's "personal interest in his work and his honor"); Kwall, *Copyright and the Moral Right*, *supra* note 17, at 92 ("[T]he integration of the moral right doctrine into our copyright statute will necessitate balancing the interests of creators, copyright proprietors, owners of copyrighted works, and the public.").

116. Notwithstanding the legitimate concerns of an American *droit moral* enacted overnight, it is somewhat puzzling that legal writers as a group are not more sympathetic to the rights of authors and artists, especially the integrity right, given their own position as expositors of original expression. Through their writings, law professors also create. Their written work, not unlike the creations of artists, reflects the personality and spirit of the authors. Legal academicians could also be described as a rather territorial and possessive lot when it comes to their own work product, especially sensitive to certain authorial interests. Indeed, it is not the uncommon law professor who can recall an experience of submitting an article for publication, then seeing it (allegedly) butchered, mangled, and mutilated, turned into a distorted version that no longer reflects what the author intended. The anecdotal evidence is considerable.

One professor reports the horror of seeing in published form the penultimate *draft* of his article. Interview with Robert H. Jerry, II, Missouri Endowed Floyd R. Gibson Professor of

Law, University of Missouri-Columbia School of Law, in Columbia, Missouri (May 10, 2001). *See* Robert H. Jerry, II, *Introduction to Wolf Creek Symposium*, 33 KAN. L. REV. 419 (1985) (publishing draft of article); *Editor's Notes, Erratum*, 33 KAN. L. REV. (No. 4) vi (1985) (stating in subsequent issue that editor regretted that author was not provided with opportunity to review draft before publication). Another professor's protestations against the student editors' changes of his submitted work led to a most incredible denouement. Frustrated with the liberties that the editors took, the professor declared that the edited article was no longer a representation of his work and withdrew it from publication. The editors apparently received the statement literally, and much to the shock of the professor, published under a student author's name a version of the article specifically rejected by the professor. Only after the threat of a lawsuit, the law review issued an apology, acknowledging that the article was based on the professor's submitted work and that the student no longer claimed authorship. Telephone interview with Bruce A. Markell, Doris S. and Theodore B. Lee Professor of Law, University of Nevada-Las Vegas, William S. Boyd School of Law (May 10, 2001).

The story of the late Professor Vaughn C. Ball likely represents one extreme of what results when the author is displeased with the published product. Professor Ball once submitted an article, on which he and the editors failed to agree on an acceptable version, and which was published over his objections. Vaughn C. Ball, *The Myth of Conditional Relevancy*, 1977 ARIZ. ST. L.J. 295 [hereinafter Ball I]. Three years later, Professor Ball submitted a version of the same article more to his liking to another law journal, which presumably published it in accordance with his wishes. Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980) [hereinafter Ball II]. In a footnote in the latter article, he explained that the second piece was intended to "supersede and replace an article with the same title published by the Arizona State Law Journal." He continued: "[The previous] article, in its printed form, was disapproved by me prior to publication, and did not correctly state my views on this subject." *Id.* at 435 n.*.

In many law libraries, the first page of the article in the *Arizona State Law Journal* contains a conspicuously pasted notice in which Professor Ball "disclaims responsibility for the published article because of changes made during the editing process," and refers the reader to the authorized version in the *Georgia Law Review*. Ball I, *supra*, at 295. Professor Ball had also written a letter to all law libraries possessing the *Arizona State* volume, explaining his predicament:

> This is to notify you that the [*Arizona State*] article was published without my consent and over my protest. It was based on a manuscript written by me at the request of the Dean of the Arizona State College of Law. By the time of publication, numerous errors had been inserted by the Journal which mutilated my own statements and analysis, turned quotation into misquotation, and even citation into miscitation. These errors were not contained in my manuscript; and the published version is something I neither wrote nor ever approved. It misrepresents not only what I said on this subject but also my standards of scholarship and accuracy.
>
> The refusal of the Journal staff and the College to correct the erroneous impression caused by this publication has forced me to write you this notice in an effort to reduce the damage that is being caused to me by the circulation of this unauthorized version of my article.

Letter from Vaughn C. Ball, Thomas Reade Rootes Cobb Professor of Law, University of Georgia School of Law, to Mississippi College Law Library (Sept. 18, 1979) (on file with *Washington and Lee Law Review*).

As to whether the vocal attempts by the author to disassociate himself with the first article that bears his name were successful, one treatise that refers to Professor's Ball "pathbreaking article," notes in the citation that the 1977 article was replaced by the 1980 article and gives cita-

A preliminary suggestion toward an American protection of authors' rights is nearly as old as the discussion of moral rights itself – to revise the name. As numerous commentators have observed, "moral rights" is a translation of the French *droit moral*,[117] the term *droit* meaning "law" or "right,"[118] and *moral* meaning moral, ethical, or having to do with mores.[119] Yet an additional definition of *moral* is "mental" or "intellectual,"[120] terms that better convey the underlying theory behind the French moral rights doctrine, that is, respect for the author, her work, and the creative process, in light of the author's personal relation with her created work. It is this translation of the additional term that American observers failed to consider, either through oversight or volition. American reluctance to protect authors' moral rights appears to stem in part from the use of the term "moral" and the suggestion to give legal status to an author's notion of proper mores. One of the most vocal advocates of moral rights[121] sought to dispel this notion in 1952: "It is best to clear up at the outset a misconception based upon a misnomer: the moral right doctrine is *not* concerned with rights whose enforceability is a matter of moral suasion divorced from legal sanction. The *moral rights* of an author are *legal rights*, and enforceable as such."[122] Such statements have gone unnoticed, and

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tions to both. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5054, at 134, 137 n.30 (2000 Supp.). Another text referring to Ball's work, however, cites only to the disapproved version. *See* 29 AM. JUR.2D EVIDENCE § 311, at 326 n.78 (1994). The reader is encouraged to compare the two versions of the article in order to individually determine whether Professor Ball's reaction was warranted. I thank Professor Edward H. Hunvald, Jr. for bringing the Ball articles to my attention.

117. *E.g.*, MERRYMAN & ELSEN, *supra* note 28, at 142; Cotter, *supra* note 15, at 10 n.40; Diamond, *supra* note 32, at 244; Halpern, *supra* note 25, at 65 n.3; Kwall, *Copyright and the Moral Right*, *supra* note 17, at 3 n.6; Netanel, *supra* note 29, at 383.

118. GRAND DICTIONNAIRE 295 (1993); CASSELL'S DICTIONARY 271 (1981).

119. GRAND DICTIONNAIRE, *supra* note 118, at 583; CASSELL'S DICTIONARY, *supra* note 118, at 496. Surprisingly, the term *droit moral* does not appear in any of the leading French or French-English dictionaries.

120. GRAND DICTIONNAIRE, *supra* note 118, at 583; CASSELL'S DICTIONARY, *supra* note 118, at 496. These definitions were also contained in the dictionaries of the early twentieth century. *See, e.g.*, A FRENCH AND ENGLISH DICTIONARY 432 (1902) (defining moral as "moral nature, mind"; "morally; mentally").

121. Arthur S. Katz made a passionate plea for the formal incorporation of the moral rights doctrine into American law. Katz, *supra* note 15, at 375 ("*Proposed*: That the doctrine of Moral Right be formally incorporated into American copyright law."). As to why American courts had not yet accepted moral rights, Katz offered "ignorance," *id.* at 410, "judicial abdication most foul," *id.* at 412, and "inept[ ] handl[ing] by so much of the Anglo-American Bench and Bar," *id.* at 376. He asked: "Is it too much to ask that the author's right of personality be formally recognized and protected by the courts of the United States?" *Id.* at 427.

122. Katz, *supra* note 15, at 390; *see also* 1 LADAS, *supra* note 63, § 272, at 575 (stating that term is "incorrect because it implies that it is not a legal right enforceable by legal reme-

the American "moral rights" term has become "firmly entrenched"[123] from its earliest use[124] (in part because of the lack of other names or the refusal to adopt them).[125]

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dies"); Kwall, *Copyright and the Moral Right*, *supra* note 17, at 3, n.6 (stating that *droit moral* "also encompasses a right that exists in an entity's ultimate being"). Nevertheless, a small chorus of speakers in the moral rights dialogue maintain that moral rights does or should include a moral dimension. *See* WORLD INTELLECTUAL PROP. ORG., GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41, 42 (1978) (explaining that article 6*bis* "underlines that, in addition to pecuniary or economic benefits, copyright also includes rights of a moral kind. These stem from the fact that the work is a reflection of the personality of its creator, just as the economic rights reflect the author's need to keep body and soul together"; article 6*bis* "stops entrepreneurs from turning the moral right into an immoral one"); Amarnick, *supra* note 15, at 35 (referring to "spiritual or moral interest in instilling respect within the public for the creative process and its products"); Sarraute, *supra* note 25, at 465 (stating that "the 'moral' right . . . includes non-property attributes of an intellectual and moral character").

123. Diamond, *supra* note 32, at 244.

124. The case law indicates that among American authors, the term "moral rights" was used as early as 1940. *See* Harris v. Twentieth Century-Fox Film Corp., 35 F. Supp. 153, 155 (S.D.N.Y. 1940) (stating that under contract between parties, plaintiff "divested herself of all rights generally known as the moral rights of authors").

125. In one of the early articles on the subject, Roeder wrote, "it is difficult to find any other expression which would do as well without being unwieldy." Roeder, *supra* note 25, at 554-55. As early as 1938, a treatise author urged that a more appropriate term would be "the right of author's personality," from the German *Urheberpersönlichkeitsrecht*. 1 LADAS, *supra* note 63, § 272, at 575 n.2. More similar to the German term than the French is the Korean *in-gyuk-kwon*, whose three characters are derived from Chinese characters that mean roughly, "person," "human" or "man" (*in*), "rule" or "form" (*gyuk*), and "right" or "authority" (*kwon*). BRUCE K. GRANT, A GUIDE TO KOREAN CHARACTERS 28, 160, 326 (2d rev. ed. 1982). Over the years, several commentators have repeated Ladas's observation, and others have called for the replacement of "moral rights" with "personality right." *E.g.*, Kwall, *Copyright and the Moral Right*, *supra* note 17, at 3 n.6; Merryman, *supra* note 25, at 1025; Netanel, *supra* note 29, at 383; Stevenson, *supra* note 38, at 90; *see also* Beyer, *supra* note 25, at 1023 (stating that moral rights are "ordinarily described as 'rights of personality'"). Indeed, one commentator proposed the use of "personal right" over "moral rights" "since it more accurately translates *droit moral* than does 'moral rights,' and it is more suggestive of the theoretical basis that underlies the concept." Damich, *The Right of Personality*, *supra* note 22, at 6. Not many have adopted the suggestion. On the lighter side (presumably), one commentator muses about the great activity over the terminology:

> In the United States . . . the need to argue against so lofty an appellation as 'moral rights' has always troubled critics of the doctrine and put them on the defensive. Thus they frequently suggest adoption of less charged labels as the subject of the debate. 'Personal rights' and 'non-economic rights' are some of the less imaginative substitutes. More recently my colleague Professor Robert Gorman informally coined the phrase 'aesthetic veto' as a substitute for 'moral rights'. Somewhat more combative, and in the heat of advocacy rather than the perhaps more amicable and scholarly confines of this hall, I have suggested replacing the term *droit moral* with the term *droit caprice*.

Baumgarten, *supra* note 93, at 87.

At best, the partial translation of the French term has led to hardened views among some over the meaning of moral rights; the literature indicates far too much judging of the book of moral rights by its cover, and authors have paid the price.[126] The mention of "moral rights" suggests to too many judges, commentators, and interested observers, the legal enforcement of some moral value. One judge wrote in 1952 that "'moral rights' seems to indicate to some persons something not legal, something meta-legal"; indeed, the very phrase might have "frightened" American courts.[127] Even VARA, universally regarded as the first federal moral rights statute, avoids the phrase "moral rights," preferring instead "rights of certain authors to attribution and integrity."[128] Popular discussion on the subject of authors' moral rights still indicates a misunderstanding and confusion of moral rights.[129]

D. Summary: U.S. Moral Rights

A summary of the above discussion is in order. Despite various proposals for reform and elaboration,[130] the moral rights of authors in the United

126. Indeed, the doctrine might well have been better received in the United States with reference to personality as opposed to morality. *See* Diamond, *supra* note 32, at 244.

127. Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); *see* Damich, *The Right of Personality*, *supra* note 22, at 6 n.16 (noting that judicial reluctance to accept *droit moral* is "a negative reaction to the term 'moral,' which has seemed to invite the application of 'ethical' as against 'legal considerations.'") (quoting JOHN M. KERNOCHAN, CASES AND MATERIALS ON BUSINESS TORTS, Installment IV, 104 (1983)).

128. 17 U.S.C. § 106A (1994).

129. The confusion and misunderstanding was most obvious in the debate over the colorization of black and white movies, when movie directors opposing colorization urged that movie studios had the *legal*, but not *moral*, right to colorize the films they owned. David Blum, *Ted Turner's Effort to Put Some Color in Bogart's Cheeks*, MINN.-ST. PAUL STAR-TRIB., Jan. 29, 1987, at 17A, *available at* 1987 WL 4938833. That led to the following observation by one observer: "[T]he argument made against colorization is that just because you have the legal right to do something doesn't mean you have the moral right. So why are movie directors above moral law, while [Ted] Turner is not?" *Id.*

Then there is the case of the law graduate who sued his law alma mater and its law journal (of which he was a member), alleging that the journal's editors had "mangled" his law review comment. Choe v. Fordham Univ. Sch. of Law, 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996). The case prompted one observer, a practitioner and law lecturer, to declare that "there is simply no such thing as a federal claim for violations of one's moral rights." Richard Grossman, *Understandably, Few Read Law Reviews*, THE SYRACUSE POST-STANDARD, Aug. 14, 1995, at A6, *available at* 1995 WL 3742783. Making clear that the writer's understanding of "moral rights" had little to do with an author's personal rights, he added that if the plaintiff were "really astute, he would have known that all human beings waive whatever moral rights they have the moment they enter law school." *Id.* For good measure, he dismissed Choe's action as an "obscene waste of a court's time." *Id.*

130. *See* Stevenson, *supra* note 38, at 116-17 (proposing amendment to Copyright Act).

States appear settled in a legal thicket – federal legislation that is applicable to a limited number of artists and situations,[131] a patchwork of state statutes[132] (on which the preemptive effect of federal legislation is still in question),[133] and a melange[134] of common law theories emanating from a "collage of judicial attempts"[135] to define American moral rights.[136] Courts have followed "a tortuous path," to find some accommodation "between traditional property and copyright concepts and creative sensibilities."[137] Moreover, the American moral rights movement has as its worst enemy its own name, which further discourages understanding of the personal interests of the creative process. Most importantly, the integrity right specifically and moral rights generally suffer from a lack of a consistent theme, an underlying purpose, a construct, and a configuration.[138] As Professor Lawrence Adam Beyer wrote, "Unless and until moral rights doctrine is developed into a determinative, coherent, and compelling body of principles, 'the moral right of integrity' will serve only as a stirring rhetorical wrapper for an expandable bundle of basically unnecessary and unjustified interest group preferences."[139]

As elaborated on in the next part, this Article proposes that the author's moral rights (chiefly, the right of integrity) be designated more simply as the author's right of dignity. Perhaps a new designation, under a new rationale, will merit further consideration or at least encourage further discussion in the search for a meaningful moral rights plan suited to American interests. The purpose here is to adopt an American right of integrity consistent with the American socio-legal culture, rather than to transplant the French *droit moral*.[140]

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131. 17 U.S.C. § 106A (1994).

132. H.R. REP. No. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6919 (testimony of John Koegel, Esq.).

133. For a full discussion of the preemption question, see Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 29-45. One commentator subscribes to the view that VARA largely pre-empts the state statutes. Netanel, *supra* note 29, at 351 n.9, 393.

134. Amarnick, *supra* note 15, at 61.

135. Halpern, *supra* note 25, at 78.

136. Legal claims asserted from this thicket have yielded scattered results. Professor Cotter posits that current moral rights protections in American law is "close to the optimal system for this country at this time," because "a more vigorous system poses substantial risks to the well-being of both artists and audiences." Cotter, *supra* note 15, at 6.

137. Halpern, *supra* note 25, at 78.

138. Professor Halpern notes that in light of the limitations of VARA, "[i]t may well be that . . . we should move to a totally separate moral right configuration . . . . We need to question our underlying assumptions both to find and to form the consensus from which meaningful moral right recognition can emerge." Halpern, *supra* note 25, at 88.

139. Beyer, *supra* note 25, at 1111.

140. For a discussion of the development of moral rights protections in common law countries whose culture is similar to that of the United States, see Gerald Dworkin, *The Moral*

If it is true that the body of moral rights is culturally dependent[141] and moral rights protections differ from jurisdiction to jurisdiction, then this Article proposes a right of integrity that can be established in light of the American cultural fabric.

III. Toward Dignity-Based Moral Rights

A. What Dignity?

This Article proposes an American understanding of moral rights based on the author's right of *dignity*. Initially then, it is important to discuss what dignity means because the term has multiple meanings in common usage[142] and is often used without precise definition.[143] Perhaps by default, or because of the lack of any more informed source, the dictionary is a proper beginning

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Right of the Author: Moral Rights and the Common Law Countries, 19 COLUM.-VLA J.L. & ARTS 229 (1995). With regard to transplantation of rules, "International experience with the [European] transplantation, as distinguished from the adaptation, of legal institutions has not been encouraging. We can learn from the [continental] experience, but we must develop our own method of employing its lessons." Merryman, *supra* note 25, at 1043. For a discussion of the issues seen in the transplantation of copyright rules in the international setting, see Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994).

141. *See supra* text accompanying notes 106-10.

142. Because the dignity-based rationale for moral rights takes into account the individual dignity of the author, dignity here refers to personal or human dignity.

143. *See* Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1294 n.6 (1988) (noting "amorphous multiple meanings of the word in common usage"). There are several contexts in which the term can be used with regard to an American legal proceeding. A court is an institution of dignity. Indeed the physical courtroom can "add[ ] to the atmosphere of dignity and authority." William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest,"* 42 U. MIAMI L. REV. 475, 475 (1988). A judge may be complimented for lending to the proceedings an "aura of dignity." Laura Asseo, *Rehnquist Prefers to Keep Things Moving - Chief Justice Remains Mum about His Views*, STAR-LEDGER (Newark, NJ), Feb. 10, 1999, at 9, *available at* 1999 WL 100315852 (quoting Rep. Henry Hyde). During the course of a trial and hearings, judges are empowered to take action necessary to vindicate the court's dignity. Pounders v. Watson, 521 U.S. 982, 988 (1997); Cooke v. United States, 267 U.S. 517, 534 (1925).

Note the contexts in which candidate George W. Bush used the term "dignity" in his acceptance speech before the Republican National Convention: "[W]e will extend the promise of prosperity to every forgotten corner of this country: . . . to every family, a chance to live with *dignity* and hope"; "our new economy must never forget the old, unfinished struggle for human dignity"; "[w]e will transform today's housing rental program to help hundreds of thousands of low-income families find stability and *dignity* in a home of their own"; "I will swear to uphold the honor and *dignity* of the office to which I have been elected." *Bush Outlines His Goals: 'I Want to Change the Tone of Washington,'* N.Y. TIMES, Aug. 4, 2000, at A24 (emphasis added). Democratic candidate Al Gore did not refer to dignity in his acceptance speech.

point.[144] The primary definition of "dignity" in *Webster's* is "the quality or state of being worthy[;] intrinsic worth."[145] *Webster's* uses as an example the reference in the United Nations Universal Declaration of Human Rights, that "[a]ll human beings are born free and equal in dignity and rights."[146] Indeed, it is in the international setting[147] and often in the materials issued by the United Nations that the term appears with some regularity.[148] The preamble to

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144. The dictionary is, of course, "not the source definitively to resolve legal questions." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 n.9 (1986). Although it may be "the last resort of the baffled," Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting), here, it is an early reference. For a revealing examination of the Supreme Court's use of dictionaries in its work, see Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

145. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 632 (3d ed. 1993). The primary definition also includes "excellence," which it offers as a synonym. *Id.* The full definition is as follows:

> [1] the quality or state of being worthy: intrinsic worth: EXCELLENCE <the [ ] of this act was worth the audience of kings – Shak.> <all human beings are born free and equal in [ ] and rights – *U.N. Declaration of Human Rights*> [2] the quality or state of being honored or esteemed: degree of esteem: HONOR . . . [3a] high rank, office or position [b] *archaic*: RANK, DEGREE [c] a particular office, rank, or title of honor . . . [d] *Eng law*: a title of honor that is an incorporeal hereditament or real property [4] *archaic* [a]: one holding high rank: DIGNITARY . . . [b] persons of high rank as a body [5] formal reserve of manner, appearance of manner, appearance, behavior, or language; behavior that accords with self-respect or with regard for the seriousness of the occasion or purpose: GRAVITY, POISE . . . .

Id. Note the definitions of dignity under *Black's*, which do not refer to individual worth as discussed herein:

> 1. The state of being noble; the state of being dignified. 2. An elevated title or position. 3. A person holding an elevated title; a dignitary. 4. A right to hold a title of nobility, which may be hereditary or for life.

BLACK'S LAW DICTIONARY 468 (7th ed. 1999). Nor do the Scriptural references to dignity appear to relate to individual worth. *See Genesis* 49:3 (King James) ("Reuben, thou art my firstborn, my might, and the beginning of my strength, the excellency of *dignity*, and the excellency of power"); *Esther* 6:3 (King James) ("And the king said, What honour and *dignity* hath been done to Mordecai for this? Then said the king's servants that ministered unto him, There is nothing done for him."); *Ecclesiastes* 10:6 (King James) ("Folly is set in great *dignity*, and the rich sit in low place."); *Habakkuk* 1:7 (King James) ("They are terrible and dreadful: their judgment and their *dignity* shall proceed of themselves.").

146. WEBSTER'S, *supra* note 145, at 632 (quoting *Universal Declaration of Human Rights*, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948)).

147. For an insightful discussion on intellectual property rights as international human rights, see Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conversation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998).

148. *Universal Declaration of Human Rights*, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration of Human Rights*]; U.N. CHARTER pmbl. ("inherent dignity and worth").

the original U.N. Charter, promulgated in 1945, included an affirmation of the "inherent dignity and worth of the human person."[149] Two decades later, the International Covenant on Economic, Social and Cultural Rights recognized "the inherent dignity . . . of all members of the human family."[150] Finally, the United Nations Declaration of Common Values, issued at the conclusion of the Global Millennium Summit,[151] declared, "[W]e have a collective responsibility to uphold the principle[ ] of human dignity."[152] But none of these materials attempt to define "dignity" in any meaningful way.[153] The voluminous commentary on dignity notes the difficulty, perhaps futility, in defining the term.[154] One observer asks whether defining dignity as intrinsic human worth is any more illuminating because it does not explain what dignity is, as it simply renames it.[155] Another points out that if dignity means worth, then the various references to "dignity and worth" in the literature pose a redundancy, unless the two terms are synonymous and one is not a definition for the other.[156] Adding

149. U.N. CHARTER pmbl.; *see also Universal Declaration of Human Rights, supra* note 148, pmbl. (referring to "the inherent dignity and . . . the equal and inalienable rights of all members of the human family" and "the dignity and worth of the human person"). A 1987 resolution by the United Nations General Assembly included guidelines to develop "international instruments in the field of human rights," which should "[b]e of fundamental character and derive from the inherent dignity and worth of the human person." G.A. Res. 41/120, U.N. GAOR Supp. No. 53,3 at 178-79, U.N. Doc. A/41/53 (1987).

150. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 preamble (1966).

151. For a report of the summit by the popular press, see Barbara Crossette, *Summit in New York: The Overview; U.N. Meeting Ends with Declaration of Common Values*, N.Y. TIMES, Sept. 9, 2000, at A1.

152. United Nations Declaration of Common Values, Declaration I.2, *reprinted in Text of the Declaration*, N.Y. TIMES, Sept. 9, 2000, at A4 [hereinafter Declaration of Common Values]; *see also id.* Declaration I.6 ("Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice."); Declaration VI.26 ("We resolve to . . . help all refugees and displaced persons to return voluntarily to their homes, in safety and dignity, and to be smoothly reintegrated into their societies.").

153. Professor Louis Henkin points out that perhaps the authors of the *Universal Declaration of Human Rights* thought a definition unnecessary. Louis Henkin, *Human Dignity and Constitutional Rights, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210, 211 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter CONSTITUTION OF RIGHTS].

154. *See* William A. Parent, *Constitutional Values and Human Dignity, in* CONSTITUTION OF RIGHTS, *supra* note 153, at 52 (noting that without "a convincing account" of obscure terms to define dignity, "we are left with high-sounding but vacuous explanations"); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983) ("In some situations an abstract definition is not needed; but it is not entirely satisfying to accept the idea that human dignity cannot be defined or analyzed in general terms.").

155. Parent, *supra* note 154, at 47, 52.

156. Schachter, *supra* note 154, at 849.

to the difficulty of a clear definition of dignity is the frequency with which the term is presented in conjunction with apparently related terms – equality,[157] autonomy,[158] personality,[159] personhood,[160] identity,[161] self-esteem,[162] self expression,[163] the right to be let alone,[164] and quite frequently, privacy.[165] Such discussion raises the question of whether dignity overlaps with the other terms, whether it is a subset of one or more (or vice versa),[166] or whether definitions

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157. Declaration of Common Values, *supra* note 152, I.2 ("[W]e have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level."). Some state constitutions refer to "dignity" but apparently mean "equality." For example, the Louisiana Constitution provides for a "Right to Individual Dignity." LA. CONST. art. 1, § 3. The text of this provision, however, sounds of equal protection:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

Id. Likewise, the Montana Constitution provision on individual dignity states: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." MONTANA CONST. art. II, § 4.

158. Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty, in* CONSTITUTION OF RIGHTS, *supra* note 153, at 145; R. Kent Greenawalt, *The Right to Silence and Human Dignity, in* CONSTITUTION OF RIGHTS, *supra* note 153, at 192-93.

159. *E.g.*, Henkin, *supra* note 153, at 211.

160. *E.g.*, Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 193 (2001).

161. *See* Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 214 (1999).

162. *E.g.*, Henkin, *supra* note 153, at 211.

163. *E.g.*, Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 538 (1997); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 736, 762 (1998); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809 (1999); Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1197-98 (1983); Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's* Democracy and the Problem of Free Speech, 62 U. CHI. L. REV. 423, 441-42 (1995) (book review).

164. *See* Edward J. Bloustein, *Group Privacy: The Right to Huddle*, 8 RUTGERS-CAM. L.J. 219, 278 (1977); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 533 (1997).

165. *See generally* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); *see also* Greenawalt, *supra* note 158, at 193; Buffaloe, *supra* note 164, at 533.

166. Indeed, in the United Nations Declaration of Common Values, dignity appears under the heading of "freedom," which is described as one of six "fundamental values": "Freedom.

of dignity and the other terms are mutually exclusive to the extent that they are not identical.

It was within one discussion of privacy in which the matter of dignity was raised, which sets the stage for this Article's discussion of the dignity-based moral rights of authors. Some background is necessary. In *The Right to Privacy*,[167] a highly influential law review article, Samuel D. Warren and Louis D. Brandeis argued for the formal recognition of the right.[168] Years later, Professor Edward J. Bloustein elaborated on Warren and Brandeis's discussion in his *Privacy As an Aspect of Human Dignity*.[169] Though neither Warren and Brandeis nor Bloustein referred to moral rights of the author, their wide-ranging discussions in advancing an actionable right of privacy included mention of the works of authors.[170] For instance, in drawing a parallel between the right to be let alone and the protection given to artistic or literary expressions, Warren and Brandeis wrote, "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an *inviolate personality*."[171] Seizing on this language, Bloustein explained that "inviolate personality" means "the individual's independence, dignity and integrity,"[172] which "defines man's essence as a unique and self-determining being."[173] He wrote, "It is because our Western ethico-religious tradition posits such dignity and independence

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Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice." Declaration of Common Values, *supra* note 152, Declaration I.6. The other five fundamental values are equality, solidarity, tolerance, respect for nature, and shared responsibility. *Id.*

167. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

168. Judge Alex Kozinski described *The Right to Privacy* as "perhaps the most influential law review article ever published." Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 311 (2000); *see also* Jane E. Kirtley, *Privacy and the Press in the New Millennium: How International Standards Are Driving the Privacy Debate in the United States and Abroad*, 23 U. ARK. LITTLE ROCK L. REV. 69, 70 (2000) ("[W]ith one law review article, this pair of Boston lawyers lit the slow fuse on a time bomb that took about 100 years to explode. When it did, the impact was felt around the world.").

169. Bloustein, *supra* note 165. Bloustein's article did not intend to examine the contours of the dignity right, but was a response to a piece by William L. Prosser, in which Prosser rejected the notion of privacy as a single tort, but rather claimed it to be a "complex of four." William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Bloustein disagreed, preferring the single versus the four-part approach. Bloustein, *supra* note 165, at 1000.

170. Warren & Brandeis, *supra* note 167, at 198-204; Bloustein, *supra* note 164, at 968-71.

171. Warren & Brandeis, *supra* note 167, at 205 (emphasis added).

172. Bloustein, *supra* note 165, at 971.

173. *Id.*

of will in the individual that the common law secures to a man 'literary and artistic property' – the right to determine 'to what extent his thoughts, sentiments, emotions shall be communicated to others.'"[174] Warren's and Brandeis's notion of privacy would protect what is tantamount to the author's disclosure right: "[T]he individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent."[175] Bloustein elaborated that it would be "inconsistent with a belief in man's individual dignity and worth to refuse him the right to determine whether his artistic and literary efforts should be published to the world."[176]

Warren's and Brandeis's references to the protection of personal writings and productions against publication "in any form" and the governing principle of "inviolate personality"[177] should resonate for advocates of authors' rights. With regard to the former phrase, "*publication* in any form" emphasizes the author's right of disclosure, whereas publication "in *any* form" relates to the right of integrity. In addition, Warren's and Brandeis's "inviolate personality," together with Bloustein's complementary references to individual uniqueness, independence, and self-determination, ring of the author's personality interest. With this backdrop, the following query is posed: if privacy would protect the author's right of disclosure (as referenced in *The Right to Privacy*), and if privacy can be regarded as a *subset* of human dignity,[178] then could the

174. *Id.* (quoting Warren & Brandeis, *supra* note 167, at 198).

175. Warren & Brandeis, *supra* note 167, at 199 (footnote omitted). "This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed." *Id.*

176. Bloustein, *supra* note 165, at 971. "He would be less of a man, less of a master over his own destiny, were he without this right." *Id.* Warren and Brandeis stated that this right "is lost *as soon as* there is a publication." Warren & Brandeis, *supra* note 167, at 200. They noted that the "right is lost only when the author himself communicates his production to the public, – in other words, publishes it," *id.* at 199-200, thus indicating that privacy could not be expanded to include what students of copyright know as the right of integrity. The applicability of Warren and Brandeis's views on authors' moral rights is also noted in Hughes, *The Philosophy of Intellectual Property*, *supra* note 22, at 355-56.

177. Warren & Brandeis, *supra* note 167, at 205 (emphasis added).

178. The view that privacy is a subset of the broader dignity has support from the commentators. *See, e.g.*, Kahn, *supra* note 161, at 219 ("[W]here dignity broadly implicates a consideration of the inherent value of human beings, a respect for their personhood, as it were, privacy involves the more focused rights to protect the conditions necessary to individuation."); *see also* Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, LAW & CONTEM. PROBS. 326, 326 (1966) ("privacy is surely deeply linked to individual dignity and the needs of human existence."). *But see* Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 897 (1991) (describing as "unsatisfactory" Bloustein's characterization of privacy as a subcategory of dignity: "Human dignity can be called into question by a wide variety of practices in society that have nothing to do with privacy and for which the law makes no effort to provide a remedy.").

broader dignity interest of an author provide for a right of integrity subsequent to disclosure (as inferred in *Privacy As an Aspect of Human Dignity*)? The enticing question presents a logical launching point for a dignity-based moral rights system, one that would emphasize the right of integrity, but also include the right of disclosure, and perhaps more remotely, the right of attribution.[179]

Of course, hasty optimism should not prevail at the expense of deliberation. A legal recognition of dignity first requires the ability to ascertain the core elements and outer dimensions of what has been traditionally described as a value (in contrast to a right), which is a difficult task, as discussed above. Indeed, commentators have been critical of Bloustein's reliance on the dignity concept. One observed that "although human dignity is an important value, it is hard to define, identify, and measure."[180] Yet another commentator credited Bloustein with "passionately affirming the importance of [a] moral principle," but declared that "the judicial system lacks the capability effectively to protect the interest. The law is probably not the appropriate vehicle for the furtherance of the 'inviolate personality.'"[181]

Thus, the initial step toward a dignity-based moral right of authors is to identify the proper dimensions of a legal dignity. This task accomplished, the second step is to fashion the specific protections that an authorial dignity right would encompass. This discussion follows.

B. American Dignity

Commentators, especially those espousing a formal American right of dignity, have noted the implicit presence of individual dignity in the Declara-

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179. The right of attribution could be seen as a means to protect one's identity, and the right of identity as a form of a dignity interest.

180. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 339 (1983). But Bloustein had already addressed this concern:

> The words we use to identify and describe basic human values are necessarily vague and ill-defined. Compounded of profound human hopes and longings on the one side and elusive aspects of human psychology and experience on the other, our social goals are more fit to be pronounced by prophets and poets than by professors. We are fortunate, then, that some of our judges enjoy a touch of the prophet's vision and the poet's tongue.

Bloustein, *supra* note 165, at 1001. Nevertheless, Bloustein's many references to "dignity" are in conjunction with other terms, indicating his own understanding of the related nature of dignity and other values, and perhaps the difficulty in definition: dignity and personality, *id.* at 974, 991, 994, 995; dignity and individuality, *id.* at 973, 974, 982, 984, 991, 1003; dignity and freedom, *id.* at 973, 1000; dignity and pride, *id.* at 984; dignity and independence, *id.* at 971; dignity and worth, *id.* at 971; dignity and integrity, *id.* at 971, 982.

181. Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539, 563 (1991).

tion of Independence[182] and are quick to point out the explicit references to the term in the *Federalist Papers*.[183] Yet unlike the national constitutions of some countries,[184] the United States Constitution does not provide for the right of dignity. Nevertheless, some commentators have urged that dignity is constitutionally inspired.[185] The late Justice William Brennan was perhaps the most prominent and vocal advocate of this view, arguing that human dignity is a value that the Constitution affirms.[186] Other commentators have argued that,

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182. *See* Bernard R. Boxill, *Dignity, Slavery, and the Thirteenth Amendment*, *in* CONSTITUTION OF RIGHTS, *supra* note 153, at 102, 105; Henkin, *supra* note 153, at 213. Both Boxill and Henkin rely on the oft-quoted text, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

183. *E.g.*, Parent, *supra* note 154, at 69-70 & nn.65-66.

184. English translations of various national constitutions indicate that several countries provide for a right of dignity in some form. *See, e.g.*, ALG. CONST. pt. 1, ch. IV, art. 34(1)-(2), *available at International Constitutional Law Algeria*, http://www.uni-wuerzburg.de/law/ag 00000_.html ("The State guarantees the inviolability of the human entity. Any . . . breach of dignity is forbidden."); CAMBODIA CONST. ch. III, art. 38(2), *available at International Constitutional Law, Cambodia*, http://www.uni-wuerzburg.de/law/cb00000_.html ("The law protects the life, honor, and dignity of the citizens."); F.R.G. CONST. ch. I, art. 1(1), *available at International Constitutional Law, Germany*, http://www.uni-wuerzburg./law/gm00000_.html ("Human dignity is inviolable. To respect and protect it is the duty of all state authority."); GREECE CONST. pt. I, § I, art. 2(1), *available at International Constitutional Law, Greece*, http://www.uni-wuerzburg./law/gr00000_.html ("Respect for and protection of human dignity constitute the primary obligation of the State "); PARA. CONST. ch. II, art. 33(2), *available at International Constitutional Law, Paraguay*, http://www.uni-wuerzburg./law/pa00000_.html ("The protection of the privacy, dignity, and private image of each individual is hereby guaranteed."); RUSS. CONST. pt. I, ch. 2, art. 21(1), *available at International Constitutional Law, Russia*, http://www.uni-wuerzburg./law/rs00000_.html ("The dignity of the person is protected by the state."); SWED. CONST. ch. 1, art. 2(1), *available at International Constitutional Law, Sweden*, http://www.uni-wuerzburg./law/sw00000_.html ("Public power shall be exercised . . . for the freedom and dignity of the individual."); YUGO. CONST. § II, art. 22(2), *available at International Constitutional Law, Yugoslavia*, http://www.uni-wuerzburg./law/sr00000_.html ("The personal dignity and security of the individuals shall be guaranteed."). English translations of more than 80 countries' constitutions are available at *International Constitutional Law, at* http://www.uni-wuerzburg.de/law/.

For a comparison of the American view of dignity with that of other jurisdictions in the international community, see Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997).

185. *E.g.*, G. P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONT. L. REV. 171 (1984); Parent, *supra* note 154.

186. *See* Michael J. Meyer, *Introduction*, *in* CONSTITUTION OF RIGHTS, *supra* note 153, 183, at 1 & n.1 (citing *In Search of the Constitution: Mr. Justice Brennan* (PBS broadcast, 1987); *In Search of the Constitution: Ronald Dworkin: The Changing Story* (PBS broadcast, 1987)) (alluding to Justice Brennan and Professor Ronald Dworkin's emphasis that "the fundamental value affirmed by the Constitution . . . was the value of human dignity"). *Cf.* William J. Brennan, Jr., *The Essential Dignity of Man* (remarks to Morrow Citizens Association on Correction, Nov. 21, 1961, Newark, New Jersey) (copy on file with author).

like privacy, the right of dignity ought to be a Constitutional right.[187] Yet the case for judicial recognition of dignity as a fundamental right is still, at best, in its early stage.[188] The various references to individual and personal dignity by the Supreme Court do not rise to a formal recognition of the right.[189] Individual litigants who have asserted dignity as a constitutionally protected right have been turned away.[190]

Perhaps realizing the judicial reluctance or wariness to recognize a dignity right, Professor Bedau wrote aptly, "If human dignity is to be protected and advanced, it must be by congressional legislation, or by the sovereign states, or by private persons and their organizations – but not by the federal courts claiming to interpret our constitutional law."[191] Notwithstanding the commentators' doubts as to dignity's ascertainable meaning, private organizations have formally demanded dignity for their members,[192] and Congress,

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187. *See* Parent, *supra* note 154, at 69-70 (arguing that human dignity enjoys implicit constitutional protection in First, Fifth, Sixth, Eight, Thirteenth, Fifteenth, and Nineteenth Amendments and that references to dignity in *Federalist Papers* indicate purpose to advance dignity in Constitution); *see also* Tremper, *supra* note 143, at 1296 (urging that "the concept of human dignity pervades the Constitution and has clear implications for constitutional adjudication"); *id.* at 1297 n.20 (citing authorities that share view that "'[t]he basic value in the United States Constitution, broadly conceived, has become a concern for human dignity'").

188. *See generally* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L. J. 145 (1984) (surveying Supreme Court's references to "dignity" in opinions and noting increased frequency and changed meaning); Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998) (discussing Justice Brennan's concept of human dignity and his increasing references to dignity in later opinions).

189. For a compilation of the Justices' references to personal dignity in case opinions, see Paust, *supra* note 188, at nn.35-55; Wermiel, *supra* note 188, at 224 & n.7. Professor Wermiel catalogues the first references to individual dignity by the Supreme Court. *Id.* at 226 (quoting Chisholm v. Georgia., 2 U.S. (2 Dall.) 419, 455 (1793) ("A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance."); Brown v. Walker, 161 U.S. 591, 632 (1896) (noting "sentiment of personal self-respect, liberty, independence and dignity which has inhabited the breasts of English speaking peoples for centuries") (Field, J., dissenting)).

190. *E.g.*, Hutchinson v. Lausell, 672 F. Supp. 43, 45 (D.P.R. 1987) ("[P]laintiff claims that . . . his dignity has been damaged. The Constitution of the United States, however, does not contain such bald protection[ ]."). One court has declined to recognize a claim for a breach of the right of dignity. Afentakis v. Mem'l Hosp., 667 N.Y.S.2d 602, 604 (N.Y. Sup. Ct. 1997).

191. Bedau, *supra* note 158, at 146.

192. Often such organizations have "dignity" in their name – Dignity/USA and Death with Dignity National Center, for example. Dignity/USA is a national organization (with various local chapters) comprised of gay, lesbian, and transgendered Catholics, that claims an "inherent dignity" and seeks to reinforce and affirm their "sense of self acceptance and dignity." Dignity/USA, *Statement of Position & Purpose, available at* http://www.dignityusa.org/purpose.html> (last visited Oct. 13, 2001). *See* Murray Dubin, *In Conflict with Faith*, PHILA. INQUIRER, Aug. 29, 2000, at D1 (reporting Dignity/USA's history and activity), *available at* LEXIS , News

federal agencies, and the states have included numerous references to dignity in their laws. The frequent mention of dignity in Congressional enactments[193] affirms that certain classes of persons are entitled to dignity – most frequently, victims of crime,[194] the elderly,[195] those with disabilities or special needs,[196] and those without means – the homeless[197] and the unemployed.[198] Similar

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Aug. 29, 2000, at D1 (reporting Dignity/USA's history and activity), *available at* LEXIS , News Library, PHI File; Death with Dignity National Center, *How You Can Get Involved, available at* http://www.deathwithdignity.org/involved/involvedhome.htm (last visited Oct. 13, 2001) ("There is an urgent need to reform medical guidelines, rewrite laws, and build a national consensus around an individual's right to die with dignity.").

193. Perhaps the frequency of references to personal dignity is not so surprising in light of the occasional puffery seen in legislative preambular declarations. It may surprise advocates of formal recognition of the dignity right to find within the text of the United States Code a Congressional reference to the "traditional American concept of the inherent dignity of the individual in our democratic society." 42 U.S.C. § 3001 (1994).

194. *See infra* text accompanying notes 202-03.

195. Illustrative is the obligation "to assist our older people to secure equal opportunity to the full and free enjoyment of . . . [r]etirement in health, honor, dignity – after years of contribution to the economy". 42 U.S.C. § 3001 (1994); *see also* 12 U.S.C. § 1701q(a) (1994) (enabling "elderly persons to live with dignity"); 42 U.S.C. § 3001 (citing Congressional finding that "the fulfillment, dignity, and satisfaction of retirees still depend on the continuing development of a consistent national retirement policy"); *id.* § 1485(y)(1)(F) (1994) (enabling "frail elderly persons residing in federally assisted housing to live with dignity and independence"); *id.* § 3021(a)(1)(A) (securing and maintaining maximum independence and dignity in a home environment for older individuals capable of self care with appropriate supportive services"); *id.* § 3057a ("It is the sense of the Congress that older individuals who are Indians, older individuals who are Alaskan Natives, and older individuals who are Native Hawaiian are a vital resource entitled to all benefits and services available and that such services and benefits should be provided in a manner that preserves and restores their respective dignity, self-respect, and cultural identities."); *id.* § 8011(a)(1)(B) (enabling "frail older persons and persons with disabilities to maintain their dignity and independence"); *id.* § 8011(a)(2)(D) (providing "services – in a manner that respects the dignity of the elderly and persons with disabilities"); *id.* § 8011(d)(4)(E) ("enabling frail elderly persons residing in federally assisted housing to live with dignity and independence").

196. 42 U.S.C. § 8001 (1994) ("Congress finds that – congregate housing, coordinated with delivery of supportive services, offers an innovative, proven, and cost-effective means of enabling temporarily disabled or handicapped individuals to maintain their dignity and independence and to avoid costly and unnecessary institutionalization."); *id.* § 8013 ("The purpose of this section is to enable persons with disabilities to live with dignity and independence within their communities by expanding the supply of supportive housing . . . ."); *id.* § 12703(5) (increasing "the supply of supportive housing, which combines structural features and services needed to enable persons with special needs to live with dignity and independence").

197. *Id.* § 11301(a)(6) (stating as finding that "the Federal Government has a clear responsibility and an existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless").

198. 15 U.S.C. § 3103 (a)(5) (1994) ("Unemployment exposes many families to social, psychological, and physiological costs, including disruption of family life, loss of individual dignity and self respect . . . ."); *see also* H.R. Rep. No. 95-1225, at 4 (1978), *reprinted in* 1978

references appear in the parallel provisions of the Code of Federal Regulations.[199] Individual states provide equivalents in state enactments.[200] Impor-

U.S.C.C.A.N. 5583, 5585 (summarizing provisions in legislative history of Veterans and Survivors Improved Pension Act of 1978 to "assure a level of income above the minimum subsistence level allowing veterans and their survivors to live out their lives in dignity").

Other references to dignity are scattered throughout the United States Code. 18 U.S.C. § 1116(b)(4)(B) (1994) (setting forth punishment for "whoever kills or attempts to kill" a person who "is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity"); 22 U.S.C. § 290f(b) (1994) ("It is the purpose of this section to provide support for developmental activities designed to achieve conditions in the Western Hemisphere under which the dignity and the worth of each human person will be respected . . . ."); *id.* § 2151-1 (enabling "them to satisfy their basic needs and lead lives of decency, dignity, and hope"); 29 U.S.C. §3002(a)(7)(A)(i) (1994) (respecting "individual dignity, personal responsibility, self determination, and pursuit of meaningful careers"); *id.* § 701(c) (same); 42 U.S.C. § 6601(b)(1) (fostering "leadership in the quest for international peace and progress toward human freedom, dignity, and well-being by enlarging the contributions of American scientists").

199. 7 C.F.R. Pt.1924, Subpt. A, Exh. I (2000) ("It is important that the design of the Labor Housing site and buildings will help to create a pleasing lifestyle which will promote human dignity and pride among its tenants"); *id.* § 275.12(c)(1) (Food Stamp and Food Distribution Program: "Personal interviews shall be conducted in a manner that respects the rights, privacy, and dignity of the participants."); *id.* § 3418.1 (noting requirements for recipients of agriculture research, education, and extension formula funds: "*Seek stakeholder input* means an open, fair, and accessible process by which individuals, groups, and organizations may have a voice, and one that treats all with dignity and respect."); 20 C.F.R. § 416.110 (2000) (stating that one of basic principles outlined in financial assistance programs for aged, blind, and disabled is "[p]rotection of personal dignity. Under the Federal program, payments are made under conditions that are as protective of people's dignity as possible."); 24 C.F.R. § 91.1 (2000) ("Decent housing also includes increasing the supply of supportive housing, which combines structural features and services needed to enable persons with special needs, including persons with HIV/AIDS and their families, to live with dignity and independence; and providing housing affordable to low-income persons accessible to job opportunities."); *id.* § 964.15 (HUD policy on resident management: "Potential benefits of resident-managed entities include improved quality of life, experiencing the dignity of meaningful work, enabling residents to choose where they want to live, and meaningful participation in the management of the housing development."); 28 C.F.R. § 512.11 (2000) (concerning inmate research projects: "In all research projects the rights, health, and human dignity of individuals involved must be respected."); 38 C.F.R. § 17.33(a) (2000) (Pensions, Bonuses, and Veterans' Relief: "Patients have a right to be treated with dignity in a humane environment that affords them both reasonable protection from harm and appropriate privacy with regard to their personal needs."); *id.* § 17.63 (stating that residents in community residential care facilities must "[b]e treated with respect, consideration, and dignity."); *id.* § 36.4286(b)(1) (Partial or Total Loss of Guaranty: "Obtaining and retaining a lien of the dignity . . . "); 42 C.F.R. § 51b.103(c) (2000) (project grants for preventive health services: "The application shall contain assurances that no one will be denied services because of inability to pay, and that the services are provided in a manner which preserves human dignity and maximizes acceptance."); *id.* § 51c.303(m) ("A community health center supported under this subpart must . . . [b]e operated in a manner calculated to preserve human dignity and to maximize acceptability and effective utilization of services."); *id.* § 59.5(a)(3) (requirements that must be met by a family planning project: "Provide services

in a manner which protects the dignity of the individual."); *id.* § 405.2138(c) (Patient Rights: "*Standard: respect and dignity.* All patients are treated with consideration, respect, and full recognition of their individuality and personal needs, including the need for privacy in treatment."); *id.* § 460.4 ("Maximize dignity of, and respect for, older adults."); *id.* § 460.7(a)(1)(ii) (PACE services recipients: "Ensure a safe, sanitary, functional, accessible, and comfortable environment for the delivery of services that protects the dignity and privacy of the participant."); *id.* § 460.112 (PACE services recipients: "To be treated with dignity and respect, be afforded privacy and confidentiality in all aspects of care, and be provided humane care."); *id.* § 483.15 ("A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. (a) *Dignity.* The facility must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality."); *id.* § 483.152(b)(4)(iv) (requirements for approval of a nurse aide training and competency evaluation program: "Allowing the resident to make personal choices, providing and reinforcing other behavior consistent with the resident's dignity."); 43 C.F.R. § 26.3(b) (2000) (Youth Conservation Corps: "objectives will be accomplished in a manner that will provide the youth with an opportunity to acquire increased self-dignity and self-discipline"); 45 C.F.R. § 73.735-301(a) (2000) ("An employee's conduct on the job is, in all respects, of concern to the Federal government. Courtesy, consideration, and promptness in dealing with the public must be shown in carrying out official responsibilities, and actions which deny the dignity of individuals or conduct which is disrespectful to others must be avoided."); *id.* § 2551.11 ("Program funds are used to support Senior Companions in providing supportive, individualized services to help adults with special needs maintain their dignity and independence.").

200. ARK. CODE ANN. § 20-10-1003(b)(3) (Michie 2000) (entitling residents of long-term care facility to "[t]he right to dignity and respect"); CAL. WELF. & INST. CODE § 4502(b) (West 1998) (giving persons with developmental disabilities "[a] right to dignity, privacy and humane care"); *id.* § 5325.1(b) (persons with mental illness have a "right to dignity, privacy, and humane care"); D.C. CODE ANN. § 6-1901(a)(2) (1995 & Supp. 2001) (specifying in statement of purpose intent of Council of District of Columbia to "assure that . . . habitation is skillfully and humanely provided with full respect for the person's dignity and personal integrity and in a setting least restrictive of personal liberty"); FLA. STAT. ANN. ch. 393.13(2) (1998 & Supp. 2001) ("[p]ersons with developmental disabilities shall have a right to dignity, privacy, and human care"); GA. CODE ANN. § 29-5-3(B)(1) (1997 & Supp. 2001) (guardian of a person of an incapacitated adult "[s]hall respect and maintain the individual rights and dignity of the ward at all times"); MINN. STAT. ANN. § 245.467, subd.1(8) (West 1998) ("[m]ental health services . . . must be . . . provided under conditions which protect the rights and dignity of the individuals being served"); *id.* § 245.4876, subd.1(10) (West 1998 & Supp. 2001) ("[c]hildren's mental health services . . . must be . . . provided under conditions that protect the rights and dignity of the individuals being served"); MONT. CODE ANN. § 53-20-142(1) (1999) ("Persons admitted to a residential facility for a period of habilitation shall . . . have a right to dignity, privacy, and humane care"); N.C. GEN. STAT. § 122C-51 (1999) ("It is the policy of the State to assure a basic human rights to each client of a [mental health, developmental disabilities, or substance abuse] facility. These rights include the right to dignity, privacy, humane care, and freedom from mental and physical abuse, neglect, and exploitation."); OHIO REV. CODE ANN. § 3721.13 (Anderson 1999) (giving residents of rest homes and nursing homes "[t]he right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality"); R.I. GEN. LAWS § 38-2-1 (1997 & Supp. 2000) ("The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free

tantly, many of these materials, which include textual references to dignity, are of recent vintage, indicating a growing popular and deliberative appreciation of individual dignity.[201] Yet the dignity term continues to go undefined in all of these materials, and in all but one instance in which a class of persons is deemed to be entitled to dignity, there is little or no elaboration on what entitlement to dignity actually entails, nor is dignity described as a "right." The one specific context in which Congress and the several states have gone beyond describing dignity as a precatory value and moved closer toward a status of a right involves victims of crime.[202] The federal crime victims' act provides that "[a] crime victim has . . . [t]he *right* to be treated with fairness and with respect for the victim's *dignity* and privacy."[203] But again, dignity is not defined and the nature of the "right" appears weak because the victim of crime is entitled only to the best efforts of the federal government's

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society."); W. VA. CODE § 16-5C-1 (1998 & Supp. 2000) ("[I]t is the policy of this state to encourage, promote and require the maintenance of nursing homes so as to ensure protection of the rights and dignity of those using the services of such facilities."); W. VA. CODE § 16-5D-1 (1998) ("[I]t is the policy of this state to encourage, promote and require the maintenance of personal care homes so as to ensure protection of the rights and dignity of those using the services of personal care homes."); W. VA. CODE § 16-5H-1 (1998 & Supp. 2000) ("[I]t is the policy of this state to encourage, promote and require the maintenance of residential board and care homes so as to ensure protection of the rights and dignity of those using the services of such residential board and care homes.").

201. The majority of these materials was enacted in the 1980s or later. Perhaps gradually, the U.S. jurisdiction is heading toward a culture of legal dignity seen in some European countries. For an insightful comparative discussion of the legal recognition of honor, dignity, and respect between the U.S., France and Germany, see James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 179 (2000).

202. Proponents of victims' rights urge that victims' right to dignity should be at least equal to that of the criminal defendant. Thus, if "even the lowest of the low, namely hateful criminals" are owed dignity, Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEG. STUDIES 553, 557 (1998), then surely the victims of such crimes should receive equal dignity.

203. 42 U.S.C. § 10606(b)(1) (1994) (emphasis added). The full section reads as follows:

> A crime victim has the following rights:
>
> (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (2) The right to be reasonably protected from the accused offender.
> (3) The right to be notified of court proceedings.
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
> (5) The right to confer with [the] attorney for the Government in the case.
> (6) The right to restitution.
> (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id. § 10606(b).

agents[204] and violation of the purported right of respect for dignity does not allow a claim in the event of a failure to accord such respect.[205] Likewise, several states provide by their constitution or statute that victims of crimes have a right "to be treated with dignity, respect, and fairness."[206] Like the federal counterpart, most state laws that provide enumerated rights for crime victims specify that the law does not create a cause of action,[207] with only one

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204. *Id.* § 10606(a) ("Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described . . . .").

205. *Id.* § 10606(c).

206. *See, e.g.*, ALASKA CONST. art. I, § 24 ("Crime victims . . . shall have . . . the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process . . . ."); ARIZ. CONST. art. II, § 2.1(A)(1) ("[A] victim of crime has a right . . . [t]o be treated with fairness, respect, and dignity . . . throughout the criminal justice process."); IDAHO CONST. art. I, § 22 ("A crime victim . . . has the following rights: (1) To be treated with fairness, respect, dignity and privacy throughout the criminal justice process."); ILL. CONST. art. I, § 8.1(a) ("Crime victims . . . shall have . . . [t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); MICH. CONST. art. I § 24(1) ("Crime victims . . . shall have . . . [t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); N.M. CONST. art. II, § 24 ("[A] victim of [enumerated crimes] shall have the following rights as provided by law: (1) the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process."); R.I. CONST. art. I, § 23 ("A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process . . . ."); S.C. CONST. art. I, § 24(A)(1) "[V]ictims of crime have the right to . . . be treated with fairness, respect, and dignity . . . throughout the criminal and juvenile justice process . . . ."); TEX. CONST. art. 1, § 30(a)(1) ("A crime victim has . . . (1) the right to be treated with fairness and with respect for the victim's dignity and privacy . . . ."); UTAH CONST. art. I, § 28(1)(a) ("Victims of crimes have [the right] . . . [t]o be treated with fairness, respect, and dignity . . . throughout the criminal justice process."); VA. CONST. art. I, § 8-A ("That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect . . . and . . . may be accorded rights [including] . . . [t]he right to be treated with respect, dignity and fairness at all stages of the criminal justice system."); *see also* LA. CONST. art. I, § 25 ("Any person who is a victim of crime shall be treated with fairness, dignity, and respect . . . ."); MD. CONST. art. 47(a) ("A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."); OHIO CONST. art. I, § 10a ("Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process . . . ."); OKLA. CONST. art. II, § 34(A) ("To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process."); OR. CONST. art. I, § 42 (1) ("[T]o ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord [them] due dignity and respect."); WASH. CONST. art. I, § 35 ("To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect."); WIS. CONST. art. 1, § 9m ("This state shall treat crime victims . . . with fairness, dignity and respect for their privacy.").

207. LA. CONST. art. I, § 25; MD. CONST. art. 47(c); OHIO CONST. art. 1, § 10a; OR. CONST. art. I, § 42(2); S.C. CONST. art. I, § 24(B); UTAH CONST. art. I, § 28(2).

allowing for a mandamus action to compel compliance with the constitutional or statutory provision.[208] Thus again, the rights status of dignity remains in question,[209] and the lack of available remedies may actually work against a characterization of dignity as a right, because one meaning of dignity is the ability to assert a claim.[210] In any event, it appears that the federal and state materials recognize an entitlement to dignity for persons of a certain condition, all of them involuntary. Such recognition is reminiscent of the understanding of dignity advanced by the philosopher Immanuel Kant – in part, that dignity is not necessarily a means, but an inherent end in itself, requiring every man to show respect for every other.[211] Kant, of course, did not limit the dignity owed to any class of persons, instead making it a universal requirement.[212] Congress and the states appear to identify certain persons as especially entitled to dignity, reflecting a sense of *respect* for persons' worth, *regardless* of their condition. It is a respect for these persons' integrity, whether physical, psychic or otherwise.[213]

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208. The South Carolina Constitution does provide for a writ of mandamus, "to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section." S.C. CONST. art. I, § 24(B). There are reports of a popular movement to include provisions allowing victims a cause of action against officials who fail to notify them of their rights or to enforce them. Terry Carter, *Righting Victims' Rights: Activists Seek Cause-of-Action Clauses for Noncompliance*, A.B.A. J., Dec. 2000, at 24, 24.

209. Dignity is referenced in the Illinois Constitution, but it does not give rise to a right. The state constitution includes a section entitled, "Individual Dignity," which provides: "To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned." ILL. CONST. art. I, § 20. In rejecting a plaintiff's claim for breach of a right to dignity, under this constitutional provision, the court characterized the text as preambular and not operative, which "was never intended to establish any new course of action. Irving v. J.L. Marsh, Inc., 360 N.E.2d 983, 984 (Ill. App. Ct. 1977).

210. Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* CONSTITUTION OF RIGHTS, *supra* note 153, at 10, 11.

211. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor trans., ed. 1997); *see also* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 47-50, 53 (1992). Kant's work has influenced the way legal scholars think of protecting intangible property. For a discussion of Kant, dignity and the right of publicity, see Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999).

212. Professor Gewirth: "[M]an is obligated to acknowledge, in a practical way, the dignity of humanity in every other man. Hence he is subject to a duty based on the respect which he must show every other man." Gewirth, *supra* note 210, at 11 (quoting Kant).

213. *See* Henkin, *supra* note 153, at 210 ("[H]uman dignity requires respect for every individual's physical and psychic integrity . . . .").

A final bridge from the present discussion to a dignity-based right of authors is the extension of the affirmation of a legal dignity owed especially to those of an involuntary condition[214] toward an entitlement of dignity to those who have made *choices*. "Going back to Kant, and reflected in much of modern liberalism," Professor Frederick Schauer writes, "a common way of thinking about dignity focuses on the ability of the independent moral agent to make choices about her life, the result of which is that deprivations of dignity occur when those choices are neither respected nor permitted."[215] For authors specifically, the inquiry turns to whether one who chooses to be an author or who chooses to create one work over another will have those choices respected.[216] It is this respect that is advanced here as authorial dignity.

C. Dignity-Based Right of Integrity

The imposition of one jurisdiction's legal doctrine onto another jurisdiction whose socio-legal culture is different from the first raises obvious questions of fit. As discussed above, a poignant example may be the transplanting of the French *droit moral* (designed for a jurisdiction whose priority in art and deference to artisans is unmatched) onto American copyright culture whose focus is more on the distribution of proprietary interests.[217] A more inviting system of personal rights protections for the American author should be based on a more stateside rationale – perhaps an American understanding of personal dignity. Importantly, it is contemplated that the specifics of the dignity-based right of integrity would be achieved through legislative enactment rather than judge-made rule. The former has been more receptive to protections of authors than the latter.[218] American courts have been too reluctant to create a judicially crafted moral rights doctrine,[219] and appear still undecided

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214. In other words, one does not voluntarily choose to be a crime victim, or developmentally disabled, or elderly.

215. Frederick Schauer, *Speaking of Dignity*, *in* CONSTITUTION OF RIGHTS, *supra* note 153, at 178, 187.

216. An argument (of an existential nature) could be made that one being an author is not a matter of choice. Authorship may be a matter of an immutable condition or individual destiny. Note Maslow's statement: "A musician *must* make music, an artist *must* paint, a poet *must* write, if he is to be ultimately at peace with himself. What a man can be, he *must* be." BARTLETT'S FAMILIAR QUOTATIONS 724 (16th ed. 1992) (emphasis added) (quoting ABRAHAM HAROLD MASLOW, MOTIVATION AND PERSONALITY (1954)).

217. *See supra* note 107 (referencing Kwall's commentary).

218. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995) ("Artists fared better in state legislatures than they generally had in courts."), *rev'g*, 861 F. Supp. 303 (S.D.N.Y. 1994).

219. *See* Stevenson, *supra* note 38, at 111 ("This is a problem for the Congress and not the courts."). A legislatively crafted moral rights doctrine in the United States will result in an

or unequipped to enunciate rights based on individual dignity. In contrast, Congress has already enacted the first federal moral rights statute in VARA; and through various references to dignity, though in the most general terms, it has shown a willingness to promote dignity interests, in at least one instance elevating it to a dignity-based legal right.[220] The legislative vehicle also invites the possibility of extending the current entitlement of dignity to an actionable right based on violation of the dignity interest. Most importantly, the path to the legislature also allows for compromise, which, as a practical matter, will likely be crucial in the accommodation between an expanded moral rights program and a copyright scheme with some history.

Before Congress confers any new protections,[221] it must declare initially (perhaps as part of a legislative purpose) that American authors as a group are entitled to a basic right of dignity that requires respect for them as creators, for their work, and for the creative process.[222] Though authors may not fall within a class of persons with an involuntary condition, they as a group may be sufficiently discrete and their work of such public interest that Congress may declare that the entitlement to dignity should extend to authors.[223] Though art may not occupy the gloried status stateside that it does in France, the recognition and preservation of art is still an American public policy interest.[224] Preliminarily, the declaration of an authorial dignity would likely

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international irony: a French *droit moral* in a civil law jurisdiction initiated by judge-made rule, and an American moral rights system in a common law jurisdiction crafted by legislative statute.

220. *See supra* text accompanying notes 202-03.

221. I am in agreement with those who state that Congressional authority to enact authors' moral rights legislation is based on the copyright clause, U.S. CONST. art. I, § 8, cl. 8. *E.g.*, Kwall, *Copyright and the Moral Right*, *supra* note 17, at 70, 91.

222. As Professor Halpern reminds, "The fundamental question is one of societal values: how do we value the artistic or creative persona apart from the property interest in the creation?" Halpern, *supra* note 25, at 80.

223. Identifying authors and artists in this way will likely lead to charges of elitism. Indeed, a moral rights system that allows creators to have peremptory powers over the rights of property owners has been described not only as "elitist," Carter, *supra* note 93, at 102; Zlatarski, *supra* note 16, at 204, 206 n.18, but also "despotic," Carter, *supra* note 93, at 102. Responds Professor Justin Hughes, "Never mind that on economic indicators, it is usually the property owner – the art collector, the studio mogul – who is more 'elite' than the creator who would have the moral rights." Hughes, *The Personality Interest of Artists and Inventors*, *supra* note 22, at 137. Moreover, given Congressional recognition of an entitlement to dignity for various classes of persons, it is not the case that only authors would have a dignity-based right when others do not, as some have suggested. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 208 (1998) ("We don't see why authorial dignity is so important that it's entitled to special protection where other dignity interests are not.").

224. Note the *Gilliam* court's view of the relationship between law and the arts: "[T]he copyright law should be used to recognize the important role of the artist in our society and the

face little political opposition because, as a general statement, few could be opposed to dignity of any persons or group. The more difficult question is what such dignity would entail – that is, what would be the costs of an authorial dignity? This discussion follows, after an important aside on the scope of authors that a dignity-based right would protect.

Currently, the federal statute that provides for the rights of attribution and integrity applies only to the category of visual artists.[225] This narrow scope has been the subject of criticism.[226] There appears little explanation for such limitation, other than the great success of the lobbying efforts of those who exploit the works of authors – publishers and motion picture producers and distributors, for example. Given that the influence and economic interests of these groups are substantial, the proposed dignity-based right of integrity, which envisions protecting authors more broadly,[227] will again test Congressional mettle. It is a quandary between advancing artist protections and appeasing powerful lobbies.

One criticism leveled by opponents of an extensive moral rights system in the United States is that the rights of attribution, disclosure, and integrity would apply to an infinite number of authors, all of whom would allege personality interests in their works. For example, could a cabinetmaker,[228] an office memo writer,[229] or a room decorator[230] also seek protection against changes in her handiwork – the cabinet, the memo, and the room, respectively – given that each is the result of deeply personal labors and a reflection of the creator's spiritual presence?[231] On one score, the question fairly highlights the difficulty of defining the bounds of those who could and should claim personal rights. Yet the task of definition, of inclusion and exclusion, upon deliberation and compromise, is precisely the type of line drawing that is the function of the legislature. Initially, Congress has a general authority to enact legislation

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need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public." Gilliam v. Am. Broad. Cos., 538 F.2d 14, 23 (2d Cir. 1976) (citing Mazer v. Stein, 347 U.S. 201 (1954)).

225. 17 U.S.C. § 101 (1994) (defining "work of visual art" and providing specific exclusions); *id.* § 106A(a) (applying to "author of a work of visual art").

226. *E.g.*, Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 951-58.

227. For a comprehensive examination of the definition of "author" within the copyright scheme, see Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323 (1996).

228. Fisher, *supra* note 93, at 1773 n.494.

229. Leval, *supra* note 95, at 1128.

230. Beyer, *supra* note 25, at 1085-86.

231. Or, "Could we imagine giving a plumber a control over the pipes she installs even after the work is paid for, or a cabinet maker the right to veto the conversion of her writing desk into a television cabinet?" James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988).

regarding matters relating to "useful Arts" and "writings."[232] In determining the bounds of protected creators and creations for the dignity-based approach, Congress need not define art, a task that may well be impossible, nor need Congress be correct in its first effort. Congress may well choose to exclude the cabinet, the office memo, or the decorated room. In all events, the limitation to visual artists for the protection of moral rights is an unusually stringent component of American law that continues to draw suspicion,[233] and the argument that virtually "anything under the sun"[234] could receive protection should not so sweepingly deprive all other authors of the personal interests stemming from their work.

Under the proposed moral rights system herein, authors would be entitled to authorial dignity, such that as creators of their work, they and their work are accorded a certain respect. This approach accepts the view that the created work reflects the author's person and personality. Though this view may appear identical to the French model of respect for the *auteur* and the creative process,[235] the specific rights that flow from the dignity-based approach will be mindful of the American socio-legal fabric and values. Stated briefly, those authors who are granted a dignity-based right of integrity would have:

(i) the right to prior notification of another's unauthorized alteration[236] or use[237] of the work beyond the intentions of the author;[238]

(ii) the right to object and request less drastic alternative alteration or use still acceptable to the author;

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232. U.S. CONST. art. I, § 8, cl. 8 (stating that Congress has power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

233. *See supra* note 225. The enactment of VARA was described as "a triumph of principle over moneyed interests." Damich, *The Visual Artists Rights Act of 1990*, *supra* note 16, at 947.

234. Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (quoting S. REP. No. 82-1979, at 5 (1952), *reprinted in* 1952 U.S.C.C.A.N. 2394, 2399; H.R. REP. No. 82-1923, at 6 (1952)), *noted in* Cotter, *supra* note 15, at 38 n.202.

235. *See supra* text accompanying note 45.

236. For ease of reference, the term "alteration" is used to include any change, modification, distortion, mutilation, or the like.

237. "Use" is the counterpart here to the Berne Convention's "derogatory action." Berne Convention, *supra* note 53, art. 6*bis*(1).

238. The notification requirement would perhaps necessitate a national registration of all eligible authors and their work for which protection is sought. Such registration could include, for example, the author's name, contact information, a description of the work, and its intended use. In practice, this might reduce the number of authors to those seriously interested in maintaining the integrity of their work. Discussion is invited on what impact the failure to provide notification should have on the parties' positions in any ensuing litigation.

(iii) failing resolution,[239] the right to bring a claim for violation of the author's right of integrity, with the burden on the author to show how the challenged alteration or use violates the author's dignity interest, and the tribunal's disposition to take into account, principally, the balancing of the author's dignity interest and the competing interest of the opposing party;
(iv) the dignity-based right of integrity for the duration of the author's life; and
(v) the right to voluntary transfer and waiver of the above rights.

Elaborating, the requirements of notifying the author of alterations in her work or use contrary to her intentions and of allowing the author to voice an objection sound of protections in procedural due process. Granted, the twin requirements of notice and opportunity to be heard are not normally due when state action is not present;[240] nevertheless, the prerequisites to procedural protections notwithstanding, individual dignity is one interest served by procedural due process.[241] Being informed of actions taken against one's interests and the ability to make one's case in opposition are desired ends that are consistent with an American understanding of fairness in process.[242] They are inherent in what Professor Tribe refers to as valuing process and heeding the "independent value of respecting personal dignity."[243]

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239. A requirement could be added that the parties confer and in good faith attempt to resolve the dispute in advance of litigation. The alternative dispute resolution component, along with prior notification to the author and the author's option to request less drastic alteration or use, may be administrative prerequisites that must be exhausted before commencement of any action by the plaintiff author. The dispute resolution attempts could be administered by the Registrar of Copyrights or a court-appointed mediator. A full elaboration of the methods of dispute resolution alternative to a civil action involving authors' rights is beyond the scope of this Article. For a general discussion on dispute resolution in the intellectual property context, see Scott H. Blackmand & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U.L. REV. 1709 (1998).

240. Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989) ("We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State . . . . ").

241. *See Developments in the Law, Zoning and Procedural Due Process*, 91 HARV. L. REV. 1427, 1502, 1505 (1978), *cited with approval in* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 469 F. Supp. 836, 860 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). The other interests served by procedural due process are efficiency and representation. *See Developments in the Law*, *supra*, at 1505.

242. *See* Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 197 (2000) ("'Due process,' one of the most familiar of legal phrases, is a promise of our culture's legal tradition.").

243. Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157 (1984). He explains:

> It is said that, before God expelled Adam from the Garden of Eden for eating of the Tree of Life, He gave Adam a moment to regain his composure and asked him why

Failing resolution, the author may advance against the party engaging in unauthorized alteration or use a claim of the dignity-based right of integrity. The burden falls squarely on the author to show how the defendant's alteration or use of the work violates her authorial dignity, that is, how it disrespects the plaintiff author's role as creator, her work, or the creative process. As noted above, the author benefits from an initial presumption that her work is an extension of her personality. Importantly, however, the dignity-based right of integrity is not absolute,[244] nor should it take on a presumption of priority. Because there is a competing interest of the user, resolution requires a weighing and balancing[245] of the author's dignity interest in preserving the integrity of her work against the opposing party's interest, whether based on property (as will normally be the case) or some other ground.[246] To reach a decision, the court must take into account the nature of the author's work, the author's intentions in creating the work, the extent of the alteration or use complained of, and the defendant's own intent and motivation behind the alteration.[247] With regard to the nature of the alteration or use, the court could consider, where appropriate, the industry practice, the foreseeability of such alteration or use at the time of the creation, and the impact of allowing such alteration or use on the public interest.[248] Also pertinent may be the nature of

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> he had taken a bite. You might wonder about the reason for God's inquiry. Surely it was not to reduce the risk of divine error – to minimize the costs of an inefficient adversarial process. It was a matter of process for its own sake, rather like the code of Wild Bill Hickock: never shoot a man until you've looked him in the eye. That is, God's inquiry was an affirmation of the *dignity* even of those who had strayed.

Id. (emphasis added).

244. Even the French *droit moral* does not prohibit modifications of a work necessary to present it in a different medium. DaSilva, *supra* note 25, at 35. *See* Dominique Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 641-42 (1976) (discussing French court's decision on permissible work of cinematographic adaptor). Nor are changes for restoration purposes actionable under the dignity-based test. VARA includes a similar exception. 17 U.S.C. § 106A(c) (1994) (excepting "modification . . . [as] a result of the passage of time or the inherent nature of the materials").

245. Commentators with an eye toward reforming the American moral rights doctrine have urged the need for the balancing of interests. Kwall, *Copyright and the Moral Right*, *supra* note 17, at 92 (urging "balancing of interests of creators, copyright proprietors, owners of copyrighted works, and the public" in adoption of moral rights doctrine); *see also* Amarnick, *supra* note 15, at 35 (urging moral rights statute that considers "conglomeration of interests").

246. There may be instances when the user advances her own dignity interest. Take for example, a commissioned work of art, a portion of which the purchaser finds shocking, degrading, offensive, or immoral. The artist may claim that alteration of the work infringes her dignity, while the purchaser argues with equal force that displaying the work unaltered disrespects her sense of dignity.

247. That defendant's alteration or use was motivated by bad faith or ill will should not work in her favor.

248. For example, the court could consider the impact of its decision on the nation's cultural heritage and preservation of its arts. It should be noted here that although the dignity-

the relationship between the defendant and the plaintiff author, for instance, whether they work in collaboration or are strangers in the marketplace. With consideration of these relevant factors, the balancing test provides the court with a means and flexibility to address a host of situations – the hypersensitive author who protests minor or incidental alterations in her work (probably in favor of the defendant), the party whose alteration seeks only economic interests against an author who presents a strong dignity interest (a stronger case for the author), and the defendant whose alteration or use is based on some constitutionally-based interest against a strong dignity interest (a difficult case).

In essence, it is the dignity-based standard's consideration of the author's dignity and balancing of the author's interest versus that of the user of the work that are woefully absent in VARA, the only federal moral rights scheme. Importantly, the dignity-based approach also proposes a substantive standard different than that of the statute. Putting aside the procedural protections (which VARA does not provide), the federal statute provides relief for the author if the alteration or use is "prejudicial" to the author's "honor or reputation."[249] These terms are not defined in the statute, and references to them in the legislative history are not particularly illuminating for courts. To date, only one reported case offers an indication of a judicial understanding of these terms. In the district court's decision in *Carter v. Helmsley-Spear, Inc.*,[250] though reversed on other grounds, the court referred to *Webster's* and declared that "prejudicial," "honor," and "reputation" have readily understood meanings.[251] Thus, the court stated that in determining whether the prejudice to honor or reputation standard has been met, it would "consider whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community."[252]

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based integrity right initially would be permitted by legislative enactment, the contours of the right ultimately would be shaped by judicial application and interpretation.

249. 17 U.S.C. § 106A(a)(2) (1994). The language tracks the standard presented in Berne Convention, *supra* note 53, art. *6bis.*

250. 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77 (2d Cir. 1995).

251. *Id.* at 323. The court stated:

> "Prejudice" is commonly understood to mean "injury or damage due to some judgment of another." *Webster's Third New International Dictionary (unabridged)* 1788 (1971). "Honor" is commonly understood to mean "good name or public esteem." *Id.* at 1087. "Reputation" is commonly understood to mean the condition of "being regarded as worthy or meritorious." *Id.* at 1929. Use of these definitions will not cause a result that runs contrary to VARA's purpose. Therefore, this Court is convinced that these definitions were intended by VARA's drafters to be applied in interpreting the statute.

Id.

252. 861 F. Supp. at 323. Preliminary thoughts on the honor/reputation vs. dignity standard are offered here. The dictionary definition of "honor" suggests that the precise meaning

The difficulty with the reputational standard is that though it seeks some objective measurement of injury to the author, it neglects her personal or personality interests.[253] Although authors do have an interest in their commercial and professional reputation, the reputation standard does not adequately capture the more fundamental interest of the author, that of respect for the author's dignity as a creator of works. Moreover, as commentators have alluded, there may well be instances when an unauthorized alteration or use of the author's work results in an *enhanced* community reputation or economic benefit.[254] VARA precludes the author's relief in such cases, even if

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of the term is no less elusive than that for dignity. Moreover, as between honor and dignity, the former has received far less attention in the legal commentary. At first glance, it appears that courts may be better equipped to apply the reputation standard over that for honor because the former is often seen in the libel context. Otto W. Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579, 1637 (1991). But Professor Kwall notes that "the appropriate standard for evaluating an author's reputation is not analogous to showing reputation in a defamation case, and that any evidence with regard to such a showing is 'irrelevant.'" Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 13 n.66 (citing H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925).

253. Perhaps harm to reputation could be relevant in assessing relief *after* a dignity violation has been found.

254. *See, e..g.*, SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 472 (1987) (stating that Berne Convention's criterion of prejudice to honor or reputation of author "is not necessarily appropriate to a situation where an author feels that his artistic intentions have been betrayed by a particular performance or production of his work, but the latter nonetheless has considerable claim to being a valid artistic statement"); Konrad, *supra* note 252, at 1637 ("[E]ven if an author has a reputational interest, the public may perceive the distortion to the author's work as benefitting the author's reputation rather than harming it."); Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 14 ("Situations can and do arise in which a defendant's alteration of a work perverts the author's artistic integrity, but nonetheless stimulates interest in the original work."). An illustration in this regard is the author's own experience, regarding submissions of pieces for an op-ed column of an English newspaper in Seoul, Korea. The newspaper published some articles exactly as I had submitted them. For a subsequent piece, however, the editors made several stylistic changes without seeking my consent, indeed without contacting me at all. The changes did not affect the length of the article, nor did they substantially affect its overall theme, but they did result (in my view) in noticeably awkward phrases and poor style. Acquaintances to whom I had pointed out the differences between the submitted and published text informed me that few if anyone would notice the awkward phrasing or poor style and that any negative inferences drawn from my authorship would be far outweighed by the great publicity I had received – an article with a byline and an accompanying photograph. I was advised that my name, esteem, and reputation in the community were enhanced by publication of the article, faults and all. My view was that I would have gladly declined these rewards (and the nominal compensation received for writing each article) in exchange for the basic respect that an author should be given, which should include prior notice of changes that the newspaper intended to make and the option of not going forward with publication (thereby being relieved of the task of disassociating myself with text that I did not author). For me, the final breaking point occurred when my cousin, an English teacher at a high school in Seoul, reported that he proudly

the alteration or use results in a great violation of the author's dignity. The dignity-based standard would better capture the personality interest.

As to the duration and alienability of the dignity-based right of integrity, the right would be effective for the author's life and subject to waiver at the author's wishes. Conceptually, the dignity-based right of integrity is a *personal* right, one that demands respect for the author's person (and the person's artist), her *person*hood,[255] and inviolate *person*ality, as reflected in her creation. All of these interests must be said to terminate with the death of the author.[256] The dignity-based approach would also make alienable the right of integrity because this approach emphasizes not the "inherent worth" of all humans, but rather respect for the particular artist and her work. This distinction in place, then, dignity by itself would be an inalienable right, whereas respect for authorial dignity is left to the wishes of the individual author. Thus, the author may choose to transfer or waive the dignity-based right of integrity in consideration for some other benefit.[257] As under VARA, any transfer or waiver should be voluntary and memorialized; the author is presumed to otherwise retain the dignity-based right.

Implementation of the specific protections proposed under the dignity-based approach requires significant change of, and some accommodation for, the current copyright law. For instance, *if* VARA were the starting point, the statute must be revised (and re-named) to expand the category of authors from

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showed one of my articles to his students, beaming, "This is my cousin. And *this* is how you are to write in English."

255. The *in* in the Korean *in-gyuck-kwon* is derived from the Chinese character that appears to show the basic outline of a person. *See* GRANT, *supra* note 125, at 28.

256. The dignity-based interest terminates at the life of the author. It should be noted that in some jurisdictions, a celebrity's claim of the right of publicity passes to her estate upon her death. *See* CAL. CIV. CODE § 3344.1(c)-(d) (West Supp. 2001); 765 ILL. COMP. STAT. 1075/15 (1993); IND. CODE ANN. § 32-13-1-16 (Michie 1995); KY. REV. STAT. ANN. § 391.170 (Michie 1999); NEV. REV. STAT. 597.800 (2000); OHIO REV. CODE ANN. § 2741.04 (Anderson 2000); OKLA. STAT. ANN. tit. 12, § 1448 (West Supp. 2001); WASH. REV. CODE ANN. § 63.60.030 (West Supp. 2001). The right of publicity also has been described as one protecting individual dignity interest. *See* Haemmerli, *supra* note 211; Kahn, *supra* note 161.

257. As a practical matter, this rule may force publishers and art dealers to demand a waiver of the author's moral rights, including the dignity-based right, as a matter of business. Indeed, commentators have noted the marketplace reality and the bargaining position of the author. *See supra* note 68 and accompanying text (listing commentators). A survey taken by the Copyright Office after then enactment of VARA shows "that written waivers may become increasingly common with respect to commissioned works and works incorporated into buildings." *See* MARYBETH PETERS, U.S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS: FINAL REPORT OF THE REGISTER OF COPYRIGHTS, MARCH 1, 1996 (1996), *noted in* Cotter, *supra* note 15, at 26 & n.139. Yet, oral contracts in some settings still take place, and in all events, the proposed dignity-based right would provide a default for those who cannot reach written agreement.

visual artists to a more inclusive group.[258] In addition, procedural due process components of notification and objection would have to be inserted and the prejudice to honor or reputation standard would have to be replaced by the dignity-based standard requiring consideration of authorial dignity and balancing of competing interests. The duration and alienability provisions in VARA are restored in the proposal herein. With these not insignificant changes adopted, the proposed dignity-based standard contemplates the intactness of the rest of the copyright scheme. For example, the dignity-based right of integrity would be independent of authors' exclusive rights to copyrighted works;[259] not apply to works made for hire;[260] and be subject to fair use.[261] The commentary includes significant discussion on the latter two – the merits of excluding works made for hire from moral rights protection,[262] and arguments as to why the fair use doctrine should not apply to moral rights issues.[263] On both points, the debate and discussion toward a more informed policy should continue. Yet the rules governing works made for hire and fair use[264] have become such an ingrained part of the American copyright culture

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258. As acknowledged above, this involves the unenviable task of line drawing. *See supra* text accompanying notes 228-34.

259. 17 U.S.C. § 106A(a) (1994) (noting that section is "independent of the exclusive rights provided in section 106").

260. Currently, VARA applies only to works of visual art, *id.*, and works made for hire are specifically excluded from the definition of "work[s] of visual art," *id.* § 101 ("A work of visual art does not include . . . any work made for hire . . . . ").

261. *Id.* § 106A(a) ("Subject to section 107 . . . ."). Section 107 provides in part:

> Notwithstanding the provisions of sections 106 ("Exclusive rights in copyrighted works") and 106A ("Rights of certain authors to attribution and integrity"), the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id. § 107.

262. *See* Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 10-12 (calling for amendment of VARA to provide for more enhanced moral rights protections for artists, subject to limitations). *But see* Peter H. Karlen, *"Joint Ownership of Moral Rights,"* 38 J. COPR. SOC'Y U.S.A. 242, 263-65 (1991) (arguing that interests of employers outweigh those of employee artists, such that work for hire doctrine should work to limit artists' moral rights protections).

263. *See* Ciolino, *supra* note 45, at 33 (arguing that fair use doctrine, which permits use of copyrighted work without authorization for such purposes as criticism, comment, news reporting, or education use, is incompatible with moral rights). *But see* Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86 (1996) (arguing that "under fair use an artist's moral right of integrity should in most circumstances yield to the right of the parodist").

264. It has been noted that the fair use doctrine in copyright is constitutionally-based. *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1378 (1993) ("[T]he fair use

that the specter of a moral rights program eliminating these rules would likely be seen as overarching and be rejected altogether. This is one point of accommodation and compromise.

D. Dignity-Based Right of Integrity in Application

Helpful in the understanding of the dignity-based protections introduced above is the application of the proposed test to three cases in which a moral rights claim was advanced: *Shostakovich v. Twentieth Cenury-Fox Film Corp.*,[265] *Choe v. Fordham Univ. School of Law*,[266] and *Huston v. la Cinq*.[267] These cases involved, respectively, a musical composer, a law review comment author, and a film director, all of whom would be covered under the proposed dignity-based system. The three cases vividly illustrate the authors' passion for the integrity of their work. In two of the three cases (involving the composer Shostakovich and director Huston), the authors failed to vindicate their integrity interest stateside, but prevailed in the French courts. Under the dignity-based proposal then (and assuming unsuccessful resolution between the parties after receipt of notification of, and protest against, the proposed alteration or use of the author's work), how might the dignity-based right of integrity apply practically? The application provides a revealing look at the nature of the court's general task – the balancing of the competing interests and consideration of the appropriate factors.

Plaintiffs in *Shostakovich*, world renowned musical composers and citizens of the then Soviet Union, brought an action against the company that

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doctrine encompasses all claims of [F]irst [A]mendment in the copyright field") (quoting New Era Publ'ns. Int'l, ApS v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989)); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001) ("We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine."). First Amendment protections have also become part of the American socio-legal culture. *See* David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1217 (1991) (reviewing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)) ("No one would deny that the [F]irst [A]mendment is more than a legal rule. . . . [T]he [F]irst [A]mendment plays a role in American culture beyond its legal role."); *see also* Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 805 (1993) (reviewing JAMES B. TWITCHELL, CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA (1992)) ("Americans adore their First Amendment freedoms.").

265. 80 N.Y.S.2d 575 (N.Y. Spec. Term 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949).

266. 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

267. Judgment of May 28, 1991, Cass. Civ. 1re, 149 R.I.D.A. 197 (1991), *noted in* Netanel, *supra* note 29, at 388 n.182. A discussion of the case (along with an English translation of the French decision) is available in Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135, 159 (1991).

produced and distributed a film whose soundtrack included their musical compositions.[268] The composers' names were included in the credits at the end of the film.[269] The alleged wrong here was the use of the plaintiffs' music in a film "whose theme is objectionable to them in that it is unsympathetic to their political ideology."[270] The plaintiffs also advanced a libel claim, arguing that the film's use of their music indicated their approval, endorsement, and participation in the movie "thereby casting upon them 'the false imputation of being disloyal to their country,'" as well as the implied consent, approval, or collaboration in the movie's production and distribution.[271] In one of the earlier decisions that declined to recognize the moral rights doctrine,[272] a New York court summarily rejected all of the composers' claims.[273] The same dispute in a French court, however, led to a decision in favor of the plaintiffs.[274]

Even allowing that the plaintiffs in *Shostakovich* could have voiced their objections more passionately, knowing of the dignity-based standard, the facts do not appear to present a strong case for a violation of authorial dignity, that is, a disrespect for the plaintiffs as composers of their music. Reasonable minds may differ, but the argument that use of one's music in a film that is merely "unsympathetic" to one's political ideology and leads to a misleading perception of one's approval, consent, endorsement, or participation in a movie does not appear to strike at the central authorial dignity interest of personality and personhood.[275] The nature of the objected use also works in favor of the defendant producer and distributor here. As the court explained, the use of the plaintiffs' music could best be described as "incidental, background matter. Aside from the use of their music neither the plot nor the theme of the play,

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268. The film was entitled "The Iron Curtain." *Shostakovich*, 80 N.Y.S.2d at 576. Plaintiffs conceded that all of the music was in the public domain and had no copyright protection. *Id.* at 577.

269. The credit line read: "Music – From The Selected Works of the Soviet Composers – Dimitry Shostakovich, Serge Prokofieff, Aram Khachaturian, Nicholai Miashovsky [the Plaintiffs] – Conducted by Alfred Newman." *Id.* at 576.

270. *Id.* at 578.

271. *Id.*

272. "In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined." *Id.* at 579.

273. *Id.* at 578-79.

274. *See* Soc. Le Chant du Monde v. Soc. Fox Europe, Jan. 13, 1953, Cours d'appel, Paris, Dallez, *Jurisprudence*, D. Jur. 16, 80, *noted in* Kwall, *Copyright and the Moral Right*, *supra* note 17, at 28 & n.103.

275. Perhaps a different outcome should result if the nature of the author's work is closely identified with a particular cause and is used to promote a conflicting or drastically different cause.

in any manner, concerns plaintiffs."[276] Thus, the proposed dignity-based standard applied to *Shostakovich* would favor the defendant user.

A more current parallel to the facts in *Shostakovich* can be seen in the use by political campaigns of songs of popular musical artists. Examples are the use of Bruce Springsteen's *Born in the U.S.A.*[277] and Bobby McFerrin's *Don't Worry, Be Happy*[278] by various political candidates for national office.[279] As discussed above in the application of the dignity-based standard to the facts in *Shostakovich*, unauthorized use of an artist's music in a medium espousing certain political themes that the artist opposes, resulting in the possibility of public perception of author endorsement and association, is not by itself sufficient to establish a violation of the author's dignity interest. To distinguish themselves from the plaintiffs in *Shostakovich*, artists like Springsteen and McFerrin would have to offer a stronger case for violation of authorial dignity. Perhaps the most optimum situation would allow the author to show that her own works promote and advance social or political views so contrary to those of the candidate's campaign that the use of the author's songs to promote the latter amounts to disrespect for the author's personality that is reflected in the music.[280] In addition, the author's case would be more en-

276. *Shostakovich*, 80 N.Y.S.2d at 576. The court also described as "incidental" the use of the name of one plaintiff when in one scene, a character is shown placing a recording of the particular plaintiff on a phonograph. *Id.* at 577. "[T]he name is mentioned in an appreciative, familiar fashion, the impression given being that the character has come upon a record of a composition which he recognizes and appreciates hearing." *Id.*

277. Bruce Springsteen, *Born in the U.S.A.*, *on* BORN IN THE U.S.A. (Columbia Records 1984).

278. Bobby McFerrin, *Don't Worry, Be Happy*, *on* SIMPLE PLEASURES (EMI Manhattan Records 1995).

279. President Ronald Reagan used *Born in the U.S.A.* at campaign events during his re-election bid in 1984. Springsteen "publicly ripped the president, calling the gesture a misuse of the song and its meaning." Sean Piccoli, *Pop Music Is Playing Politics*, ORLANDO SENTINEL, July 3, 2000, at F3, *available at* 2000 WL 3616330. Presidential candidate George H.W. Bush used McFerrins' *Don't Worry, Be Happy* in 1988, until McFerrin threatened to sue. Lloyd Grove, *Fine-Tuning from Democrats*, THE RECORD (Northern New Jersey), Nov. 7, 1991, at C15, *available at* 1991 WL 7500801; Gillian Harris, *Labour Going for Song in Scotland*, THE TIMES (London) Feb. 11, 1999, at 12, *available at* 1999 WL 7972247. Bush finished the campaign with Woodie Guthrie's *This Land is Your Land*. Bret McCabe, *Campaign Songs Say Very Little About Candidates*, FT. WORTH STAR-TELEGRAM, Nov. 5, 2000, *available at* 2000 WL 28289235. For a list of presidential candidates, the songs used in their campaigns, and the artists' reaction to such use, see *Sour Notes*, BUS. WEEK, Oct. 2, 2000, at 12, *available at* 2000 WL 24485473. Under *Shostakovich*, as well as under current American moral rights law, it is doubtful that these artists could have prevailed on a moral rights claim against politicians' use of their songs in campaign events.

280. As between Springsteen and McFerrin, the former could have better made this case. "Springsteen wrote *Born in the U.S.A.* as a wry critique of America under Ronald Reagan. [Springsteen] then stood back and watched, horri[fi]ed, as it was adopted as a flag-waving, xeno-

hanced if the use of her work in the particular medium was not incidental, but a major part of the presentation.[281]

Perhaps a stronger argument for violation of authorial dignity than that seen in *Shostakovich* is made by the plaintiff's protestations in *Choe*.[282] There, the author of a law review comment alleged that the defendant journal and its editors had mutilated[283] and mangled[284] his work before publication, presenting a "garbled and distorted version" of his work.[285] The "numerous substantive and typographical errors" and "the mutilations that occurred on nearly every single page" in the published product left Choe "horrified."[286] According to the plaintiff, the attribution of authorship left readers to think that he was "a terrible writer," and "very sloppy, careless, and stupid."[287] Expressions of author outrage are certainly germane in the determination of whether a dignity interest has been infringed, but unilateral declarations cannot be conclusive. Such declarations must be viewed in context of the specific alteration in the case, which, according to the court was not substantial, suggesting an overly sensitive author. As the court noted, the plaintiff acknowledged that readers "would uncover the essential meaning and . . . realize that it is a good, well-researched, and argued piece."[288]

Also pertinent in *Choe* are the nature of the relationship between the plaintiff author and the defendant, the industry norms, and the foreseeability of the challenged alterations. The relationship between an author and editor

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phobic anthem by the American right. Reagan himself, referring to the tune, dubbed Springsteen a 'great patriot'." Andrew Smith, *Beat the System: How Come Dance Music Is Mixing It with Politics?*, THE GUARDIAN, Oct. 28, 1994, at T010, *available at* 1994 WL 9716874.

281. For example, the nature of the use would have more impact if the author's song is provided as background music in a 30-second television commercial with no other audio than the use of the same song at a campaign rally where it is one of several played.

282. Choe v. Fordham Univ. Sch. of Law, 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996). The case is discussed in some detail in Robert Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?*, 27 J.C. & U.L. 53 (2000).

283. *Choe*, 920 F. Supp. at 45, 46.

284. *Id.* at 46.

285. *Id.* This setting certainly preys on the sympathies of the typical law professor in light of their experiences of frustration with law review editors. *See supra* note 116.

286. *Choe*, 920 F. Supp. at 46.

287. *Id.* at 47. The court's frequent use of the "[sic]" notation to indicate errors in quotations of Choe's testimony and papers does little to dissuade the opinion's readers from inferring the plaintiff's sloppiness and carelessness. *See id.* at 46 (six), 47 (two).

288. *Id.* at 47. Indeed, that readers would understand the comment in the form published "was borne out when a student note in the *Stanford Law Review* cited accurately Choe's argument in two footnotes." *Id.* "Choe conceded at his deposition that the Stanford Note recorded accurately his Comment's argument." *Id.*

in virtually all settings is such that some collaboration and negotiation occur between the two throughout the editing process. Both sides agree to alterations in the text, sometimes quite reluctantly. Not infrequently, the finished product may have errors objectionable to the author; this appears to be understood by those in the law journal industry, given the number of subsequent errata sheets and superseding text issued,[289] as well as author complaints of poor editing.[290] In *Choe*, the court dismissed plaintiff's "purported 'moral rights' claim" on the ground that the applicable law "does not recognize an author's common law 'moral rights' to sue for alleged distortion of his written work."[291] Although the dignity-based moral rights approach would recognize such a claim, it would have difficulty prevailing under the proposed standard.

A difficult case for resolution under the dignity-based approach involves the colorization of motion pictures. Beginning from the late 1980s, advances in cinematic technology made possible the alteration or enhancement of motion pictures originally made in black and white such that they could be presented in color. Though now commonplace, the initial announcements by media mogul Ted Turner (who owned or controlled the rights to numerous classic films made in black and white) to go forward with colorization met with fierce opposition by film directors and actors of the black and white genre.[292] Few

289. A random sample: Errata, 34 HOWARD L.J. 1 (1991) (providing corrections to original article; 7 pages); Erratum, 74 WASH. L. REV. (No. 1) vii (1999) (providing revised first footnote to original article).

290. *See supra* note 116. Authors who wish complete control over the finished product (and who have the bargaining power to make such a demand) may secure their position by contract. In *Choe*, after publication of the article, the dissatisfied author and the editorial board entered into an agreement that "he would abide by its decision about what action, if any, it decided to take." *Choe*, 920 F. Supp. at 46. The court's decision does not rest on the interpretation of the contract, however.

291. *Choe*, 920 F. Supp. at 49.

292. Directors and actors provided quotable quotes and sound bites in protesting colorization. *See* Richard T. Marin, *Film Snobs Assemble a Color Guard*, WALL ST. J., Dec. 29, 1986, § 1, at 18, *available at* 1986 WL-WSJ 238933 (noting that Woody Allen described colorization as "a criminal mutilation;" Jimmy Stewart, "cultural butchery"); David Patrick Stearns, *Congress Looks at Colorization: Film Pros Take Battle to the Hill*, USA TODAY, May 13, 1987, at 1D, *available at* 1987 WL 4560116 (reporting that Woody Allen described colorization as "sinful;" *Amadeus* director Milos Forman compared it to repainting the Sistine Chapel; James Stewart called colorization of *It's a Wonderful Life* "'detrimental to the whole film;'" Ginger Rogers reportedly said, "To see yourself painted up like a birthday cake . . . is embarrassing and insulting" and claimed that "she never would have stepped before the camera looking as she does in the colorized version of *42nd Street*."); Herman Wong, *Art Director Sees a Rosier Picture for Colorization*, L.A. TIMES, Sept. 25, 1987, at 6-1, *available at* 1987 WL 2269477 (stating that Woody Allen, Billy Wilder, and John Huston saw colorization as "a massive, brutal distortion of the original director's style and emphases in the black-and-white version").

made a more impassioned case than the late John Huston, the director of several black and white classics,[293] who protested the colorization movement to his dying days.[294] Huston was also prone to theatrical rhetoric. He believed colorization to be a "vulgarity," "as great an impertinence as for someone to wash flesh tones on a Da Vinci drawing,"[295] and suggested a boycott of the products advertised on televison airings of colorized movies.[296] Huston was at his most colorful when commenting on the alteration of his own films. After viewing the colorized version of his film *The Maltese Falcon*, Huston responded, "My only comment is any four-letter word you can think of,"[297] then added, "It's as though our children have been sold into white slavery," and "now the Ted Turner organization has dyed their hair."[298] The colorization of the same film was also "bushwhacking"[299] and "mindless insipidity."[300] After viewing the first few minutes of the colorized version of his film *The Asphalt Jungle*, Huston reportedly said, "I just can not watch anymore . . . please I can't watch anymore."[301]

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293. Among Huston's films are: ACROSS THE PACIFIC (Warner Bros. 1942); BEAT THE DEVIL (United Artists 1953); FREUD (Universal 1962); HEAVEN KNOWS, MR. ALLISON (20th Century Fox 1957); IN THIS OUR LIFE (Warner Bros. 1942); KEY LARGO (Warner Bros. 1948); MOBY DICK (Warner Bros. 1956); MOULIN ROUGE (United Artist 1954); THE AFRICAN QUEEN (United Artists 1951); THE ASPHALT JUNGLE (MGM 1950); THE BARBARIAN AND THE GEISHA (20th Century Fox 1958); THE MALTESE FALCON (Warner Bros. 1941); THE MISFITS (United Artists 1961); THE NIGHT OF THE IGUANA (MGM 1964); THE RED BADGE OF COURAGE (MGM 1951); THE ROOTS OF HEAVEN (20th Century Fox 1958); THE TREASURE OF THE SIERRA MADRE (Warner Brothers 1948); WE WERE STRANGERS (Columbia 1949).

294. Huston was in poor health at the height of the debate over colorization. He conducted press conferences and gave testimony before a House subcommittee breathing from an oxygen tank because of emphysema. Lou Lumenick, *Huston's Impressive Scrapbook*, THE RECORD (Northern New Jersey), Aug. 30, 1987, *available at* 1987 WL 4864125.

295. Marin, *supra* note 292.

296. Charles Krauthammer, Casablanca *in Color? I'm Shocked, Shocked! (Colorization of Classic Films)*, TIME, Jan. 12, 1987, *available at* 1987 WL 2364353.

297. Penny Pagano, *Ruling on Colorizing a Blow to Directors*, L.A. TIMES, June 20, 1987, *available at* 1987 WL 2166800 (regarding *The Maltese Falcon*).

298. Dave Kehr, *Colorization Turns Angry Faces Red, Purple*, CHI. TRIB., Dec. 28, 1986, *available at* 1986 WL 2735751.

299. Stearns, *supra* note 292, at 1D.

300. Bob Thomas, *Landmarks Fall and Controversy Rages on Coloring Old Films*, ASSOCIATED PRESS, Dec. 31, 1986, *available at* 1986 WL 3087142 (regarding colorization of *The Maltese Falcon*).

301. David A. Honicky, *Film Labelling As a Cure for Colorization [and Other Alterations]: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409, 409 (1994) (quoting Huston, *quoted in* Telephone Interview with Keith LaQua, Executive Director of the Artists Rights Foundation (Apr. 8, 1993).

Had Huston brought an action challenging the colorization[302] under the dignity-based standard, with such protests of indignation and outrage and affront to personality plain, it would be difficult to reject such a case for a violation of authorial dignity. Here, the protestations of the author would not be a mere unilateral declaration. Film critics and scholars also added their voices objecting to colorization; they also addressed the substantial alteration inherent in colorization.[303] This is one setting in which expert testimony would have facilitated the informed deliberation of the trier of fact. In the balancing of competing interests in contrast to the plaintiff's dignity interest, the interest of the colorizing party appears mostly economic.[304] Although the latter would likely advance a property interest and argue that a decision in favor of the author would amount to an unconstitutional taking, as argued by Professor Kwall, moral rights protections may be granted consistent with the demands of constitutional takings.[305] Moreover, because it was technology not available at the time of production of the black and white films that

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302. Huston was unsuccessful in persuading Congress to enact legislation prohibiting the colorization of his movies, with Congress declining to pass a bill. After his death, Huston's estate brought an action in France, alleging moral rights, and prevailed. Judgment of May 28, 1991, Cass. Civ. 1re, 149 R.I.D.A. 197 (1991).

303. *See Film Integrity Act of 1987: Hearing on H.R. 2400 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. of the Judiciary*, 100th Cong. 83 (1988) (statement of Vincent Canby, Film Critic, *The New York Times*) ("When black and white movies are subjected to a tinting process, the art form is mutilated and corrupted and history is rewritten."); *id.* at 90 (statement of Monroe E. Price, Dean, Benjamin N. Cardozo School of Law of Yeshiva University) ("I favor a policy of mandatory labeling of films to disclose whether they are works that are different from the originally issued film in significant ways. Colorization is one such significant alteration . . . ."); Marin, *supra* note 292. The views of film critic Roger Ebert could also have been considered:

> On Wednesday night [November 9, 1988] Ted Turner will present a colorized version of "Casablanca" on cable television. And that will be one of the saddest days in the history of the movies. It is sad because it demonstrates that there is no movie that Turner would spare, no classic safe from the vulgarity of his computerized graffiti gangs.

Gary R. Edgerton, *"The Germans Wore Gray, You Wore Blue": Frank Capra,* Casablanca, *and the Colorization Controversy of the 1980s*, J. POPULAR FILM & TELEVISION, Jan. 1, 2000, at 24, *available at* 2000 WL 14128621 (quoting Roger Ebert).

304. The defendant would likely argue that colorization is a form of free speech and that enforcement of a moral rights claim is an infringement of its First Amendment rights. This point has some discussion in the commentary. It has been noted that "a colorizer" is also "an artistic auteur" entitled to "free expression interests," Beyer, *supra* note 25, at 1071, but also that the First Amendment "does not represent 'a license to trammel on legally recognized rights in intellectual property,'" Wagner, *supra* note 58, at 721 (quoting Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979)). The First Amendment dimension has yet to be fully developed in American moral rights litigation.

305. Kwall, *How Fine Art Fares Post VARA*, *supra* note 25, at 16-29.

allowed for colorization, alteration was not foreseen or foreseeable by the industry or the plaintiff. The factors favor the plaintiff author here.

The above illustrations indicate a method for addressing an author's claim of the right of integrity in a manner that allows for the balancing of the competing interests of the creator of the work on the one hand and its user on the other and that provides the flexibility to consider factors pertinent to the particular setting. Depending on the facts present, the dignity-based approach would, like the French model, allow the author to prevail on her claim advancing the right of integrity, albeit on different (that is, American) grounds. In other situations, the dignity-based approach, like current U.S. law, would reject the author's claim, but again, under a different rationale. This is toward an American moral rights in copyright.

IV. Conclusion

Moral rights protections under U.S. law remain in a confused and uncertain state. The personal interests of the American author are not adequately protected in the thicket of limited statutes and multiple common law theories. Importing the French *droit moral* for stateside application is not inviting, as the French rule on the one side and the American copyright culture on the other are not suitable partners. What is needed is a moral rights plan based on an American purpose. Toward this end, this Article proposes consideration of an American moral rights doctrine premised on the dignity of the author. Though dignity appears elusive in definition, Congress and the state legislatures have, in an increasing number of settings, recognized that respect for individual and personal dignity is an end that the law may demand. The right of authorial dignity would demand respect for the creator of art and writings, her work, and the creative process. With regard to the author's central right of integrity, the dignity-based approach would provide for notice to the author of alteration or use of her work, opportunity for the author to protest such action, and the legal capacity to challenge it. Resolution would entail a balancing of the dignity interest of the author and competing interest of the user. In the end, what may emerge is a doctrine of moral rights molded by American values, one that demands respect for the author's personality interests and the balancing of competing interests.