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RUMPELSTILTSKIN REVISITED: THE INALIENABLE RIGHTS OF SURROGATE MOTHERS

A surrogate mother provides a strange blend of intimate services and products. She permits a doctor to artificially inseminate her, carries a child to term, and in nine months delivers a newborn child to whoever hired her. She sells her ovum, her ability to nurture a single cell into an infant, and all her future claims to rear the child she bears. Her client can purchase, by contract, a series of promises. The surrogate mother will not smoke, will not drink, will see a doctor, and will follow certain medical procedures. She will not abort the child. And she will most certainly not keep it. Many contracts explicitly provide for specific performance of these promises in case the surrogate mother attempts to breach her obligations.¹ In an effort to protect all parties to these agreements, several states have considered legislation that would regulate surrogate mothering.² Many of the proposed bills authorize courts to grant specific performance of the surrogate mother's promise not to abort the fetus and her promise to give up the child when it is born.³

This Note evaluates the constitutionality of statutory authorization for specific performance of such promises.⁴ Part I sets forth and

¹ See Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982) (describing the provisions of a sample surrogate mother contract); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1310-1316 (1985) [hereinafter cited as *Proposed Uniform Act*] (proposing a uniform act that includes provisions for specific performance of these promises).

² See Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1654 n.67 (1984) (listing proposed bills to regulate the use of surrogate mothers); Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA) 3001 (Jan. 29, 1985); Note, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. REP. 107, 109 & n.18, 135-40 (1982) (discussing proposed legislation in Michigan).

Several states have considered prohibiting surrogate motherhood. See Pierce, *supra*, at 3003. The Supreme Court has not yet considered the constitutionality of a statute prohibiting the practice. Much of the scholarly literature, however, argues that such a prohibition would violate the constitutional privacy rights of both the surrogate mother and those seeking her services. See, e.g., Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 75-82 (1982); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L. REV. 147, 161-66. *But see* Note, *supra*, at 110-13.

³ Under current state laws, surrogate mother arrangements often conflict with baby-selling, adoption, and paternity statutes. For discussions of various state law conflicts and solutions, see Coleman, *supra* note 2, at 94-117; Note, *Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals*, 23 WASHBURN L.J. 601, 604-09 (1984). Under proposed regulatory schemes, special exceptions to existing state laws would facilitate the surrogate mother arrangement. See *Proposed Uniform Act*, *supra* note 1, at 1307, 1318-19 (discussing proposed California regulations); Note, *supra*, at 623-24 n.131.

⁴ This Note discusses only statutory authorization, because without an authorizing statute, courts would not likely grant specific performance. See *Proposed Uniform Act*, *supra* note 1, at 1310; cf. Coleman, *supra* note 2, at 85-87, 91 (arguing that specific performance would be denied on both common law and constitutional grounds).

critiques two doctrinal objections to specific performance of the promise not to abort: the thirteenth amendment prohibition of involuntary servitude and the constitutional right to privacy. It concludes that neither of these doctrines, as traditionally understood, offers clear grounds for deciding the constitutionality of specific performance. Part II examines and rejects several theoretical justifications for holding specific performance unconstitutional. It then proposes an alternative analysis based on the inalienability of rights central to personhood. Part III applies this analysis to the constitutional issues raised by the promise not to abort and by the promise to give up the child at birth. It concludes that courts should hold specific performance of the promise not to abort unconstitutional but that they should uphold specific enforcement of the promise to give up the child.

I. THE PROMISE NOT TO ABORT: TRADITIONAL DOCTRINES

Although no court has yet considered the constitutionality of specific performance of a surrogate mother's promise not to abort, some academic commentators argue that it would violate the thirteenth amendment's prohibition of involuntary servitude and the constitutional right to privacy. This Part argues that a court cannot determine the constitutionality of specific performance by applying these doctrines, because neither unambiguously applies to the surrogate mother's promise.

A. *The Thirteenth Amendment*

The thirteenth amendment, and the Anti-Peonage Act passed under its authority, prohibit all forms of forced servitude.⁵ The Act, as interpreted by federal courts, proscribes any "status or condition of compulsory service, based upon the indebtedness of the peon to the master,"⁶ even if the former enters the arrangement freely, fully informed, and in exchange for a salary.⁷ The Act thus prohibits not only slavery and traditional forms of indentured servitude but also statutes that permit imprisonment for breach of employment contracts.⁸ Because the threat of criminal prosecution offers the employee

⁵ See U.S. CONST. amend. XIII; Peonage Act, 42 U.S.C. § 1994 (1982).

⁶ *Clyatt v. United States*, 197 U.S. 207, 215 (1905). Indebtedness, under this standard, includes a debt based on contractual obligations. See *Bernal v. United States*, 241 F. 339, 340-42 (5th Cir. 1917).

⁷ See *Heflin v. Sanford*, 142 F.2d 798, 799 (5th Cir. 1944) ("Compensation for services may cause consent, but unless it does, it is no justification for forced labor."); *State v. Olivia*, 144 La. 51, 52-53, 80 So. 195, 196 (1918) ("It matters not that the service was begun voluntarily by contract . . . it is nevertheless peonage.")

⁸ See 42 U.S.C. § 1994 (1982); *Bailey v. Alabama*, 219 U.S. 219, 243-44 (1911) (striking down as violating the thirteenth amendment an Alabama statute that criminally punished breach of employment contracts).

no real choice but to perform the contract, specific performance is tantamount to forced servitude.⁹

Some academic commentators suggest that specific enforcement of the surrogate mother's promise not to abort would violate the thirteenth amendment.¹⁰ They reason that a court, acting under the authorization of a specific performance statute, could order a surrogate mother to carry her child to term and then imprison her for contempt if she did not. Because the Anti-Peonage Act, implementing the thirteenth amendment, prohibits criminal sanctions for the breach of an employment contract, the statute would be invalid.

This syllogism fails because it overlooks a number of gaps in thirteenth amendment doctrine. Despite its broad language, the amendment appears to allow several family arrangements that bear a striking similarity to slavery.¹¹ Children must obey and remain in the custody of their parents,¹² and spouses, until recently, were bound to remain married unless they could show that the other had breached the marriage contract.¹³ Although the spouses were free to live apart, they had very specific affirmative duties, which even to this day include obligations to provide sex.¹⁴ These family relationships, like slavery, force wives and children to provide personal services.¹⁵

⁹ Much less coercive threats have been held to constitute compulsion for purposes of compulsory service. *See, e.g.,* *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 180 (1984) (holding that threats of physical force or legal action are not necessary elements of involuntary servitude).

¹⁰ *See, e.g.,* Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 470 (1982) (arguing that specific performance of a surrogate mother's promise might violate the thirteenth amendment).

¹¹ Although no court has explicitly upheld these family arrangements against a thirteenth amendment challenge, their longevity and prevalence suggest some presumption of constitutional acceptability.

¹² The Supreme Court has referred to the parent-child relationship as an exception to the thirteenth amendment. *See, e.g.,* *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905) (asserting that peonage is "a status or condition of compulsory service based on the indebtedness of the peon to the master. . . . We need not stop to consider any possible limits or exceptional cases, such as . . . the obligations of a child to its parents . . .").

¹³ *See, e.g.,* ILL. ANN. STAT. ch. 40, § 401 (Smith-Hurd 1980) (listing causes that justify the grant of a divorce) (amended by P.A. 83-162 Supp. 1985). Every state except South Dakota now has some form of no-fault divorce. *See* L. WEITZMAN, *THE DIVORCE REVOLUTION* 41 (1985).

¹⁴ The combination of traditional fault-based divorce laws and the marital rape exemption permitted women to alienate their right to protection from physical invasion. Because the thirteenth amendment applies to private parties and the government alike, this alienation violates the thirteenth amendment whether or not an exception in the criminal rape laws constitutes state action. Although courts have not struck down traditional divorce and marital rape laws, some commentators argue that both are unconstitutional. *See* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986); Note, *Are Fault Requirements in Divorce Actions Unconstitutional?*, 16 J. FAM. L. 265 (1977-78); Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306 (1977).

¹⁵ Courts also allow a general exception for widely imposed public duties, such as military service and conscription into the army, *see* *United States v. Gidmark*, 440 F.2d 773, 774 (9th

The argument that the thirteenth amendment prohibits enforcement of the surrogate mother's promise not to abort presupposes that the surrogate mother arrangement does not fall within this gap in thirteenth amendment doctrine. It tacitly assumes that marriage is special and that surrogate motherhood lacks some essential characteristic that justifies this special treatment.¹⁶ Yet without some explanation of why marriage is special, this analysis begs central questions: should courts strike down forced service in a state-sanctioned family setting that would violate the thirteenth amendment if it took place outside of a family arrangement? Is the surrogate mother relationship essentially similar to marriage; is it a new form of regulated procreation that deserves the deference due a family relationship? Or is it essentially a commercial transaction constrained by the thirteenth amendment?¹⁷

The decision to treat a promise not to abort as a thirteenth amendment issue cannot rest on a simple appeal to settled categories of doctrinal analysis. In order to decide, courts must weigh the reasons for letting people contract into such arrangements against the evils the thirteenth amendment sought to eliminate by prohibiting forced servitude.

B. The Constitutional Right to an Abortion

In *Roe v. Wade*¹⁸, the Supreme Court recognized a woman's constitutional right to choose an abortion, in consultation with her doctor, during her first three months of pregnancy.¹⁹ Laws that deny abortions to women unless they obtain consent from their parents²⁰ or husbands violate this right to decide. In *Planned Parenthood v. Dan-*

Cir. 1971), *cert. denied.*, 404 U.S. 868 (1971), civilian work for conscientious objectors, *see* *United States v. Goodman*, 435 F.2d 306, 314 (7th Cir. 1970), and mandatory work programs for prisoners, *see* *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963), *cert. denied.*, 375 U.S. 915 (1963).

¹⁶ Such a view would parallel the judicial treatment of marriage under contract law. In civil cases, courts justify special rules for marriage contracts based on the unique position of marriage, which they traditionally explain on the grounds that marriage is not a contract, but a status. *See, e.g.*, *Maynard v. Hill*, 125 U.S. 190, 210-14 (1888); *In re Marriage of Walton*, 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472, 475-766 (1972).

¹⁷ The distinction between two versions of constitutional law — one for the market and another for the family — might make little sense in today's commercialized family and semi-welfare-state market. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1559-60 (1983) (arguing that the separate spheres of the market and the family have been blurred by attempts to reform both by making each more like the other); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 328-34 (1982) (arguing that in response to recent changes in society and the institution of marriage, courts should view marriage as essentially a contractual arrangement subject to market contract doctrines).

¹⁸ 410 U.S. 113 (1973).

¹⁹ *See id.* at 163-64.

²⁰ *See Bellotti v. Baird*, 443 U.S. 622 (1979).

forth,²¹ the Court held that "since the State cannot regulate or proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion."²² Surely, some commentators argue, if the Court denies a woman's husband the right to veto her decision to end a pregnancy, it cannot grant this right to an unrelated natural father in the surrogate mother context.²³ A statute that authorized a court to compel specific performance of her promise not to abort would thus violate the privacy right embodied in *Roe* and *Danforth*.

This argument — that *Danforth* and *Roe* create a right to an abortion and therefore preclude enforcing the promise not to abort — presents a simplistic solution to the complex issue of the alienability of constitutional rights; it confuses inalienability with indefeasibility. Alienation transfers control over A's right from A to B.²⁴ Defeasance means revocation of a right by the government. *Roe* created an indefeasible right to an abortion during the first trimester of a pregnancy. *Danforth* extends the rule from *Roe* to prevent the government from transferring abortion rights to third parties; *Danforth* makes the right nondelegable. The argument that indefeasible, nondelegable rights should be inalienable assumes that private control of the right invites evils similar to those of government control and that inalienability will not create evils of its own. Neither logic nor intuition compels this conclusion.²⁵

Supporters of specific performance counter with an equally simplistic argument: courts can protect a woman's ability to invoke her constitutional right without preventing her from "waiving" it.²⁶ They

²¹ 428 U.S. 52 (1976).

²² *Id.* at 69.

²³ See, e.g., Coleman, *supra* note 2, at 85; see also Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Independence*, 99 HARV. L. REV. 330, 336 & n.24 (1985) (arguing that *Bellotti* and *Danforth* indicate the inalienability of the abortion right). *But see* Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1593 n.29 (1979) (stating that a woman who has expressly contracted "to carry a fetus is a much more appropriate subject for compulsion than one who has not").

²⁴ See Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 221, 238-46 (1980); Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936-37 (1985); see also Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972) (describing alienability and presenting policy reasons for inalienability rules). Note that one can alienate two distinct rights: the right to do or not to do a substantive act, such as having an abortion, and the right to breach the promise and pay damages. Without this second transfer, a surrogate mother alienates only her right to have the abortion without paying damages. Full alienation of a substantive right thus requires the promises to be specifically enforced.

²⁵ One can certainly imagine indefeasible, nondelegable rights that are also alienable. Whenever the right protects against government abuse only, such an arrangement seems coherent. For example, civil due process, which can be alienated simply by settling the claim, is arguably indefeasible and nondelegable.

²⁶ See *Proposed Uniform Act*, *supra* note 1, at 1314 n.162. *But see* Note, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 31, 243 (1985).

argue that courts should question, not the waivability of the abortion right, but the quality of the waiver, when they consider the constitutionality of specific performance. In other contexts, the Court permits people voluntarily to waive their constitutional rights as long as they act intelligently and "with sufficient awareness of the relevant circumstances and likely consequences."²⁷

This counterargument conflates the standards for waiver and alienation of rights. Waiver means giving another permission to do what otherwise she could not, or not to do what otherwise she must. It occurs only at the time that the right could have been invoked.²⁸ Alienation means promising now to waive a right in the future. An unwaivable right, like an indefeasible right, need not be inalienable. Although waiver, defeasance, and alienation all block the exercise of a right, they are logically separable.²⁹ Because the law permits different methods of disposal for different rights, courts cannot rely on some imagined internal structure or logic in a system of rights to deduce inalienability from either indefeasibility or unwaivability.³⁰ Traditional privacy doctrine, therefore, provides no clear standard for deciding the alienability of the abortion right.

II. THEORETICAL JUSTIFICATIONS FOR INALIENABLE RIGHTS

Because the constitutional doctrines invoked in Part I offer no determinate answers to questions of alienability, the decision must rest on some independent ground: a theory of inalienability. The constitutional question, therefore, poses an issue of theory: which constitutional rights ought to be inalienable? This Part considers and rejects

²⁷ *Brady v. United States*, 397 U.S. 742, 748 (1970). In noncriminal contexts, courts use a similar, although less stringent standard. See *In re Adoption of Jackson*, 89 Wash. 2d 945, 578 P.2d 33 (1978) (holding that a mother voluntarily waived her right to notice and an opportunity to be heard when she consented to relinquish her maternal rights through adoption).

²⁸ See *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 205 & n.37 (1977); *Rubin, Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 487 (1981). The standard for waiving constitutional rights — that the waiver must be knowing, voluntary, and intelligent — only applies when the permission and the infringement occur at the same time.

²⁹ One cannot infer alienability from waivability. For example, although one can both waive and alienate civil due process rights, one can only waive criminal due process. Neither can one infer inalienability from other protections of rights. This latter mistake takes several forms. See, e.g., *Tribe, supra* note 23, at 335-36. *Tribe* infers that the abortion right is inalienable from the fact that voluntary sex does not impliedly waive the right. This argument, like his argument inferring inalienability from indefeasibility and nondelagability, assumes that because the law prevents one destruction of a right, it must prohibit others.

³⁰ Nevertheless, certain patterns emerge in specific substantive areas. The law often permits waiver but prohibits alienation and destruction of rights to freedom from physical invasions of our bodies and homes and rights to control over our physical location and activities. For example, a professional boxer can waive but cannot alienate the right not to be punched in the face. Forcing him to continue in a fight against his will would violate his thirteenth amendment rights. A theory of inalienability should both explain the intuition that these rights should be inalienable and provide a way to decide new cases like the alienability of the abortion right.

one traditional approach: inalienability is justified by and limited to special circumstances that require paternalism. It argues that paternalism provides no grounds for deciding to make any particular right inalienable, because both alienability and inalienability treat right-holders paternalistically. It then proposes an alternative ground for decision based on rights central to personhood.

A. *The Failure of Paternalism as a Ground of Decision*

1. *Paternalism Underlies Inalienability.* — Inalienability — however motivated — is inherently paternalistic because it forces an individual, for her own good, to act as though she valued something more highly than she in fact does.³¹ Because inalienability forces surrogate mothers to retain a right that they would prefer to transfer, it inevitably imposes values. Even if other goals, such as efficiency or redistribution,³² motivate the decision to make a right inalienable, they do not avoid the paternalistic effect.³³ An argument in favor of inalienable rights based on efficiency or redistribution must explain why a court should value these goals more than it values individual autonomy. Courts should recognize that the decision to make the abortion right inalienable inevitably rests on a justification of paternalism.³⁴ Recognition of the paternalistic motives underlying this desire does not, however, justify the inalienability of a constitutional

³¹ The paternalism involved in imposing inalienable rights differs from many examples of paternalism that purport to remedy some misconception. Inalienable rights seek to correct the rightholder's inability to assess the likelihood and significance of her changing her mind about how best to pursue her values or to determine the substance of those values. Most discussions of paternalism concern inability to consider the risk and consequences of events in the outside world, such as riding a motorcycle without a helmet. See, e.g., J. KLEINIG, *PATERNALISM* 81-96 (1984).

³² The economic effects of inalienability will depend on a series of complex factors that would be difficult to predict. See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 604-07 (1982). Inalienable rights, constitutional or statutory, often create inefficiency. When the law prohibits specific performance and thereby prevents people from selling their rights, it also prevents others who value those rights more highly from buying them. See Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 291-96 (1979); Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 365 (1984). But see Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1385-86 (1982). But alienability too can create an inefficient allocation of rights. If buyers of rights tend to have more resources and sophistication than sellers, judges might prohibit alienation to prevent fraud or nondisclosure. See Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766-77 (1983).

³³ The efficiency argument rests on paternalism, because it restricts choice in order to protect its beneficiary from under- or overvaluing some good. Redistribution also embodies an element of paternalism, because it imposes terms on bargains in order to prevent its beneficiaries from undervaluing their sales or overvaluing their purchases.

³⁴ See Kennedy, *supra* note 32, at 624-25.

right. Most liberal theorists believe that paternalism, unless justified by special circumstances, undermines the law's presupposition of respect for individual autonomy.³⁵ Paternalism itself requires justification.

2. *Traditional Justifications for Paternalism.* — Liberal justifications for paternalistic intervention fail in two key respects: they offer no coherent justification for the inalienability of particular rights, and they provide no useful tools for recognizing justifiably inalienable rights.

Many liberals who disapprove of paternalism but nevertheless support intervention in the form of inalienable rights claim that the law imposes such apparently paternalistic rules not because they protect the rightholder, but rather because they protect society from the harms brought about by individual alienation of rights. For example, the prohibition of peonage protects not just the rights of individuals who might themselves become indentured, but also prevents the creation of a perpetual hierarchy that offends most people's vision of a free society.³⁶

Stressing the offense to collective vision, however, proves too much; all rights are potentially inalienable depending on current aesthetic preferences. Any time enough people disapprove of the alienation of some right, they can claim that alienating that right so offends them that they have a collective right not to live in a society that permits individuals to disempower themselves. But any attempt to distinguish between merely offensive alienation and alienation that could lead to truly harmful hierarchies risks reintroducing the paternalism that the argument sought to avoid. The suggestion that society should prohibit alienation of a right for society's own good becomes suspect if its own good always coincides with the good of those who might otherwise alienate their rights. Because the hierarchies that harm society most are probably the same hierarchies that most disempower individuals who alienate rights, the social-interconnectedness justification probably masks a paternalistic argument. The observation that the individuals suffer much more directly, concretely, and intensely from alienating their rights than others in society suffer, reinforces this suspicion. For example, if the alienability of abortion rights for surrogate mothers depends on how much it would harm

³⁵ See, e.g., J. MILL, ON LIBERTY 68 (G. Himmelfarb ed. 1982).

³⁶ See Tribe, *supra* note 23, at 332–33 (arguing that the Constitution protects certain positive group rights in order to prevent the “creation or perpetuation of hierarchy”); see also Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1389–90 (1984) (arguing that voting is a group right). But see G. CALABRESI & P. BOBBIT, TRAGIC CHOICES 33 (1978) (arguing that society prohibits peonage in part because it prefers not to see “[t]he willingness of a poor man, confronting a tragic situation, to choose money rather than the tragically scarce resource”).

society, which in turn depends on how severely, if at all, it would disempower women as a group, the inquiry returns to paternalism because it imposes values on women if and only if the imposition is in their own interests.

Consequentialist and consent-based justifications of inalienability try to avoid the appearance of imposing goals or values on rightholders. Consequentialist theorists stress that inalienable rights merely help individuals to reach their own goals by freeing them from the influences of naivete, passion, and lack of foresight. An inalienable abortion right protects a woman's freedom to pursue her personal goals from her present hasty decisions and thus maximizes her future freedom.³⁷ Consent theorists argue that society can interfere with the autonomy of an individual only if it obtains her consent, either before or after the interference.³⁸ They also justify interference with a woman's autonomy based on hypothetical consent as a way to protect her true, or lasting, desires from frustration by mere episodic whims.³⁹

These theories fail, however, because they suppose that we can determine when someone truly changes her mind, and when she merely experiences an episodic whim. But, in fact, we often cannot; even long-standing desires change.⁴⁰ Both the consent and consequentialist arguments justify an inalienable abortion right as though it were a neutral way to facilitate free choice and ensure the effectiveness of women's preferences. However, none of these justifications presents a neutral basis for deciding the constitutionality of specific performance, because the choice itself reflects a preference either for her *future* freedom and consent or for her *present* freedom and consent.⁴¹

³⁷ See generally J. KLEINIG, *supra* note 31, at 51-55 (distinguishing various theories of freedom maximization).

³⁸ See *id.* at 55-67 (distinguishing five forms of the consent-based arguments).

³⁹ Consent theorists recognize that paternalist intervention is motivated in large part by a desire to protect not just whatever choices someone might want to make but also particular kinds of choices that seem most important. Consent theories try to avoid the charge of ignoring individual autonomy by, for example, supporting interference only when it protects the individual's real or lasting choices. See *id.* at 58-59.

⁴⁰ Theories based on subsequent consent try to answer this claim by arguing that intervention was justified if it turns out that the individual ultimately appreciated the intervention. See Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 119 (Wasserstrom ed. 1983). Subsequent consent shows that the intermediate desire was merely a whim. But see J. KLEINIG, *supra* note 31, at 61-62. Kleinig argues that intervention can manipulate the individual into later consenting when, had no one intervened, she would have continued in her former path. Some scholars try to avoid these objections by positing an ideal paternalist who can predict whether the paternalist act will elicit subsequent consent and whether without such interference the desire will pass and prove to be merely a whim. See, e.g., Regan, *Paternalism, Freedom, Identity and Commitment*, in *PATERNALISM* 113, 125-127 (R. Sartorius ed. 1983) (arguing that an ideal paternalist might legitimately require motorcyclists to wear helmets). Perhaps with enough data, a decisionmaker might make such predictions about a surrogate mother.

⁴¹ Whenever the rightholder prefers present freedom over future freedom, inalienable rights limit her choice. The fact that she might subsequently approve the decision to create an inalienable right does not alter the disrespect for present autonomy. When we accept or reject

3. *Alienability and Inalienability: Two Paternalistic Choices.*— Because all inalienable rights impose values, liberal attempts to evade the charge of paternalism fail. Their failure recalls the problem that the liberal theorists hoped to solve: what justifies the paternalism of inalienability? In the realm of inalienable rights, we can justify paternalism on the ground that paternalism is inevitable: the available choices — alienability and inalienability — are both paternalistic.

Inalienable rights protect future freedom at the expense of present free choice. They impose values on present selves. Alienable rights, however, are no less paternalistic and coercive than inalienable rights. Alienability permits present selves to impose values and choices on future selves.⁴² Judges must choose, therefore, not between paternalism and no paternalism, but rather between governmental paternalism that protects future choices and paternalism by present selves toward future selves — sanctioned by the government — to protect present choices. Any justification of inalienability must abandon anti-paternalism, because the structure of rights requires the imposition of undesired goals on either present or future selves. The decision to make a constitutional right inalienable cannot rest on the choice between protecting free choice and imposing unwanted values. Because either alternative will both limit and facilitate free choice, the decision to make the abortion right inalienable must rest on a desire to limit some kinds of choices and to protect others.

An alienable right acts as a self-binding device that permits a surrogate mother to prevent herself from implementing a future change of opinion.⁴³ Because paternalism provides no way to decide

the alienation of a right, we choose between the power of the present self to consent for a future self and the power of the future self to undermine the efficacy of present decisions. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211–13 (1979) (arguing that the notion of individual freedom contradicts itself because it requires coercive communal action fundamentally incompatible with individual autonomy); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980–84 (discussing the basic contradiction between freedom of action and security).

⁴² Viewing individuals as disjointed in this way presupposes a controversial vision of personal identity. Philosophers interested in this issue debate the significance of personal changes over time and its effects on personal identities. Some argue that identity over time requires that something remain constant throughout. See Williams, *Persons, Character and Morality*, in THE IDENTITIES OF PERSONS 206–07 (Rorty ed. 1976). Others account for apparent change by positing a series of overlapping persons whose identity can change over time. Derek Parfit argues that under this “complex view” of personal identity, certain promises should be irrevocable. See D. PARFIT, REASONS AND PERSONS 326–29 (1984); Parfit, *Later Selves and Moral Principles* in PHILOSOPHY AND PERSONAL RELATIONS 144–47 (A. Montefiore ed. 1973). Philosophers and legal scholars use this view of personal identity variously to justify and to rebut paternalistic interventions. See, e.g., J. KLEINIG, *supra* note 31, at 45–48 (arguing that Parfit's vision fails to justify paternalistic interventions); Regan, *supra* note 40, at 122–34 (arguing that the complex view of personal identity justifies paternalistic intervention on behalf of future selves to prevent harms from the outside world and that later selves should not be bound by the promises of earlier selves).

⁴³ The story of Ulysses and the sirens contains the classic example of self-binding. Ulysses bound himself into the future by asking his crew to tie him to the mast when they approached

whether to permit self-binding, judges must look to the substantive ends that the various admittedly paternalistic policies seek to achieve. Judges will protect the values of future selves only if they prefer the substantive choices that future selves tend to make to the substantive choices that current selves tend to make. Although this process seems to conflict with the traditional vision of respect for autonomy, that traditional vision masks a contradiction. No rule can at once protect present and future autonomy.

4. *Choosing Despite the Inevitability of Paternalism.* — In order to choose between two paternalistic options, alienability and inalienability, courts and legislatures balance the importance of the security gained through permanent decisions against the freedom gained by having several choices available in the future. Although they cannot avoid imposing some of their own values, decisionmakers can try to minimize the evil that underlies our aversion to paternalism: disrespect for individuals. They should impose values in the way that seems to harm individuals the least. When values conflict, judges should choose to displace those values that are least important to an individual's sense of herself as a person.

B. An Alternative Analysis: Centrality to Personhood

Judges should make this value judgment using the only tools available to them — their intuitions and life experiences. They should try to predict whether security or open future choice would likely be

the sirens. Because he expected a brief future period of irrationality fraught with danger of self-destruction, he needed to bind himself in order to prevent that future harm. Some scholars believe that similar devices, often called "Ulysses" or "self-commitment" contracts, could remedy certain social problems. See, e.g., Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777 (1982).

A woman might invoke this device for various reasons: like Ulysses, she might want to minimize the harm from an expected future period of irrationality; she might want to prevent any future change of mind from undermining her present plans; or she might simply want the extra money available in exchange for her right to change her mind in the future. Those who are sympathetic to the Ulysses situation because they view it as a way to implement the "true" wishes of the individual without violating individual autonomy, however, disapprove of self-binding when it is motivated either by a desire to prevent future change of mind or by the simple desire to increase the value of a promise. Because these motivations do not permit a true value to triumph over a temporary whim, but rather permit an earlier value to triumph over a later value, they violate the prohibition on limiting freedom and autonomy. Self-binding is seen as legitimate only for semi-rational people. See J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36 (1979). A decisionmaker's inability to distinguish a temporary whim from a change in values on neutral grounds, however, undermines this liberal claim. See T. SCHELLING, 4 *ETHICS, LAW AND SELF COMMAND (TANNER LECTURE ON HUMAN VALUES)* 55-57 (1983) (arguing that deciding whether to honor requests for help in self-binding cannot be neutral); *supra* p. 1944.

central to most people's identity or personhood.⁴⁴ "Central to personhood" refers to those emotions and attributes that we, as individuals, believe most important to our personality and feelings of self-worth.⁴⁵ To decide whether a particular right should be alienable, judges must first assess the centrality of freedom to the identity of current individuals and then compare it with the centrality of security from past selves to the personal identity of future individuals.⁴⁶

Margaret Radin's analysis of property rights central to personhood⁴⁷ provides a useful analogy. At an intuitive level, she suggests, some rights fall easily into categories. Rights to industrial property will almost never form the core of anyone's identity.⁴⁸ The rights to choose a profession or to find a spouse constitute central elements in the identity of many people. Between these poles lies a spectrum of more difficult cases. When close questions arise, judges can only attempt to make responsible decisions for other people.

Personhood analysis can facilitate more responsible decisions about inalienable rights. Importing personhood discourse into legal doctrine can lead judges and legislators to consider specific aspects of people's lives that other doctrines ignore. Because personhood focuses the relevant discourse on the needs of the people affected, a decisionmaker must hear arguments about how they live and about the likely effects of alienability on their lives. Although the personhood analysis cannot force judges and legislators to take account of elements that people view as central to their identities, this standard can force them to hear evidence on the subject and to discuss its merits.⁴⁹

⁴⁴ Any decision about what most people view as central to their personhood will create over- and underinclusive rules. Some people will have such unlikely values that any general rule will undermine decisions that they view as central to their lives. Cf. J. HODSON, *THE ETHICS OF LEGAL COERCION* 97-105 (1983) (discussing overinclusive paternalist rules as a necessary means to protecting personal autonomy).

⁴⁵ See Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982). Radin argues that some property is more central to personhood than other property and that the law ought to protect rights to the former more than it protects rights to the latter. We can measure an object's relationship to personhood by the "kind of pain that would be occasioned by its loss." *Id.* at 959; see also Luban, *Paternalism and the Legal Profession*, 1981 *WIS. L. REV.* 454, 466-79 (arguing that we are more justified in imposing coercive rules on someone to protect values that form the core of her personality than to protect values that we believe most people in society hold, because this latter sort of paternalism is not neutral among theories of the good). These justifications for paternalism presume that the decisionmaker can know, or at least guess reasonably well, what values are central to the individual. Not all decisionmakers are equally well situated for this job. Cf. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387, 389 n.7 (1984) (arguing that although paternalism might be acceptable in some cases, men lack the ability to make decisions for women).

⁴⁶ See Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 779-86 (1983).

⁴⁷ See Radin, *supra* note 45.

⁴⁸ See *id.* at 960.

⁴⁹ When judges decide to make some right inalienable, they cannot simply ask whether the right probably constitutes part of someone's personhood. They must try to evaluate the relative

Personhood analysis can explain why many currently inalienable rights should remain inalienable. For example, Anthony Kronman explains the common law rule that courts must permit people to breach personal service contracts and pay damages in terms that illustrate, but by no means exhaust, the concept "violation of personhood." He argues that people must depersonalize their mistakes in order to protect their senses of personal integrity. When someone breaches a personal service contract, she likely changed her mind about some value or goal, such as the value of choice in the future. Kronman argues that when she changes her mind about a contract, she will probably view her earlier decision to enter the contract as a foreign and irrational act. She will view her earlier self as almost a different individual — one who betrayed her by committing her to act against her best interests. This feeling of former self-betrayal and irrationality can undermine her ability to make decisions and future commitments by leaving her in doubt of her current rationality and of the effects of her present decisions on a future self. Specific performance of promises requiring personal cooperation intensifies her feelings of regret and self-betrayal, because it forces her physically to confront her former irrational commitment.⁵⁰ Protecting her right to breach the promise and pay damages ensures her ability to depersonalize the relationship and thereby preserves her self-respect.⁵¹

Personhood analyses, such as Kronman's vision of self-betrayal and depersonalization, avoid the theoretical pitfall of liberal justifications for inalienable rights. The theory does not mask the fact that decisionmakers must choose between two paternalistic alternatives. An inalienable right imposes values on present selves; it forces them

importance of security to individual rightholders, both now and in the future, as well as to the potential transferees, now and in the future. For example, because denying a surrogate mother the ability to alienate her right to breach and pay damages might force the adoptive couple to alienate their own right to the child, judges must consider effects on all parties.

Judges might also consider the effect on groups of rightholders. For example, they might decide to create an alienable or inalienable right to an abortion on the grounds that the alternative would disempower women as a group. Of course, protecting the power of a particular group will often coincide with protecting the personhood of its members.

⁵⁰ See Kronman, *supra* note 46, at 780-84.

⁵¹ One can dispute Kronman's suggestion that specific enforcement disables future decisions. Inalienability might deter commitment to one's decisions as much as alienability. If the motivation for trying to alienate a right were to prevent an anticipated and harmful temporary change of mind, then creating inalienable rights makes commitment impossible; any decision we make in the present can be undermined by a future self with different values. Although Kronman recognizes that commitment in the present poses a danger to a later self who changes her mind, he neglects the harm to a present self from an inability to control later changes of mind. Kronman's liberal goal, to justify certain contract rules as neutral protectors of personal identity, precludes him from recognizing this dual danger in the choice between alienable and inalienable rights. His core idea, however, supports a personhood analysis: we can create an inalienable right, because specific enforcement puts at risk one's self-respect and feeling of competence.

to value their future ability to depersonalize harms from present decisions. This imposition undermines the efficacy of present decisions just as much as an alienable right would undermine future decisions. But the consequences for personhood differ. Although imposing values on present selves challenges the rationality of present decisions, it does not add a constant reminder of self-betrayal.⁵²

Personhood analysis provides a more reasoned ground for the intuitions that underlie inalienable constitutional rights under the thirteenth amendment and privacy doctrines. For example, the anti-peonage laws follow naturally from the thirteenth amendment if we assume that the Constitution prohibits slavery to protect personhood rather than autonomy. Although no thirteenth amendment or privacy decision suggests that courts perform the personhood analysis that this Note advocates, personhood comports with many of these decisions.⁵³

III. PERSONHOOD ANALYSIS APPLIED TO SURROGATE MOTHERS

This Part applies the personhood analysis developed above to the surrogate mother's promises. It analyzes first an easier case — the promise not to abort — and then a limiting case — the promise to give up the child.

A. Application to the Abortion Right

Kronman's depersonalization argument provides personhood grounds for preferring an inalienable abortion right in the surrogate mother context. If forcing someone to continue in personal employment poses a threat to her integrity and self-respect because it imposes a constant physical reminder of a past mistake, then surely compelling

⁵² Kronman's theory also incorporates the distinction between correcting false perceptions about the outside world and altering perceptions of the possible harm that an individual's own future change of values might cause. Painful feelings of self-betrayal derive from an internal change of values rather than from new circumstances in the world that leave personal values unaffected. See Kronman, *supra* note 46, at 780 (discussing the distinction between regret, which stems from a change in values, and disappointment, which stems from a mistaken assumption about the world).

⁵³ This analysis also provides an argument that fault-based divorce laws and marital rape exemptions should be held to violate the thirteenth and fourteenth amendments. The right not to provide sexual or other physical services remains central to one's personhood irrespective of marital status. Precisely the same intuition that underlies the prohibition of forced service — that compelling a physical reminder of a past decision violates personhood because it exacerbates feelings of regret and self-betrayal — demands that people not alienate their right to refuse sex or to obtain a divorce. Personhood also supports privacy decisions outside the alienability context. For example, *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Bellotti v. Baird*, 443 U.S. 622 (1979), can all be understood as protecting a woman's personhood. Because these cases all protect a woman's right to terminate a pregnancy without coercion, they all prevent a forced physical reminder of a past decision that might now seem like an act of self-betrayal.

a woman to continue with a pregnancy also threatens her dignity and self-respect. Because the abortion right, in this context, protects a woman's control over her body and her procreative decisions, the right is more central to her personhood than the right to breach most employment contracts. Because infringing upon this right imposes a constant, sometimes painful, and always invasive physical reminder of what seems a self-betrayal, specific enforcement of her promise violates her personhood even more severely than would other compelled labor. Judges should therefore hold the abortion right inalienable.⁵⁴

Using this personhood theory of inalienability, a court could strike down a statute authorizing specific performance as unconstitutional under either thirteenth amendment or privacy doctrine. The statute would clearly violate the thirteenth amendment as interpreted to prohibit alienation of certain rights that are central to personhood. Similarly, the statute would violate a surrogate mother's right to privacy if that right is understood to guarantee protection, against both self and state, for personhood. The statute violates the right to privacy, not because the statute permits the alienation of a constitutional right, but because alienation of this constitutional right undermines personhood.

B. Consent to Give Up the Child

A surrogate mother's promise to surrender her parental rights upon the birth of the child presents a much more difficult question for a personhood analysis: should the constitutional right to privacy prevent her from alienating these rights? Because she alienates a more complex set of rights, the choice between paternalism toward present or future selves becomes correspondingly more intricate. It requires an analysis not only of the rights that the surrogate mother's promise alienates but also of the effect of an alienability rule on the father's personhood. Because inalienability permits the surrogate mother to keep the child, it exposes some of the father's procreative rights to risk as well.

1. *The Complexity of Procreative Rights.* — A surrogate mother's promise to give up the child alienates a substantial proportion of her procreative rights, some of which the law already permits her to alienate. The procreative rights she alienates include interests in con-

⁵⁴ A complete discussion of the personhood ramifications of an inalienable abortion right must also consider the effect on other people's personhood. Creating an inalienable abortion right for surrogate mothers forces their clients to alienate certain procreative rights. These rights should affect a judge's decision only if genetic parents of aborted fetuses likely suffer feelings of regret and self-betrayal similar to those of a surrogate mother compelled to carry a child to term.

trolling one's physical autonomy, genetic code, biological ties, and emotional attachments.⁵⁵ In order to assess alienation of parental rights, we must consider which of these interests requires the protection of inalienability.

Some procreative rights stem from our claim to control our own genes.⁵⁶ We assert both a positive claim, to transmit our genes to offspring, and negative claims, not to have our genes appropriated from us to create children we do not want or to whom we have no access. Although most people feel some strong connection with their genetic children, the law permits alienation of this negative genetic right. People can sell sperm and ova and with them the right to access to any child produced.⁵⁷ Parents also surrender access to their children when they consent to adoption.

Although the current alienability of these rights does not prove that they should be alienable under a personhood analysis, the practical needs that motivated these laws support a personhood argument for alienability. Laws permitting adoption and artificial insemination, for example, protect the security interest of the new social parents.⁵⁸ Because social ties to children seem more likely than genetic ties to form a parent's personal identity as a parent, alienating the genetic claim, when it is separable, poses less of a risk to core personal characteristics. Furthermore, social relations, more than genetic ties, will tend to change a parent's values in such a way that she will feel regret, rather than disappointment.⁵⁹ Our genetic claims ought, therefore, to be freely alienable.

A surrogate mother's procreative rights, however, rest on more than genes. Even if she contributed no ovum,⁶⁰ she would have a

⁵⁵ This discussion does not imply that Supreme Court doctrine actually distinguishes or protects all these elements. Much of the confusion in the area of procreative rights stems from the Court's failure to say, at any given time, which of these rights it means to protect. For example, in *Roe* the Court protects the pregnant woman's right to privacy without specifying whether this protection stems from a right to control her genes or from a right to control her bodily integrity.

⁵⁶ See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (protecting the right to have offspring). But see *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) ("Parental rights do not spring full-blown from the biological [genetic] connection between parent and child. They require relationships more enduring." (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))).

⁵⁷ In order to facilitate artificial insemination, many states have statutory presumptions against considering a semen donor the legal father of a child. See, e.g., CAL. CIV. CODE § 7005(b) (West 1983).

⁵⁸ See, e.g., OR. REV. STAT. § 677.355-.370 (1977).

⁵⁹ If her values change so that with her new set of values, she would never risk promising to give up a child with the knowledge that she might change her mind, then she feels regret. If she does not like the current outcome, but would still take the risk, then she feels only disappointment.

⁶⁰ A surrogate carrier, unlike a surrogate mother, contributes no genetic material of her own.

strong claim as a biological mother. During the nine months of her pregnancy, physical and emotional bonds form between mother and child. These bonds, which perhaps influence her decision to keep the child, may contribute to her self-image as a mother. Many people view their emotional bonds with their children as central parts of their existence. Furthermore, the decision to give up a child with whom one has an emotional bond seems precisely the sort of decision that, if one's values later change, would seem an irrational self-betrayal.

Although the personhood analysis thus far suggests that biological claims to rear children — claims that stem from the bonds that develop between a woman and the child she carries — should be inalienable, it has not yet taken into account the competing emotional claims of adoptive parents. In practice, these competing claims justify alienability of almost all common law, and perhaps constitutional, rights to rear children. For example, states frequently permit biological parents to alienate all claims to their children, even after they have formed social bonds.⁶¹ Yet competing claims do not always justify alienation. The law never enforces a pregnant woman's promise to consent to adoption after the child is born.⁶²

The surrogate mother's situation lies somewhere between these two cases. Like parents who consent to adoption after birth, she promised to give up the child under less stressful conditions than those of a pregnant woman who needs money.⁶³ But like the pregnant woman, she promises to give up the child before she knows how she might change during the pregnancy. The inalienability of parental rights in the second case, however, cannot rest on the mere possibility of regret; any parent who consents to adoption might change her mind. The threat to personal identity from giving up one's child and then regretting the decision seems equally severe irrespective of when the

She is implanted with another woman's ovum that has already been fertilized *in vitro*. See Annias & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 *FAM. L.Q.* 199, 216-17 (1983).

⁶¹ Courts sometimes enforce these claims even if the adoptive couple does not yet have custody of the child. See *J.M.A.L. v. Lutheran Social Servs.*, 418 A.2d 133 (D.C. App. 1980). But see *In re Appeal in Gila County Juvenile Action No. 3824*, 124 *Ariz.* 69, 601 P.2d 1353 (1979).

⁶² Courts usually explain that her promise should not be enforced because she was probably vulnerable to coercion or under financial and emotional stress. See, e.g., *Sullivan v. Mooney*, 407 So. 2d 559 (Ala. 1981).

⁶³ See Note, *supra* note 2, at 130. Defenders of specific performance of the promise to give up the child argue that, unlike the pregnant woman approached and asked to give up her child, the surrogate mother had time to consider the options before she became pregnant. See *Proposed Uniform Act*, *supra* note 1, at 1312-13. Many surrogate mothers are married and have children of their own. More than half have graduated from high school, and increasing numbers are middle class. See, e.g., L. ANDREWS, *NEW CONCEPTIONS* 189-90 (1985). But see Note, *supra* note 26, at 231, 233-35 (1985) (arguing that the debate over surrogate mothers deemphasizes negative aspects of the practice like the monetary incentive).

promise is made. So, if judges decide that a surrogate cannot alienate her parental rights until she gives birth, they must rely on the high probability that she will change her mind during the pregnancy compared with the lower probability that she will change her mind after making a post-delivery promise. Were no other rights involved, this higher risk of regret might easily justify an inalienable right.

2. *The Father's Rights.* — Even if judges decide that surrogate mothers will so likely change their minds during pregnancy that their otherwise alienable right to raise their children should be inalienable until the child is born, they must still consider whether the father has any similar interest. Although alienability risks the personal identity of the mother, inalienability might risk the personal identity of the father, because he must risk losing access to his children. To resolve this issue, judges must consider whether they think that the mother's and father's emotional attachments to the expected child, even if different in degree, contribute to their personal identities in similar ways.

If the mother's emotional attachment to the child before birth is substantially more important to her than the father's is to him, courts should protect that attachment as a right central to personhood by preventing her from alienating it until the child is born. A pregnant woman certainly has a more concrete relationship with the particular child than does the father, simply by virtue of her constant physical connection to the fetus. She anticipates the birth of this particular child, whom she carries, more concretely and intensely because it is she, and not the father, who physically bears and gives birth to the child. Her unique and constant relationship with the particular child might contribute to an emotional attachment to this child different in kind from the father's.

If we believe that fathers, unwillingly deprived of access to their children, suffer from feelings of regret and self-betrayal similar to those that surrogate mothers could feel, then courts cannot choose between alienability and inalienability of rights central to personhood.⁶⁴ One party or the other must risk a personhood right. Rather, courts must choose to permit breach and effectively treat men's rights differently from women's, on independent policy grounds, or they must enforce contracts that alienate women's rights to their children. If alienation comparably endangers the personhood of both the mother

⁶⁴ If a court decided that the father would more likely experience disappointment than regret, it might choose to deny specific performance on the ground that this loss threatened his personhood no more than any soured business transaction. If the source of the father's anguish derives from the simple fact that he risked the loss of his child and lost, then he indeed suffers only disappointment. But if the father, like the mother, changed significantly as the child developed so that by the time of breach his values differ and he would no longer be willing to take such a risk, then the father risks the feelings of regret and self-betrayal.

and the adoptive parent, then the state has no reason to decide for the parties which parent will take the risk.

Although in many cases a mother's bond with her child differs from a father's, both in origin and strength, we know very little about when the bond develops and the differences between the way mothers and fathers suffer when separated from their children.⁶⁵ Without some reason to believe that mothers suffer differently from fathers, judges can rely only on their experiences and intuitions. That fathers suffer exactly as mothers do seems unlikely. But they have strong feelings, worthy of consideration, nonetheless. Fathers, like mothers, fight for their children in custody battles and mourn when their children die. Like mothers, they fall prey to self-doubt and regret over past decisions. They too suffer with the pain of separation. These considerations suggest that fathers develop emotional ties to their children similar to mothers' and that, therefore, the centrality to personhood will no longer decide the issue. One parent must suffer a violation of personhood.

Although some violation of personhood is inevitable if a surrogate mother tries to breach her promise to consent to adoption, the violation is not so severe as in the abortion context. If specific performance of the adoption is constitutional, the surrogate mother may face feelings of regret and self-betrayal, but no physical invasion or constant reminder, save for an absence, will exacerbate these feelings. Denying enforcement of the surrogate mother's promise to give up the child, however, threatens the father's personhood in much the same way as specific performance would threaten the mother's. Because personhood provides no reason to hold the surrogate mother's right to her child inalienable until birth, courts should not deny, on constitutional grounds, specific performance of a surrogate mother's promise to consent to adoption.

IV. CONCLUSION

Current doctrinal analysis based on thirteenth amendment and privacy rights provides no way to decide whether or not such rights are alienable. Nor do liberal theories that justify inalienability as nonpaternalist suggest a basis for decision. The paternalistic impulses that motivate both alienability and inalienability require a more honest and sensitive ground for decision. Personhood justifies inalienable constitutional rights without falling prey to the emptiness of calcified

⁶⁵ If the bonds between parents and their children develop in part from social expectations, then this argument becomes weaker. But even if mothers become more attached to their children than fathers, not for any biological reason but because they are socialized to relate to children differently, a court or legislature might choose to create an alienable right in order not to reinforce the stereotypes that perpetuate this social phenomenon.

doctrines or the contradictions of nonpaternalist theories. The application of personhood to the thirteenth amendment and privacy questions raised by specific performance of a surrogate mother's promises suggests that courts should not permit surrogate mothers to alienate their right to an abortion because the risks of specific performance are so severe in comparison with the risks of an inalienable abortion right. Although specific performance of the promise to consent to adoption also poses risks, courts should permit specific performance because the risk is less serious and because denying specific performance risks comparable harm to the father.