

ARTICLE

COPYRIGHT'S MISSING PERSONALITY

*David A. Simon**

ABSTRACT

Copyright law recognizes two sets of rights. One is economic. The other is not. The former is justified by traditional economic theory: copyright incentivizes the creation of new works by providing exclusive rights that authors can use to recoup the costs of creating them. The latter—so-called moral rights—is typically justified by personality theory: when an author creates a work, she invests her “personality” in it, generating a special relationship with the work that deserves separate protection. Moral rights, on this view, protect the author-work relation rather than the author’s ability to recoup the costs of creating the work. Personality theory, then, faces a challenge that economic theory does not. It must explain the nature of the author-work relation. In particular, it must explain what personality is and how investing it gives rise to a special author-work relation. Without an explanation of what personality is, we cannot understand the nature of the author-work relation or whether it is the kind of thing that deserves, or is capable of, protection.

* Associate Professor of Law, Northeastern University School of Law. For comments and suggestions, I thank Isabella Alexander, Shyam Balganes, Charles Beitz, John Basl, Oren Bracha, Lionel Bently, Bruce Boyden, Mala Chatterjee, Melissa Eckhause, Christine Haight Farley, Terry Fisher, Kat Geddes, Deborah Gerhardt, Patrick Goold, Wendy Gordon, Peter Karol, Tim McFarlin, Gideon Parchomovsky, Sarah Polcz, Jennifer Rothman, Guy Rub, Matt Sag, Catherine Seville, Haochen Sun, Rebecca Tushnet, Jacob Noti-Victor, Margaritha Windisch, Yijiao Wang, and the participants of the Fourth Annual Art Law Works-in-Progress Colloquium and the University of Pennsylvania Carey Law School Copyright Roundtable.

Tracing personality theory from some of its earliest moral rights devotees, this Article argues that moral rights theory has failed because it has not developed a substantive account of the concept of personality. As a result, theorists have been unable to convincingly explain how personality could be invested into a work or, if investment is possible, the nature and content of the author-work relation. It contends that a justification of moral rights is likely to succeed, if at all, by moving away from the personality-investment metaphor and toward concrete interests. Rather than offering a grand philosophical theory, this Article identifies existing personal interests protected by civil law and asks whether it makes sense to extend similar protections to authored works. It argues that reputation-based regimes, like defamation and trademark, plausibly capture interests similar to authors and may help to justify moral rights. Analyzing these regimes, however, shows that they contain important doctrinal limitations that make them challenging to apply to authors of copyrighted works.

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I. INTRODUCTION

Say you paint a masterpiece—or maybe something less grand. Should you be able to use the law to prevent others from modifying that work, perhaps replacing your name with theirs, even after they purchase it? What about a book or sculpture? Many scholars think the answer to these questions is, generally, yes. They argue that copyright should provide authors with special noneconomic legal rights—so-called “moral rights”¹—to prevent others from modifying an author’s work (the integrity right) or attributing it to someone else (the attribution right) without the author’s personal authorization.² The international community seems to agree, with most countries codifying some form of moral rights.³

It all sounds intuitive. But it isn’t obvious why such rights should exist. Nearly all scholars who support them will, if pressed, find themselves relying on a seemingly simple word: personality.⁴ Most of these scholars, whom I call personality theorists, typically make some version of the following four-step argument for moral rights. Step one asserts the existence of a thing called personality

1. When I use the term “moral rights,” I refer only to these special rights in copyright law. I do not refer to the more general categories of rights that are derived from moral imperatives, or any other kind of moral obligation.

2. These rights include a variety of sub-rights, such as the right to be named as the author, the right not to be named as the author of another’s work, the right to publish pseudonymously, the right to publish anonymously, etc. These are beyond the scope of this Article.

3. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) [hereinafter *Berne*]. Moral rights may include two additional “core” rights—the right to divulgation and the right to withdrawal. David A. Simon, *Copyright, Moral Rights, and the Social Self*, 35 YALE J.L. & HUMANS. 754, 786–87 (2024) [hereinafter Simon, *Copyright and the Social Self*]. A discussion of them is not material to this paper.

4. Not every scholar justifies moral rights using personality theory. *E.g.*, Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUDS. 95, 102, 104 (1997).

that authors possess or embody.⁵ Step two then argues that authors invest all or part of their personality in a work when they create it. This, in step three, is said to generate a special, unbreakable bond or relation between the author and her work that deserves protection. Step four is to argue that moral rights protect the author's personality by protecting this relation.⁶

Personality theorists almost universally share this intuitive thought. And what has been described as “startling . . . uniformity” in the scholarship advocating for moral rights is not just one branch of personality theorists⁷—it runs all the way to the roots of the rights’ earliest proponents. Perhaps this is unsurprising.⁸ If scholars all hang around the same theoretical terrain, they are sure to draw concepts from the same philosophical well.

What is surprising, however, is that most moral rights scholars have not sufficiently explained the fundamental idea that animates their arguments. Despite widespread agreement that moral rights are based on the author-work relation generated by the investment of personality, proponents of moral rights have at least two theoretical problems. First, they struggle to define the concept of personality. Second, they generally ignore the substance of the author-work relation that personality is thought to generate (when the author invests it in her work).⁹ Because the concept of personality underwrites the author-work relationship, the first difficulty can in part explain the second.

Skeptics of moral rights have noticed the general problems with the argument, but at times have glossed over what appear to be important theoretical defects. Professor William Fisher, for example, has described “personhood” theories of intellectual property as “too abstract and thin.”¹⁰ And Amy Adler’s biting critique, which “attacks the very foundations of the law,” is that

5. The discussion here is both metaphysical and moral. For a discussion on the implications of using the term personality in different contexts see Paul B. Miller, *Corporate Personality, Purpose, and Liability*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 222, 224 (Elizabeth Pollman & Robert B. Thompson eds., 2021). Paul Miller notes, “ascrib[ing] a legal entitlement to an individual is to make a value judgment about the importance of their interests as a matter of natural and/or social ontology.” Paul B. Miller, *The Concept of Personality in Private Law*, in INTERSTITIAL PRIVATE LAW 179, 190 (Samuel L. Bray et al. eds., 2024) [hereinafter Miller, *The Concept of Personality*].

6. See Simon, *Copyright and the Social Self*, *supra* note 3, at 773.

7. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 264 (2009).

8. See *infra* Part II.

9. See *infra* Parts III–IV.

10. William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 191 (Stephen R. Munzer ed., 2001).

moral rights are self-defeating because they inhibit the creation of art they seek to protect.¹¹ Karen Gover, meanwhile, has suggested that personality theorists are merely “emotivist[s]” who wish to protect things they feel strongly about.¹² Still, a variety of other scholars have pointed out the problem with centering timeless rights on contingent concepts (author and work), which developed not through mirroring reality but rather through a confluence of social, legal, and technological factors.¹³ Moral rights, in other words, employ conceptions of the author and the work that may be inaccurate, flawed, or, at the very least, contingent.¹⁴

That is not to say the deeper problem with personality and its purported ability to create an author-work relation has gone unnoticed. Moral rights scholars themselves have conceded that personality is “a concept . . . as difficult of satisfactory definition as is the concept of God or Truth or Evil.”¹⁵ And critics like Adam Beyer and Charles Beitz have written that it is “not obvious”¹⁶ what this “vague and mysterious link”¹⁷ between author and work “amounts to.”¹⁸

11. Adler, *supra* note 7, at 265, 279.

12. K. E. GOVER, ART AND AUTHORITY: MORAL RIGHTS AND MEANING IN CONTEMPORARY VISUAL ART 22–26 (2018).

13. See, e.g., *id.* at 26; JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 51–53 (1996); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U.L. REV. 625, 628–29 (1988); Michel Foucault, *What is an Author?*, in THE BOOK HISTORY READER 225, 230 (David Finkelstein & Alistair McCleery eds., 2002). Others have argued that this modern conception is purely ideological and did not result only from technological advances. E.g., Lisa Maruca, *Bodies of Type: The Work of Textual Production in English Printers’ Manuals*, 36 EIGHTEENTH CENTURY STUDS. 322, 335 (2003). See also Jeffrey Masten, *Playwrighting: Authorship and Collaboration*, in A NEW HISTORY OF EARLY ENGLISH DRAMA 357, 370 (John D. Cox & David Scott Kastan eds., 1997); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1–5, 23 (Martha Woodmansee & Peter Jaszi eds., 1994).

14. Other research in social psychology tends to confirm the suspicion that emphasis on the author-as-expresser is a cultural artifact, rather than some fundamental fact of human nature. Research has shown that Eastern cultures differ from Western cultures in how they perceive the idea of self-expression generally. While Western cultures tend to view expression as a product of the inner self (thoughts, emotions, desires), Eastern cultures are more likely to characterize expression as a product of external circumstances or simply something that is of trivial importance. See Heejung S. Kim & Deborah Ko, *Culture and Self-Expression*, in FRONTIERS OF SOCIAL PSYCHOLOGY: THE SELF 325, 326–29 (Constantine Sedikides & Steven J. Spencer eds., 2007).

15. Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 399 (1951).

16. Charles R. Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. POL. PHIL. 330, 339 (2005).

17. Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U.L. REV. 1011, 1083 (1988).

18. Beitz, *supra* note 16, at 340. Beitz seems to equate personality with the special relationship, but it is important to disentangle the two to understand the argument. *Id.* at 343.

While these criticisms are important, none has focused exclusively on identifying and explicating these shortcomings of moral rights scholars in the personality tradition.

The goal of this Article is twofold. First, it shows that scholars, dating all the way back to the earliest moral rights theorists to the present, have not adequately grappled with each step of their own argument. Second, this Article attempts to identify a basis for moral rights protection outside the personality tradition.

To achieve the first goal, this Article argues that personality theorists have not in step one adequately specified what personality is, in step two how it could be invested in a work, and in step three in what the resulting author-work relation could consist. Nor have they specified why, even if their assertions are true, authors or this relation deserve special legal protection. These omissions are significant. Moral rights without either personality or a special author-work relation to protect must look for some other relation or interest to justify them.

While there may be one, personality theory, as it exists today, seems unlikely to supply it. The reason is because the author-work relation derives from the author's investment of her personality in the work—something that is not specified with any meaningful detail. In short, the Article disassembles the central plank—the author-work relation—personality theorists have used to build their legal edifice.

To put things more systematically, personality theorists generally make the following claims, where *A* is the author, *p* is personality, *w* is work, and *A-w* is the author-work relation:

- (1) *A* contains *p*.
- (2) *A* invests *p* into *w* by creating it.
- (3) Investing *p* into *w* creates *A-w*.
- (4) *A-w* generates authorial interests moral rights protect.

This Article argues against claims (1) and (4). It contends that the principal problem with claim (1) is that it is difficult to say what *p* is and, therefore, how A could contain *p* and, if so, in what way.¹⁹ It then argues that it is not clear why, even accepting claims (1)–(3), claim (4) ought to be true.

The second goal—establishing a non-personality-based justification—is less theoretical and more practical. Rather than expound some grand theory, however, it tries to ascertain the relevant interests an author may have in her person by examining how civil laws may already protect some of them. It argues that these are largely reputational interests. By highlighting the differences between moral rights and current legal rights that protect personal interests—like intentional torts, defamation, and trademark—it argues that a legal regime designed to protect the reputational interests of authors faces several significant challenges.

The bulk of this Article proceeds by canvassing and deconstructing arguments rather than making them outright. Part II explains how the rules underlying moral rights developed through a hodgepodge of court decisions. It also briefly explains the theoretical frameworks of two philosophers who most influenced moral rights theorists: Immanuel Kant and Georg W.F. Hegel.

Part III then explains personality and its central place in early moral rights theory. It argues that although early theorists had reasons for employing the concept of personality, they did little to explain why it entailed special authors' rights.²⁰ The problem was twofold. First, the concept of personality itself seemed quite general—and it took inspiration from philosophical theories that were concerned with much different problems than authors' rights. Second, even assuming the concept itself was coherently defined, the theorists did not show why it ought to give authors special rights. That is, even if the creative work somehow embodied the author's personality, it was not clear why this generated a special relation with the work—or, if it did, why that special relation ought to be protected over other interests.

19. This is *not* a claim that people lack personality. It is, rather, a claim that no one has defined personality sufficiently clearly, making it difficult to understand what it means for a person to “have” personality.

20. This Article's claims are limited to the arguments found in sources translated to or published in English. I did not evaluate the texts of moral rights theorists that were available only in French, German, or some other non-English language. Therefore, it is possible that early or modern moral rights theorists writing in languages other than English have provided stronger arguments than those presented in this Article.

Part IV follows the trajectory of moral rights theory from its early proponents to its more modern ones. It finds substantially the same problems among the more modern theorists, though two—Justin Hughes and Neil Netanel—do more to argue for moral rights personality theory than nearly any other scholar, early or modern. Yet, by examining their theories, this Article shows that even their approaches do not adequately explain personality or how or why its investment in a work should generate special rights that trump others' interests.

Part V moves beyond personality and examines whether existing law might shed light on either the interests moral rights might protect or the manner in which it might protect them. Comparing existing civil law protections of the person to moral rights protections, it argues that reputational interests best capture what moral rights protect. But doing so requires confronting several practical and theoretical challenges. To resolve them, this Article suggests we practice an old legal habit: transparently weighing and balancing the interests of the author, others, and the public.

II. MORAL RIGHTS, PERSONALITY, AND PHILOSOPHY

Because the concept of personality plays a central role in the discourse of early and contemporary moral rights advocates, Section A briefly outlines the historical development of moral rights and its attachment to personality theory. Section B then highlights the philosophical ideas that inspired early moral rights theorists.

A. *Moral Rights: Law and Personality*

As a body of legal rules, moral rights were not handed down from a legislature or towering philosophical figure. What eventually became “moral rights” arose from a combination of legislative enactments and uncoordinated judicial decisions in the eighteenth and nineteenth centuries.²¹ In France²² and some German states, for

21. See Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 76–78 (2007) [hereinafter Rigamonti, *The Conceptual*]; DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 80 (1992); Cyrill P. Rigamonti, *Moral Rights in Copyright Law: A Comparative and Historical Study* 127–28, 127 n.11 (May 2006) [hereinafter Rigamonti, *Moral Rights*] (unpublished partial dissertation) (on file with the Harvard Law School Library) (citing as examples France's 1793 copyright law, and Prussia's codification of private law in 1794 and of copyright in 1837); *id.* at 131 (noting that Prussia and Austria adopted rules relating to nonperformance of publishing contract (right of disclosure) prior to enacted copyright statutes); Robert C. Hauhart, *Natural Law Basis for the Copyright Doctrine of Droit Moral*, 30 CATH. LAW. 53, 64 (1985).

22. Rigamonti, *Moral Rights*, *supra* note 21, at 125, 127–28 (discussing the legality of attempts to force an author (frequently a debtor) “to disclose or forfeit their unpublished works”).

example, lawyers and judges exploited gaps in the civil code to argue for default, moral rights–like terms in publishing contracts. While courts in France developed decisional rules through a “patchwork” of case law,²³ in countries like Prussia and Austria the legislature stitched together laws for the courts to hem.²⁴

The diversity and prevalence of these rules across countries drove legal scholars to unify and explain them. In the late-eighteenth and early-nineteenth centuries, initial efforts by theorists to explain these rules resorted to the language of either property or contract.²⁵ But as more nations began adopting similar laws, the theoretical gaze shifted away from traditional economic conceptions to more humanistic ones.

Personality, as a substantive concept, held great promise for theorists.²⁶ For one thing, the concept of a *right or rights of personality* represented a distinct reaction to legal theories that “conceived [the individual] . . . as a mere peg to which were duly attached economic rights and duties, the sole objects worthy of legal attention.”²⁷ Law’s newfound attention to “human needs . . . and . . . feelings”²⁸ required theories for new types of rights that would protect and promote them—a task for which personality seemed engineered. For another, the term “personality” was used expressly by eminent philosophers like Immanuel Kant and Georg W.F. Hegel.²⁹ These philosophers provided both a formal structure and an authoritative source from which to build the personality theory of moral rights.

B. *Hegel and Kant*

Kant and Hegel both made a distinction that would become important to moral rights theories. They noticed that they could divide relations into “subject” and “object”: the person was the

23. Friedemann Kawohl, *The Berlin Publisher Friedrich Nicolai and the Reprinting Sections of the Prussian Statute Book of 1794*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 207, 215, 218–22, 239–40 (Ronan Deazley et al. eds., 2010); SAUNDERS, *supra* note 21, at 103; see Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467–69. (1968).

24. See SAUNDERS, *supra* note 21, at 119–20; Rigamonti, *The Conceptual*, *supra* note 21, at 80.

25. Rigamonti, *Moral Rights*, *supra* note 21, at 86–87.

26. See generally Miller, *The Concept of Personality*, *supra* note 5.

27. Stig Strömholm, *Right of Privacy and Rights of the Personality: A Comparative Survey* 19 (May 1967) [hereinafter Strömholm, *Right of Privacy*] (working paper prepared for the Nordic Conference on privacy organized by the International Commission of Jurists).

28. *Id.*

29. Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 378 (1993).

subject, the actor; everything external to the person was the object.³⁰ The person, *qua* person, had certain basic and inalienable rights of personality. Those things external to the person, though, were not aspects of inalienable personality. As a result, the individual did not hold special inalienable rights in relation to them.³¹

The concept of personality—or perhaps personality theories—that linked Kant and Hegel did so imperfectly.³² Hegel’s philosophical project was grandiose—a three-stage process of development of (or the conditions required for) the individual’s achievement of absolute freedom,³³ of self-understanding:³⁴ abstract right, morality, and ethics.³⁵ It is in the first stage of abstract right that Hegel introduces the notion of property rights. In this stage, the person exists as an abstraction, a mere ego separate and apart from one’s specific desires, inclinations, etc. This is what Hegel meant by “personality,” which is the subject’s total consciousness of the existence of himself as an abstract ego without limits or borders.³⁶ Rather than something like “character,” personality is “the abstract will consciously self-contained.”³⁷ Personality was so fundamental to freedom that it was inalienable.

To give content to this abstraction—to actualize the will into the world—one needs to stake out some part of the external world as hers and distinguish itself from others. The acquisition of property (by social convention³⁸) is a basic method of doing this. Another is contract. Property and contract rights aid in the individual’s freedom by facilitating others’ recognition of the individual; using these instruments, the individual “subjects

30. Hegel and Kant viewed the relationship between subject and object very differently. The former viewed them as inseparable, while the latter as separable and the “object” as unknowable. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 34–35 (1996).

31. See *id.*; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1891–94 (1987); Netanel, *supra* note 29, at 372.

32. While a complete exposition of Kant and Hegel’s writings are beyond the scope of this Article, understanding their arguments is crucial to evaluating the arguments for moral rights.

33. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* §§ 43, 68–69 (S.W. Dyde trans., 2001). For Hegel, personality was absolute freedom, and it implied the ability to possess certain rights. *Id.* §§ 35–36. Thus, it is different from the idea of legal personality discussed earlier. See *supra* Section II.A.

34. For Hegel, human existence was directed at a goal: absolute knowledge and absolute freedom. This occurred when *Geist* came to know itself as absolutely free. See HEGEL, *supra* note 33, § 4.

35. MICHAEL INWOOD, *A HEGEL DICTIONARY* 313–14 (1992).

36. HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 512–13 (1967); HEGEL, *supra* note 33, § 49.

37. CAIRNS, *supra* note 36, at 513.

38. HEGEL, *supra* note 33, § 54 (taking possession through marking or use); Kenneth Westphal, *The Basic Context and Structure of Hegel’s Philosophy of Right*, in *THE CAMBRIDGE COMPANION TO HEGEL* 234, 247 (Frederick C. Beiser ed., 1993) (noting that Hegel founded property rights on convention, not natural law).

herself to legal duties and learns to recognize other people as bearers of legal rights.”³⁹ Legal rights, then, aided in developing personhood, realizing oneself in the external world. Property and contract are ways of mediating individuals’ relations with others. On Hegel’s view, a person holds property by occupying it with her will—in the form of possession, marking, or use.⁴⁰ On one view, it is hers by virtue of it holding the embodiment of her will, her personality.⁴¹ Property, though, has an important attribute: it existed only when it was held external to the person.

Like Hegel, Kant also drew on the concept of personality. Broadly speaking, Kant’s moral philosophy focused on the exercise of autonomy by a moral agent, which included not just individuals but also nation-states.⁴² For example, he describes “Moral Personality” as something roughly like an agent’s freedom to obey moral law.⁴³ However, personality as a concept also seemed to refer to the “supersensible” character of human beings as moral agents.⁴⁴ Personality—the invisible self—was to be distinguished *both* from the tangible thing that made us human (our body) and the specific instance of our being (as a person). And our moral personality was to be contrasted with our mere awareness of our own existence.⁴⁵ Kant’s version of the personality was, in some sense, similar to Hegel’s, in that it provided the contrast agent to our empirical world—the mechanism by which we understood that the moral law exists *for us and in virtue of us*.⁴⁶

39. Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 455 (2006).

40. See HEGEL, *supra* note 33, § 54.

41. This is how Hughes interprets the work. See *infra* Section IV.A.1.

42. Immanuel Kant, *The Metaphysics of Morals* (1797), in IMMANUEL KANT: PRACTICAL PHILOSOPHY, 353, 378, 401–02, 460–61 (Mary J. Gregor ed., trans., 1996) [hereinafter Kant, *The Metaphysics*].

43. *Id.* at 378. (distinguishing moral personality from psychological personality or being “conscious of one’s identity”).

44. CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 120, 194 (Lewis White Beck ed., trans., 1949).

45. Kant, *The Metaphysics*, *supra* note 42, at 395 (distinguishing moral personality from psychological personality or being “conscious of one’s identity”).

46. CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY, *supra* note 44, at 258–59.

Unlike Hegel, however, Kant explicitly discussed authors' rights in his writing.⁴⁷ One problem for scholars seeking to leverage this work was its focus on the author's right to speak within the context of a particular social arrangement: publishing. Kant posits that the author has inalienable rights to ensure his work is presented to the public in his own name—and this right imposed corollary duties on publishers to communicate in certain ways.⁴⁸ Because the publisher is authorized to speak *to* the public *for* the author, it is under a dual obligation, and both arise from the author's decision to speak to the public. Indeed, there were, according to Kant, cases in which the public could demand the work, or corrected versions of it, from the publisher.⁴⁹ Kant's work also limited these rights, but the boundaries are less illustrative than the sketch that was drawn outside them—that is, what scholars took from Kant's *other* philosophical writings (with its focus on agency, autonomy, and hence personality) and transplanted it into the realm of authors' rights.⁵⁰

47. Kant's works include writings on author's rights and book publishing. The most widely discussed work is *Kant: On the Unlawfulness of Reprinting, Berlin (1785)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) 403, 416 (L. Bently & M. Kretschmer eds., 2024), https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_d_1785&pagenumber=1_1&show=translation [https://perma.cc/F9SD-UQY W]. Other translations have been Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books (1785)*, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 29 (Mary J. Gregor ed., trans., 1996) [hereinafter Kant, *Wrongfulness*]; see also Stig Strömholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 42 SCANDINAVIAN STUDS. L. 217, 225 (2002) [hereinafter Strömholm, *Droit Moral*].

48. Kant argued that, in the absence of heirs, the publisher had a duty to print the work delivered to it even after the author's death. Kant, *Wrongfulness*, *supra* note 47, at 33. But this also has consequences for reprinters. Unauthorized reprinting harms *publishers*, not authors. And the harm is economic. See Fichte: *Proof of the Unlawfulness of Reprinting, Berlin (1793)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) 457–58 (L. Bently & M. Kretschmer eds., 2024), https://copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_d_1793&pagenumber=1_1&show=translation [https://perma.cc/2CQ4-ZMYK].

49. Kant, *Wrongfulness*, *supra* note 47, at 33–34. Some moral rights theorists found even this theory bizarre. See *Commentary on: Kant: On the Unlawfulness of Reprinting (1785)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2024) (quoting JOSEF KOHLER, URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT 76 (Luis A. Sundkvist trans., 1907)), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1785 [https://perma.cc/HD8U-LPQ7].

50. See Kant, *Wrongfulness*, *supra* note 47, at 35; Anne Barron, *Kant, Copyright, and Communicative Freedom*, 31 L. & PHIL. 1, 11, 41–42 (2012). Kant did not comment on whether such modifications would force attribution to another author, or the authorship status of such a work. Thanks to Lionel Bently for raising this point. See Kant, *Wrongfulness*, *supra* note 47, at 34; IMMANUEL KANT, THE PHILOSOPHY OF LAW 130 (W. Hastie, B.D. trans., 1887). Others such as Fichte, however, argued unauthorized reprinting harmed the author directly. See, e.g., Fichte: *Proof of the Unlawfulness of Reprinting, Berlin (1793)*, *supra* note 48, at 6. Kant's general view, then, is that an author's work relates to

While Kant's and Hegel's view have distinctive elements, they share important features. Personality, for both, was an abstraction—something by which individuals recognized themselves (and others) as moral agents. The specifics on how this happened for Kant and Hegel are different, but they both stand in opposition to a more narrow, fundamentally social conception of the self.⁵¹ Personality, for both Hegel and Kant, was not, at least not at first or only, the thing that made a person *that person*. It was, instead, the thing that made that person *a person* (a moral agent) worthy of respect or capable of recognition.

III. EARLY MORAL RIGHTS THEORISTS

This part examines some of the writings of moral rights scholars from the late-nineteenth and early-twentieth centuries. These writings illustrate the difficulties of the central claim made by many early moral rights scholars: that the author has a special relation with the work—a work embodying her personality—by virtue of creating it.

This claim, of course, was made necessary only because early theorists sought to develop new rights—rights different in kind from property. To justify their position, early moral rights scholars tended to rely on either Hegel or Kant. Those who followed Hegel's use of property, called “dualists,” separated persons from things for economic purposes but not for noneconomic ones.⁵² Kantians, on the other hand, were “monists” because these two interests were both complementary and inseparable.⁵³ For both monists and dualists, however, early theorists spent time trying to explain what personality rights are and how they are different from property rights.⁵⁴

While this theoretical difference between them has practical significance (e.g., right length, scope, etc.), it is less clear that it matters to the underlying philosophical thrust of personality theory. A more fruitful way to analyze the theorists—one present across early and modern moral rights scholars—is by *method*.

speech, not property. *But see, e.g.,* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 72, 77–79 (2011) (arguing that Kant viewed works as property).

51. *See* Simon, *Copyright and the Social Self*, *supra* note 3, at 764–66.

52. *See infra* text accompanying notes 66; Rigamonti, *Moral Rights*, *supra* note 21, at 160. Dualists “insist[] [upon] a clear conceptual separation between alienable rights of authors in their works (copyrights) and inalienable rights of authors in their personhood (rights of personality).” *Id.*

53. MARGARET DAVIES & NGAIRE NAFFINE, ARE PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY 2, 10–11 (2002); Netanel, *supra* note 29, at 378–79.

54. *See supra* Part III.

Some theorists, typically German, worked from general theory to render specific rights while other scholars, typically French, worked from specific rules to general rights.⁵⁵ Section A explores the former “deductivists” who attempted to divine specific legal rules from general metaphysical principles: German Josef Kohler⁵⁶ and Karl Gareis.⁵⁷ Section B explores the latter “inductivists” who sought metaphysical unity from the gurgling legal morass: Frenchman M. André Morillot⁵⁸ and Swiss jurist Johann Kaspar Bluntschli.⁵⁹

It must be kept in mind, however, that divisions like these are flexible rather than firm. And they are most useful as a compass rather than a map—to develop an orientation one can use to chart a course through early moral rights theory. Recall that the northernmost point in moral rights theory was located beyond mere economic interests.⁶⁰ Thus, some of the first moral rights⁶¹ thinkers,⁶² such as Kohler, Gareis, Johann Kaspar Bluntschli, M. André Morillot, and Otto Von Gierke, grounded their theories on *the rights of personality*.⁶³ While the direction of this compass seems always to point toward personality, navigation nevertheless is increasingly difficult because the location of the final

55. SAUNDERS, *supra* note 21, at 121; see Strömholm, *Droit Moral*, *supra* note 47, at 226; 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, 30 (1988).

56. ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 27–28 (2006) (citing JOSEF KOHLER, *DAS AUTORRECHT: EINE ZIVILISTISCHE ABHANDLUNG* (1880)); KOHLER, *URHEBERRECHT*, *supra* note 49; Netanel, *supra* note 29, at 379 n.151 (citing KOHLER, *DAS AUTORRECHT*, *supra*, at 98).

57. See Strömholm, *Right of Privacy*, *supra* note 27, at 29; KARL GAREIS, *INTRODUCTION TO THE SCIENCE OF LAW: SYSTEMATIC SURVEY OF THE LAW AND PRINCIPLES OF LEGAL STUDY* 18, 20–21, 88 (Albert Kocourek trans., 1911).

58. Rigamonti, *Moral Rights*, *supra* note 21, at 164–66, 168. See Strömholm, *Droit Moral*, *supra* note 47, at 226 (noting that Morillot discovered the German dualist doctrine in 1870 but failed to use French caselaw to support his position).

59. See *infra* Section III.B.1.

60. 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 11 (Manley O. Hudson ed., 1938).

61. These rights of the author would eventually be known as moral rights, though the term would not become commonplace in legal circles for some time after it was first used by Morillot in 1878. *Morillot on the Author's Right, Paris (1878)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) 111, 128 (L. Bently & M. Kretschmer eds., 2024), https://copyright.history.org/cam/tools/request/showRepresentation.php?id=representation_f_1878&pagenumber=1_1&show=translation [<https://perma.cc/DP9P-6X58>]. Despite the different terminology, for the purposes of this Article, I use the two terms “moral rights” and “authors’ rights” interchangeably.

62. “Moral rights thinkers” here just means the first scholars to begin conceptualizing authors’ rights as derived from personality as a special kind of right.

63. In the early literature, scholars often referred to either a “right of personality” or “rights of personality.” Because personality was used as a term to include many rights, I will use the plural form. See Strömholm, *Right of Privacy*, *supra* note 27, at 29.

destination is unknown. The discussion below, though organized by method, helps to see why charting a course by relying on this navigational instrument is often difficult.

A. *Early Deductivists*

This section examines the philosophies of two deductivists, Josef Kohler (1849–1919)⁶⁴ and Karl Gareis (1844–1923).⁶⁵

1. *Josef Kohler.* Kohler was not just a moral rights theorist but a well-regarded jurist and Hegelian devotee. Perhaps this makes it unsurprising that he marked out a general theory of personality and found within it authors' rights. And these "[r]ights in one's own person, or rights of personality," were not some afterthought that buttressed moral rights; they were fundamental and "must be the starting point of every legal system."⁶⁶

For Kohler, the legal right was consistent with Hegelian conceptions of recognition as an individual human being, though by no means did it follow from it. "[T]he right of personality," Kohler wrote, is "the right for every man to be recognised as a personality of full value, morally and spiritually, [and] is expressed in different ways."⁶⁷

Yet while Kohler's concept of personality was central, it was elusive. Defining personality as the "right to be recognized as a personality," for example, is empty. Attempts to add content by calling it those "individuating traits of man" is helpful only insofar as it sets men apart from nonhumans. And the "singularity" that renders Terry different from Jerry is something akin to personal identity. But even that reading requires some extrapolation.

Kohler tried to concretize personality by translating it into specific legal rights. The move is a critical one—because until one has connected personality to concrete rights, the rights themselves are simply declarative statements about an abstract concept.

64. *Commentary on: Kohler: Author's Right (1880)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2024) https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1880 [<https://perma.cc/9SU> P-H6GC].

65. *Gareis: Juridical Nature of Author's Rights (1877)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2024) [hereinafter *Gareis: Juridical*], https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_d_1877 [<https://perma.cc/2U58-3YAW>].

66. JOSEF KOHLER, PHILOSOPHY OF LAW 80 (Adalbert Albrecht trans., 1914).

67. SAUNDERS, *supra* note 21, at 117 (quoting JOSEF KOHLER, DAS LITERATURE UND ARTISTISCHE KUNSTWERK UND SEIN AUTORSCHUTZ: EINE JURIDISCH-...ESTHETISCHE STUDIE 587 (Mannheim, J. Bensheimer 1892)).

Here, Kohler's argument is a rather complicated version of the personality-as-investment argument described in Part I. It had two parts. First, he distinguished property rights from rights *immaterialgüter*, or immaterial rights,⁶⁸ which inhered in economic goods (e.g., books and other works that could be bought and sold for a market price).⁶⁹ Second, he had to make authors' rights "absolute rights to immaterial goods."⁷⁰ For this step he needed to distinguish authors' rights from immaterial (economic) rights more generally.⁷¹ To do this, he identified "individual rights," which included "a person's rights to his or her bodily and spiritual goods."⁷²

Here, personality—albeit with a Kantian flavor⁷³—did the legwork. Drawing on a version of the concept that had been expounded earlier by Morillot,⁷⁴ Kohler defines personality to include "imaginary representations (*imaginäres Bild*)" of a work: "an ideal notion, a preliminary mental image of the future work."⁷⁵ This "floating ideal," as Kohler termed it, included the author's feelings, intentions, and intuitions (present and future), and the future structure and content of the work.⁷⁶ Once the representation is formed, the work passes through two further stages. The next stage is the "inner form" (*innere Form*), which amounts to the "core" that will be present in any translation. The final stage is the "outer form" (*äussere Form*), which is the physical manifestation of the

68. Friedemann Kawohl, *Commentary on Josef Kohler: The Author's Right (1880)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2024), https://www.copyrighthistory.org/cam/commentary/d_1880/d_1880_com_317200832856.html [<https://perma.cc/BXU7-47BL>]; see also LADAS, *supra* note 60, at 9–10 (explaining briefly Kohler's view of Immaterialgüterrechte).

69. Kohler: *Author's Right, Jena (1880)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) 58, 67 (L. Bently & M. Kretschmer eds., 2024) https://copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_d_1880&pagenumber=1_69&show=translation [<https://perma.cc/VPM4-LQG5>].

70. *Id.* at 66.

71. Kohler, recall, was a dualist.

72. Kohler: *Author's Right, Jena (1880)*, *supra* note 69, at 74.

73. Damich, *supra* note 55, at 29 ("[T]he writer can not only demand that no strange work be presented as his, but that his own work not be presented in changed form. The author can make this demand even when he has given up his copyright. This demand is not so much an exercise of dominion over my work, as it is of dominion over my being, over my personality which thus gives me the right to demand that no one shall share in my personality and have me say things which I have not said.") (quoting KOHLER, URHEBERRECHT, *supra* note 49, at 15). In fact, this passage suggests that Kohler seemed to think both Kant and Hegel were right. Kant was right in that the work was a manifestation of the inner self (and a communication) that could not be alienated (or published against the author's will); Hegel was right that the work was property that could be alienable.

74. See *infra* Section III.B.2.

75. SAUNDERS, *supra* note 21, at 118 (quoting KOHLER, DAS LITERATURE, *supra* note 67, at 33).

76. *Id.*

work.⁷⁷ Because personality exists in the representation, form, and manifestation of the work, the law must protect them all—separate and apart from the economic value of the work.

Kohler's approach is consistent with the view that the author's investment of personality makes it hers, but he does not explain what it means for the work to be part of the author. If one takes Kohler to be discussing personality as a form of social identity, the statement makes more sense. The work is so tightly bound up with the author's social identity that she must have control of it in the same way she has control of her own actions. She has the right to make decisions that shape who she is. When Margaret chooses to become a doctor, for example, she makes a choice that shapes who she and others take her to be. Margaret's identity expands because of her choice—she now has the knowledge, ability, and skills of a physician—and she holds certain beliefs. I have argued elsewhere that this is one way to understand moral rights—and perhaps it is one way to understand Gareis' conception of creating a work: it represents a choice to present yourself in a certain way, to construct your identity through a particular kind of social self.⁷⁸

An expression, however, is more than just a choice or belief. Unlike an idea to which one chooses to adhere, an expression both represents *and itself generates and adds content to* its author's identity. When you choose a belief, that belief may add content to your identity, but you did not create the facts upon which that belief is based. If, by contrast, you create a sculpture, you both express your identity and generate *the thing that expresses it* by creative action: you are the person that *created* a sculpture, and that sculpture and its content adds to who you are. Creating, then, may be akin to building part of one's identity, one's personality. Likewise, one's intentions, projects, and plans about a work are intermingled with this identity and cannot be ripped loose (directly).

Although this reading is facially plausible, it faces a number of difficulties. Perhaps the most fundamental is this: even if one defines personality to mean social identity and specifies how creation of a work adds to the author's personality, one still needs to explain *why* this *particular relation* deserves protection—as contrasted with others.⁷⁹ For Kohler, this is a problem that remains unresolved.

77. *Id.*

78. See Simon, *Copyright and the Social Self*, *supra* note 3, at 781.

79. Pursuing a life path, too, involves creating one's identity. And both involve doing so within certain predetermined limits. Just as becoming a doctor involves creating one's identity within preformed social categories, so too does molding one's identity through the creative arts as a painter, sculptor, or playwright.

In short, it is not clear why the “original” *authors’* personality interests were superior to property or other interests.⁸⁰ For example, why should authors’ rights—authors’ rights included to prevent others from placing their names on the authors’ work and to prevent the work from being “presented in a changed form”⁸¹—trump the rights of others to freely appropriate and use the works in question? Don’t they have interests using and transforming the work? Aren’t they, in many cases, doing the same thing the author claims she did in creating her work—investing their personality in the work? Pointing to authorial personality typically considers one side of the equation: the narrowly defined author; others’ interests are left to the side. Consequently, personality alone cannot supply the clinching rationale.

2. *Karl Gareis*. Like Kohler, Karl Gareis—one of the first moral rights scholars to develop a “consistent theory” of personality rights—aimed his theorizing at something beyond mere economic rights.⁸² And, also like Kohler, he first needed to distinguish personality rights from economic and other social rights, such as those in property (real rights) and family (claim rights). His solution was to argue that personality had as its legal object *the individual* and not claims over others or things.⁸³

Although this made rights of personality unique, Gareis found the term used to describe them confusing. By invoking the term personality, the phrase conflated two concepts—personality and capacity—and implied a naturalist origin. To avoid confusion, Gareis proposed instead the term “individual rights.”⁸⁴ One important category of individual rights was the right to use one’s capacities to be recognized and respected as an individual, which entailed “author’s rights: that is, literary and artistic author’s rights.”⁸⁵

80. Damich, *supra* note 55, at 28.

81. Netanel, *supra* note 29, at 380 (quoting Damich, *supra* note 55, at 29); ADENEY, *supra* note 56, at 51 (quoting KOHLER, DAS AUTORRECHT, *supra* note 56, at 152–53) (“Nobody may give a picture the appearance of being the work of an artist other than the true artists through attaching to it a name or monogram.”).

82. *Commentary on: Gareis: The Juridical Nature of Author’s Rights*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2024), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1877 [<https://perma.cc/EBW5-9JGH>]. This theory happened to be a positivist one. *Gareis: Juridical*, *supra* note 65, at 198–99.

83. *Gareis: Juridical*, *supra* note 65, at 200. This was also the view of some French scholars. Marty and Raynaud, for example, sought to distinguish classes of rights based on “their pecuniary or personal character, their objects and their subjects.” Strömholm, *Right of Privacy*, *supra* note 27, at 53.

84. *Gareis: Juridical*, *supra* note 65, at 198–99.

85. *Id.* at 197–98.

For Gareis, authors' rights are designed to facilitate *individuality and its recognition*.⁸⁶ The reasoning—reflecting Hegel's idealism—is that individual rights secure for each and every individual freedom of *volition*, to decide for oneself.⁸⁷ This protection is required, not necessarily for Absolute Freedom, but for each individual to “realis[e] his overall life potential [for prosperity and happiness].”⁸⁸ Because each individual is free to make choices that enhance his individuality, he has a right to use “his personal qualities” so long as they do not violate others' rights. The right is universal and bilateral: not only does each person hold this right, but each person has the obligation to recognize that others have this right. Thus, each person must respect others' rights to make use of their faculties and attributes. Gareis now has articulated something resembling the German notion of “subjective rights”—based on the philosophy of Kant or Friedrich Carl von Savigny—or the more British sphere of personal liberty (based on the philosophy of J.S. Mill).⁸⁹

If a person (within these rights) uses their mind to produce something saleable, say a book or a poem, the law recognizes that more than mere alienation could occur: it elevates the “faculties as such” to the protection of law.⁹⁰ And so the law will protect the activity itself and the resulting product. The protection of the “fruits attained through” one's faculties is recognition of “an achievement of the individual.”⁹¹ Protection ensures not only that the individual will be recognized for her achievement, but also that she will be able to control herself as embodied in her creation. Other individuals, therefore, must recognize the right of a person to their intellectual creation, and to allow them to use it so long as it does not infringe the rights of others. This also means others must not infringe the individual's right to use her mind.

Individuality, therefore, grounds the right. Each subject has a right to be recognized as the individual she is—the person with whatever qualities it is that make her *her*.⁹² Indeed, for Gareis,

86. *Id.* at 196.

87. *Id.* at 194.

88. *Id.*; JOHN STUART MILL, ON LIBERTY 22 (3d ed. 1859) (second alteration in the original).

89. See, e.g., Ana Caldeira Fouto, *Revisiting “Subjectivity” in Rights Theories: The (Re) Creation of the “Legal Subject” in Second Scholastics Juridical Discourse*, 75 REVISTA PORTUGUESA DE FILOSOFIA 1103, 1104–05 (2019); Gareis: *Juridical*, *supra* note 65, at 194; see *supra* Section II.B; see MILL, *supra* note 88, at 22.

90. Gareis: *Juridical*, *supra* note 65, at 195.

91. *Id.*

92. *Id.* at 196 (“By ‘individuality’ one should understand all that is characteristic of a subject as an individual existing on his or her own right, assumed to have various specific qualities.”).

recognition is the sole goal of individual rights: “juridical subjects demand the recognition of their individuality, recognition of their activity as individuals, and recognition of their control over what is individual about them.”⁹³ Authorship is nothing but a “striving for individualization” on these three dimensions.⁹⁴ The law’s role is to facilitate this goal by protecting the individual’s achievement.

Gareis’ theory, like Kohler’s, is abstract and difficult to concretize despite its focus on individuality. Gareis’ theory centers on the person, and what it means for her to flourish *qua* individual. Indeed, his fundamental postulate is that the “juridical subject[] demand[s]” recognition of her individuality and control over it. Gareis’ three demands might be restated as follows: (1) being recognized as a person (“individuality”); (2) being recognized as a particular person (“activity as individuals”); and (3) having control over some aspects of what make them the particular person they are (“control over what is individual about them”)—presumably to facilitate (1) and (2).⁹⁵

How might authors’ rights facilitate this? They may help to identify both *a* person and a *particular* person by requiring, for example, identification (attribution) of that individual. Part of what makes the individual author *that person* is the intimate bond she shares with the work. An author’s poem generates legal protection because such protection aids in his recognition as author-the-poet. Given that the poem is now identified with John, control of that poem becomes central.⁹⁶ Attribution of the poem ensures the recognition of *author as the individual*—and control over the content bolsters this recognition.

Here again, then, we see elements of Hegelian identity as abstract, as well as shades of Kohler’s view of identity as social rather than philosophical. But Gaeris’s theory does not tell us why authors’ rights in particular are required to achieve this recognition, or why this recognition exists in a special case because of some investment of the work. Even if it is true that some aspect of the individual’s social identity depends on the work, it is not obvious why other aspects of the individual’s right to recognition—or others’ rights of recognition—ought not to take precedence over these. Consider, in concluding, Gaeris’s contention that we ought to protect the author’s “faculties as such” by impinging on others’ ability to take actions with

93. *Id.* at 199.

94. *Id.* at 198.

95. *Id.* at 198–99.

96. Rigamonti, *Moral Rights*, *supra* note 21, at 123.

respect to one's work.⁹⁷ Even if we could show some nexus between those traits and the work, and that the creation by a particular individual "caused" the nexus, we still need to know *how* it is connected. Gareis left this aspect of his theory unexamined.

B. Early Inductivists

Deductivists' problems in defining and using personality to argue for authors' rights are not limited by their method. This section shows that inductivists Johann Kaspar Bluntschli (1808–1881) and M. André Morillot (1849–1922) faced similar difficulties.

1. *Johann Kaspar Bluntschli.* Like both Kohler and Gareis, Bluntschli first tried to distinguish authors' rights as different and separate from traditional economic rights.⁹⁸ But he did so based on the motivation of the author and the nature of the work; property owners and authors have different motives: whereas the property owner wants to keep property for herself, the author "wants to *communicate his work to the public*."⁹⁹

This difference is at least part of the reason why Bluntschli, crediting Kant, thought the authors' right (collectively)—compared to property rights—is a "*personal right* of the author, as the *right of the originator*."¹⁰⁰ What seemed to generate the intensely personal nature of this right, aside from the communicative nature of the work, was Bluntschli's view that the physical embodiment of the work is "a *revelation and expression of [the author's] personal intellect*."¹⁰¹ And this act of creation by investment, Bluntschli posits, establishes a "natural relationship" "[b]etween author and work"—just as God has with his creations.¹⁰² As such, the author has a natural right that others respect this relationship.¹⁰³ And it is this relationship, and the

97. Gareis: *Juridical*, *supra* note 65, at 195.

98. Bluntschli was Swiss. *Johann Kaspar Bluntschli*, BRITANNICA, <https://www.britannica.com/biography/Johann-Kaspar-Bluntschli> [https://perma.cc/TNX7-A539] (last visited Feb. 17, 2025).

99. The author wants to communicate the work publicly so long as it's done "in an ordered manner and his authorship can be respected." *Bluntschli: On Authors' Rights, Munich (1853)*, in PRIMARY SOURCES ON COPYRIGHT (1490–1900) 187–89 (L. Bently & M. Kretschmer eds., 2024), https://copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_d_1853a&pagenumber=1_1&show=translation [https://perma.cc/HH4K-QXJH]. It is obvious from passages like this, as well as direct citations, that Bluntschli was influenced by Kant. *See, e.g., id.* at 188 n.7.

100. Property had the wrong object in mind (it cared about *any* owner of a thing instead of the individual author). *Id.* at 188–89, 188 n.7.

101. *Id.* at 191–92.

102. *Id.* at 192. Authors' rights "arise from the act of authorship." *Id.* at 199.

103. *Id.* at 192.

creation that gives rise to it, that makes authors' rights "highly personal."¹⁰⁴

Bluntschli does not pursue in earnest the God analogy, perhaps because it has significant limitations.¹⁰⁵ But, invoking it tells us something about what he thought followed from the author-work relation (that generated personal rights). First, the author is in a position of authority with respect to the work. He has a right to communicate his work "in an ordered manner and [to have] his authorship . . . respected."¹⁰⁶ So the author may choose not to publish it, or to prevent another from publishing it against his will. These rights also include their theoretical opposites: the author has the right to publish her work—and reproduce her work—when and how she wants.

At the same time, Bluntschli's writing recognizes that these rights have limits, and these limits tell us at least two things about the nature of the author's relationship with her work. First, he did not think the nature of the relationship was unchanging and unbreakable. For example, others have a right to use the work provided their creations contain sufficiently "independent intellectual effort"—quite similar to the language used to describe transformative fair use today.¹⁰⁷ Additionally, publishing the work, says Bluntschli, changes the nature of this relationship. By deciding to open her work to the public, the author relinquishes part of her right to the interest of the public. He also recognized that the relationship depended in large part upon others.¹⁰⁸ In discussing duration, for instance, Bluntschli claimed that *that* right lasts as long the author's "person is still fresh in people's memory."¹⁰⁹

Despite its nuances, Bluntschli's theory—like Kohler's and Gareis'—took as its foundational premise a special relation between the author and her work, one firmly grounded in the *person* (if not "personality"). In trying to briefly flesh out that relation, Bluntschli invokes the God-creature analogy, but says little else about it. This leaves the reader in much the same

104. *Id.* at 199.

105. These are described in David A. Simon, *Analogies in IP: Moral Rights*, 21 YALE J.L. & TECH. 337, 377–80 (2019).

106. *Bluntschli On Authors' Rights, Munich (1853)*, *supra* note 99, at 189.

107. *Id.* at 210. Examples include reprinting individual passages (so long as not excessive); including individual essays, poems, etc. in compilations (so long as not excessive); and translations of foreign works. *Id.*

108. *Id.* at 193–94.

109. *Id.*

position as the theories of Kohler and Gareis, lacking a developed explanation about the nature of this relationship.

2. *M. André Morillot*. It may seem odd that Bluntschli and Kohler did not critically examine the key conceptual component of their own claims. But it is not an anomaly. At least one prominent French inductivist, M. André Morillot, did the same thing. Morillot was one of the first French scholars to import German ideas about moral rights into France, which had been a locus for decisions on authors' rights.¹¹⁰ He shared with other theorists a disdain for commingling property rights with authors' rights.¹¹¹ And his focus on personality was as prominent as any moral rights scholar.

For Morillot, the key to understanding authors' rights, and his version of personality rights, was to conceptualize a work as "purely intellectual"—by which he meant the creation only as it exists in the author's brain. Physical expressions of the work were not a "work." Indeed, any author's expression would be some imperfect form of the original.¹¹² The work is thus not merely an idea in the author's brain—"it is the author."¹¹³

Morillot's view of a "work" is similar in some respects to Kohler's three-stage model of creation. To him, a work was a mental representation of something known only and completely to the author.¹¹⁴ The work is a static, finished product rather than a fluid process of creation. In his view, the author who paints a painting of a cathedral, for example, constructs the work entirely in her brain *before she paints*. When putting paint to canvas, the author merely expresses some imperfect form of her perfectly constructed mental representation of a cathedral.¹¹⁵ The author, in other words, creates a finished mental representation of the work in his brain, where it remains forever.

110. Strömholm, *Right of Privacy*, *supra* note 27, at 27 n.17; see Rigamonti, *Moral Rights*, *supra* note 21, at 163, 165–66.

111. Rigamonti, *The Conceptual*, *supra* note 21, at 101–02. Although he began his theorizing on moral rights quite narrowly (focusing only on the right of divulgation), he would later expand his ambit (to include attribution and integrity). *Id.*

112. See Morillot on the Author's Right, *Paris (1878)*, *supra* note 61, at 111, 113. This view also has implications for creativity. Morillot thought that the true spiritual creative act took place upon creation in the mind. Expressing the work, because it would necessarily be imperfect, meant it "has only a secondary creativity." *Id.*

113. *Id.* at 114 (emphasis added).

114. *Id.* at 113. Moral rights scholars might both adhere to and reject different aspects of this view. They could believe that the author's mental state determines how a work should be treated, but they do not view the work as entirely static and complete.

115. See WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 8 (Routledge 2002) (1982).

Morillot's account is not only about creation, but also creativity. For him, the creative process occurs before expression.¹¹⁶ And this had theoretical implications.¹¹⁷ Because the work *is* the author—her personality—she has “full moral sovereignty over [her] work” before and after publication.¹¹⁸ The work exists in the author's thoughts or consciousness—and so the author has (or ought to have) as much control over the work as she has over her thoughts. The author, therefore, is the “absolute master of [her] work.”¹¹⁹ Because the absolute dominion over a work arises without the aid of law, the right is a natural one. The work of an artist exists in the author's thoughts and consciousness; only she has access to it.

This much is also true of the work *after* it is expressed. Once the author expresses the work, however, a change occurs. The work-as-expression no longer *is* the person; it becomes—similar to Kohler's and Bluntschli's views¹²⁰—an “extension of his person.”¹²¹ Now, exposed to the world, it is “vulnerable to . . . attacks.”¹²² But the expression of a work does not break or even diminish whatever bond exists between the work (in its pure form) and the author.¹²³ The author, in other words, does not become less of a person. Rather, she *extends her person*, expanding its scope and retaining this bond,¹²⁴ a view shared by others such as theorist Otto von Gierke.¹²⁵ Yet the work itself remains in the author's consciousness—always “inviolable.”¹²⁶ It is, now and forever, tied or connected to the author.

116. For why this may not be a correct description of the creative process, see, for example, David A. Simon, *Culture, Creativity & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 304, 307 (2011), and ONG, *supra* note 115, at 7.

117. Because a work exists only in the mind, the author has total dominion over the work. Yet, legal ownership is impossible. See Morillot on the Author's Right, *Paris* (1878), *supra* note 61, at 113. The reason? For Morillot, ownership implies a property relation. And it is impossible, on his view, that a creator could own himself, a conclusion that would follow from owning the work. *Id.* This holds even after the author expresses the idea. She can own only the material representation; the idea remains forever in the author's mind. *Id.*

118. *Id.* at 124.

119. *Id.*

120. Although like Bluntschli's description of the author's relation to the work (as an expression or revelation), *Bluntschli: On Authors' Rights, Munich* (1853), *supra* note 99, at 191–92, Morillot's was slightly different (extension of the author), *Morillot on the Author's Right, Paris* (1878), *supra* note 61, at 124.

121. See Morillot on the Author's Right, *Paris* (1878), *supra* note 61, at 124.

122. *Id.*

123. *Id.* at 125. This was also the view of other French scholars such as Plaisant. SAUNDERS, *supra* note 21, at 31.

124. *Morillot on the Author's Right, Paris* (1878), *supra* note 61, at 125.

125. Rigamonti, *Moral Rights*, *supra* note 21, at 158.

126. *Morillot on the Author's Right, Paris* (1878), *supra* note 61, at 125.

What does all this mean? On the one hand, Morillot thought the work was present in the author's brain (so long as the author was alive). In that sense, it was impossible to separate the work from the author; they were inextricably bound together. The author's painting of the cathedral is fixed perfectly and permanently in his brain—it cannot be separated from the brain's substrate. On the other hand, the expressed work is no longer physically part of the author, but it retains a link to that fixed mental representation. The painting of the cathedral is an extension of the representation of the cathedral in the author's brain: although physically external, the expression (the painting of the cathedral) is an embodiment of something wholly internal (the work of the cathedral). As a result, Morillot views the work as maintaining some aspect of the internal, as part of the author's personality. Personality, then, must be either (i) the author's brain states (or something similar) that involve the work; or (ii) the relation in which the author stands to the work. Without evaluating these positions, it's at least worth noting that if personality is (ii), then the concept of personality has not been explained.

In either case, harms flow when another impairs this relation (i.e., as an extension of her work). Recall that Morillot is an inductivist, which means he starts first with the rights and theorizes them later. For him, there were three separate rights that corresponded to harms that the rights protected against. First, a right to prevent unauthorized publication protected the author's personal liberty.¹²⁷ Harm to authorial liberty occurs when someone usurps the ability of the author to act (by forcing her to speak). Assume that someone publishes the author's painting of a cathedral against the author's will. This, according to Morillot, constitutes “a violent and unfair attack upon the author's person [*personnalité*], a genuine infringement of his liberty, [and] a palpable moral injury for which he may demand reparation.”¹²⁸ Unfortunately, Morillot does not specify *how* this action violates the author's liberty or what violence it does to “personality.”

One explanation might be that the publisher *forces* the author to expose part of her work to the public. Such a decision is not the publisher's to make. The choice must be the author's. This is because the author's work is enmeshed with the author's thought process. And certainly no one can force someone to publish their thoughts. So, it follows, no one can force the author to expose her cathedral because it is part of her work.

127. *Id.*

128. *Id.*

Even on this reading, though, it's not clear whether Morillot thinks this "infringement of liberty" is tantamount to an "attack on personality." He may have surmised some other kind of harm to personality, though it is hard to see what it might be. On these grounds, Morillot thought that the law should intervene in this case to ensure "the author is respected."¹²⁹ But "respect to the author" is something different from an "infringement of liberty," and it may be different still from an "attack on personality." Given that Morillot does not precisely state the harm the law should protect against, however, it is difficult to know exactly how the law should go about protecting the author from "it."¹³⁰

Morillot then states that the second violation of the personality right—"present[ing] the work only in a faulty or inaccurate version"—harms "the author's person."¹³¹ Once again, the idea of the "author's person" or "personality" are not stated. Although one might read this as to define personality in various ways, Morillot's failure to do so ultimately undermines his claim that harm occurs when others present a "faulty or inaccurate version" of the author's work.¹³²

Lastly, Morillot argued that harm occurred when an author's work was falsely attributed to another. Morillot characterizes the injury here as "robbing the writer or artist of . . . glory."¹³³ Perhaps "glory" relates to "recognition" and Hegel can rescue the statement to save it from being relegated to one about either fraud or reputation. Again, though, Morillot doesn't say exactly what he means. And he did not explicitly link personality to either fraud or reputation.

One idea is that the work is both part of the individual and something with which they are associated. This latter association arises by virtue of being its "source."¹³⁴ Usurping one's "glory" is

129. *Id.*

130. *Id.*

131. *Id.*

132. Several readings are possible. One might mean a distortion of the author's vision or conception as embodied in the expression. On this reading, faulty presentation of an expression damages the *purity* of the author's relation to her work. Assume the author's painting of the cathedral is meant to revere and praise the Holy Order and its clergy. A similar painting of the cathedral that depicted clerical greed, for example, would be a view other than the author's. The purity of the author's work has been damaged; a vision of the work different from the author's has been presented. Even on this reading, however, it is hard to see how this harms the author's *person*, rather than others' *perception(s)* of her social self. Simon, *Copyright and the Social Self*, *supra* note 3, at 773, 779.

133. *Morillot on the Author's Right, Paris (1878)*, *supra* note 61, at 125.

134. *See supra* Section III.A.1.

akin to impersonation. The person who falsely attributes the cathedral painting to herself posits a connection between himself and the work that does not exist. This may dilute the connection between the work and the author, as others come to associate the author's work with someone else. Thus, the public is defrauded in one sense because they are presented with a false claim about authorship. In another sense, this false representation of source may harm the author's reputation by diminishing her standing in the community. Each claim rests on separate interests, interests Morillot does not articulate or tie to personality.¹³⁵

In light of Morillot's views on creation, it is understandable why he thought these acts "violate the consciousness of the author."¹³⁶ The expression was still very much attached to the mental representation (the work). Violating the former meant violating part of the latter. Morillot, however, failed to explicitly connect these harms with personality in a meaningful way. The idea of liberty, for example, seems to stand alone as a concept independent of personality. Indeed, liberty in this context seems to follow on Kant's idea that unauthorized publication of a book is tantamount to forcing the author to speak against her will. Personality, meanwhile, is left undefined—but it purports to form the locus of harm.

Despite all this, the legal rights that protect the author from harm all fall within the category that Morillot baptized as the "moral right"¹³⁷: a natural right designed to protect the author's person that springs into existence from the moment of

135. This is discussed in Parts III and IV.

136. *Morillot on the Author's Right, Paris (1878)*, *supra* note 61, at 129–30.

137. Rigamonti, *Moral Rights*, *supra* note 21, at 164, 166–68; Damich, *supra* note 55, at 29 (stating that Morillot "was the first to consciously use the term *droit moral* in a technical sense" in 1878). For some examples of his influence on French law, see CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROPERTY CODE] art. L111-2 (Fr.) ("The work is deemed to be created, independently of any public disclosure, by the sole fact of the realization, even unfinished, of the author's conception."); André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-J.L. & ARTS 381, 385–86 (1985) (citing Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Mar. 23, 1977, Cour d'appel [CA] [regional court of appeal] Paris, June 2, 1978 (Debuffet c. Régie Nationales des Usines Renault) (Fr.); Cour de Cassation [Cass.] [supreme court for judicial matters], 8 Jan. 1980, RIDA 1980, 104 (Fr.); Cour d'appel [CA] [regional court of appeal] Versailles, July 8, 1981, RIDA 1981, 110 (Fr.) (holding that an artist had a right to prevent destruction and finish the work that was to be erected on the property of an automaker, who decided it no longer wanted it, halted construction, and began dismantling it); Stina Teilmann, *Justifications for Copyright: The Evolution of le droit moral*, in 1 NEW DIRECTIONS IN COPYRIGHT LAW 73, 82–83 (Fiona MacMillan ed., 2005).

expression.¹³⁸ Thus, the moral right fosters respect for the author's person by safeguarding her expression—part of her person—from unauthorized publication, false attribution, and faulty or inaccurate presentations of the work (as expressed).

Yet even for Morillot, like for Bluntschli, authors' rights were not absolute. He goes so far as to recognize reproduction of the work after publication as a natural right of readers (or users). Indeed, reproduction causes the author no harm except in exceptional circumstances (pecuniary harm may occur under modern positive law).¹³⁹ Morillot also recognizes, for example, that "imitation" is essential for art and life to continue, and it therefore cannot offend the author's moral right. He also, for practical and theoretical reasons, did not view moral rights as perpetual, a characteristic that distinguishes them from property rights.¹⁴⁰

Coining a term that would last for over a hundred years is an achievement. Unfortunately, Morillot's account also faces two problems common to other moral rights scholars. First, he could not define personality in any meaningful way. Second, Morillot's attempt to connect personality to legal rights did not sufficiently explain *how* personality is invested or, if it is, *why* it ought to generate special rights. To his credit, Morillot's conception of the work *did* capture why it was in some ways part of the author's person—but that conception changes dramatically when the author extends the work from her brain into an expression. Here the personality interests, the key component of Morillot's theory, break down into legal rights that seem to have very little to do with some underlying concept to personality.

138. Damich, *supra* note 55, at 29. The exact moment these legal rights attach is not clear, but Morillot's writing support this interpretation. Morillot speaks of "the author's setting down and publishing a work" as the moment of legal protection, but also uses for support of moral rights the historical punishment of "plagiarism," which, broadly speaking, does not require publication. *Morillot on the Author's Right, Paris (1878)*, *supra* note 61, at 126. Shortly after this discussion, he speaks of "setting down or publication," which seems to be consistent with the idea that moral rights exist from the moment of expression (i.e., they do not require publication). *Id.* (emphasis added).

139. *Morillot on the Author's Right, Paris (1878)*, *supra* note 61, at 128, 130.

140. *Id.* at 117, 121, 128. Morillot based this opinion partly on his belief that no European legislature would ever enact such a provision. It also stemmed from his rejecting the idea that authors' rights were property rights; if they were property rights, they had to be perpetual. Morillot thought they were something different. *Id.* at 117–18.

C. *Lessons from Early Moral Rights Scholars*

Each of the early theorists had different methodologies and views on law—inductivist/deductivist, naturalist/positivist, monist/dualist. Yet what linked, or perhaps united them, was a focus on the person, the individual—what each called, in one form or another, personality.¹⁴¹ This part has demonstrated, however, that although personality may have been a unifying concept, the concept of personality was hardly unified.¹⁴²

Each method revealed a slightly different aspect of the problem. Deductivists first attempted to outline the concept of personality, or the author as an individual.¹⁴³ When they discussed specific rights, however, their analysis became more pragmatic. At this stage, authors' interests are weighed against "(a) other individuals, (b) the organized public, [and] (c) society."¹⁴⁴ Perhaps this analytical move is, as David Saunders argues, logically required; it is a function of transitioning from general, abstract notions to particular cases.¹⁴⁵ Yet moving from the abstract to the specific proved difficult because it was not always clear *what* we were considering in the abstract or *why* specific rights ought to follow from investment of personality.

Inductivists, by contrast, tended to start with particular rights and then theorize their metaphysical unity. Here, rights were clear because they were plucked from cases. The problem for scholars like Morillot was generating a coherent theory to unify them. Stig Strömholm has gone so far as to say that, "[i]f ideological aspects are set aside, the energetic affirmations of the inexhaustible character of the 'general right of the personality' mean little more than the list of cases which may be decided in favour of a plaintiff claiming a violation."¹⁴⁶ Like deductivists, inductivists struggled to articulate the meaning of personality or why it followed that its investment generated a special relation that required legal protection.

141. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 344, 346–49 (1915).

142. Strömholm, *Right of Privacy*, *supra* note 27, at 54.

143. See, e.g., HERBERT SPENCER, JUSTICE 108–09 (1891); Pound, *supra* note 141, at 353–54.

144. Pound, *supra* note 141, at 351–54.

145. See SAUNDERS, *supra* note 21, at 78.

146. Strömholm, *Right of Privacy*, *supra* note 27, at 56–58 (citing H.C. Nipperdey, *Das allgemeine Persönlichkeitsrecht*, 30 UFITA 1–29 (1960) (a short but very complete survey of modern German law, discussing the German "right[s] of the personality").

Both methods, then, yielded similar problems. First, there was the concept of personality, which was like an element on the periodic table: it could not be defined further than the notion itself.¹⁴⁷ The concept itself, however, lacked a coherent definition—and so one is left wondering what, exactly, is the most central concept in moral rights theory.

Yet this definitional problem is just one challenge for personality theorists. Another was that even assuming some coherent definition of personality, scholars had to explain how personality can move into a work to create a “relation” between author and work that law must protect through moral rights.

These are challenges, as the next part demonstrates, that modern personality theorists have not adequately addressed.

IV. MODERN PERSONALITY THEORISTS

Modern moral rights scholars largely follow in the philosophical and conceptual footsteps of the early thinkers.¹⁴⁸ Kant and Hegel loom large, and the concept of personality is central. Methodology also tends to divide them in the same way as early scholars—with some working from rights to theory while others work from theory to rights. And both sets of scholars have trouble with the same two central questions as early scholars, though their philosophical dexterity varies considerably. For example, deductivists spend a great deal of time justifying the rights, often pointing to particular interests that could be harmed, but they do not squarely confront the questions of what personality

147. See *id.* at 55 (citing Heinrich Hubmann, *Das Persönlichkeitsrecht* 123 (1953) (most complete modern German monograph)).

148. Not all approaches to moral rights—either inductive or deductive—rely on the personality tradition. For example, focusing instead on Kant’s attempt to structure a society in which thinking flourishes, some recent scholars interpret authors’ rights as an operational part of this communicative framework. *E.g.*, Barron, *supra*, note 50 at 25–26; Laura Biron, *Public Reason, Communication and Intellectual Property*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 228 (Annabelle Lever ed., 2012); Maria Chiara Pievatolo, *Publicness and Private Intellectual Property in Kant’s Political Thought* (Nov. 11, 2005, 19:37), <http://bfp.sp.unipi.it/~pievatolo/lm/kantbraz.html> [<https://perma.cc/6V5E-NF4T>] (presented at the 10th International Kant Congress); Maria Chiara Pievatolo, *Freedom, Ownership and Copyright: Why Does Kant Reject the Concept of Intellectual Property?*, *THE ITALIAN SOC’Y OF POL. PHIL.* (July 2, 2010), <https://sifp.it/archivi/freedom-ownership-and-copyright/> [<https://perma.cc/2UHX-FAMJ>]; Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 *CARDOZO ARTS & ENT. L.J.* 1059, 1067 (2008); see also Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 205–07 (Annabelle Lever ed., 2012). But see MERGES, *supra* note 50, at 72–83. Christopher Yoo has recently advanced a moral rights theory based on personal development through creative play. Christopher S. Yoo, *Rethinking Copyright and Personhood*, 2019 *U. ILL. L. REV.* 1039, 1077 (2019).

is and how investing it in a work creates a special relation that deserves protection. Most inductivists, on the other hand, are adept at claiming harm and pointing to rights, but are less successful at explaining what personality is or why it matters that it is harmed.¹⁴⁹

Section A explores the work of deductivists while Section B examines scholarship of inductivists. Throughout both sections, the Article highlights how these two central questions have not been adequately addressed. But it is important to underscore that the work of deductivists does more to grapple with these two questions than the inductivists. The inductivist work, however, is still important to show how personality, as a concept, still takes a “protean diversity of forms” and has “the formlessness of a protoplasmatic fluid.”¹⁵⁰

A. *Modern Deductivists*

The two most important deductivists are Justin Hughes and Neil Netanel.¹⁵¹ This section explores each of their writings. Like the early moral rights scholars before them, Hughes and Netanel argue that personality rights are different from economic rights and that personality makes them so.

1. *Justin Hughes.* Hughes’s account of personality is Hegelian,¹⁵² though it draws heavily on Margaret Radin’s interpretation of Hegel in the property context.¹⁵³ Although Hughes’s reading of Hegel is highly contested as a philosophical matter, his argument for moral rights based on it is an important contribution that should be taken seriously.¹⁵⁴

149. See *supra* Part III.

150. *Gareis: Juridical*, *supra* note 65, at 188.

151. Another author who argues for moral rights from a philosophical perspective, though one that doesn’t focus on personality as such, is Ilhyung Lee. Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 854 (2001). Robert Merges seems to think a grander “midlevel” principle of dignity grounds moral rights claims, and IP more generally. MERGES, *supra* note 50, at 156–58.

152. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988) [hereinafter Hughes, *Philosophy of IP*].

153. Compare *id.* (explaining that the personality justification posits that rights are derived from the concept of personality), with Radin, *supra* note 31, at 1892–95 (interpreting Hegel’s theory of personality by claiming that rights are developed from a person’s will), and Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) [hereinafter Radin, *Property and Personhood*] (elaborating on the link between personal value and the concept of personality).

154. The law professor with the most forceful argument against this, one supported by several other philosophical readings, is found in Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIA. L. REV. 453, 458–60 (2006). For a more recent argument in

Hughes applies Hegel's philosophy to answer the following question: "what justifies the author in alienating copies of his work while retaining the exclusive right to reproduce further copies of that work?"¹⁵⁵ His argument follows a familiar structure. First, the individual owns the intellectual product by creating it, which entails investing her personality into the work. Hughes's first step, then, is to draw on Radin's intuitive conception of property as part of the self and define personality in the context of created works in similar terms¹⁵⁶—as the self moving into the object, or perhaps the object being "caused" by an "individual's personality."¹⁵⁷ This creates a special relationship—and "[t]he *relationship* between object and creator is where personality is visible."¹⁵⁸

To help us see personality, Hughes shifts to identifying three personality *interests*: creativity, intentionality, and sourcehood.¹⁵⁹ Creativity is inherently tied to the concept of personal expression.¹⁶⁰ When John paints a creative picture, some of what is "creative" is found in the object being *John's expression*. The object created—and the creativity that produced it—reflect, to some extent, John's experiences, though not *only* his experiences but his personal expression of them.

Whereas creativity is concerned with personal expression, intentionality is concerned with conscious direction; when an individual creates an object, she often *intends* to convey some

a similar vein see CAIRNS, *supra* note 36, at 513–15, 523; Allen W. Wood, *Introduction* to G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, at xii–xvi (Allen W. Wood, ed., H. B. Nisbet trans., 1991). For those following this reading, see Michael Spence, *Justifying Copyright*, in DEAR IMAGES: ART, COPYRIGHT, AND CULTURE 389, 399–400 (Daniel McClean & Karsten Schubert eds., 2002); Thomas Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 9 (1997); PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 88 (1996); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1240 (1996).

155. Hughes, *Philosophy of IP*, *supra* note 152, at 338. The arguments constructed here are drawn from two of Hughes's papers, published ten years apart. See generally *id.* (published in 1988); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. (1998) [hereinafter Hughes, *Personality Interests*] (published in 1998). To some extent, I am reading the arguments in tandem, and Hughes may not endorse this reading.

156. After all, Radin's perspective was concerned with where the object ended up, not from whence it came. Radin, *Property and Personhood*, *supra* note 153, at 987.

157. Hughes, *Personality Interests*, *supra* note 155, at 81, 86–87.

158. Hughes, *Philosophy of IP*, *supra* note 152, at 344.

159. Hughes, *Personality Interests*, *supra* note 155, at 162–63.

160. When discussing the implications of Hegel's work, Hughes describes a similar personality interest: expression. This means a situation where the creator *expresses* her personality or will in the work. Hughes, *Philosophy of IP*, *supra* note 152, at 343.

message or capture some idea, image, or conception.¹⁶¹ Intentionality can bring into the ambit of copyright claims of photographers and journalists, as well as other copyright puzzles.¹⁶²

Finally, Hughes discusses the personality interest of being “the source of the *res*”—what I refer to as “sourcehood.”¹⁶³ In this discussion, he harkens back to two Hegelian ideas, both of which Gareis discussed in his work¹⁶⁴: the right to be identified and the desire for social recognition.¹⁶⁵ This sense of personality relies on *recognition* by others and *identification* of the person with a thing. In a Radinian fashion, Hughes writes: “in the sourcehood situation there may be *expressions* which become *personal*.”¹⁶⁶ This personality interest sheds light on situations where one has a eureka moment, where the person is the source of information, or where one simply labors (but is not creative and the intentions come from another). But it also poses problems for other cases, like songs that people incorporate into their identity and “claim” or think of as part of themselves.

Hughes’s move to identify personality interests gives us some content to the “thing” moral rights might protect. But this move also presents a problem from the perspective of alienation. If the property in which work is embodied is *completely* alienated, it is abandoned. This forces the owner to divorce all personality interests from the object. With intellectual products, though, “no recognizable *res* . . . exists” “independent of our personality.”¹⁶⁷ Because the creator’s personality is “in” the work, Hughes argues that Hegel “consider[ed] the *complete* alienation of intellectual property to be wrong—morally analogous to slavery or suicide because it is the surrender of a ‘universal’ aspect of the self.”¹⁶⁸

161. Here Hughes means purposeful actions, not the study of mental states. See *Intentionality*, STAN. ENCYCLOPEDIA PHIL., (Feb. 7, 2023), <https://plato.stanford.edu/entries/intentionality/> [https://perma.cc/5PEW-NZWU]. But see Hughes, *Personality Interests*, *supra* note 155, at 141.

162. Hughes, *Personality Interests*, *supra* note 155, at 141.

163. *Id.* at 163.

164. When discussing the implications of Hegel, Hughes described two personality interests. The first was expression. See *supra* note 160. But the second was *source identification*, where the creator seeks to identify or relate her personality with the object in which some of her personality is invested. Hughes, *Philosophy of IP*, *supra* note 152, at 343. Here we might think of a new surgical instrument; the inventor wishes to be known as the *inventor* of that surgical instrument. A non-IP example could be the university one attended; the alumna wants to be known as a graduate of that university. Thus, for Hughes, it is the object, subject, *and* relation between them that is important. *Id.* at 344.

165. See Strömholm, *Right of Privacy*, *supra* note 27, 29.

166. Hughes, *Personality Interests*, *supra* note 155, at 168.

167. Hughes, *Philosophy of IP*, *supra* note 152, at 347.

168. *Id.* at 348 (emphasis added).

Hughes responds by arguing that the personal connection can and must be maintained even after alienation of a token work. The argument hinges on the nature of the creative expression: precisely because the created object is now external to the person, she can alienate *it* without alienating her *self* from that aspect of expression that is unique to her. On this view, transferring copies does not constitute complete alienation if two conditions are met: “[F]irst, the creator of the work must receive public identification, and, second, the work must receive protection against any changes unintended or unapproved by the creator.”¹⁶⁹ Thus, although Hegel’s theory allows the creator to alienate copies, these two protections prevent her from completely alienating all rights in the work.¹⁷⁰

Although Hughes’s argument is careful and more robust than early personality theorists’, he faces the same two problems at each step of the argument. First, his articulation of a Hegelian justification relies heavily on a highly abstract concept that is part of a larger, complicated philosophical system. If Hegel’s system is discarded, it is not clear that the concept of personality does much work—making the claim highly dependent on a convoluted, and somewhat bizarre, philosophical enterprise.¹⁷¹

Even in Hegel’s system, it is not clear that personality has the kind of meaning that Hughes wants to ascribe to it—that is, something *specific and personal to the individual*. It suffers, in other words, from the same kind of vagueness that plagues early theorists by framing the question as one fundamentally about the self: “[D]oes the object show others an aspect of the creator’s self?”¹⁷²

But now the argument has brought us to fundamental questions many moral rights scholars in the personality tradition encounter but do not analyze: what is a “self” and how does it go into a work? To suggest, as Hughes does, that the work reflects some personal experience is certainly a plausible conception of creativity, but surely it cannot be what we mean by “self.” Asserting the self as the cause, rather than the thing that infuses

169. *Id.* at 349–50. Others have taken the position that this misreads Hegel, who thought that a copyright was freely alienable as all other external property. Cotter, *supra* note 154, at 9; Schroeder, *supra* note 154, at 476; DRAHOS, *supra* note 154, at 80; Sterk, *supra* note 154, at 1240–43.

170. Alienation is not merely for economic purposes; it can facilitate the recognition necessary for personhood in the form of “respect, honor, and admiration.” Hughes, *Philosophy of IP*, *supra* note 152, at 350.

171. For some choice words, see generally 2 ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* (R.B. Haldane & J. Kemp trans., 6th ed. 2012) (ebook).

172. Hughes, *Philosophy of IP*, *supra* note 152, at 343.

the work, does not help to clarify the inquiry.¹⁷³ Instead, it begs the question of whether this produces some significant connection, and what that connection might be.

Second, although Hughes asserts that “personality is visible” in “[t]he relationship between object and creator,” it is still quite difficult to see.¹⁷⁴ Part of the fuzziness results from a subtle shift in concepts—from “personality” to “personality interests”—which elides describing what personality is or could be. And it also smuggles in the connection generated by the author-work relation by working in reverse. If the interests specify the content, then the content cannot generate the interests that deserve protection without circularity.

Third, even if this problem is avoided, focusing on intentionality and sourcehood as important contributors to personhood interests actually seems to increase, not decrease, the importance of the creativity interest—one that Hughes thinks is overemphasized in the literature.¹⁷⁵ For example, one can find an antique or a special rock and become its source in a way similar to an inventor. Finding property, however, seems to involve a categorically different act than the one involved in creating copyrighted works.¹⁷⁶ Likewise, human beings can carry out intentions and purposes with respect to all kinds of property—real and personal—(during and after their life through testamentary instruments) in ways that generate meaning for themselves as individuals. They can remodel their house or cultivate their land or create a shrine of family heirlooms. So, what seems to distinguish personhood interests in intellectual property is creativity. But here we face a different problem: if recognition of one’s personality is so important, then the argument for cabining it through creativity’s limits surely can’t be right.¹⁷⁷

2. *Neil Netanel.* Hughes’s contribution is paralleled in depth only by Neil Netanel’s, though the latter relies on support from Kant rather than Hegel. He claims that “Kant categorized authors’ rights as

173. *Id.* at 344.

174. *Id.*

175. Hughes, *Personality Interests*, *supra* note 155, at 88–89.

176. On one relevant aspect of the difference, see Patrick Goold & David A. Simon, *Lucky IP*, 42 OXFORD J. LEGAL STUD. 843, 863–64 (2022).

177. One wonders whether Hughes’s equation (more constraints = less personality) is correct. Could it be that some *selves* are just composed more of equations, maths, and experiments than others? What may be happening here is a desire to square a feeling about what kinds of selves count with a theory, rather than the other way around. For further discussion, see *supra* Section III.B.2.

personality rather than property.”¹⁷⁸ In grounding authors’ rights in personality, Kant postulated a special connection between the work and its author.¹⁷⁹ Netanel argues that “[t]he inalienability of the author’s rights in his work is implicit in Kant’s categorization of a literary work as part of the author’s person instead of an external thing.”¹⁸⁰ Kant’s idea of the work as part of the author herself accords with the views of some early moral rights scholars like Kohler, Bluntschli, and Morillot. And so again we find that a work containing “personality” implies the author has a special connection or stands in a special relation to it.

But this is as far as Netanel takes this point. Unlike Kohler or Morillot, Netanel has no interest in “imaginary representations” (Kohler) or “purely intellectual” conceptions (Morillot) of the work in the author’s mind.¹⁸¹ Instead, Netanel points out that, although Kant viewed an author’s rights as “an innate right, inherent in his own person,”¹⁸² he did not limit rights only to expressions of the author’s personality (nor, for that matter, to the author herself).¹⁸³ Netanel argues that, for Kant, authorial rights were linked to autonomy or self-governance.¹⁸⁴ Thus, although Netanel—like Hughes and Radin—discusses personality in the context of moral rights (i.e., as expression of the self),¹⁸⁵ he frames his argument for inalienability restrictions using “continuing author sovereignty.”¹⁸⁶

Despite Kant and Hegel’s different conceptions of property as internal (Kant) or external (Hegel), there is some similarity between how Netanel reads Kant and how Hughes reads Hegel. For Netanel, authorial rights are linked to the ability to function

178. Netanel, *supra* note 29, at 374.

179. Despite this difference, Netanel notes that moral rights have been justified by one central idea found in both Kant and Hegel: the author’s personal connection to her work. *Id.* at 376–77.

180. *Id.* at 376.

181. SAUNDERS, *supra* note 21, at 118; *See Morillot on the Author’s Right, Paris (1878)*, *supra* note 61, at 113.

182. Netanel, *supra* note 29, at 374 (quoting Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdruckes*, in IMMANUEL KANTS WERKE 221 n.1 (Ernst Cassirer ed., 1913)).

183. *Id.* at 375 (noting rights to author’s thought); Treiger-Bar-Am, *supra* note 148, at 1067.

184. Treiger-Bar-Am, *supra* note 148, at 1074.

185. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 17 (1994); *see* John Christman, *Autonomy, Social Selves, and Intellectual Property Claims*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 46 (Annabelle Lever ed., 2012).

186. Netanel, *supra* note 185, at 6–7. In some sense, this term can be interpreted in the way Radin and Hughes use the term “personhood.” Both use the term to refer to some fundamental aspect of being a human that is necessary for a full and complete life. *See* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 354–55 (1993); Hughes, *Personality Interest*, *supra* note 155, at 180.

as a human being. Hughes makes a similar claim when invoking Hegel's system of property: property rights—and potentially a special form of authors' rights—are necessary for individuals' development and flourishing as human beings.¹⁸⁷

This brings them both closer to the ideas of Gareis than any other early moral rights scholar. Underlying both ideas is the conception of the author as specially tied to the work in some way. Yet both have explained authors' rights functionally—as necessary to the achievement of human functioning or development. The right is not valuable in itself. Nor is the right concerned directly with some metaphysical entity, and the nature or structure of that entity.

The relation between the author and the work is also cast somewhat functionally. For Hughes, it facilitates the development of an individual in the Hegelian scheme, or rests on several interests (personal expression, creativity, and sourcehood). Netanel takes a similar path, explaining authors' rights as a necessary component of a properly autonomous individual, the sovereign author. Thus, they are both drawn, as was Gareis, to the idea that authorial rights are necessary to “each individual's realisation of his overall life potential [for prosperity and happiness].”¹⁸⁸

Netanel's focus on autonomy leads him to identify interests served by communication, which is a form of expression and, as such, is necessary for autonomy, identity, and self-realization. Netanel identifies at least four benefits or interests in expression:

Self-consciousness: expression is a projection of the self, and it entails a decision about what image to project to others;

Interaction-Mediation: expression acts as a mediating mechanism with the world—it helps the individual construct a reality and interact with herself and other individuals;

Creative-addition: expression adds something new to the social discourse; and

Self-realization: expression is a means of constructing and understanding the self.¹⁸⁹

187. See *supra* Section II.B.

188. *Commentary on: Gareis: The Juridical Nature of Author's Right*, *supra* note 82, at 194.

189. Netanel, *supra* note 29, at 401–02.

To fulfill these functions truly, Netanel argues, expression *must* be “an authentic manifestation of the self.”¹⁹⁰ By this he means (in a Kantian way) that expression *must* be “entirely the product of free choice.”¹⁹¹ Thus, this “continuing connection” is, rather than any conception of “personality” as such.¹⁹²

Personality makes an appearance later in Netanel’s argument, when he evaluates four potential justifications for the inalienability of author’s rights: distributive (unequal bargaining position of the author); personhood (forcing commodification of author’s work/personality would diminish personhood); paternalism (protecting the author from diminishing her capacity for self-actualization and self-definition); and communitarian (the protection of community values justifies restrictions on authors).¹⁹³ The personhood and paternalism rationales both turn on the “continuing connection between authors and their work” and authors’ “profound sense that their creations are inextricably related to their person.”¹⁹⁴ What this “continuing connection” is or why a “profound sense” of inextricability should justify moral rights is not Netanel’s focus. As a result, the nature of this relation and connection based on the author’s self or personality is not explained in detail.

Netanel’s account is an important contribution. But in focusing on Kantian autonomy, rather than personality as such, Netanel neither grounds his theory in personality nor explicates it. Yet like other scholars before him, he at least pays lip service to the personality-based special relation between the author and work as a potential justification for some aspects of authorial rights.¹⁹⁵ And, just as with other scholars, he does not explain in what this relation could consist.

B. *Modern Inductivists*

Despite the difference in method, deductivists and inductivists share a common framework to argue for moral rights. Step one identifies the concept of personality as important. Step two asserts

190. *Id.* at 402.

191. *Id.* He notes that imitation of another’s expression is not inauthentic per se. Rather, it is just not *as* expressive—it has less “potential for self-realization”—than “original expression.” *Id.*

192. *Id.* at 412–15. Netanel offers a separate, autonomy-based argument for continuing *control* of the work. *Id.* at 403.

193. *Id.* at 409–30; *see also, e.g.*, John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043–44 (1976).

194. Netanel, *supra* note 29, at 413–14.

195. *Id.* at 350–51. This is a function of Netanel’s approach rather than a criticism of his work.

that authors invest personality into their work, creating an “intimate bond” with it that deserves protection.¹⁹⁶ This section shows that inductivists face similar problems as deductivists at each step of the argument. With respect to step one, it demonstrates inductivists have difficulty defining personality with any clarity, frequently trading the concept for other, similarly ill-defined concepts like identity or the self.¹⁹⁷ Then, with respect to step two, this section explains why attempts to generate rights from an investment of personality are problematic. By focusing on the types of harms against which moral rights are supposed to protect, this Article shows that it is difficult to understand *in what* the author-work relation consists.

1. *Personality as the Self/Identity.* Most inductivists describe personality as either a form of “identity” or as a “self.” Under the Investment Theory, then, the author invests her identity or self in a work, which generates a special relation that warrants legal protection.¹⁹⁸ Yet inductivists have defined the terms “identity” and “self” in several different ways.

Arthur Katz, for example, quotes two separate sources to define identity.¹⁹⁹ One takes personality to mean something like *human identity*: “[T]hat which designates a human being as different from an animal: what makes him specifically a man.”²⁰⁰ The other views personality as *personal identity*: “[T]hose individualizing traits of a

196. Sarraute, *supra* note 23, at 465.

197. Personality is also sometimes swapped seamlessly for dignity or privacy. Lee, *supra* note 151, at 824–25 (discussing a dignity-based approach). For use of the concept in privacy, see Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 962 (1989); Charles Fried, *Privacy*, 77 YALE L.J. 475, 478 (1968); Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1891).

198. Stephen Munzer has described this idea as a theory of (but not full justification for) property. STEPHEN R. MUNZER, A THEORY OF PROPERTY 61–62 (1990). He says that “the operative image is that property rights are [intentional] *projections* of the body that result from *embodying* the person into external things.” *Id.* at 67. What is this supposed to mean? Similar accounts can be found in early privacy literature discussing personality. See, e.g., D.B. Resnik, *A Pluralistic Account of Intellectual Property*, 46 J. BUS. ETHICS 319, 326–27 (2003) (discussing Hegel and property).

199. In truth there are three, but one source is incomprehensible. Katz, *supra* note 15, at 390, 399 (quoting Smoschewer, *Das Persönlichkeitsrecht im Allgemeinen und in Urheberrecht*, found in 3 L'Archiv für Urheber–Film–und Theaterrecht 135 (Germany 1930)) (stating personality “includes all those secrets of life and their formation into a substance or essence, which, though detached from the external world, and endowed with purely personal characteristics, remains, nevertheless deeply affected by action in the external world”).

200. *Id.* at 399–400.

man which constitute his singularity and differentiate him from all other human beings.”²⁰¹ One might extend this latter concept to another: social identity—what an individual is regarded as in the society where she finds herself.

A slightly different version of personality, which riffs on both personal and social identity, is that of the self. Scholars have described personality as the “[i]nner-self,”²⁰² “innermost self,”²⁰³ “innermost being,”²⁰⁴ and “self.”²⁰⁵ This idea of personality as the “self” also seems to be a plausible interpretation of others scholars’ statements about personality.²⁰⁶ Because we all think we have a self and know what it is, the idea of investing our self into a work is intuitive.

Despite the intuitive appeal of personality-as-self, no inductivist has set out to define the “self,” let alone address the philosophical questions that underlie it (e.g., is there such a thing as a self? If so, what is it? In what does self-experience consist? and so on).²⁰⁷ And, therefore, no inductivist has attempted to explain *how* a self is or could be manifested in a work.²⁰⁸ This is a serious problem for moral right theorists. The first step of defining personality is crucial to understanding how it is invested in a work and why, if it is, it creates a relation that deserves protection.

201. *Id.* at 400. *See also* Hansmann & Santilli, *supra* note 4, at 102, 110 (discussing why inventors do not receive moral rights, and arguing that “personal identity” may do some lifting: “A plausible justification for this distinction between inventors and artists is that the marketability of an invention has little relationship to the *personal identity of the inventor* and, in particular, to the other items that the inventor has patented.” (emphasis added)).

202. Katz, *supra* note 15, at 381.

203. *Id.* at 401.

204. JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 423 (5th ed. 2007).

205. Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 23 (2001); Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 45 (1998).

206. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (“When 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 and subjects it to the ravages of public use.”); e.g., Damich, *supra* note 55, at 4 (“[W]orks of art are expressions of the creative personality of the author.”).

207. *See* Lee, *supra* note 151, at 840 (accepting “the view that the created work reflects the author’s person and personality” but not defining either and arguing for a dignity-based approach to justify moral rights). *See generally* 2 JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, Chapter 27 (1694); DAVID HUME, *A TREATISE OF HUMAN NATURE*, pt. II, § VI (1739); KATHLEEN V. WILKES, *REAL PEOPLE: PERSONAL IDENTITY WITHOUT THOUGHT EXPERIMENTS* (1988); DEREK PARFIT, *REASONS AND PERSONS* (1984); JOHN PERRY, *PERSONAL IDENTITY AND THE SELF* (1984).

208. Hughes’ account comes the closest by describing personality *interests*. *See supra* Section IV.A. But this is not an explanation of how the *self* manifests in the work.

These are significant problems. Without a definition of personality, it is hard to understand how it can be invested into a work. Perhaps it is true, as one scholar has noted in defending the concept of dignity, that the “words we use to identify and describe basic human values are necessarily vague and ill-defined.”²⁰⁹ But this seems to elude the problem by describing it as insolvable. Indeed, the fact that our core values could be so ill-defined means we should be careful to ensure that we define them carefully before we rely on them to grant important legal rights.

2. *Protecting Personality.* Although inductivists lack a workable definition of personality, their method has the benefit of starting with rights and working backwards to interests or theories that justify the rights. That is, their goal is to show that rights protect certain interests, and that these interests give life to the definition of personality. In what follows, this section explains how scholars have used harms, interests, and values to define personality generally and the need for various moral rights specifically.

What are these interests? Some try to find them by taking the metaphor of the self literally. Martin Roeder has argued that moral rights generally protect against something analogous to “bodily injury.”²¹⁰ Roberta Kwall seems to suggest something similar, arguing the rights prevent “assault[s]” on the author’s “personality [as it] is embodied in the fruits of her creation.”²¹¹ The work, in this view, is in some sense a part of the author’s physical body. Harms to the work are analogous to harm to the author’s body. But this is a claim about what the work is. And it is not clear how “unauthorized (and possibly temporary or nondestructive) alteration of some *thing* causes an objective injury to someone.”²¹² Because inductivists do not answer this question, suggesting the work is part of the person is more a rhetorical point than a substantive argument.²¹³

209. Bloustein, *supra* note 197, at 1001.

210. Roeder, *supra* note 206, at 564 (“Moral rights . . . may not, therefore, be assigned; in general, however, they may be effectually waived before or after violation just as a blood donor, or boxer, waives his right against bodily injury.”); see MERRYMAN ET. AL., *supra* note 204, at 422; see also Kwall, *supra* note 205, at 24 (quoting 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, 4 (1988)); Liemer, *supra* note 205, at 43.

211. Kwall, *supra* note 205, at 24.

212. Beyer, *supra* note 17, at 1091. The point is a good one, though it is not clear what “objective harm” is supposed to mean. The law attempts to correct for “emotional” harms, and other harms, such as “pain” which are not “objective” in the sense that Beyer uses the term here. See RESTATEMENT (THIRD) OF TORTS: REMEDIES § 20 (AM. L. INST., Tentative Draft No. 2, 2023).

213. Interests, even personal interests, can be violated by damaging a thing or another. But that is not the issue. Personality theorists must explain how (1) this harms “personality,” which (2) justifies legal protection.

Others take moral rights as designed to protect specific interests, including the author's spiritual interest; feelings, "intentions," or "artistic vision";²¹⁴ and honor and reputation.²¹⁵ For others, such as John Merryman, Albert Elsen, Susan Liemer, and Simon Stokes, personality interests include things like dignity and privacy.²¹⁶ For Roberta Kwall, injuries to personality harm the author's "honor, . . . artistic spirit," "human spirit," "individuality, . . . freedom," "dignity, self-worth, and autonomy."²¹⁷ Personality may also include—for some like Katz—collective or cultural interests.²¹⁸ Society, in other words, may have an interest in preserving a particular work of art. Perhaps the best way to characterize the harms and interests at stake, then, is in terms of an artist's noneconomic interests.²¹⁹

Sometimes, these interests are made more concrete by invoking them in the name of specific rights. Yet this invocation tends to remove the concept of personality from discussion. Consider the rights of divulgation and withdrawal, which most scholars, either explicitly or implicitly, seem to ground in liberty or autonomy.²²⁰ These other concepts, however, are not explained in any way that sheds light on the relation that personality investment is said to create. Damich and Kwall seem to invoke a concept of liberty to justify the rights of disclosure and

214. This was the view of H. Desbois, who described two authorial interests, one being purely intellectual—these are "preoccupations, scruples, [and] regrets" accompanied by a work that "betrays [the author's] ideal[s]." SAUNDERS, *supra* 21, at 95 (quoting HENRI DESBOIS, *LE DROIT D'AUTEUR EN FRANCE* 276 (3d ed., London: Nonesuch Press 1978)).

215. Katz, *supra* note 15, at 404, 406.

216. See Liemer, *supra* note 205, at 43–44. Simon Stokes parrots Merryman and Elsen nearly exactly. He endorses both the investment rationale and the Merryman-Elsen tripart scheme of harms. For some, he says, "the personality of artists as expressed in their creations benefits from protection as a propriety [moral] right." SIMON STOKES, *ART AND COPYRIGHT* 65 (2003); MERRYMAN ET. AL., *supra* note 204, at 422–23. But, he notes, personality may also mean something like "particular meaning[]" over which the artist alone should have control. STOKES, *supra*, at 65 (quoting L.A. Byer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 N.W.U. L. REV. 1011, 1027 (1988)). On this view, personality means something like the "inner self." Following Merryman and Elsen, he says that "[t]o mistreat the work of art is to mistreat the artist, to invade his privacy and impair his personality." *Id.* So Stokes adds one additional interest—control over meaning—but doesn't explain the basis for that control. *Id.*

217. Kwall, *supra* note 205, at 5, 15, 23, 25. Kwall does not explain in what "dignity" consists. *Id.* at 5. Some have even tried to analyze moral rights in terms of economics and incentives. See generally Lindsey A. Mills, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, 90 TEX. L. REV. 443 (2011); Hansmann & Santilli, *supra* note 4. Others note that, although not focused on economics, they may have an economic effect. Liemer, *supra* note 205, at 55–56.

218. See Katz, *supra* note 15, at 404–05.

219. See Roeder, *supra* note 206, at 557.

220. Kwall, *supra* note 205, at 18–19.

withdrawal.²²¹ The right of disclosure for Damich protects the author's right to decide how to project her personality.²²² For Kwall, the right to divulge a work gives the author control over the creative process.²²³ On Liemer's view, similar notions of liberty and freedom of choice support the rights of withdrawal and disclosure. These rights protect the author's relationship with her work—whatever that may be—by giving the author control over the creative process.²²⁴ Some of the mental harms that may arise from disruption of this relationship are mental distress and disappointment. These occur, of course, in everyday life as well, and proponents of divulgation/withdrawal rights need to show why the law should protect against them in the case of copyrightable works.

These descriptions mix both harms and values. Infringement of liberty, it is argued, is a harm unto itself *and* a harm to the author's mental state. These arguments about liberty, though, are curiously similar to Kant's conception of speech and one's right to make speech on her own terms.²²⁵ The relation between the author and the work on this view is not clearly articulated. Nor, for that matter, does personality necessarily seem to be an embodiment of the self; the speech itself *originates* from the author, but need not be "part of" the author.

Related issues crop up when scholars discuss the interests protected by the right of attribution. Roeder, for example, argues that the author is entitled to communicate with the public under her own name to facilitate self-definition.²²⁶ Edward Damich suggests something similar, claiming that moral rights protect the author's "ability accurately to reflect the author's personality."²²⁷ For others, like Katz, Liemer, and Kwall, the right of attribution preserves the author's "concrete" and "intensely personal" relationship with a work by allowing the author to present herself *as she wishes*.²²⁸ Stewart Sterk has characterized this as

221. See Damich, *supra* note 55, at 8; Kwall, *supra* note 205, at 23–24, 23 n.99. Roeder seems to do the same for the right to create (or not). See Roeder, *supra* note 206, at 557.

222. Damich, *supra* note 55, at 8.

223. Kwall, *supra* note 205, at 23.

224. Liemer, *supra* note 205, at 53–54.

225. See Kant, *Wrongfulness*, *supra* note 47, at 35.

226. See Roeder, *supra* note 206, at 561–62.

227. Damich, *supra* note 55, at 4.

228. *Id.* at 14 ("This focus highlights the purpose of personal rights: protecting the work as a projection of the author's personality."); Liemer, *supra* note 205, at 47–49; Kwall, *supra* note 205, at 12–13, 15, 22–23; see Katz, *supra* note 15, at 387. Despite the apparent

“protecting authors[] . . . work . . . to protect their self-conceptions[; i.e.,] to maintain a sense of identity.”²²⁹ Both of these accounts, like those offered in support of the right of divulgation, seem to emphasize the author’s ability to define her “self”—her ability to choose when and how she presents herself as an author.

But the assertion raises a number of questions. The most obvious are related to the foundation that forms the basis for the claim: What is a self, how can it be defined through creative expression, and why providing moral rights is central to protecting this ability? And just what is the “concrete relationship” that is protected? Another relates to the interest in self-definition. If self-definition is the objective, then the right should not be limited to creative expression unless we can reliably distinguish between creative expression and other activities. And if the right is limited to creative expression, it will need to account for the interest in self-definition that others have in using the author’s work.

Here, the right functions as a bootstrapping mechanism for the relationship: the right protects the relationship, and the relationship requires the right. But what is the relationship?

Similar issues pervade discussion of the interests protected by the integrity right, which include not just self-definition but also respect, honor, and reputation.²³⁰ Liemer, for example, argues that moral rights are designed to encourage “respect for the art work, its creator, and the process by which she created.”²³¹ But she also thinks the integrity right is central to protecting the creative process, and in describing the harm that befalls a creator, calls violations of moral rights a “slap[] in the face.”²³² Damich, by contrast, views the integrity right as protecting personal liberty or self-definition: the ability to control whether and how one projects herself to the public.²³³ And Kwall grounds it in a “guarantee[] that the author’s work truly represents her creative personality.”²³⁴

similarity with Kant, Damich’s conception is too individualistic to fit into Kant’s theory of communication. See Kant, *Wrongfulness*, *supra* note 47, at 35.

229. Sterk, *supra* note 154, at 1239. Yet on Sterk’s view, personality rights are about Hegelian property—and so do not lend support to moral rights. See *id.* at 1240.

230. An example of noneconomic harm Roeder provides is publishing works “in a manner harmful to [the artist’s] honor and reputation as creator.” Roeder, *supra* note 206, at 557. As to the right against excessive criticism, Roeder offers neither legal nor philosophical justification; he merely asserts its existence. *Id.* at 572.

231. Liemer, *supra* note 205, at 50–51.

232. *Id.* at 50.

233. Damich, *supra* note 55, at 15.

234. Kwall, *supra* note 205, at 23.

The questions here are similar to the ones raised above. Why do the interests or values at stake—e.g., liberty, respect, autonomy, self-definition—give rise to the right or the relation between the author and her work? Why, for example, does the right of integrity exist as the presumption, later to be weighed against the interests of others?²³⁵ Why not make the default position the interest of the public? And to the extent they are supposed to shed light on the nature or content of personality, these general values do very little. Nor do they, in any substantive way, sketch out how the author has a special relationship to her work. While it is possible that some of these values could ground this relationship, they have not been adequately explored by the scholars discussed in this section.

C. *Lessons from Modern Personality Theorists*

Both deductivists and inductivists rely on personality, though to varying degrees, to argue for moral rights. The problems that plagued early moral rights theorists also bedevil modern scholars. One challenge scholars have is articulating what personality means. Defining personality—whether in Hegelian or Kantian terms or by using concepts like “self” or “identity”—simply begs the question of what those concepts mean. Without this definition, it is hard to understand precisely what is invested in a work when the author creates it, or why special rights are needed to create any resulting author-work relation.

Scholars have not been able to solve this problem by working backward from rights to interests. When scholars try to articulate the interests or harms at stake when moral rights are violated, the results are similarly diverse.²³⁶ As Michael Spence notes, personality seems to carry meanings ranging from reputation to self-expression to self-presentation.²³⁷ But it also seems to mean dignity, liberty, autonomy, and honor.²³⁸ In short, “there does not appear to be a single, coherent creator interest that argues for a system of Moral Rights; in fact, there are several such interests,

235. It does seem that at some point in any moral rights framework, rights and interests are weighed against one another. Perhaps not all theorists engage in this explicitly, but most are aware that personality interests are not a universal trump card.

236. Mere disagreement over the content of a concept of course, does not necessarily render the concept unintelligible or vapid. But when scholars cannot articulate the basic features of a concept, the fact that they employ diverse and opaque conceptions should give us pause.

237. Spence, *supra* note 154, at 399.

238. Beitz, *supra* note 16, at 335, 343–44, 351.

and they do not always travel together.”²³⁹ However, there is no account of why these particular interests are implicated by the Investment Theory.²⁴⁰ And there is even less discussion about how these interests conflict or interact with other, potentially competing interests.

Perhaps this is why William Fisher III has called personality theories “too abstract and thin.”²⁴¹ They fail, in other words, to give any full account of personhood. In his view, there are no less than ten (10) interest-based arguments for (property) rights from the personality perspective. He lists them as (1) peace of mind; (2) privacy; (3) self-reliance; (4) self-realization as a social being; (5) self-realization as an individual; (6) security and leisure; (7) responsibility; (8) identity; (9) citizenship; and (10) benevolence.²⁴²

Reliance on other interests or values²⁴³ raises questions about why they ought to justify special authors’ rights. And even if moral rights represent “a compound” of personal rights or interests,²⁴⁴ it is hard to understand why they cohere or on what grounds they are justified. Fisher argues that personhood-style arguments for intellectual property rights must be found, if at all, in the interests of privacy, individual self-realization, identity, and benevolence.²⁴⁵ But, he says, no one can agree on the weight or contours of each interest.²⁴⁶ While consensus isn’t a requisite of theoretical coherence, scholars have yet to provide much substantive argument supporting the claim that they generate special authorial rights. In short, the idea that one can sustain a personality-based justification on a deflated version of personality is possible, but it requires more than simply identifying specific interests and nominating them for legal protection. Even then, calling the justification one based on personality would be misleading.

239. *Id.* at 340.

240. *See generally* Simon, *Copyright and the Social Self*, *supra* note 3.

241. Fisher, *supra* note 10, at 191.

242. *Id.* at 189–90.

243. Ladas thought these “three” rights could be broken down into at least five: the right to create; the right to communicate; the right to modify; the right to withdraw; and the right to destroy. LADAS, *supra* note 60, at 594.

244. Katz, *supra* note 15, at 390–91. This, he argues, means that no one definition of the term moral rights exists; instead, definitions matter only as to the scope of the right (which presumably is a matter of preference). *Id.* at 390–99.

245. Fisher, *supra* note 10, at 190–92.

246. *Id.*

V. MORAL RIGHTS WITHOUT PERSONALITY

This part moves beyond personality but not the person. Comparing existing civil law protections of the person to moral rights protections, it argues that reputational interests best capture what moral rights protect. However, doing so requires confronting several practical and theoretical challenges, which this part addresses by transparently identifying and weighing all relevant interests involved.

Section A asks whether existing civil law may provide some insight into the kinds of interests moral rights purport to protect against. Drawing on tort law, it identifies two principles that limit the scope of actions that harm personal interests and contrasts them with actions potentially prohibited by moral rights. Section B then uses Hughes's framework to ask whether the author's *interests* can serve as the basis for moral rights. It argues that using these interests as the basis for new rights faces challenges because they lack features that traditionally limit the nature and scope of rights that protect personal interests. Section C concludes by identifying the nub of the problem, regardless of whether the interests are good candidates to justify rights: how ought these reputational interests be weighed against other interests? In answering this question, it argues that special authors' rights may be difficult to justify given the limiting principles identified in Section B.

A. *From Selves to Personal Interests*

Individuals already enjoy protection for injuries to their person in civil law.²⁴⁷ So if the work is indeed some extension of the person, then it is worth asking whether moral rights represent a justified extension of the existing rights covering persons.²⁴⁸ Doing so achieves two aims. First, it re-emphasizes the limits of the investment/self-metaphor. Second, it demonstrates that the law carefully limits its recognition of psychological and personal harms. At the very least, this should make us suspicious of the assertion that the author's protection from psychological harm is significant enough to deserve special rights.

247. See generally RESTATEMENT (SECOND) OF TORTS (AM L. INST. 1965).

248. The law's recognition of a harm, of course, is not a justification for that recognition. The law may be wrong to recognize moral rights at all, or it may be wrong because it doesn't recognize them in strong enough form.

We can drive home the first point quite easily by considering the obvious fact that a work is not (part of) a physical body. Since the two are separate, the harm that befalls a mutilated body is different than the harm that befalls a mutilated work. Although this analogy is imperfect, it may nevertheless capture something important about the similarity of interests at stake when bodies or works are violated in some way.

Unfortunately, it is difficult to know what this similarity might be. Indeed, it is precisely because the *thing at issue* is *not* similar in both cases that the interests implicated by them seem categorically different. Intentional torts, like assault and battery, are fundamentally about the individual interest in bodily autonomy: actual or potential physical harm to an individual *person*.²⁴⁹ Moral rights, by contrast, are about harm that occurs because of actions affecting *works*.²⁵⁰ If the author is harmed, her physical body is not. Whatever it's like to watch someone burn a copy of your painting, it is decidedly different from watching them throw a Molotov cocktail at your face.

Burning a masterpiece may not injure the author's body, but it may damage her mind. Law recognizes harm without physical injury in limited circumstances.²⁵¹ Here the design and purpose of common law and moral rights protections may overlap or converge; but in so doing, they show several important principles that may prevent a merger.

Suppose, for instance, someone intentionally burns an author's original and only version of her life's work or otherwise "mutilates" it. Depending on the circumstances, tort law may recognize harm for the author's psychological injury through a doctrine like intentional infliction of emotional distress. For example, if the tortfeasor *knows* the individual highly values the work, would be devastated by its destruction, and intends to cause her to suffer severe emotional distress, the law may provide redress.²⁵²

249. See generally RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1965); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 32 (3d ed. 1964). Sometimes even third parties may have claims when others negligently cause them purely emotional harms. *E.g.*, *Dillon v. Legg*, 441 P.2d 912, 924–25 (Cal. 1968); see also *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 549 (1994) (applying the zone of danger test in the context of a federal statute and noting the split among states between the zone of danger test and the *Dillon* rule).

250. *Mass. Museum of Contemp. Art Found., Inc. v. Büchel*, 593 F.3d 38, 46–49 (1st Cir. 2010) (discussing the actions of the Museum in covering Büchel's work with a tarpaulin).

251. Examples include assault, intentional infliction of emotional distress, and negligent infliction of emotional distress. *E.g.*, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (assault); *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292, 294 (Colo. App. 1982) (intentional infliction of emotional distress); *Robb v. Pa. R.R. Co.*, 210 A.2d 709, 709 (Del. 1965) (zone of danger).

252. The conduct must also be outrageous. See, e.g., *Peltier v. Sacks*, 328 F. Supp. 3d 1170, 1183–84 (W.D. Wash. 2018) (holding removal of a painting from an art exhibition

But where knowledge of the author's susceptibility is less certain—or more significantly where what is destroyed or altered is one of many *copies* of the author's work—the claim will probably fail absent some special circumstances.²⁵³ The reason: when a tortfeasor damages or destroys property, even a 200-year-old family heirloom, the owner cannot recover damages for sentimental value or emotional distress.²⁵⁴ It is precisely this fact—that actions with respect to a *copy* of a work rather than either the unique original work or the person herself—that makes it fundamentally different from the personal *bodily* interests implicated by torts like assault, battery, or intentional infliction of emotional distress. It also distinguishes it from damage to property, or even quasi-property claims like misappropriation of identity.²⁵⁵ Perhaps this is why the Restatement explicitly singles out the author and denies her recovery for “sentimental” value or “emotional distress” when her manuscript is destroyed.²⁵⁶ For authors, there is no physical threat to an actual body, a person, animal, or even to a material thing, but rather a metaphysical threat to a “copy” of a thing. At this point, the interests that previously seemed to converge begin to split apart.

The tort of intentional infliction of emotional distress highlights the law's skepticism toward recognizing a psychological injury without accompanying physical contact.²⁵⁷ If private law takes a pause before

after receiving complaints about the artist was not extreme, atrocious, or utterly intolerable conduct, and did not meet the outrage standard).

253. It may recognize the harm independent of any knowledge of special susceptibility.

254. *Pickford v. Masion*, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (holding that sentimental value was not a factor to consider for extending liability for injury to a pet); *cf.* *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (allowing recovery for emotional harm resulting from “malicious injury” of a pet). Exceptions to the rule are narrow and involve damage to a unique physical object coupled with further wrongful intent (like maliciousness or fraud). *E.g.*, *Schroeder v. Auto Driveaway Co.*, 523 P.2d 662, 671 (Cal. 1974) (malice, fraud, or oppression). Sometimes they involve both malice and harm to pets. *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 600–01 (Cal. Ct. App. 2012) (emotional damages recovery for trespass to chattel (dog)). *See also* RESTATEMENT (SECOND) OF TORTS § 927 cmt. m (AM. L. INST. 1979) (suggesting emotional harm may be recoverable when deprivation of property results in “humiliat[ion]”).

255. *E.g.*, *Petty v. Chrysler Corp.*, 799 N.E.2d 432, 443 (Ill. App. Ct. 2003) (“[M]ental suffering and distress could be expected and constitute actual damages in misappropriation of identity cases.”).

256. RESTATEMENT (SECOND) OF TORTS § 911 cmt. e (AM. L. INST. 1979). Punitive damages may be awarded in cases where property is “wantonly destroyed.” *Id.* Here, section 911 is somewhat in tension with section 927.

257. RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (AM. L. INST. 1965). For a dignitary conception of this tort, see generally Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101 (2021). Even on a dignitary conception, the limits on this tort are still cabined as described.

recognizing purely psychological harms to an individual person caused by another's action *directed to that person*, then we should take a particularly long beat when personality theorists insist on expanding the concept of harm to cover psychological harms that result from *all kinds of actions not necessarily directed toward anyone*. The animating principle here is this: law tries to keep personal, and particularly psychological, harms tightly tethered to *the individual* (and her body) rather than the things *merely* produced by or associated with the individual (or her body).²⁵⁸

Defamation helps to underscore this point, as well as another. Under circumstances that vary by jurisdiction and person, an individual can sue another who injures their reputation by making a false statement of fact about them.²⁵⁹ A critic, for example, says the author has stolen the work of another artist and passed it off as her own. Unlike intentional infliction of emotional distress, where tortious action is *directed to a person*, defamation allows recovery for tortious statements made *about the individual*. Thus, while the harm in question may be less physical, the tort demands a strict connection between the personal interest protected (reputation) and the action causing harm (statement about the individual).

The second important point is that by requiring a statement of fact about the individual, defamation places objective limits on recovery.²⁶⁰ This distinguishes it from other kinds of statements or communications, such as those that use another's work for some other purpose (e.g., making new work or commenting negatively on the original).

Moral rights seem to lack both characteristics. They prohibit what others do with the author's *work* rather than what others can say *about the author*. If harm is considered reputational, for example, moral rights miss the tight connection to the individual demanded by tort law because what causes harm is a *use* of a work rather than a statement about *the author*.²⁶¹ Because the statement is not necessarily or typically about the author, the objective check on reputational harm seems missing.²⁶²

258. The exceptions for emotional harm generated by damage to property involve some wrongful intent beyond mere intentional destruction. See *supra* notes 251–56 and accompanying text.

259. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

260. RESTATEMENT (SECOND) OF TORTS § 621 (AM. L. INST. 1977) (limiting recoverable damages to proven, actual harm).

261. While it is possible to imagine cases where a use might be considered a statement about the author, most uses seem to represent a different category of communication altogether.

262. An objectivity component is still possible, as explained *infra* in Section V.B.

These two differences suggest that moral rights require additional justification. In other words, the reasons supporting moral rights should be stronger than those supporting defamation. What we have seen, however, is that the reasons given for supporting moral rights grounded in personality theory are somewhat ethereal. Instead of providing a justification for the rights, personality *theory* papers over exactly what harm occurs by asserting the existence of the author-work relation. Without the concept of personality, it is hard to understand what is so special about the use of an author's work that justifies moral rights. That is the question to which the next section turns.

B. *Personal Interests Without Personality*

Because personality has proved problematic in both understanding and justifying moral rights, this section explores what *interests* authors might have in moral rights. It argues that the primary interest protected by moral rights is reputational, and that lessons from Section A might help us understand how best to protect them. It concludes by arguing that it is challenging to identify why these rights ought to apply to different types of works.

1. *Interests.* What interests might authors have in their works? Hughes identifies three—creativity, sourcehood, and intentionality.²⁶³ This is a good start. And if we separate these interests from the concept of “personality,” we can start to see more clearly what is problematic about a use moral rights might protect, such as publishing an altered version of the work. Interests like sourcehood, creativity, and intentionality here are important not because of some ineffable link to the work, but because people assume that the work is authored by a particular individual.²⁶⁴ And in communicating the work, the person may have a particular intentional stance. That intentional stance can be recognized, if at all, by identifying them as the individual who took it. To put things differently, when Taylor Swift publishes a song, she communicates some message through the song. For her to communicate this message, and to communicate it as her message, she must be identified in some way as its source. Sourcehood, creativity, and intentionality interests are therefore connected in an intimate way. This has nothing to do with her

263. Hughes, *Personality Interests*, *supra* note 155, at 180.

264. Recent advances in artificial intelligence and machine learning may change this assumption.

“self” or even “the work” and everything to do with how people perceive her—namely, her reputation.²⁶⁵

What is the nature and scope of such reputational interest? The remainder of this section analyzes the first of these two issues. Consider another’s action that causes a third party to misinterpret the author’s intentional stance—a potential violation of either the attribution or integrity rights. Here the author may have wished to convey a particular message or idea, but another’s action caused some kind of adulteration of the message or idea. Harm “in the air” here won’t do;²⁶⁶ it must be conceived of in terms of the author’s interest of intentionality *and* source/creativity interests. If the artist is Taylor Swift, she may suffer economic harm—like lost sales—when her intentionality, her message, is adulterated because people think she conveyed a message she did not.²⁶⁷ But in many cases, the author may suffer some other, sometimes noneconomic harm—such as negative perceptions or psychological harm.

Maybe the interests of intentionality, creativity, and source are strongest at the point of *initial* communication and protecting that interest is justified. But there are two problems here. One is that if the interest is conceived of too broadly, then the right could cover *any and all* people engaged in communication with the public, including “mass produced products of, say, elegant design.”²⁶⁸ Another is that Kantian arguments, which are grounded in duty rather than interests, regard duty as bilateral: it runs both from and to the author.²⁶⁹ A bilateral discussion of duties suggests one for interests as well. What interests, for example, does the audience have in the intentionality, source, and creativity of the author’s communication? And what interests to others have that compete with the authors? That subject is explored in Section C.

To more concretely identify the harm to these interests, consider for a second a potentially more obvious example: intentional or reckless actions by which one intends to cause a misinterpretation—or to otherwise harm interests of

265. For a self-centered approach, albeit a social one, see generally Simon, *Copyright and the Social Self*, *supra* note 3.

266. *Martin v. Herzog*, 126 N.E. 814, 816 (1920) (Cardozo, J.) (quoting FREDERICK POLLOCK, *THE LAW OF TORTS* 472 (10th ed. 1916)).

267. A use might also act as a market substitute, but that is an economic harm already addressed by copyright law. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–69 (1985).

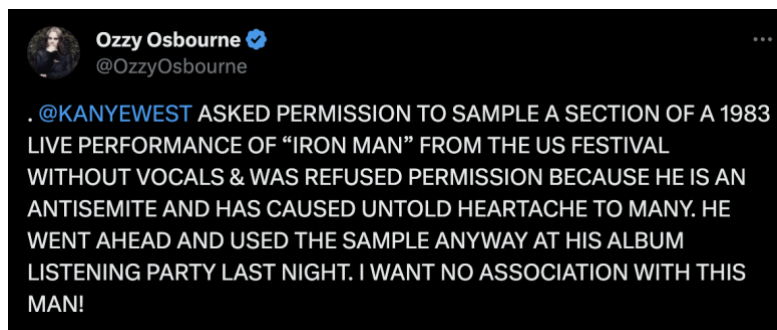
268. Beyer, *supra* note 17, at 1108.

269. See, e.g., Treiger-Bar-Am, *supra* note 148, at 1091–92.

intentionality or source. While such actions seem like good candidates for the basis of integrity or attribution rights, we must be careful not to recognize them too quickly. Sometimes the point of the use—the action by another—is to change the message or one's interpretation of it. Because the harm to the author cannot exist “in the air,” saving the interest requires tying intentionality to sourcehood; i.e., when, because of another's deliberate action, the audience incorrectly understands the adulterated communication or idea to *originate with the author*.

This is why it seems strange to provide, for example, Ozzy Osbourne with any special rights to prevent Kanye West from using samples of his songs or making some kind of disclaimer or attribution claim. Osbourne's objection is one of *association*. But even if one knows that the *sample* originates from Ozzy Osbourne, they also know that Kanye West's song *using* that sample does not.

Image 1. Tweet from Ozzy Osbourne.²⁷⁰



In other words, deliberate actions must be coupled to a particular audience's perception that the author was the source of the work. Which audience and how it is assessed are separate questions. This looks very familiar. It looks like the land of reputation, not personality.²⁷¹

270. Ozzy Osbourne (@OzzyOsbourne), X (Feb. 9, 2024, 5:37 PM), <https://x.com/OzzyOsbourne/status/1756100047056564602?s=20> [<https://perma.cc/SQ4W-YM27>].

271. Even the Berne Convention, which helped to codify moral rights around the globe, extends protection “to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author's] honor or reputation.” Berne, *supra* note 3, at arts. 1, 6bis(1) (emphasis added). Its net is wider, however, including “honor” and a variety of actions that may harm reputation that may not be justified, for reasons discussed. Of course, questions of source raise questions of *agency* and free will. See Goold & Simon, *supra* note 176, at 865, 868. While these questions are outside the scope of this Article, they present a potential challenge to a regime grounded on source-based interests.

Reputation ties rights of attribution and integrity to sourcehood, intentionality, and creativity interests in an obvious way. Failure to attribute may cause reputational harm because the person is not recognized as the source of the achievement or message; false attribution to the author has potentially altered the author's reputation by imputing her as the source of a message that didn't originate with her. Thus, while attribution may seem to protect only a sourcehood interest ("that was *me*") it also is intimately connected with the potential intentionality of the thing itself ("I meant *that*"), as well as creativity interests ("that is *my* expression").²⁷²

The same may not be true for a sourcehood interest, which might independently generate a reputational concern worth protecting. While our interest in sourcehood may vary by context, one general idea—an idea that goes back to, but by no means needs to rely on, Hegel—is that we have an interest in being recognized for what we do. One might charitably read Gareis to have meant this when he said that moral rights protect the author's "faculties as such."²⁷³ Here, the concern can be recast in terms of attribution, not of our personhood, but of our actions.

Consider a few examples. Professors care a great deal about their work being cited and their ideas attributed, at least in part, because it shows they are clever or influential. An author may care about attribution because her book is considered well-written. A sculptor may desire attribution because, without it, she has no prospect of success. Attribution in each case is not *just* a tool for self-recognition, but rather, or perhaps more poignantly, to help others figure out what to think about the author (and for the author to figure out what others think about her).²⁷⁴ In this way, sourcehood contributes to our reputational interest by helping others identify us by our actions. Yet if our achievements are of no consequence to our reputation, then failing to attribute them to us seems to cause no harm.

272. The connection may be stronger or weaker depending on the work and how one broadly or narrowly one conceives of intentionality. For example, a painting may be recognized as masterful independent of the author's intentional stance; but the artist's intentional stance can be construed to include the things she intended to do that made the work great. Perhaps here what ties attribution and intentionality is creativity interests.

273. *Commentary on: Gareis: The Juridical Nature of Author's Rights*, *supra* note 82, at 195.

274. This may not be the only purpose. The authors may also care about being recognized because it makes them feel good or shows them "respect."

Reframed this way, interests like sourcehood and intentionality are recognized because they affect one's reputation, not because they are in themselves special "personality" interests specific to moral rights. Intentionality, creativity, and source are tied together and to reputation because, without sourcehood, distortions of the author's intentionality don't seem to harm her reputation. Thus, violations or harms to intentionality interests must, at least on a reputational view, be coupled with violations or harms to a sourcehood interest.

Maybe these reputational interests are significant enough that law ought to protect them in some way. If so, the civil law's approach to personal harm discussed in Section A may provide guidance on how to protect them. Recall that civil law often imposes two constraints on recognizing psychological or reputational harm. One is some objective standard to measure harm. To state a defamation claim, for example, the statements made by another must be factual.²⁷⁵ For intentional infliction of emotional distress and assault, either the harm suffered or the reaction that is the basis for the harm is evaluated using an objective standard.²⁷⁶ The second is that statements are *personal*: they are *about the person* or reflect directly on the person's reputation, and not, say, a judgment about the relative merits or demerits of, or a comment on, their artistic style. The statement *Frank defrauded his company out of a million dollars* is different in kind from *the use or modification of a painting Frank made*.

In some ways, moral rights may be able to respond easily to these constraints. But in other, more fundamental ways, it may have trouble doing so. Consider first that reputational injuries are subjective assessments. This is true, of course, for defamation but there it is cabined by the objective nature of factual inquiry.²⁷⁷ Other areas that protect reputational interests, like the intentional tort of battery or trademark infringement, also have some objective component (e.g., reasonable person) that limits the reach of the law.²⁷⁸ Moral rights could impose such a requirement, perhaps by making the potential

275. See RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977). Facts are slippery, no doubt, but they are different from interpretations of facts or other kinds of expressive communication. See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (holding opinions can give rise to defamation when they reasonably imply false and defamatory facts).

276. RESTATEMENT (SECOND) OF TORTS §§ 21, 46 (AM. L. INST. 1965).

277. See *supra* note 260 and accompanying text. This is true in trademark as well, where source confusion is a subjective inquiry but coupled with a reasonable person standard to inject some objectivity. See, e.g., *In re I.A.M.Symbolic, LLC*, 866 F.3d 1315, 1319, 1322 (Fed. Cir. 2017).

278. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965) (defining offensive contacts); see also *I.A.M.Symbolic, LLC*, 866 F.3d at 1319, 1322.

attribution and integrity rights turn on an objective assessment of what a reasonable interpreter would perceive.²⁷⁹

A harder problem to solve, at least in some cases, is tying the use to a statement or communication about the person. Uses of works, as noted above, need not be about the author to cause some kind of reputational harm. So, rights prohibiting uses of a work that cause reputational harm seem to be a mistake unless the use concerns a statement “about” the author. But uses frequently require interpretation, and to widen the ambit of liability we need a principle that cabins its scope. Merely stating that the use must reflect poorly on the author’s reputation widens the ambit but also its scope. Requiring a statement about the author seems to cabin the scope but also the ambit of liability, bringing us to defamation or, if the injury is psychological and not reputational, then to intentional infliction of emotional distress.

Perhaps this is not such a big problem. If what matters to reputation is being the source of some message, then mistaken association as the source is the problem. Trademark law may be able to help here. Trademark law serves a number of purposes. One is an “information transmission function”—it communicates to consumers information about the source and the quality of goods to which the trademark is affixed.²⁸⁰ And by limiting others’ use of the mark on confusingly similar goods or services, trademark law also serves a reputational function: both firms and consumers can capture the value of reputation, and in some cases firms may have a *sui generis* right to protect the purity of their reputation.²⁸¹ Trademark law also contains some objective limitation on the reputational interest (the reasonable consumer), despite the subjectivity of its substantive assessment (i.e., likelihood of confusion, sponsorship, etc.).²⁸² Moral rights might work better, then, if framed in terms of trademark law.

279. For the standard in U.S. law, see 17 U.S.C. § 106A. There is some dispute about whether U.S. law requires a showing of reputational injury. *Compare* Canilao v. City Com. Invs., LLC, 613 F. Supp. 3d 1236, 1251 n.1 (N.D. Cal. 2022) (stating plaintiff need not plead reputational injury because violation of the right is the injury), *with* Kerson v. Vt. L. Sch., Inc., 79 F.4th 257, 269 (2d Cir. 2023) (requiring that “there be both (1) an intentional distortion, mutilation, or other modification to a work *and* (2) prejudice to an artist’s honor or reputation as a consequence thereof.”).

280. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 555–56 (2006).

281. *E.g.*, 15 U.S.C. § 1125(c).

282. *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015).

Limitations on trademark law, however, are different from intentional torts in an important way. Trademark law grounds harm primarily, though not only, in competition and consumer search costs rather than harm to the producer (or her psychological state).²⁸³ Of course, it's possible to refashion moral rights in the image of trademark law so that they reduce search costs or promote fair competition,²⁸⁴ but it is less clear that this vindicates the relevant reputational interest that matters. Trading on one's public image, as Professor Xiyin Tang puts it, is quite different from protecting reputational interests one may have in the communication of their work.²⁸⁵ And it may also, though not always, be different from a kind of passing off like Professors William Landes and Richard Posner have suggested.²⁸⁶

If we are unwilling to go along with the trademark-style arguments but not with purely economic artist-as-brand, then it is difficult to identify what reputational interest is at stake without reverting to arguments about communication or personality, which have their own significant problems. We have to find a middle ground. On the one hand, we needn't require the reputational interest relate "only [to] specific objects that the artist has placed into the stream of commerce with his 'brand' affixed."²⁸⁷ On the other hand, we *do* have to insist that there is some kind of direct link between the *use* of the work and the author sufficient to generate a reputational injury.

Now we are right back to the problem identified above: if the statement is not about the author in a direct way, it is challenging to show what that link is without pointing back to reputation. As a last gasp, we might try something like a false sponsorship or endorsement claim, but these claims are likely to fail precisely because an objective requirement should place strict limits on sponsorship claims given the nature of communication and the need to tie reputational interests to the author. This leaves us at a crossroads with no obvious path forward.

283. *E.g.*, *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002). Perhaps a notable exception is the cause of action for blurring by tarnishment, 15 U.S.C. § 1125(c)(2)(C).

284. Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 254 (2012).

285. *Id.* at 234.

286. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 259 (2003).

287. Tang, *supra* note 284, at 235.

2. *Scope.* If reputational interests justify or at least support attribution and integrity rights—through trademark or otherwise—there is still a question of how expansive or narrow the rights should be. The precise scope of a right is a context-dependent inquiry that must address others' competing interests (discussed in Section V.C). One can at least partially address it, however, by looking to the reputational interests implicated by the *type* of work itself—at least insofar as the work is thought to bear on one's reputational interests.²⁸⁸ That is, thinking through the types of works to which moral rights should apply may help us determine the relevant scope of reputational interests.

As it turns out, the task presents a central challenge for moral rights proponents. Hughes's response is to distinguish works, and hence interests, by creative *constraints*. He argues that harm is most acute where creators operate under weak constraints and less robust (perhaps nonexistent) where constraints are strong.²⁸⁹ Constraints are weak in domains like art but strong in science or engineering because the artist, unlike the scientist, has neither a problem to solve nor a mechanistic process by which she must solve it.²⁹⁰ This, according to Hughes, is a potential justification for providing moral rights to artists but not engineers.²⁹¹ Although Hughes makes this argument in the personality tradition, it could be applied equally to a reputation-centered justification of moral rights as well.

It is not clear, however, why constraints should be the proper limiting factor for certain interests. Perhaps an engineer is constrained by her task, but depending on the task, the author may be equally constrained by at least four factors. First, artists may be constrained by *content*. A story must follow a particular pattern, the characters a particular type, and so on. Deviating too far from this will yield either an incomprehensible story or a poor one. A review of recent movies also reveals a rather shallow stock of stories from which to draw—and so the screenwriter seems quite constrained by their project of storytelling. One is reminded of Kurt Vonnegut's famous graph that depicts the shape of three different stories.

288. Countries implementing Berne have taken a practical approach to implementing it, carving out various works from certain protections. In the United Kingdom, for example, the law explicitly denies the computer programmer the right of attribution and the right to object to the work's derogatory treatment. Copyright, Designs and Patents Act 1988, c. 4, §§ 79(2)(a), 81(2) (U.K.). In the United States, by contrast, the law does not explicitly deny these rights, but excludes them by definition (i.e., computer works are not covered). See 17 U.S.C. §§ 101, 106A.

289. Hughes, *Philosophy of IP*, *supra* note 152, at 342–43; see also Hughes, *Personality Interests*, *supra* note 155, at 157.

290. Hughes, *Philosophy of IP*, *supra* note 152, at 342–43.

291. *Id.*

Image 2. Kurt Vonnegut depicts the shapes of stories.²⁹²

Second, authors may also be constrained by medium. Sculptors cannot make novels, and the materials they use may be no different than those available to engineers. Indeed, engineering may be part of the design, and the design may be constrained by the idea, which could be considered similar to the function of a product. Third, culture and norms can constrain what the author expresses, either through the force of social convention,²⁹³ the more subtle normative restriction that delimits the imagination, or the limits of the content of the culture itself. And, finally, just like creators of all types, authors are constrained by *technology*. Compared to a musician today, a musician two hundred years ago was severely constrained in how she could express musical works. A piano may have been available, but what about a drumitar?²⁹⁴

292. David Comberg, *Kurt Vonnegut on the Shapes of Stories*, at 4:31, YouTube (Oct. 30, 2010), <https://www.youtube.com/watch?v=oP3c1h8v2ZQ> [<https://perma.cc/BYH7-Y2BB>]. Vonnegut actually submitted a thesis on the eight shapes of stories to the University of Chicago anthropology department, which rejected it. Stephen Johnson, *Kurt Vonnegut on the 8 "Shapes" of Stories*, BIG THINK (June 13, 2022), <https://bigthink.com/high-culture/vonnegut-shapes/> [<https://perma.cc/8HFU-PR8S>].

293. See, e.g., Jonas Holmgren, *George Orwell, The Freedom of the Press, Orwell's Proposed Preface to Animal Farm, 1945*, MARXISTS INTERNET ARCHIVE, <https://www.marxists.org/archive/orwell/1945/preface.htm> [<https://perma.cc/4D5L-M87G>] (last visited Mar. 6, 2024).

294. The SynthAxeDrumitar is a "guitar synthesizer . . . customized to play drum and percussion" by Roy Wilfred Wooten, also known as Future Man. *Future Man*, WIKIPEDIA (Oct. 24, 2023, 8:34 PM), https://en.wikipedia.org/w/index.php?title=Future_Man&oldid=1181722189 [<https://perma.cc/FSB4-Z2ZU>].

Image 3. Roy Wooten playing the drumitar, an electronic synthesizer instrument he invented.²⁹⁵



Should any of these constraints affect the author's interests or the rights that protect them? The obvious answer is no because all human activity is constrained by content, medium, culture, and technology. And to prioritize some types of works over others is to pass judgment about the nature of the interest generated by a contingent set of facts rather than the nature of the interest itself.

But the less obvious answer is yes because the contingency of everything affects how we conceive of interests and the rights that ought to protect them. Consider how the nature of technology affects the type of interest at stake. That is, if constraints help to distinguish between those deserving moral rights and those that don't, then certainly technological constraints on authors will affect the interests that law might protect. If this is true, then it makes a great deal of sense to protect computer code differently than paintings, not based on the creative constraints on computer programmers, but rather based on the constraints imposed by technology. Once this door is opened, however, one must grapple with how other differences in technology affect the interests moral rights seek to protect—photographs, digital renderings, and all the old debates that have yet to be resolved.

295. Stewart Oksenhorn, *Roy Wooten: Drummer of Invention*, ASPEN TIMES (Jan. 31, 2007), <https://www.aspentimes.com/news/roy-wooten-drummer-of-invention/> [https://perma.cc/ULN7-TCCD]

C. *Weighing Competing Interests*

Once relevant interests are identified, one must ask whether there are good reasons for protecting them with *rights*. This requires taking two further steps. First, one must provide a good argument that the rights are warranted. Second, one must weigh the interests protected by the rights against “(a) other individuals, (b) the organized public, [and] (c) society.”²⁹⁶

The second step is the hardest one to make. Choices must be made about both which interests count and their relative weights: author, other, public, and so on. What personality theory tries to do is fatten up the author’s interest so as to outweigh the others. Without personality theory, however, one must make an affirmative argument for placing a thumb on the author’s side of the scale.

Reputation, the previous section suggested, may provide a better picture of the interest authors have. While the interest is more concrete and identifiable, it also is less robust. Civil law has traditionally imposed limitations on the personal and psychological harms caused by others, including reputational harm.²⁹⁷ This suggests that moral rights will have to bear the full weight of not just the limitations but the interests those limitations are designed to protect: free speech, cultural exchange, creativity, and autonomy. Balancing these interests may yield particular rights that protect authorial interests, but they are likely to be far less robust than what personality theorists would suggest.

VI. CONCLUSION

Personality is a concept that has unified moral rights theorists. Yet scholars have struggled to define it with any kind of rigor or consensus. The concept has “become[] totally lost by awakening every conceivable response in every conceivable investigator.”²⁹⁸ The point of this Article was to show not just that the concept was difficult to define, but also that its definitional elusiveness presents a serious obstacle to crafting a moral rights theory based upon it. This is true not just for the modern proponents of the rights, but also their philosophical forebears. Although almost all personality theorists assert that the author’s investment of personality creates a link to the work that must be

296. Pound, *supra* note 141, at 354.

297. See text accompanying notes 277–81.

298. Gregory P. Stone, *Appearance and the Self*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES 86, 93 (Arnold M. Rose ed., 1962).

protected, they fall short of describing in any detail what personality is, how it is invested in a work, and why doing so should generate special legal protection. In showing that personality is a clumsy tool for crafting a justification for moral rights, this Article suggested better ones may be found in civil law, particularly civil law that protects reputation. While it stopped short of endorsing a reputation-based moral rights system, it offered some thoughts on why a reputation-based approach is more attractive than a personality-based one—and why it may be difficult to implement.